

Making Numbers Count: An Empirical Analysis of “Judicial Activism” in Canada

M E L A N I E M U R C H I S O N *

ABSTRACT

This paper empirically examines the decision making of the justices on the Supreme Court of Canada after the enactment of the *Charter* and before and after the events of September 11, 2001 (9/11) to determine if the levels of judicial activism on the Court have changed. The term judicial activism is used by academics, journalists, and citizens alike but the phenomenon is ill defined and often used as a pejorative term. The field of law, particularly in traditional doctrinal analysis, has been reluctant to adopt this approach, as few legal scholars have attempted to understand the phenomenon using empirical methodology. This paper adopts a hybrid content analysis empirical approach to depict the elusive, but widely cited, occurrence of “judicial activism” in Canada. Drawing upon an adapted and critiqued version of Cohn and Kremnitzer’s “multidimensional model of judicial activism”, this paper argues that there have been statistically significant shifts in judicial behaviour since 9/11. The Cohn and Kremnitzer model measures activism across multiple dimensions and this paper argues that empirical measurements of the phenomenon of “judicial activism” can contribute to broader understandings of the Canadian Supreme Court’s approaches to justice. In doing so, this paper projects two significant findings: firstly, that using a hybrid content analysis to analyse activism complements and challenges the existing methods for critiquing judicial

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behaviour and assessing judicial activism, and secondly, that the current approaches to understanding complex legal phenomena can be complemented and supplemented using empirical methodology.

Keywords: *Judicial Activism; Charter; Supreme Court of Canada; Hybrid Content Analysis; Comparative Constitutional Law; 9/11; Judicial Behaviour.*

The doctrine of precedent is a safeguard against arbitrary, whimsical, capricious, unpredictable and autocratic decision-making. It is of vital constitutional importance. It prevents the citizen from being at the mercy of an individual mind uncontrolled by due process of law.¹

I. INTRODUCTION

The concept of judicial activism is a subject widely discussed in academia, with little consensus emerging as to what it looks like or what defines it. It is a phenomenon that has been highly politicized but has remained largely fluid and ill defined, with jurists, citizens, and sometimes scholars taking an “I’ll know it when I see it” approach. According to Keenan Kmiec, a highly regarded scholar who studies judicial activism, in the years between 1990 and 1999, 3815 journal and law review articles were published that at least mentioned judicial activism and from 2000 to 2004 scholars had written a further 1817 articles.² This means that more than 450 publications a year that discussed judicial activism in some way were being published on average.³ When looking at American case law, 253 federal cases and 364 state cases in the United States used the words “judicial activism” in the year 2003 alone.⁴ It is expressly because of this lack of clarity and uniformity regarding a definition of judicial activism that this paper seeks to define it using an empirical approach. While numerous scholars have discussed judicial activism in a normative fashion and expressed their opinions on which cases are the most activist, or their preferences on whether or not activism is an acceptable behaviour for a

¹ John D Heydon, “Judicial Activism and the Death of the Rule of Law” (2004) 10:4 Otago L Rev 493 at 515 [Heydon] (emphasis added).

² Keenan Kmiec, “The Origin and Current Meanings of “Judicial Activism”” (2004) 92:5 Cal L Rev 1441 at 1442 [Kmiec].

³ *Ibid* 1442.

⁴ *Ibid* 1459.

Supreme Court to engage in, there remains a central question that needs to be solved. What is judicial activism, can it be quantifiably measured, and does its nature change over time? In seeking to answer this question, this paper adopts Lindquist and Cross's definition of activism which states that it is "a multifaceted concept" and that:

Activism is characterized by the Court's failure to act "like a judiciary"⁵. ... First, a judiciary should use "accepted interpretive methodology, it should interpret governing texts using approved canons of interpretation and other appropriate tools of the trade"⁶ and not distort the meaning of those texts simply to further judges' personal policy preferences. The accepted judicial methodology also involves some fealty to precedent and consistency with past decisions. While this legal model of judging is difficult to capture simply, it requires decisions according to tenets of the law, rather than the personal preferences of the judge.⁷

As such, this paper defines judicial activism as a legal phenomenon whereby the Court pushes institutional boundaries and changes the law in a way that is empirically significant, which helps quantify and enhance normative debates. As stated by Lindquist and Cross, "activism is best conceptualized in terms of a continuum between activism and restraint, with justices or Courts compared in terms of gradations along that continuum".⁸ Using this definition, this paper seeks to discover whether there have been statistically significant changes to the Canadian Supreme Court's level of activism in the *Charter* sections surrounding police powers post 9/11 (Sections 8, 9, 10(b) and 24(2)).⁹ In Canada, accusations of an "activist" Supreme Court have been made with increasing frequency since the enactment of the *Canadian Charter of Rights and Freedoms* (the *Charter*) in 1982.¹⁰ The *Charter* (most particularly the rights conferred in sections 7-11 and 24(2))¹¹ transformed the Canadian legal process, specifically in the area

⁵ *Ibid* 1471.

⁶ *Ibid* 1473.

⁷ Frank B Cross & Stefanie A Lindquist, "The Scientific Study of Judicial Activism" (2007) 91:6 *Minn L Rev* 1752 at 1765-66 [Lindquist & Cross]. Note, "cannons" is spelt with two N's in the original text.

⁸ Stephanie A Lindquist & Frank B Cross, *Measuring Judicial Activism* (Oxford University Press, 2009) at 31 [Lindquist & Cross, *Measuring Activism*].

⁹ *Canadian Charter of Rights and Freedoms*, ss 8, 9, 10(b), 24(2), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

¹⁰ *Constitution Act, 1982*, being schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Constitution Act].

¹¹ *Supra* note 9, ss 7-11, 24(2).

of criminal procedure. The provisions outlined in the *Charter* provide legal rights, which limit the power of state agents and guarantee fair treatment for detained individuals, as well as providing the Court with a tool to exclude unconstitutionally obtained evidence, or to strike down unconstitutional laws.¹² It is the job of the Supreme Court of Canada to interpret these rights and these constitutionally enshrined rights have therefore provided for an expanded power of judicial review. According to James Kelly, the way the Supreme Court approaches judicial review “advances a certain form of democracy... with judicial activism necessary to ensure that the intention of the framers for a more vigorous level of rights protections is achieved”.¹³ In this way, judicial activism can be seen as a necessary function to preserve a system of checks and balances that “prevent judicial supremacy from being the primary institutional outcome of the *Charter*”.¹⁴ This view of the role of the Court is supported by Jochelson and Kramar who have argued that a “constitutional guardianship role” emerges, as they are responsible for the interpretation of all *Charter* protections.¹⁵

In the years immediately following the *Charter's* enactment, several high profile cases that centred upon sections 7, 8, 9, 10(b) and 24(2) were decided by the Supreme Court, which conferred additional rights for citizens and imposed more restrictions on governments and police officers.¹⁶ These decisions provoked loud complaints from the Reform Party and the Canadian Alliance (now the Conservative Party of Canada), as well as national newspapers, who bemoaned the Court’s “activist” ways, stating the Court usurped parliamentary supremacy and “engaged in a frenzy of constitutional experimentation that resulted in the judiciary substituting its legal and societal preferences for those made by the elected representatives

¹² James Stribopoulos, "In Search of Dialogue: The Supreme Court, Police Powers and the *Charter*" (2005) 31(1) *Queen's L J* 1 at 2 [Stribopoulos].

¹³ James B Kelly, *Governing with the Charter: Legislative and Judicial Activism and Farmer's Intent* (Vancouver: UBC Press 2005) at 8 [Kelly].

¹⁴ *Ibid.*

¹⁵ Richard Jochelson & Kirsten Kramar, *The Disappearance of Criminal Law: Police Powers and the Supreme Court* (Winnipeg: Fernwood Publishing, 2014) at 17 [Jochelson & Kramar, 2014].

¹⁶ *Hunter v Southam Inc.*, [1984] 2 SCR 145, 11 DLR (4th) 641 [Southam Inc].

of the people”.¹⁷ This led Kent Roach to declare that the Supreme Court of Canada was itself on trial.¹⁸

In adopting an empirical approach, this paper draws upon an adapted and critiqued operationalization of Cohn and Kremnitzer’s 2005 “multidimensional model of judicial activism” which purports to measure activism using seventeen separate parameters across three separate categories.¹⁹ The Cohn and Kremnitzer model is novel as it created a wide multivariate lens with which to assess activism using the justice’s own words and contextualize it outside of any political framework. Its value is considered to lie in its ability to remove the traditional pejorative terminology associated with activism and its ability to create comparisons across different judicial eras. To adapt and operationalize the Cohn and Kremnitzer model and determine if there have been changes in the level of activism on the Supreme Court after 9/11, a hybrid content analysis methodology which utilises both qualitative and quantitative aspects of the method was chosen. The benefit of using both qualitative and quantitative content analysis is that it preserves the latent content and context in the written decisions but also measures the manifest content such as the number of judges writing opinions and whether or not the trial judge’s verdict was upheld. The operationalisation of the adapted Cohn and Kremnitzer model measured the judicial behaviour of the Court, and discovered that the level of activism on the Supreme Court of Canada decreased substantially after the events of 9/11. In using it here, criticism is made of the model’s inability to assert any causal relationships and the difficulty in ranking or separating variables and which variables should be prioritized. Regardless of the reasoning behind the measured shifts in the levels of activism however, it must be noted that these shifts are material in nature, can be measured and recorded and do not rely on mere judgment by the individual recorder. The aim of this paper is to discover whether the Cohn and Kremnitzer model actually measures activism, and not some other judicial metric, and if it does, whether the Supreme Court of Canada has changed its approach to constitutional adjudication of these four *Charter* rights since 9/11. 9/11 was chosen as the comparative metric for

¹⁷ Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 3 citing Vic Toews, Floor of Parliament (2001) [Roach].

¹⁸ *Ibid.*

¹⁹ Margit Cohn & Mordechai Kremnitzer, “Judicial Activism: A Multidimensional Model” (2005) 18 Can J L & Jur 333 at 337, 339 [Cohn & Kremnitzer].

two reasons: firstly, as a watershed moment in both security and policing literature, it offers insight into the changing landscape of the adjudication of individual rights. Secondly, it would be expected, given patterns in the securitization literature and the perceived change in rights protection, that a seismic shift in the behaviour of the Court and their attitudes would be observed.

This paper will also add to the empirical understanding of judicial reasoning and provide further data and support for the process of theorizing and empiricising judicial decision-making. It makes no normative judgments about whether judicial activism is “good” or “bad” but instead argues that activism is identifiable and measurable, and thus this paper attempts to demonstrate the presence, or level of activism on the Court. James Kelly’s hypothesis that judicial activism has changed since the early days of *Charter* review will be empirically tested using an adapted version of the Cohn and Kremnitzer model.²⁰ The model has been used by other scholars and claims to measure judicial activism across multiple dimensions and variables; however, it has never been tested in Canada across multiple *Charter* sections nor has it been measured by measuring the individual variables, rather than to create an “activism score” of individual judges. The goal of undertaking empirical research of judicial activism is to remove “justificatory” weaknesses, take the Court’s own words more seriously, and provide substantial opportunities to understand and assess judicial analytics separately from the narrow measure of precedential effects.²¹

This research is not intended to replace traditional doctrinal interpretations of law, or to problematize normative conceptions of activism but to enhance the research on activism by creating a spectrum of normative and empirical understandings, rather than creating a dichotomy. The adapted, critiqued and operationalized Cohn and Kremnitzer model will not only enhance and expound upon the current ways of understanding judicial activism in Canada but will also help bridge the gap between purely normative, and purely empirical research. It will provide a new framework for legal academics to use when discussing the concept of activism more

²⁰ Kelly, *supra* note 13; Cohn & Kremnitzer, *supra* note 19.

²¹ Richard Jochelson, Michael Weinrath & Melanie J Murchison “Multidimensional Analysis of Judicial Decision-Making: Reframing Judicial Activism as the Study of Judicial Discourse (or taking the judgment out of the Judgment)” (2011) 2 *Annual Rev of Interdisciplinary Justice Research* 122 at 138-139 [Jochelson, Weinrath & Murchison, “Multidimensional”].

generally. This paper will then conclude by providing four recommendations for future activism research and will discuss the role of empirical methodology in judicial activism studies going forward.

II. METHODOLOGY

No case can have a meaning by itself! What counts, what gives you leads, what gives you sureness that is the background of the other cases in relation to which you must read the one.²²

Due to the lack of cohesion of the term “judicial activism”, attempts to empirically measure or quantify activism have been even more difficult. Value free empirical and quantifiable measurements of all social phenomena have their historical roots in the development of biological and psychological positivism and have created a separate type of positivism, called logical positivism or neo-positivism.²³ This movement embraced “verificationism”, or the ability to legitimize philosophical or theoretical debates using empirical methodology.²⁴ The desire to explain and understand observed behaviour through quantitative methodology dates back to the 19th century and Cesar Lombroso's book "the criminal man".²⁵ The scientific study of judicial behaviour has followed in those footsteps and, as stated by Lindquist and Cross, “while the law is not always easily reducible to a quantitative metric, political scientists have made some progress in designing simplified measures to capture legal concepts”.²⁶

This paper supports Lindquist and Cross’s view of the study of judicial behaviour by capturing the phenomenon of judicial activism using an empirical metric. As previously articulated there has never been a consistent definition of judicial activism that has been able to be measured as suggested by “verificationism”. This has led empirical scholars such as Young, Cohn, Kremnitzer, and Canon to reject official definitions and instead to measure,

²² Karl N Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Dobbs Ferry, New York: Oceana Publications, 1960) at 49 [Llewellyn] (emphasis added).

²³ Rob White, Fiona Haines & Lauren Eisler, *Crime and Criminology*, 2nd ed (Oxford: University Press, 2012) Chapter 3 [White, Haines & Eisler].

²⁴ Michael Friedman, *Reconsidering Logical Positivism* (Cambridge: University Press, 1999) [Friedman].

²⁵ Cesare Lombroso, *Criminal Man*, translated by Mary Gibson & Nicole H Rafter, eds (Duke: University Press, 2006) [Lombroso].

²⁶ Lindquist & Cross, *Measuring Activism*, *supra* note 8 at 44.

rather than defining the term. This lack of cohesion has significant implications for developing an empirical method going forward: there is a long history of doctrinal scholarship in the field of activism, but, as scholars such as Choudhry and Hunter, Songer and Johnson and Emmett MacFarlane suggest, the role that social science methodology can play in understanding legal phenomenon is emerging.²⁷ This is not to suggest that empirical legal scholarship should replace doctrinal understandings of the law, but that empirical methodologies can augment traditional understandings of judicial behaviour, something that is a current limitation of doctrinal work. As Hall and Wright suggest, content analysis of judicial decisions, “does not displace traditional interpretive legal scholarship. Instead, it offers distinctive insights that complement the types of understanding that only traditional analysis can generate”.²⁸ It is in this sense that the use of empirical methodology, such as content analysis can offer legal scholars the “best of both worlds”. Content analysis holds value not only for traditional doctrinal scholars but also for theoretical scholars as they “frequently claim, for instance, that judges and the law respond predictably to various social, political, and market conditions empirical claims that researchers can systematically test”.²⁹

Simply put, this paper will empirically ascertain whether there have been any significant discursive changes in the level of activism and adjudication of police power *Charter* rights after the events of 9/11. The process of making a hypothesis as to whether or not there will be a definitively positive or negative shift in the amount of *Charter* rights protections afforded to individuals post 9/11 has been avoided, with the focus instead on allowing the data gathered dictate the findings. The research goal aims to illuminate what activism is and if it has changed through description, not to test hypotheses. As Carney states,

²⁷ Donald R Songer & Susan W Johnson, "Judicial Decision Making in the Supreme Court of Canada: Updating the Personal Attribute Model" (2007) 40:4 Can J of Political Science 911 at 916 [Songer & Johnson]; Emmett MacFarlane, "The Supreme Court of Canada and the Judicial Role: An Historical Institutional Account" (PhD Thesis, Queen's University, 2009) [unpublished] [MacFarlane]; Sujit Choudhry & Claire E Hunter, "Measuring Judicial Activism on the Supreme Court of Canada" (2004) 49:3 McGill LJ 525 [Choudhry & Hunter].

²⁸ Mark A Hall & Ronald F Wright, "Systematic Content Analysis of Judicial Opinions" (2008) 96(1) Cal L Rev 63 at 66 [Hall & Wright].

²⁹ *Ibid* 77.

Instead of seeking facts to prove or disprove a hypothesis, [a researcher is] simply recording details, each in itself too insignificant for [her] to be able to see-and thereby be biased by-its meaning. Only when [she] has all the facts can [she] see which are emphasized most, which least; only when all the facts are in can [she] see what is not there.³⁰

However, if one believes the rhetoric posited about the nature of terrorism, crime, and securitization in the wake of 9/11, this would suppose that an increased level in Supreme Court activism and deviation from inherent core values and rights protections has been taking place.³¹ The empiricisation of judicial activism using Cohn and Kremnitzer's model would give new and significant findings around which to base further legal scholarship.³²

Using the newly operationalized and adapted Cohn and Kremnitzer model to measure activism without its inherent politicization provides advantages in that it creates substantial opportunities to assess all of the complex facets of activism, instead of the narrow focus on precedential effects.³³ Most research in this area, particularly in Canada and the United States is conducted in response to judicial decisions regarding the constitutionality of previously enacted legislation. However, many Court decisions involving constitutional principles occur in the absence of legislation and instead are based on common law principles, which may lead traditional activism researchers who adhere to narrow definitions of activism to decide against analysis. For example, improper police conduct, or the expansion of police powers in Canada is analysed in a way that is largely separate from legislation, in part because wide-ranging police powers legislation has not been enacted in Canada, leaving the Court to decide whether there is a common law power for particular behaviour.³⁴ This

³⁰ Thomas F Carney, *Content Analysis: A Technique for Systematic Inference from Communications* (Winnipeg: University of Manitoba Press, 1972) 17 [Carney].

³¹ Colleen Bell, *The Freedom of Security: Governing Canada in the Age of Counterterrorism* (Vancouver: University of British Columbia Press, 2011) [Bell].

³² Richard Jochelson, Michael Weinrath & Melanie J Murchison "Searching and Seizing After 9/11" (2012) 35:1 Dal L Rev 179 at 195 [Jochelson, Weinrath & Murchison, after 9/11].

³³ Jochelson, Weinrath & Murchison, "Multidimensional", *supra* note 21.

³⁴ Richard Jochelson, "Multidimensional Analysis as a window into Activism Scholarship: Searching for Meaning with Sniffer Dogs" (2009) 24:2 CJLS 231 at 240 [Jochelson, Dogs]; Richard Jochelson "Crossing the Rubicon: of Sniffer Dogs, Justifications, and

model allows analysis of the Court's decisions in this context, even in the absence of legislation, because the goal is to measure the level of activism of the Court on significantly more factors than mere constitutional acceptability. In order to begin the process of analysing Supreme Court decisions, a methodological framework had to be chosen which would successfully measure the changes in activism of the Canadian Supreme Court from the inception of the *Charter* in 1982 to September 11, 2001 and from September 12, 2001 to the present. A content analysis methodology using both qualitative and quantitative approaches was chosen to operationalise the Cohn and Kremnitzer model to measure the Court's own judgments, and whether or not they are phrased in terms of activism or restraint, a very different assessment than previously undertaken in the literature.

The decision to use a content analysis methodology when undertaking an examination of judicial opinions is not a novel one, as many scholars, such as Hall and Wright, Mercer, and Lawlor have advocated the practice of conducting content analyses as the best way to understand patterns in judicial decision-making. While qualitative content analysis is exceptionally nuanced and labour intensive, quantitative content analysis is particularly useful when it is necessary to examine large quantities of data, as it provides an organized and efficient method of evaluation.³⁵ The goal of undertaking content analysis, when using it as a quantitative methodology, is to measure in a numerical and mathematical process the number of occurrences of a particular variable (i.e. their amount) inside of the individual categories.³⁶ This is the case in this paper, as the amount of activism is measured inside 17 variables across different eras in the Court.

Preemptive Deference" (2008) 13:2 Rev Const Stud 209 at 211 [Jochelson, Rubicon]; Richard Jochelson, "Trashcans and Constitutional Custodians: The Liminal Spaces of Privacy in the Wake of Patrick" (2009) 72(2) Sask L Rev 199 at 221 [Jochelson, Trashcans]; Richard Jochelson, "Talking Trash with the Supreme Court of Canada: The Reasonable Expectation of Privacy Under the Charter" (as cited in K Kramar, ed, *Criminology: Critical Canadian Perspectives* (Pearson Canada, 2011) 255 [Jochelson, Trash].

³⁵ US General Accounting Office, "Content Analysis: A Methodology for Structuring and Analyzing Written Material" (1 September 1996), online: <<http://www.gao.gov/products/PEMD-10.3.1>> [US General].

³⁶ Kimberly A Neuendorf, *The Content Analysis Guidebook* (Thousand Oaks, Cal: Sage Publications 2002) at 14 [Neuendorf].

Mark Hall and Ronald Wright begin their article “Systematic Content Analysis of Judicial Opinions” by remarking that lawyers (or “the mockingbirds of the academy” as they call them) “have yet to identify their own unique empirical methodology. Instead, empirical legal methods are often standard applications of basic social science methods to subjects of (sometimes trifling) legal interest”.³⁷ In their article, Hall and Wright propose that legal scholars adopt content analysis as their own, purely unique form of legal analysis, as when “one reads cases this way, one engages in a uniquely legal empirical method - a way of generating objective, falsifiable, and reproducible knowledge about what Courts do, and how and why they do it”.³⁸ They suggest that the requirements of a content analysis will be familiar to lawyers, as it “resembles the classic scholarly exercise of reading a collection of cases, finding common threads that link the opinions, and commenting on their significance” but is much more robust and empirical a method than simple case analysis.³⁹ Instead of trying to study causes and effects of law and legal institutions, or issues that relate to law, content analysis creates a scientific understanding of the law itself (within judicial opinions and other legal texts).

Using a content analysis methodology to understand judicial decisions allows for the recorded factual or legal content of judicial opinions to be consistently analysed. The adoption of a hybrid content analysis methodology (which uses both qualitative and quantitative aspects) preserves both the manifest and latent content present in judicial decisions and removes the criticism that some scholars have had, which is that the reductionist aspect of case coding tends to neglect matters of importance.⁴⁰ Indeed, Wallace Mendelson said that scholars who engage in strict word counting processes of understanding judicial behaviour:

fail to depict even dimly the subtleties of the judicial process. They do not, presumably because they cannot, measure the range of values that play in the jurisprudence of a Holmes, a Brandeis, a Stone, or a Cardozo-to mention a few departed heroes. . . . [T]he judge's art, when greatly practiced, is far too subtle to be

³⁷ Hall & Wright, *supra* note 28 at 63.

³⁸ *Ibid* at 64.

³⁹ *Ibid*.

⁴⁰ Howard Gillman, “What's Law Got to Do With It?” (2001) 26(2) *Law & Soc Inquiry* 465 [Gillman]; Wallace Mendelson, “The Neo-Behavioral Approach to the Judicial Process: A Critique” (1963) 57:3 *Am Pol Sci Rev* 593 at 595 [Mendelson].

measured by any existing behavioral technique. "The law," said Holmes, "is the painting of a picture-not the doing of a sum."⁴¹

The ability of legal scholars to accurately record the content of judicial decisions using a content analysis methodology has been a subject that has been widely discussed in empirical legal circles.⁴² Often these discussions centre on whether judicial decisions are affected by extra-legal factors, such as tenure, appointment process, religion and docket control, and whether the decisions themselves then are based on law, or on a political or personal metric instead.⁴³

Although content analysis has become more popular in recent years there are still problems with the methodology when it comes to adopting an "in their own words" project. Those who use content analysis to measure judicial decision-making must admit that the phenomenon of "judgment writing" (the process of crafting a judgment to appear a certain way, cannot be overlooked.⁴⁴ As Juliano and Schwab state "a judicial opinion is the

⁴¹ Mendelson, *ibid* at 602-603 (emphasis added).

⁴² David E Klein, *Making Law in the United States Courts Of Appeals* (Cambridge: Cambridge University Press 2002) [Klein]; Sara C Benesh & Wendy L Martinek, "State Supreme Court Decision Making in Confession Cases" (2002) 23:1 Justice System J 109 [Benesh & Martinek]; James J Brudney, "A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process" (1996) 74:4 NCL Rev 939 [Brudney]; Tracey E George & Lee Epstein, "On the Nature of Supreme Court Decision Making" (1992) 86:2 Am Pol Sci Rev 323 [George & Epstein]; Charles A Johnson, "Law, Politics, and Judicial Decision Making: Lower Federal Court Uses of Supreme Court Decisions" (1987) 21:2 L & Soc'y Rev 325 [Johnson]; Daniel M Schneider, "Empirical Research on Judicial Reasoning: Statutory Interpretation in Federal Tax Cases" (2001) 31:2 NM L Rev 325 [Schneider]; Jeffrey A Segal, "Predicting Supreme Court Cases Probabilistically: The Search and Seizure Cases, 1962-1981" (1984) 78:4 Am Pol Sci Rev 891 [Segal]; Joseph L Smith & Emerson H Tiller, "The Strategy of Judging: Evidence from Administrative Law" (2002) 31:1 J Leg Stud 61 [Smith & Tiller]; Donald R Songer & Susan Haire, "Integrating Alternative Approaches to the Study of Judicial Voting: Obscenity Cases in the US Courts of Appeals" (1992) 36(4) American J of Political Science 963 [Songer & Haire]; Paul J Wahlbeck, "The Development of a Legal Rule: The Federal Common Law of Public Nuisance" (1998) 32:3 L & Soc'y Rev 613 [Wahlbeck].

⁴³ Wahlbeck, *supra* note 42.

⁴⁴ Kimberly D Krawiec & Kathryn Zeiler, "Common-Law Disclosure Duties and the Sin of Omission: Testing the Meta- Theories" (2005) 91:8 Va L Rev 1795 at 1832 [Krawiec & Zeiler]; Ann Juliano & Stewart J Schwab, "The Sweep of Sexual Harassment Cases" (2001) 86:3 Cornell L Rev 548 at 558-559 [Juliano & Schwab]; Hall & Wright, *supra* note 28 at 95.

judge's story justifying the judgment. The cynical legal realist might say that the facts the judge chooses to relate are inherently selective and a biased subset of the actual facts of the case."⁴⁵ While this is undoubtedly the case it does not create a fatal flaw in the use of content analysis, unless the research is proposing to assert causality or to predict future events (which this paper does not do). Hall and Wright state "few social scientists use content analysis to draw definitive cause-and-effect conclusions about complex events. Instead, they more often identify apparent associations of interest meriting further study".⁴⁶ They also offer two compelling reasons why the behaviour of "judgment writing" does not invalidate the use of content analysis methodology.⁴⁷

Firstly, Hall and Wright argue that social science is never, nor can it be, perfect, and that "reasonable approximations" suffice in both government and empirical analyses. To support this claim, they offer evidence that social scientists frequently survey members of the public about their own attitudes and behaviours, for example, to identify their voting preferences, with the assumption that the individuals are answering truthfully and accurately. Often however, this is not the case as "people sometimes fail to say what they really think, say what they imagine the researcher wants to hear, or try to maintain logical consistency across questions even if this distorts the truth".⁴⁸ In cases such as these, imperfect data must suffice as the ability to accurately determine attitudes or behaviours is either "too cost prohibitive or impossible".⁴⁹ While judges may similarly shade their views, or incorporate certain facts of a case at the expense of others the judgments are "near enough so that the savings in labor justifies the approximation".⁵⁰

Secondly, Hall and Wright state that:

the "bias" created when Courts justify their decisions may be precisely what a researcher wishes to study... Instead of predicting outcomes, content analysis is better suited to studying judicial reasoning itself, retrospectively. Scholars can use the method to learn more, for instance, about how results are justified. This type of study may be less relevant to practicing lawyers trying to gauge their cases' likely

⁴⁵ Juliano & Schwab, *supra* note 44.

⁴⁶ *Supra* note 26 at 99.

⁴⁷ *Ibid* at 100.

⁴⁸ *Ibid* at 97.

⁴⁹ *Ibid* at 97.

⁵⁰ *Ibid* at 97 citing Tyree.

outcomes, but it is perhaps more relevant to legal scholars seeking a measurable understanding of substantive law or the legal process.⁵¹

III. OPERATIONALIZATION OF THE MULTIDIMENSIONAL MODEL

There has been substantial debate among empirical legal scholars as to whether or not there has been a measurable change in the level of activism by the Supreme Court of Canada, with arguments relying heavily on specific cases, government or claimant win/loss rates, or individual justices' reasoning and voting records.⁵² While all of these metrics are important in understanding Supreme Court behaviour, they each fail to define activism and many are not broadly generalizable to larger "N" studies. Many of these studies also engage in content analysis but are purely quantitative in nature, measuring who won and who lost, how long each decision was, and how judges voted. These studies miss the latent content in the judicial decision that this paper seeks to analyse. By combining qualitative and quantitative content analysis into a hybrid content analysis, this paper proposes that a new approach to quantifying the overall level of activism in judicial decisions is required and it operationalises the multidimensional model of judicial activism first created by Cohn and Kremnitzer in 2005.

One of the reasons that there is a reluctance to apply the Cohn and Kremnitzer model in large "N" studies appears to stem from having a significant number of variables to analyse and the labour intensive nature of having to interpret and code each individual Court decision by hand, without the aid of a machine. The wide spectrum of analysis has also led some to say that conducting this type of analysis results in the measuring not of judicial activism, but some other kind of judicial diagnostic that is

⁵¹ *Ibid* at 98 (emphasis added).

⁵² Choudhry & Hunter, *supra* note 27 at 525; James B Kelly & Christopher P Manfredi, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) at 741 [Kelly & Manfredi]; Fredrick L Morton, Peter H Russell & Michael J Withey, "The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis" (1992) 30:1 Osgoode Hall LJ 1 at 12; Fredrick L Morton, Peter H Russell & Troy Riddell, "The Canadian Charter of Rights and Freedoms: A Descriptive Analysis of the First Decade, 1982-1992" (1995) 37:3 NJCL [Morton, Russell & Riddell]; James B Kelly, "The Charter of Rights and Freedoms and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1999) 37:3 Osgoode Hall LJ 625 [Kelly].

independent and not applicable to the larger discussion.⁵³ This paper aims to test whether the Cohn and Kremnitzer model can measure changes to the level of activism on the Canadian Supreme Court after 9/11. To do this, a hybrid content analysis methodology, using both qualitative and quantitative content analysis of the judicial decisions was adopted. According to Hall and Wright, a content analysis methodology “works best when the judicial opinions in a collection hold essentially equal value, such as where patterns across cases matter more than a deeply reflective understanding of a single pivotal case. While conventional legal scholarship analyses issues presented in one case or a small group of exceptional or weighty cases, content analysis works by analysing a larger group of similarly weighted cases to find overall patterns”.⁵⁴ The criteria for the model are explored below.

IV. THE MULTIDIMENSIONAL MODEL: CHARTER SECTION VARIABLES: TRADITIONAL VISIONS OF ACTIVISM⁵⁵

Judicial stability – This measures whether the Court is ready to retract from its own or former decisions. When the Court affirms the decisions of all lower Courts the case is scored as a 1. When the Court overturns a previous decision and overturns legislation and creates new law, the case is scored as a 10.

Interpretation – Does a Court interpret a legal text in possible contradiction with assumed original intent of the Constitution or its plain linguistic meaning? Where the Court interprets the *Charter* section in light of an original intent or plain meaning approach the case is scored as a 1. Where the Court interprets the section in a way that is unremittingly interpretive, the case is scored as a 10.

Majoritarianism and autonomy – This measures whether the Court interferes with policies set by democratic processes and if it is willing to supply its own solution and/or policy: when the Court does not interfere with policies set by democratic policies or leaves all legislation unimpeached

⁵³ Daved Muttart, “One Step Forward, One Step Back: Measuring Activism in the Supreme Court of Canada” (2011) Social Science Research Network Working Paper [Muttart].

⁵⁴ Hall & Wright, *supra* note 28 at 65-66.

⁵⁵ Jochelson, Weinrath & Murchison, “Multidimensional”, *supra* note 21 at 132.

the case is scored as a 1. Where the Court struck down legislation and applied its own policy or solution the case is scored a 10.

Judicial reasoning: process/substance - This variable measures how heavily the Court relied, in its decision, on strict legal and procedural grounds. Where the Court entirely relied on strict legal or procedural grounds in making a decision it was scored a 1. Where the Court relied on open ended legal tests, such as reasonableness-based assessments, it was scored a 10.

Threshold activism - This measures the extent to which the Court was willing to forgive threshold hurdles. In this context, a rigorous application of threshold issues, such as the reasonable expectation of privacy as a gateway to accessing section 8 of the *Charter*, would score a 1 (the reasonable expectation of privacy is the main threshold issue in s 8 cases). Where the Court found reasons to allow for reasonable expectation of privacy where previous cases had not the case was scored a 10.

Judicial remit - This variable asks whether the Court's decision expands or redefines the jurisdiction of the Court. When the decision did not expand or redefine the jurisdiction of the Court the case was scored as a 1. A decision that expanded the judiciary's remit into areas previously immune from intervention was scored as a 10.

Rhetoric - This variable asks whether judicial decisions are used as platforms for expression of broader positions and values or whether the use of rhetoric was restricted in the Court's explication of legal principles. The absence of legal rhetoric (usually correlating with shorter decisions) was scored as a 1. High levels of extra-legal rhetoric combined with long discussions of political implications were scored at 10.

Obiter dicta - This measures how far the Court expands its opinion beyond the legal requirements of the specific case. When the Court did not delineate any obiter the case was scored as a 1. When the Court used extensive amounts of obiter and discussed issues not relevant to the case it was recorded as a 10.

Reliance on comparative sources - This examines how extensively the Court relied on foreign sources that are not legally binding in the domestic sphere. Where the Court used domestic law exclusively it was scored as a 1. When the Court used comparative sources to create new legal conceptions with extensive comparative referencing it scored a 10.

Judicial voices - Here, the extent of other judicial decisions besides the majority decision were examined. A unanimous decision scored a 1. On

occasions where there were two concurring and two dissenting judgments (the most judicial voices seen) a 10 was scored.

Extent of decision – Here whether the Court’s ruling expressly applied to a single or specified set of circumstances or whether the law that resulted had broad implications for larger sections of society was examined. If the Court simply applied the legal rules a 1 was scored. Where the Court created a new standard that effected broader populations it was scored as a 10.

Legal background – Here it was examined whether the legal framework on the basis of which the Court made its decision was inclusive and clear or whether the rules concerned were vague, complex, self-contradictory, or incomplete. Where the Court applied clear rules that did not extend beyond the prior case law it scored a 1. Where the framework was murky and when the Court generated a new framework for analysis a 10 was scored.

Variables: core values activism

Intervention and value content – This variable examined if the subject matter under examination was highly value laden in that it had bearing on democratic principles and human liberties domestically accepted. Where the case dealt with important human rights issues and the Court appeared to assert its guardianship of the Constitution, a 1 was scored. Where the Court declined to discuss the constitutional values at stake it scored a 10.

V. SAMPLE CASES

Each Cohn and Kremnitzer variable has a possible score of 1 – 10 and each of those scores corresponds to a particular behaviour or result by the Court. For example, the variable Judicial Stability is informative as to whether or not the Court overturned previous decisions, while the number indicates to what degree they varied from those previous decisions. A 1 would indicate that they did not overturn any previous decision, while a 10 would demonstrate that they both overturned not only a previous Supreme Court decision, but also legislation by making a new test. These cases will illustrate the differences in each variable specifically.

In order to better understand the process by which Cohn and Kremnitzer’s model can be operationalized, namely how some cases score as activist, while others restrained, it is important to understand how the coding decisions were made in each case. This section will explain how each of the variables were coded using two sample cases that illustrate the

substantial differences between activism and restraint in judicial discourse, using section 24(2) variables.

R v Grant and *R v Wittwer* are two cases that occurred within one year of each other: *R v Grant*⁵⁶, (2009) is one of the most activist cases included in the dataset, while *R v Wittwer*⁵⁷, (2008) decided just one year earlier is one of the most restrained (using the discourse model). In *Grant*, two plain clothed police officers stopped the accused, a younger black male, after noticing his “suspicious movements”.⁵⁸ After a brief conversation with these officers Grant disclosed that he was carrying marijuana and a firearm.⁵⁹ He was subsequently arrested. At trial, Grant submitted that his s. 8, 9 and 10(b) rights had been violated, and that the evidence should be excluded under s 24(2).⁶⁰ He was convicted at trial and the Court of Appeal upheld his conviction.⁶¹ In *Wittwer*, the police attempted to obtain a confession out of the accused by using his own previous admissions that the police knew had been obtained while committing violations of his right to counsel.⁶² After repeated questioning Wittwer confessed, but submitted that this confession was still a violation of his 10(b) right as the interrogations were all connected and he sought to have it excluded under section 24(2).⁶³

The decision in *Wittwer* is only 27 paragraphs long, while *Grant* is more than ten times that length at 230 paragraphs. The length of the *Grant* decision is strongly correlated with the score on both *Rhetoric* and *Obiter*, as rhetorical decision making requires space, and these behaviours tend to make the decisions longer. *Wittwer* scored a “1” on both *Rhetoric* and *Obiter* while *Grant* scored “10” on both. *Wittwer* is also a unanimous judgment with no mention of any extra-jurisdictional case law or social science evidence, while *Grant* uses extensive American case law. This means that *Wittwer* scored a “1” on both *Comparative Sources* and *Judicial Voices* but *Grant* scored an “8” and a “4” on the same variables respectively.

The only variables that received the same score in both cases were Judicial Remit and Majoritarianism and both scored 1s, as the Court

⁵⁶ *R v Grant*, 2009 SCC 32, [2009] 2 SCR 353 [*Grant*].

⁵⁷ *R v Wittwer*, 2008 SCC 33, [2008] 2 SCR 235.

⁵⁸ *Supra* note 56 at paras 4-6.

⁵⁹ *Ibid* at para 7.

⁶⁰ *Ibid* at paras 9, 2.

⁶¹ *Ibid* at para 10.

⁶² *Supra* note 57 at paras 2-4.

⁶³ *Ibid* at paras 3, 8.

neither expanded its jurisdiction in these cases, nor did it overturn democratically enacted legislation. In *Wittwer*, the Supreme Court overturned both the Appeal Court and the Trial Court's decisions and held that evidence obtained by violating Wittwer's section 10(b) right to counsel should have been excluded, and ordered a new trial.⁶⁴ Because the Supreme Court overturned both lower Court decisions, this case scored a 5 on *Judicial Stability*. Meanwhile in *Grant*, the Supreme Court agreed with both lower Court decisions on four out of the five charges, but overturned both lower Courts on the fifth charge. This behaviour alone would have led it also to score a 5 however, the Court goes further and completely overhauls the test for section 24(2), which then meets the criteria for a score of 8 on *Judicial Stability*. It is because of this substantial change in the exclusion of evidence test that *Grant* also scores the highest available measurement, a 10, for the variables *Legal Background*, *Judicial Reasoning*, and *Extent of Decision*. In *Wittwer*, the Court merely applies previously created tests, and the decision does not extend beyond any previous case law, so it scores the complete opposite and the lowest possible value, a 1 on the aforementioned variables. *Threshold Activism* measures the degree to which the Court is willing to forgive or overlook the threshold for the *Charter* protection (for section 24 (2) that threshold is whether or not there is a temporal connection between the breach and the remedy). *Wittwer* scores a 1 on this measurement, as the Court explicitly discusses the temporal connection and its importance, while *Grant* scores a 3, as the Court is willing to impose limits on this threshold in this case. The variable *Interpretation* measures the level of original intent and *Wittwer* scores a 1 on this variable, as the case holds true to what is set out in section 24(2). *Grant* scores a 3, however, as the majority in the decision does not discuss the original intent of the *Charter*, though the concurring justices do. Finally, in *Core Values*, the last variable measured, *Wittwer* scored a 1, as the justices in the case discuss the importance of the adherence to *Charter* values and protections and excluded the evidence because those values were violated by the police conduct in that case. In *Grant* there is no discussion of the inherent values at stake, but the justices do interpret those values purposively, so it scores 5.

It is important to note that because this model is measuring the four separate *Charter* sections from the *Charter's* inception until 2014, the legal tests needed to be created and in some cases, particularly section 24(2)

⁶⁴ *Supra* note 57 at para 27.

overhauled entirely. Cohn and Kremnitzer's metric is able to account for this and the case that made these significant changes (*R v Grant*, 2009) scored the highest of all cases measured in both time periods.

VI. MODEL CONSISTENCY

When using a multivariable model to measure a particular phenomenon, it is crucial to demonstrate how connected each of the variables are to one another. This is important, as the stronger the correlation between the variables, the greater the likelihood that the variables are interdependent, and related to one another. As the variables are all independent of each other, there are no dependant relationships that can be uncovered, but there are significant findings that can be determined through bivariate correlation analyses. These correlations are not able to determine which variable influences another, but it indicates how strongly the variables are connected to each other.

In order to determine the relationship between each of the variables, this paper will use the Pearson's R value, or the Pearson product-moment correlation coefficient to measure the linear dependence of one variable on another.⁶⁵ The Pearson coefficient ranges from -1, which is a pure linearly negative correlation and occurs when the y value decreases as the x value increases to +1, a purely linear positive correlation that occurs when the y value increases as the x value increases.⁶⁶ When applied to a population, as in this case, the formula for the Pearson coefficient is:

$$\rho_{X,Y} = \frac{\text{cov}(X, Y)}{\sigma_X \sigma_Y}$$

When conducting a content analysis of judicial decisions there are three distinct components that must be undertaken: (1) selecting cases, or "sampling"; (2) coding cases; and (3) analysing the case coding, often through statistical methods.⁶⁷

⁶⁵ RR Wilcox, *Introduction to Robust Estimation and Hypothesis Testing* (Boston: Academic Press 2005).

⁶⁶ *Ibid.*

⁶⁷ *Ibid* at 79.

VII. SAMPLING

To apply the hybrid content analysis to operationalize the Cohn and Kremnitzer model, a group of cases that would be used for analysis had to be chosen. The purpose of conducting this operationalization was to determine if the amount of activism on the Supreme Court had changed after 9/11 in cases that deal with the police powers *Charter* sections. In order to get a complete and accurate depiction of the level of activism before and after 9/11 throughout these *Charter* cases the sample for this study is all of the Supreme Court of Canada jurisprudence surrounding all four separate *Charter* sections: Search and seizure (section 8); arbitrary detention (section 9); right to counsel (section 10(b)); and exclusion of evidence (section 24(2)). It was not possible to use random sampling in this case as there was no way to guarantee that the sample in any way would be representative of the entire population.⁶⁸

All the cases were found on the legal databases which index Canadian Supreme Court decisions: Westlaw, QuickLaw, CanLii, and LexisNexis. The databases were then cross-referenced with each other to guarantee that all cases were included. After finding all of the cases and entering them into individual spreadsheets, the Supreme Court of Canada's website was then checked and all of the cases dealing with constitutional law were indexed to be sure that no case was missed. Cases that dealt with one of the relevant *Charter* sections but were less than ten paragraphs long were excluded, as there was insufficient relevant material to analyse. Cases that made a passing reference to a *Charter* section (such as the mention of section 8 in *Cloutier v Langlois*)⁶⁹ or that merely brought up a *Charter* section to compare it to another area of law were also excluded.

Each case was printed and read through for content and relevance to its *Charter* section twice before being coded. Some cases dealt with more than one of these issues and were therefore analysed multiple times, each time focusing solely on a specific *Charter* protection. For example, *R v Grant*⁷⁰ was analysed three separate times as it is a section 9 case, a section 10(b) case

⁶⁸ Klaus Krippendorff, *Content Analysis: An Introduction to Its Methodology*, 3rd ed (Thousand Oaks, Cal: Sage Publications 2013) [Krippendorff].

⁶⁹ *Cloutier v Langlois*, [1990] 1 SCR 158, 53 CCC (3d) 257 [Langlois].

⁷⁰ *Grant*, *supra* note 56; There are two *R v Grant* cases that were used in this analysis, one in 1993 and one in 2009. I am always referring to the latter unless expressly stated.

and a section 24(2) case.⁷¹ Another example is *R v Therens*, which was the first case post *Charter* to deal with section 10(b), the right to counsel protection, but was also a case that dealt with section 24(2), and the process of the exclusion of evidence.⁷² In this case, all nine of the Supreme Court Justices heard the case but only eight took part in the judgment. The Court agreed with the decisions of the two lower Courts and upheld the defendant's acquittal, dismissing the Crown's appeal.⁷³ This consistency in this decision means that the case scored a "1" in the "judicial stability" variable posited by Cohn and Kremnitzer in both the section 10(b) and 24(2) analysis. Below are the tables that demonstrate the number of cases found, versus the number of cases analysed for each variable.

Table 1: Total Number of Cases Found by *Charter* Section

Total Number of Cases Found			
Section	Number Included	Number Excluded	Total
Section 24(2)	98	318	416
Section 10(b)	45	37	82
Section 9	23	39	62
Section 8	90	73	163

⁷¹ *Ibid.*

⁷² *R v Therens*, [1985] 1 SCR 613, 1 DLR (4th) 655.

⁷³ *Ibid* at 654.

Table 2: Number of cases analysed by *Charter* Section

Number of Cases Analyse			
Charter Sections	Pre-9/11	Post-9/11	Total
Section 24(2)	72	26	98
Section 10(b)	37	8	45
Section 9	14	9	23
Section 8	54	36	90

VIII. CODING

In order to determine how each case should be scored for each individual variable, criteria were identified on which to base a scale ranking system for each of the variables. A 1-10 Likert scale was then developed and used throughout the analysis to code attributes of the decision. A 1 indicates the lowest level of judicial activism, while a 10 represents the most activist type of behaviour along the lines postulated by Cohn and Kremnitzer. Each case was assessed each time for every variable against the content analysis criteria for ranking, which was developed as an a priori design. In order to ensure reliability, this author established all of the decisions on the variables, coding rules and how they would be measured prior to the beginning of the coding process and these rules are laid out in appendices at the end of this paper.⁷⁴ "To make valid inferences from the text, it is important that the classification procedure be reliable in the sense of being consistent: Different people should code the same text in the same way".⁷⁵ This study's author personally coded all of the individual variables and cases, as a safeguard to limit any inter-coder reliability issues that may have

⁷⁴ Neuendorf, *supra* note 36 at 11.

⁷⁵ Steven Stemler, "An Overview of Content Analysis" (2001) 7(17) Practical Assessment, Research & Evaluation Electronic J 1 at 3 [Stemler].

arisen.⁷⁶ Throughout the entire project, human coding was employed instead of computer coding, as many of the metrics being measured could not be quantified accurately by any current computer program.⁷⁷ Human coding is common when conducting a content analysis, as “where the phenomena of interest to analysts are social in nature, mechanical measurements have serious shortcomings that only culturally competent humans can overcome”.⁷⁸ For example, the number of paragraphs in a decision is likely to be highly correlated with the amount of rhetoric in that decision, but it is not possible to score the variable “Rhetoric” on paragraph length alone. This study also avoided using “key word searches” to determine variable scores, and because of this, computer coding would have been detrimental to the overall project. This led to the creation of a codebook which had high intra-rater reliability, as cases were frequently re-coded without referring to previous analyses in order to check if the variables were being coded consistently. This project also has high reproducibility, or replicability as other individuals would be able to read the case and code the variables the same way if given the same codebook. For example, the variable “judicial stability” measures whether or not the Supreme Court agreed with lower Courts, and its previous decision-making. Anyone with the codebook would be able to determine that if the Supreme Court agreed with the trial Court, and the appeal Court, the case would score a “1”, and that score is not subject to any personal opinion or coder bias. Inter-rater reliability and replicability are two of the key features of conducting a content analysis of judicial decisions and have been argued by several scholars to be the most important and most overlooked pieces of conducting analyses on judicial decisions.⁷⁹ Once each of the cases had been analysed the variables were operationalized as interval variables within “Statistical Package for the Social Sciences” (SPSS) in order that differences could be ranked and meaningful comparisons made.

⁷⁶ *Ibid.*

⁷⁷ Krippendorf, *supra* note 68 at 127.

⁷⁸ *Ibid.*

⁷⁹ Jack Goldsmith & Adrian Vermeule, “Empirical Methodology and Legal Scholarship”, (2002) 69:1 U Chicago L Rev 153 at 155-57 [Goldsmith & Vermeule]; Lee Epstein & Gary King “The Rules of Inference” (2002) 69 U Chicago L Rev 1 [Epstein & King]; Hall & Wright, *supra* note 28 at 63.

IX. LIMITATIONS OF THE COHN AND KREMNITZER MODEL

Weaknesses in measurement, even when unavoidable, necessarily weaken our confidence in the results. The answer is neither to forgo the study while waiting in vain for the day when perfection can be attained nor to conduct the study and announce the results as final and infallible.⁸⁰

Cohn and Kremnitzer themselves discuss the difficulty in operationalizing this model as they suggest there are methodological issues that must be overcome and it is a model that has been subjected to mild criticism in the past.⁸¹ This largely stems from the overall weight assessed to each of the individual variables. As there are so many definitions of activism and no clear consensus as to what constitutes activism, critiques have arisen regarding the level of importance of each of the individual variables on its own. For example, some scholars have stated that their vision of activism has nothing to do with the number of extraneous sources used in a case by any given court, as the variable “Comparative Sources” measures. Does this mean that it is not an indicator of activism? Does the variable “Rhetoric” measure judicial activism just as much as the variable “Core Values”? Is it ½ the weight? How could or should it be determined? These are issues that are largely avoided by this thesis in two ways. The first is by demonstrating the strong correlations between all of the variables. When each of the variables is measured against each other, they show a significant relationship that is statistically unlikely to occur by chance. This demonstrates that while individual scholars may differ in their individual interpretations of what activism means to them personally, the framework is measuring a consistent metric and shows strong levels of reliability. Secondly, by not taking all of the individual variable scores and combining them into one overall “activism” score for each *Charter* section, each section is able to speak for itself and let the individual scholar place the emphasis where he or she desires. In keeping each of the individual variable scores visible, this allows for individual dissemination and comparison of all of the factors that contribute to activism, allowing for a more open and transparent overall analysis.

⁸⁰ Gregory C Sisk & Michael Heise, “Judges and Ideology: Public and Academic Debates About Statistical Measures” (2005) 99:2 NW UL Rev 743 at 792.

⁸¹ Cohn & Kremnitzer, *supra* note 19 at 59; *supra* note 8 at 36.

In their study of the activism level of individual judges on the US Supreme Court, which incorporated the variables identified by the activism scholars Canon, Young, Marshall, and Cohn and Kremnitzer, Lindquist and Cross chose only to use the variables that they felt were most “amenable to valid and replicable measurement”.⁸² They also discussed the difficulty in coding the variables identified by those four scholars, such as “judicial remit”, and “interpretation” stating “... [t]hey (the variables) are not amenable to objective measurement. Identifying cases according to these ... categories requires significant subjective determinations that are not likely to be replicable from one researcher to the next.”⁸³ Lindquist and Cross also stated that “reliance on interpretive theory such as originalism as a cue for judicial activism is thus impossible to replicate with any reasonable expectation of high inter-coder agreement.”⁸⁴ Lindquist and Cross were, however, concerned with the ideological voting behaviour of the US Supreme Court Judges and on their level of “result oriented judging”. That is not the purpose of this study and is one of the reasons the Cohn and Kremnitzer model has been reoriented toward a hybrid analysis using both qualitative and quantitative understandings of Court decision making, while maintaining the content analysis framework.

If the researcher is tasked with determining the content of what a Court said about its own decision-making, then the judgment call of the researcher is reduced to an exercise of coding rather than a decision about activism. The coding exercise of the researcher is then an attempt to record the voice of the Court itself and the text of the decision becomes the empirical source of primary research.⁸⁵

It is necessary to be mindful of potential criticisms from those who study judicial activism and would problematize the coding project of a discourse-based project.⁸⁶ For example, when relying on a Court’s own justifications and use of analysis, can the researcher make an informed decision about whether the Court was behaving in an activist or restrained fashion?

⁸² Lindquist & Cross, *Measuring Activism*, *supra* note 8 at 36.

⁸³ *Ibid.*

⁸⁴ *Ibid* at 37.

⁸⁵ Jochelson, Weinrath & Murchison, “Multidimensional”, *supra* note 21 at 192.

⁸⁶ See the debate between Jochelson, Richard & Melanie Murchison, “Measuring Activism and Restraint or How to Conflate Doctrine with Activism: A Response to Professor Riddell’s small-scale judicial output study” (2005) 58:1 *Canadian J Corr* 112 at 112-117; Troy Riddell, “Response to Jochelson and Murchison” (2016) 58:1 *Canadian J of Criminology and Criminal Justice* 117 at 117-118.

Ultimately, the development of the Cohn and Kremnitzer analysis was a response to the dissatisfaction with political accounts of Courts behaving in ways that were described as activist or restrained. The determination of restraint or activism is largely a quantitative response to a qualitative question. Discourse analysis provides a means of assessing larger quantities of cases and providing an empirical basis for qualitative conclusions about activism or restraint in terms of a Court's own language. Rather than begin the discussion with a political question (i.e., activist or not?), the discourse approach outlined seeks to measure a number of parameters and to hold off discussion of a Court's analysis until the primary research is gathered.

X. LIMITATIONS OF THE CANADIAN ADAPTATION

As with any study, the method adopted to measure judicial activism has potential limitations. The first limitation is not a critique of any one model of measurement, but instead, suggests that human coding can be susceptible to guesses, or errors in judgment. The number of judgment calls to be made in this type of analysis, regardless of the activism dimension, is open to influence (at the conscious or subconscious level) by the individual researcher. It is the broad challenge in operationalizing any model to minimize the amount of judgment calls needed to be made by the researcher. This operationalization of the model has attempted to eliminate the need for as many "judgment calls" as possible, by the creation of a strict coding key. This also has removed any guesswork and has negated issues surrounding interpretation. The second issue is that it is possible that individual scholars would suggest that there are different ways to measure the Cohn and Kremnitzer variables than the way this thesis chooses to measure them. While this is possible, the consistency with which the key in current use is applied negates any issues of systemic variability or replicability.

The second limitation of the application of the Cohn and Kremnitzer model to Canada is that the model was originally designed to measure judicial activism in common law Courts (Cohn herself first used it to examine a decision in the House of Lords) and the model may not be as easily transferable to a system that includes aspects of the civilian legal tradition. One of the two unique things about Canada is that it enjoys bijuralism, which means that there are two legal traditions which co-exist within a single state, (in this case, the civil and common law traditions) and

that many of the Justices are bilingual.⁸⁷ Since 1983 every decision of the Supreme Court has been published simultaneously in both English and French, though the decisions do not specify what the original language of writing was.⁸⁸ This allows for some ambiguity as to which language and what exact words each justice chose when writing their reasons. Each Justice also has three clerks who have been educated in different provinces and have different levels of fluency in both official languages which can affect the decisions. Controlling for the differences in style between each of the Justices and their clerks was not possible given that the decisions that were coded were all in English and some of the reasons from the judges may have been translated. Because this operationalization does not use a strict word coding model, the effects of the individual word choices may have been mitigated. However, it is possible that some subtleties and nuances in the French decisions which were translated may have been lost.

The Supreme Court of Canada experienced significant changes right after the turn of the century and they are completely unrelated to 9/11. For example, on January 7, 2000 Beverley McLachlin, the third female justice appointed to the Supreme Court bench was appointed the position of Chief Justice of the Supreme Court of Canada and as such, all of the cases that were coded post 9/11 occurred after her ascendance to the Chiefship. It is therefore possible that many of the changes that occurred during this time period are attributable to the new Chief Justice (the first female to hold this position) and her preferred doctrinal approach.⁸⁹ Wetstein and Ostberg examined strategic leadership on the Supreme Court and found that each

⁸⁷ Allard, France: "The Supreme Court of Canada and its Impact on the Expression of Bijuralism" in Canada, Department of Justice: The Harmonization of Federal Legislation with the Civil Law of the Province of Quebec and Canadian Bijuralism. Ottawa, Justice Canada, 2001, online: <http://justice.gc.ca/eng/rp-pr/csj-sjc/harmonization/hfl-hlf/b3-f3/bf3a.html>. It is also important to note that differences between legal systems are said, by some comparative constitutional law scholars, to be so fundamental that cross over is nearly impossible.

⁸⁸ Supreme Court of Canada "Role of the Court" (2016) online: <http://www.scc-csc.ca/court-cour/role-eng.aspx>.

⁸⁹ Chief Justice McLachlin has affirmed the right to dissent but has stated that she and her colleagues are "trying to reduce the unnecessary differences". The day after being appointed Chief Justice she expressed a desire to increase consensus. In 2000 the Supreme Court was accused of being "too fractured" and handing down too many split decisions, leaving the legal community confused about the law's direction, see Ulrike Schultz & Gisela, eds, *Women in the Judiciary* (New York: Routledge, 2012).

of the three most recent Chief Justices' voting behaviour changed substantially after being appointed chief, leading them to write more majority opinions and fewer dissents.⁹⁰

There were also other significant changes in the Court's composition after 9/11 and this too may have had a substantial effect. Justices McLachlin and LeBel are the only ones who were on the Court prior to 2001 (though LeBel retired effective November, 2014, and he was appointed only one year prior). As such, the Court's composition is almost entirely different than the previous era. Both the retirement of justices, as well as new appointments coming in would have had a huge impact on judicial decision-making. A prime example of this would be retirement of Justice Claire L'Heureux-Dubé, the second woman ever appointed to the Supreme Court and the first ever woman appointed from Quebec, who left the Court in 2002. L'Heureux-Dubé was frequently referred to as "The Great Dissenter" by colleagues and academics alike as she dissented 28.1% of the time, almost twice the average rate of dissent.⁹¹ Prior to 2000 the rate of unanimity on the Court was approximately 50% and it increased to 70% as of 2006, in large part because of L'Heureux-Dubé's retirement and her replacement by Justice Marie Deschamps and Chief Justice McLachlin's vocal reforms.

XI. PRE- 9/11 DESCRIPTIVE DATA

In total, there were 178 individual analyses conducted on each of the Cohn and Kremnitzer variables for all four *Charter* sections pre 9/11 cases that met the selection criteria. Overall, the total mean score of all variables (obtained by adding all 13 variable means and dividing by 13) is 3.56. The variable "Judicial Voices" had the highest pre-9/11 mean score (4.65) while "Judicial Remit" had the lowest (1.51). All thirteen variables had a minimum value of 1, meaning that the lowest variable, the variable that indicates the most restraint, was used at least once. 12 out of the 13 variables had a range of 9, which indicates that each variable had each number in the

⁹⁰ ME Wetstein & CL Ostberg, "Strategic Leadership and Political Change on the Canadian Supreme Court: Analyzing the Transition to Chief Justice" (2005) 38:3 *Canadian J of Political Science* 653 at 670.

⁹¹ Marie-Claire Belleau, Rebecca Johnson & Christina Vinters, "Voicing an Opinion: Authorship, Collaboration and the Judgments of Justice Bertha Wilson" (2008) 41 *The Supreme Court L Rev: Osgoode's Annual Constitutional Cases Conference* 53 at 60-61. This measures her entire tenure on the court, which began in 1987.

Likert scale used at least once, including the highest value (10). The exception to this was the variable “Judicial Remit” which only had a range of 6 and a maximum score of 7. The standard deviations continue to be relatively large, which shows a high degree of variation across the Likert scale. The large variation in the standard deviations is not surprising, as each case is adjudicated on its individual merits, and previous cases are often not a predictor of new cases, particularly when measuring across all four *Charter* sections.

Table 3 Pre-9/11 Descriptive Statistics

	N	Min	Max	Mean	Std. Deviation
Judicial Stability	178	1	10	3.84	2.220
Interpretation	178	1	10	3.33	2.160
Majoritarian/Autonomy	178	1	10	1.69	1.650
Judicial Reasoning	178	1	10	3.21	2.208
Activism Threshold	178	1	10	3.35	2.111
Judicial Remit	178	1	7	1.51	1.085
Rhetoric	178	1	10	4.47	2.793
Obiter	178	1	10	3.20	2.368
Comparative Sources	178	1	10	2.52	2.285
Judicial Voices	178	1	10	4.65	3.009
Extent of Decision	178	1	10	4.14	2.976
Legal Background	178	1	10	3.55	2.776
Core Values	178	1	10	4.17	2.419

Overall, when the means of the first twelve indicia (the traditional visions of activism) are combined, a mean score of 3.29 is achieved. In comparison, the variable “core values”, which is the third dimension of activism (Core Values) as created by Cohn and Kremnitzer⁹² has a mean of 4.17. While the means for both groups are still relatively low (they are both below the median measurement of 5), the fact that the “core values” mean

⁹² Cohn & Kremnitzer, *supra* note 19.

is higher than the means recorded in the “traditional visions of activism”, demonstrates that the Court was less apt to adhere to its role as “the guardian of the Constitution” and to the strict protection of Constitutional rights and was relatively more activist than they were when it related to previous legal norms or rules, as set out in the first twelve variables. This is supported throughout the four *Charter* sections measured by the consistent creation of ancillary police powers in the early days of the *Charter*, which often infringed on individual liberties but were justified by the Court in the name of a significant state objective. When measuring each of the variables individually across the four *Charter* sections it is possible to determine both the highest and the lowest mean scores for each of the variables. Overall, each section had the highest mean score in at least two variables, but the lowest mean scores were much more highly concentrated in the mean scores of section 10(b).

Table 4 Table of Means Pre-9/11

Variables	Section 8 Mean	Section 9 Mean	Section 10(b) Mean	Section 24(2) Mean
Judicial Stability	4.07	3.07	4.24	3.61
Interpretation	3.24	3.60	3.11	3.46
Majoritarian/Autonomy	2.37	2.27	1.16	1.33
Judicial Reasoning	3.96	4.33	2.30	2.88
Activism Threshold	3.83	3.80	2.16	3.50
Judicial Remit	1.69	2.27	1.30	1.32
Rhetoric	4.31	4.53	3.76	4.64
<i>Obiter</i>	2.78	3.47	2.95	3.58
Comparative Sources	3.48	1.93	1.95	2.21
Judicial Voices	4.63	3.13	4.57	5.03
Extent of Decision	4.52	4.80	4.89	3.33
Legal Background	4.30	4.60	3.54	2.78
Core Values	5.38	3.93	3.24	3.82

Sections 8 and 9 each had four variables with the highest mean scores, while Section 24(2) had three (“Rhetoric”, “*Obiter*” and “Judicial Voices” and Section 10(b) had two (“Judicial Stability” and “Extent of Decision”). In contrast, Section 10(b) had the lowest mean score on seven out of the thirteen variables, while Section 9 had three (“Judicial Stability”, “Comparative Sources” and “Judicial Stability”), Section 24(2) had two (“Extent of Decision and “Legal Background”) and Section 8 had one (“*Obiter*”). The concentration of low mean scores in Section 10(b), in both the “traditional values” metric and the “Core Values” variable means that the Court generally acted in a manner that was much more restrained and in line with the Constitutional guardianship role it assumed after the enactment of the *Charter* than had happened in any other *Charter* section. This is likely because very few legal tests changed in section 10(b) and the right to counsel rarely required overturning any validly enacted laws or required significant reliance on comparative jurisprudence.

Overall, the pre-9/11 means demonstrate that the Court was acting with a significant amount of judicial restraint, as only one of the variables in one of the *Charter* sections achieved a mean greater than 5 (the halfway point, or median on the Likert scale) and when each *Charter* section was combined none of the variables had a mean greater than 5.

XII. POST- 9/11 DESCRIPTIVE DATA

There were 79 total analyses conducted on each of the Cohn and Kremnitzer variables post 9/11; less than half the number conducted in the pre-9/11 period. The methodological design of this project requires using the entire population of cases, rather than samples of those populations as these cases share a relatively uncommon characteristic and still a large enough population to achieve meaningful results. While some of the *Charter* sections have very small post 9/11 populations, which makes that *Charter* section more susceptible to larger standard deviation, the population is still considered robust. In the post 9/11 population, the ranges are identical to the ranges in the pre-9/11 group with only two exceptions. In the pre-9/11 group, the maximum values for both “Activism Threshold” and “Core Values” were 10, whereas in the post 9/11 population they only go as high as 9. The post 9/11 standard deviations are also quite similar to the pre-

9/11 levels as both show significant variability, a phenomenon to be expected when the ranges are larger.

Table 5 Post 9/11 Descriptive Statistics

		Min	Max	Mean	Std. Deviation
Judicial Stability	79	1	10	3.43	2.146
Interpretation	79	1	10	3.35	2.137
Majoritarian/Autonomy	79	1	10	1.57	1.774
Judicial Reasoning	79	1	10	2.87	1.890
Activism Threshold	79	1	9	3.76	2.191
Judicial Remit	79	1	7	1.47	1.239
Rhetoric	79	1	10	4.75	3.070
Obiter	79	1	10	3.48	2.621
Comparative Sources	79	1	10	1.75	1.480
Judicial Voices	79	1	10	3.92	2.859
Extent of Decision	79	1	10	3.67	2.881
Legal Background	79	1	10	3.05	2.552
Core Values	79	1	9	4.33	2.335

Overall, in the combined data set, the highest mean score was achieved by the variable “Rhetoric” (4.75) while the lowest mean score was “Judicial Remit” (1.47). “Judicial Remit” also had the lowest mean score in the pre-9/11 group, scoring 1.51. This indicates that throughout the entire period since the *Charter*, the Court was very unlikely to expand or go beyond the established jurisdiction of the Court. The range from highest mean to lowest mean is greater than 3 full likert scale point measurements, which demonstrates considerable flexibility in the variables measured. As the pre-9/11 data also shows a 3-point variation in the mean scores it appears that the fluctuation is consistent and that certain variables are more predisposed to activism than others. Once again, the variable “Core Values” (4.33) was higher than the average mean of the twelve “traditional visions of activism” (3.09) and this time, by an even bigger margin, more than a full Likert scale point.

Table 6 Table of Means Post- 9/1

Variables	Section 8 Mean	Section 9 Mean	Section 10(b) Mean	Section 24(2) Mean
Judicial Stability	3.42	3.00	4.25	3.36
Interpretation	2.86	3.00	4.13	3.84
Majoritarian/Autonomy	1.92	2.00	1.25	1.04
Judicial Reasoning	3.39	2.00	3.63	2.24
Activism Threshold	4.39	2.89	2.38	3.52
Judicial Remit	1.83	1.11	1.63	1.44
Rhetoric	3.53	6.22	3.63	5.80
Obiter	2.50	5.11	2.38	4.60
Comparative Sources	2.17	2.11	1.50	1.12
Judicial Voices	3.42	3.00	4.50	4.72
Extent of Decision	4.06	6.22	3.00	2.28
Legal Background	3.33	4.44	3.88	1.72
Core Values	4.42	3.78	4.63	4.40

The post-9/11 mean variables once again show considerable disparity but the highest mean scores were once again quite evenly distributed. Section 10(b) had the most variables achieving the highest scores with four, while sections 8 and 9 both achieved the highest mean scores on three variables and section 24(2) achieving the highest mean score on two variables. In contrast, section 8 and 10(b) tied for the lowest scoring variables with two, while section 9 had five, and section 24(2) had four. The lowest score on any variable for any of the sections was achieved by “Judicial Remit” in Section 9 cases (1.11), while the highest score was obtained by the variables “Rhetoric” and “Extent of Decision”, also in the section analysing section 9 cases (6.22). The means of each of the variables are clustered further apart than any of the individual *Charter* sections, and while there is variation in each *Charter* section, there are no significant outliers. Post-9/11 there is more variability across the different *Charter* sections, as the range from the lowest mean score (1.11) to the highest (6.22) is greater than the range prior to 9/11. As there were so few Section 9 cases after 9/11 it is not surprising that both the largest and the smallest results were achieved, as each case weighs much more in this population than when drawing from samples where there is a larger population size. While descriptive results are important on their own, it is necessary to compare these results in order to achieve the required result of determining whether or not is possible to ascribe any changes to the behaviour of the Court after 9/11.

XIII. PRE-AND POST-9/11 COMPARISONS

Using all the collected data, this section of the paper is able to evaluate the changes in the level of activism across all of the *Charter* sections after 9/11 and will be able to determine whether the changes achieve any level of statistical significance.

Table 7 How Variables Changed Post 9/11

Post 9/11 Variable Behaviour		
Charter Sections	Increase	Decrease
Section 24(2)	5	8
Section 10(b)	8	5
Section 9	4	9
Section 8	2	11
Total	19	33

When comparing all four *Charter* sections, it becomes apparent that there are significant trends in the behaviour of the Supreme Court after the events of 9/11 and that overall, activism decreased in a significant majority (63.5%) of the variable measurements after 9/11 (33/52). This indicates that the Court was speaking with increasing restraint post-9/11, which aligns with a post-terror, increasingly security conscious society as posited by Jochelson and Kramar and Bell.⁹³ Only one of the four sections showed an overall increase in the levels of activism after 9/11 (Section 10(b)), and that was the section with the smallest post 9/11 sample size (8 cases), which means that each of those cases counted for 12.5% of the total post 9/11 measurement and that one case had the potential to skew the results more drastically than in any other section. It is because of the small sample size that the pre-post analysis for section 10(b) is the least robust.

⁹³ Richard Jochelson & Kirsten Kramar, *The Disappearance of Criminal Law: Police Powers and the Supreme Court* (Winnipeg: Fernwood Publishing, 2014) [Jochelson & Kramar]; Colleen Bell, *The Freedom of Security: Governing Canada in the Age of Counterterrorism* (Vancouver: University of British Columbia Press, 2011) [Bell].

Table 8 – Pre and Post – 9/11 Mean Comparison

Variable List	Pre 9/11 Mean	Post 9/11 Mean	Mean Percentage Change
Judicial Stability	3.84	3.43	-10.7%
Interpretation	3.33	3.35	0.6%
Majoritarian/Autonomy	1.69	1.57	-7.1%
Judicial Reasoning	3.21	2.87	-10.6%
Activism Threshold	3.35	3.76	12.2%
Judicial Remit	1.51	1.47	-2.7%
Rhetoric	4.47	4.75	6.3%
Obiter	3.20	3.48	8.8%
Comparative Sources	2.52	1.75	-30.6%
Judicial Voices	4.65	3.92	-15.7%
Extent of Decision	4.14	3.67	-11.4%
Legal Background	3.55	3.05	-14.1%
Core Values	4.17	4.33	3.8%

In eight of the thirteen variables across all four of the *Charter* sections, the overall means on the judicial activism scale decreased after 9/11. Across the majority of variables it is evident that the Court is speaking in more restrained ways since 9/11 and can be considered much less activist than in the earliest days of the *Charter*. The largest shift in the activism score was achieved by the variable “Comparative Sources” which decreased by more than 30% after 9/11. This decrease could be attributed to the increase in domestic constitutional legal decisions available to the Court but is an important finding nonetheless. Others scholars have argued it would stand to reason that with the increase in judicial resources (the availability of the internet, international decisions and scholarship and the number judicial clerks available) that there might have been more reliance on non-binding judicial literature. It is clear from the data however, that this was not the case. It is also possible that the current Court composition prefers to use

more domestic sources, or that in the decisions they have considered since 9/11 that the previous trial judges have relied more exclusively on domestic decisions.

While the mean scores increased in the variables “Rhetoric”, “*Obiter*” and “Core Values”, they did so in small ways, increasing by less than 10% each (6.3%, 8.8%, and 3.8% respectively). The increases in “Rhetoric” and “*Obiter*” are strongly correlated with each other and demonstrate that the Court is more willing to weigh in on the political ramifications of their decisions and refrain from tailoring their decisions narrowly to the case at bar. The small increase in the variable “core values” aligns with the idea of securitization narratives becoming more prevalent and individual rights becoming less of a priority for the Court. The increase in the variable “Interpretation” is so insignificant it is likely due to chance fluctuation. The overall increase in restraint and the decrease in activism levels makes it appear that the Court wants to be seen to be treading more lightly and cautiously, though doing so in longer decisions, cautiously weighing out the ramifications of their verdicts and being cognisant of the political impact of their decisions. After careful examination of the empirical data collected across the four *Charter* sections it is now possible to explain the potential motivations of the Court for describing themselves in a more restrained way after 9/11.

XIV. CONCLUSION

This paper sought to fill a gap in the activism literature by using empirical methodology, specifically a hybrid content analysis, which utilizes both qualitative and quantitative aspects of the method, to define and measure judicial activism in the Canadian Supreme Court. Some scholars have openly argued against the use of empirical analysis in measuring legal behaviour, in some instances saying that the phenomenon is not measurable, and that, even if it is measurable, it is a pointless exercise.⁹⁴ This

⁹⁴ Emmett MacFarlane, “What We’re Talking About When We Talk About Judicial Activism” *Maclean’s* (23 February 2015), online: <<http://www.macleans.ca/politics/what-were-talking-about-when-we-talk-about-judicial-activism/>>. [MacFarlane]; Léonid Sirota, Here be No Dragons (Double Aspect Blog) online: Léonid Sirota <<https://doubleaspectblog.wordpress.com/2015/02/15/here-be-no-dragons/>>

paper challenges those claims and many of its underlying assumptions by using statistical analysis as a means to assess patterns in the elusive, but widely cited, phenomenon of “judicial activism” engaged in by the Supreme Court of Canada.

This paper also sought to demonstrate two key findings: that using new ways to analyse activism will complement and challenge the existing methods for critiquing judicial behaviour and assessing judicial activism, and that the current approaches to understanding complex legal phenomena can be accompanied and supplemented using empirical methodology. In order to achieve this goal of identifying and measuring activism in a new way this paper operationalized and adapted the Cohn and Kremnitzer “multidimensional model of judicial activism” created in 2005 and has applied it to the jurisprudence of the Supreme Court of Canada in the years following the enactment of the *Canadian Charter of Rights and Freedoms* in 1982 and before and after the events of September 11, 2001.⁹⁵ Overall, it was demonstrated that when the four *Charter* sections, used to measure the judicial behaviour of the Court, were analysed together, activism in the Supreme Court of Canada decreased substantially after the events of 9/11. Regardless of the reasoning behind the measured shifts in the levels of activism, it must be noted that these shifts are material in nature, can be measured and recorded and do not rely on mere judgment by the individual recorder. This can have a significant impact on activism studies going forward as it demonstrates that conjecture can be grounded in material and observable reality as opposed to political preferences or ideology. With this new metric with which to measure activism it is possible that the activism discussion can move beyond political biases or attitudinal voting behaviour and become grounded in measurable phenomenon. The Cohn and Kremnitzer model that this paper adapted and applied has the potential to augment both traditional doctrinal analysis and qualitative single case study because it places the decisions of the Court in a broader, more objective social context, whereas traditional activism analyses such as “win/loss” records serve not to explain or situate doctrinal analyses but to

[Sirota, No Dragons]; Léonid Sirota, Purely Hypothetical Dragons (Double Aspect Blog) <<https://doubleaspectblog.wordpress.com/2012/04/10/purely-hypothetical-dragons/>> [Sirota, Hypothetical Dragons]; Fredrick L. Morton & Rainer Knopff, *The Charter Revolution* (Peterborough, ON: Broadview Press 2000) at 13 [Morton & Knopff].

⁹⁵ Cohn & Kremnitzer, *supra* note 19.

question its very foundations. This paper does not suggest that empiricism should usurp black letter legal understandings of judicial activism but instead that content analyses can support doctrinal legal studies.⁹⁶ Empirical and doctrinal analyses are not adversaries and can have a symbiotic relationship, which can ultimately illuminate new answers to pressing legal questions.

The version of empiricism that this paper offers is more descriptive than adversarial in nature and has the potential to complicate and nuance doctrinal conclusions, rather than dismiss them outright. Traditional understandings of activism have suggested that the phenomenon occurs when individuals disagree with ultimate decisions arrived at by the Court and previously there has been no clear definition of activism created to understand how the Court sees itself. The operationalization of the Cohn and Kremnitzer model was able to determine the level of activism or restraint on the Court by undertaking a hybrid form of content analysis and using the Court's own discourse to make an objective measurement as to whether the Court is engaging in activism or restraint. As has been demonstrated throughout this paper, the way that the Court engages with police powers and reconciles those powers with individual liberty and the rights protected in the *Charter* (whether they guard them fastidiously or overrule them easily) that is an important moment in activism and is central to the findings of this paper. The Cohn and Kremnitzer model also allows measurement across the different dimensions in different times across the ancillary police era and demonstrates how the Court can be activist in some areas but restrained in others.

This paper offers four new recommendations based on the lessons learned throughout this process that future empirical judicial activism researchers should consider when undertaking their work. Firstly, it is important to minimize partisan judgments when analysing activism, as frequently activism debates have been synthesized into mere disagreement with a particular judicial decision. The use of strict measuring criteria that have been established prior to undertaking the work is critical to so as to avoid judgment calls later in the research. Using multiple coders to apply the framework, while labour intensive and potentially expensive, can also be extremely beneficial as long as inter-rater reliability has been assured. One of the lessons that was learned throughout the operationalization of

⁹⁶ Hall & Wright, *supra* note 28.

the Cohn and Kremnitzer model was that different individuals will interpret the same criteria differently, if strict parameters are not in place. If this author was going to operationalize the Cohn and Kremnitzer model again, using the same scaling, it would be beneficial to have a second coder to verify the coding scale and scheme to ensure higher levels of validity. Second, it is important that future activism researchers draw on a well-grounded model, which provides meaning and content to the terms activism and restraint. This was one of the reasons that this paper used an adapted version of the Cohn and Kremnitzer model, as concrete parameters for each variable had already been established and it was possible to statistically assess whether or not their metrics actually correlated with measuring activism. This is not to suggest that new research must build off an already existing model, but if a new model is to be operationalized it is key that the terms are well defined and that the model actually measures what is intended.

The third recommendation for future empirical activism scholars is closely related to recommendation two and it is that particular attention should be paid to the phenomenon that is purported to be measured. This seems obvious perhaps but it is imperative that the model that has been developed or operationalized measures something material and empirically observable rather than having the measurements of the model indicate a particular philosophy's desired outcomes. There is a significant difference between the two. The fourth and final recommendation that this paper makes is that any new model should be developed to both complement and complicate previous doctrinal findings rather than developing a method solely to question the legitimacy of a particular legal actor. This paper argues that it is the depoliticization of activism that is of the most importance in empirical work, and this must be ensured through careful model development and execution.

Moving forward, there are several interesting new projects that could be undertaken to further the activism analysis conducted in this paper. One of those projects would be to apply the Cohn and Kremnitzer model separately to each individual judicial opinion (majority, concurrences and dissents) divided by authorship to determine if there are recognisable differences in the level of activism by certain judges. That paper would also allow for a more detailed discussion on the composition of the Court and its diversity of language, appointment process, and previous judicial experience. Another application of the model could be to separate the judgments by

legal tradition to determine if justices from Quebec and the civil legal tradition demonstrate significantly different activism levels than the common law justices. Still another project could break up the Court's cases by judicial era (defined by changes in the Chief Justice) instead of using 9/11. This paper's author would welcome new applications of this operationalization as it would continue to shed new light on the phenomenon of judicial activism in Canada, while remaining non-partisan and empirically objective. It is clear from the results of this paper that the hybrid content analysis methodology offers an alternative account of activism by illustrating a more objectively measurable account of patterns in judicial decision-making (ones that are based on a set of observable, quantifiable criteria, rather than impressionistic and ultimately political, evaluation). The operationalization of the adapted Cohn and Kremnitzer model that this paper undertook has highlighted new ways of analysing activism that both complement and challenge the existing methods for measuring and understanding judicial behaviour, though it is certainly not the only possible measurement tool. This project demonstrated that it is possible to use empirical methodology to shed new light on the way Supreme Courts adjudicate individual rights cases, and the levels of activism that take place in those Courts. This paper challenges current activism scholars around the world to imagine how their own Courts have behaved across the same era and to adopt their own empirical framework of understanding judicial behaviour so that the activism debate can continue to be strengthened and significant cross-jurisdictional comparisons can be made. While there may be jurisdictional limitations of the Cohn and Kremnitzer model (it may not translate well to non-common law countries, for example), it could certainly be adapted for use in countries like the United Kingdom and the United States. Using this adapted version of the Cohn and Kremnitzer model would allow for interesting comparisons and create new comparative constitutional conversations.

XV. APPENDICES

Appendix A: List of Sections Used of the *Constitution Act, 1982 c. 11 (U.K.), Schedule B Part 1, Canadian Charter of Rights and Freedoms*

Legal Rights:

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention;

(b) to retain and instruct counsel without delay and to be informed of that right;

Enforcement of Rights:

24. (1) Anyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a Court of competent jurisdiction to obtain such remedy as the Court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a Court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

Appendix B – Section 8 Variable List

Development of Likert Scales for each Cohn and Kremnitzer Indicia

Category 1 – Activism under the Traditional Vision

Judicial Stability – Here it is measured whether the Court is ready to retract from its own or former decisions. When the Court affirms the decisions of all lower Courts this is scored as being the lowest level of activism. When the Court overturns a previous decision and overturns legislation and creates new law, the case is scored as a 10, or the highest level of activism.

The Courts affirm the decisions of both lower Courts = 1

The Courts affirm the decisions of the lower Courts but make any changes to the previous decisions = 2

The Courts overturn a decision made by lower Court but affirms a decision by the appeal Court = 3

The Courts affirm a decision made by the lower Court but overturn a decision made by the appeal Court = 4

The Courts overturn both lower Court decisions = 5

The Courts change a law = 6

The Courts go beyond overturning lower Court decisions and overturn legislation as unconstitutional = 7

The Courts implement new tests or increase or change previously existing tests = 8

The Courts overturn a previous Supreme Court decision but do not create any new law = 9

The Courts overturn a Supreme Court previous decision and overturn legislation and create new law = 10

Interpretation - Does a Court interpret a legal text in possible contradiction with assumed original intent of the *Constitution* or its plain linguistic meaning? The decisions that interpret the law for its original meaning and avoid straying from the protections of the *Charter* will render lower numbers on the activism scale. Courts that use their position and power to interpret legal texts to suit their own intentions, straying from its original meaning, will be seen as highly activist.

The Supreme Court interprets section 8 as one's highest valued *Charter* protection against search and seizure, which offers unremitting protection of individual rights and liberties =1

The majority interprets section 8 as a valued *Charter* protection, but not one that is without limits as prescribed by law =2

The concurring justices discuss the high valued *Charter* protections, however the majority does not =3

The majority interprets the *Charter* as it was intended, but the dissent does not =4

Majority of the Court interprets the *Charter* to their own ends, but still discusses original intent of *Charter* =5

Charter is interpreted by all Court members to their own ends =6

The majority of the Court interprets the *Charter* to their own ends but a dissent holds true to the original interpretation=7

The Supreme Court is open to overriding section 8 *Charter* protection in favour of other interests =8

The Supreme Court interprets section 8 as being easily overridden =9

The Supreme Court interprets section 8 in a way that is contradictory from being a high protection from search and seizure =10

Majoritarianism and Autonomy – Here it is measured whether the Court interferes with policies set by democratic processes and if the Court is willing to supply its own solution and/or policy?

The Court does not interfere with policies set by democratic policies and leaves all legislation alone =1

The Court discusses the constitutionality of legislation, but ultimately upholds it =2

The Court splits on the constitutionality of legislation, but ultimately upholds it =3

The concurring decision would “read down” the legislation to amend the law, but the majority upholds the law =4

The dissent of the Court “reads down” the legislation to amend the law =5

The majority of the Court “reads down” the legislation to amend the law =6

The dissent would strike down legislation, but the majority would not =7

The majority strikes down legislation, the dissent would not have done so =8

The entire Court strikes down legislation = 9

The Court strikes down legislation and applies their own solution = 10

Judicial Reasoning: Process/substance – With this indicia it is measured how heavily the Court relies on its decision on strict legal and procedural grounds. Where the Court relies entirely on strict legal or procedural grounds in making a decision the score is a 1. Where the Court relies on open ended legal tests, such as reasonableness based assessments a score of 10 is recorded.

The Court relies entirely on strict legal and procedural grounds = 1

The Court relies entirely on both strict legal and procedural grounds and adopted case law tests = 2

The Court mostly relies on legal and procedural grounds, but discusses an open ended test=3

The Court relies more on legal and procedural grounds, but also uses an open ended test = 4

The Court relies equally on legal and procedural grounds and open ended tests = 5

The dissent uses more open ended tests than legal and procedural grounds, but the majority does not = 6

The majority uses more open ended tests than legal and procedural grounds, but the dissent does not = 7

The Court uses legal and procedural grounds only to inform their reasons for using open ended tests =8

The Court uses legal and procedural grounds to create a new open ended test =9

The Court relies entirely on open ended tests = 10

Threshold Activism - This variable measured the extent to which the Court was willing to forgive threshold hurdles. In this context, a rigorous application of threshold issues such as the reasonable expectation of privacy as a gateway to accessing s 8 of the *Charter* would score a 1 (the reasonable expectation of privacy is the main threshold issue in s 8 cases). Where the Court found reasons to allow for a bypass of reasonable expectation of privacy, where previous cases have not, the case is scored as a 10.

Courts entirely defer to the threshold issue - reasonable expectation of privacy =1

The Court interprets reasonable expectation of privacy as important, but not always the most important factor =2

The threshold, or one's reasonable expectation of privacy, is interpreted as being of substantial importance but the Court imposes limits on it =3

The majority of the Court interprets reasonable expectation of privacy as exceedingly important, however the dissent varies from this view=4

There is no discussion of reasonable expectation of privacy or any thresholds =5

The dissent interprets reasonable expectation of privacy as incredibly important; however, the majority feels it is not above being overridden=6

Reasonable expectation of privacy is seen by the Court as being a consideration, but not an important one =7

Reasonable expectation of privacy is deemed to be unimportant in the case at bar=8

Reasonable expectation of privacy is almost entirely overlooked in favour of other doctrines =9

The Court entirely ignores reasonable expectation of privacy =10

Judicial Remit - This indicia asks whether the Court's decision expands or redefines the jurisdiction of the Court. When the decision did not expand or redefine the jurisdiction of the Court, the case was scored as a 1. A decision that expanded the judiciary's remit into areas previously immune from intervention was scored as a 10.

The decision does not expand or redefine the jurisdiction of the Court =1

The dissent would slightly redefine the jurisdiction of the Court = 2

The dissent would slightly expand the jurisdiction of the Court = 3

The decision does not expand the jurisdiction of the Court, but slightly redefines it = 4

The decision does not expand the Court's jurisdiction, but somewhat redefines it = 5

The decision does not expand the Court's jurisdiction, but redefines it entirely = 6

The decision slightly expands the jurisdiction of the Court and slightly redefines it = 7

The decision slightly expands jurisdiction and entirely redefines it = 8

The majority entirely expands and redefines the jurisdiction, but the dissent would not = 9

The decision entirely redefines and expands the jurisdiction of the Court = 10

Rhetoric – This indicia asks whether judicial decisions are used as platforms for expression of broader positions and values or whether the use of rhetoric was restricted to the explication of legal principles. The absence of legal rhetoric (usually correlating with shorter decisions) scored as a 1. High levels of extra-legal rhetoric combined with long discussions of political implications were scored at 10.

No rhetoric by the Courts and a very short decision = 1

Minimal rhetoric, still a fairly short decision = 2

Some expression of broad positions and values, but still a relatively short decision = 3

Substantial expression of values and positions, decision is longer than 30 paragraphs = 4

The Court engages in brief discussion of non-legal principles as well as potential implications = 5

The decision begins to become more about positions than law = 6

A lengthy decision (greater than 50 paragraphs); substantial discussion on non-legal issues = 7

A long decision; broad positions as well as political ideology discussed = 8

A very long decision (greater than 90 paragraphs) with substantial expression of non-legal principles and political values = 9

Extremely long decision (greater than 100 paragraphs) and copious amounts of rhetoric used = 10

Obiter Dicta – This indicia asks how far does the Court expand its opinion beyond the legal requirements of the specific case? When the Court did not delineate any *obiter* the case scored a 1. When the Court used extensive amounts of *obiter* and discussed issues not relevant to case a 10 was recorded.

Court does not discuss its opinion at all, no *obiter* = 1

Court does not expand its opinion beyond the case at bar = 2

Court briefly discusses potential ramifications of decision, but stays neutral = 3

Court discusses potential ramifications of decision at length, but stays neutral = 4

Court briefly discusses ramifications and appears to be expressing an opinion =5

Opinion clearly being expressed, ramifications expressed = 6

Ramifications of decision discussed in detail, opinions extend beyond the case at bar =7

Court uses substantial amounts of *obiter* = 8

Court uses substantial amounts of *obiter* and discusses issues not relevant to the case at bar = 9

Court uses extensive amounts of *obiter* and discusses issues not relevant to case at bar = 10

Reliance on Comparative Sources - Here it was examined how extensively the Court relied on foreign sources that are not legally binding in the domestic sphere. Where the Court used domestic law exclusively a 1 was scored. When the Court used comparative sources to create new legal conceptions with extensive comparative referencing the case scored a 10.

The Court uses domestic law exclusively = 1

The Court makes minimal references to the UK's common law or texts written by non-judges to understand law, not to change it = 2

Use of American law to understand law but not to change it, with minimal reference = 3

Use of comparative law to justify existing domestic laws, still fairly minimal reference = 4

Use of comparative law justifying existing domestic laws, extensive reference = 5

Use of comparative law to justify changing existing laws, minimal reference = 6

Use of comparative law to justify changing existing laws, extensive reference = 7

Use of comparative law to create new legal tests = 8

Use of comparative law to create new laws, minimal reference = 9

Use of comparative law to create new laws, extensive reference = 10

Judicial Voices - Here it was examined the extent of other judicial decisions besides the majority decision. A unanimous decision scored a 1. On occasions where there were two concurring and two dissenting judgments (the most judicial voices seen) the case scored a 10.

A unanimous decision = 1

One concurring decision with no additions to the overall law = 2

One concurring decision adding other law = 3

Two concurring decisions = 4

Two concurring decisions adding other law = 5

One dissent or three concurring decisions = 6

One concurring decision and one dissenting opinion = 7

One concurring decision adding other law and one dissent = 8

Two concurring judgments and one dissenting judgment or two dissenting judgments = 9

Two concurring judgments and two dissenting opinions = 10

Extent of Decision – Here it was examined whether the Court’s ruling expressly applied to a single or specified set of circumstances or whether the law that resulted had broad implications for larger sections of society. If the Court simply applied the legal rules the case scored a 1. Where the Court created a new standard that affected broader populations the case scored a 10.

The Court simply applies the rules set forth in the criminal code = 1

When the Courts narrow their application to the case at bar = 2

Application to case at bar, discussion on potential future standing = 3

Application to one or two other cases = 4

Application to a few cases as well as discussion on future standing = 5

Creation of a new standard which applies only to case at bar = 6

Creation of a new standard which applies to a few cases = 7

Creation of a new standard with a broad scope = 8

Creation of new powers then used in later cases = 9

Creation of a new standard that is then adopted into the common law = 10

Legal Background – Here it was examined whether the legal framework on the basis of which the Court made its decision were inclusive and clear or whether the rules concerned were vague, complex, self-contradictory or incomplete. The absence of a clear rule essentially requires the judiciary to extend its decision beyond the former case law. Once the Court does not or cannot abstain from deciding decision making in the later cases will almost necessarily involve some creative judicial expertise and will thus be activist.

Legal framework is clear, rules are clear, decision does not extend beyond prior case law = 1

Legal framework is clear, rules are clear, decision slightly extends beyond prior case law = 2

Legal framework is clear, rules are clear, decision extends well beyond prior case law = 3

Legal framework is clear, rules are not clear, but decision does not extend beyond prior case law = 4

Legal framework is clear, rules are not clear and decision extends beyond prior case law = 5

- No clear framework or rules, but decision does not extend beyond case at bar =6
- No clear framework or rules, Court adopts rules from other areas of law =7
- No clear framework or rules, Court makes new rules = 8
- No clear framework or rules, Court makes new rules that override old rules =9
- No clear framework or rules, Court makes new framework for analysis = 10

Category 3 – Activism and the Protection of Core Values

Variables: Core Values Activism

Intervention and value content – Here it was examined if the subject matter under examination was highly value laden in its bearing on democratic principles and human liberties accepted domestically. Where the case dealt with important human rights issues and the Court appeared to assert its guardianship of the *Constitution* the case scored a 1. Where the Court declined to discuss the constitutional values at stake or abdicated their guardianship, the case scored a 10.

- Unanimously high value context, *Charter* protections paramount = 1
- Majority discusses high value context, *Charter* protections paramount = 2
- Majority discusses high value context, *Charter* extremely important dissent does not = 3
- In a concurring statement, a justice discusses high value context = 4
- No value context discussion, but *Charter* is interpreted purposively = 5
- Majority discusses value context, but determines that it is not above being overridden = 6
- Dissent discusses high value context, but majority does not = 7
- Little mention of values, *Charter* discussion easily overridden = 8
- No discussion of value context, brief discussion of liberties, mostly technical decision = 9
- No one discusses value context at all, technical decision, not about liberties = 10

Appendix C – Section 8 Case List

Aubry v Éditions Vice-Versa, [1998] 1 SCR 591.
Baron v Canada, [1993] 1 SCR 416.
British Columbia Securities Commission v Branch, [1995] 2 SCR 3.
Canada (Combines Investigation Acts, Director of Investigation and Research) v Southam Inc, [1984] 2 SCR 145.

- Canada Inc v Quebec (Attorney General); Tabah v Quebec (Attorney General)*, [1994] 2 SCR 339.
- Canadian Broadcasting Corp v Lessard*, [1991] 3 SCR 421.
- Canadian Broadcasting Corp v New Brunswick (Attorney General)*, [1991] 3 SCR 480.
- CanadianOxyChemicals Ltd v Canada (Attorney General)*, [1999] 1 SCR 743.
- Chatterjee v Ontario (Attorney General)*, [2009] 1 SCR 624.
- Cloutier v Langlois*, [1990] 1 SCR 158.
- Comité paritaire de l'industrie de la chemise v Potash; Comité paritaire de l'industrie de la chemise v Sélection Milton*, [1994] 2 SCR 406.
- Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403.
- Dehghani v Canada (Minister of Employment and Immigration)*, [1993] 1 SCR 1053.
- Del Zotto v Canada*, [1999] 1 SCR 3.
- Dersch v Canada (Attorney General)*, [1990] 2 SCR 1505.
- Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326.
- Ell v Alberta*, [2003] 1 SCR 857.
- Figuroa v Canada (Attorney General)*, [2003] 1 SCR 912.
- Gosselin v Quebec (Attorney General)*, [2002] 4 SCR 429.
- Hill v Hamilton-Wentworth Regional Police Services Board*, [2007] 3 SCR 129.
- Kourtesis v Canada (Minister of National Revenue - MNR)*, [1993] 2 SCR 5.
- Knox Contracting Ltd v Canada*, [1990] 2 SCR 338.
- Lavallee, Rackel & Heintz v Canada (Attorney General); White, Ottenheimer & Baker v Canada (Attorney General); R v Fink*, [2002] 3 SCR 209.
- Lavigne v Canada (Office of the Commissioner of Official Languages)*, [2002] 2 SCR 773.
- Little Sisters Book and Art Emporium v Canada (Minister of Justice)*, [2000] 2 SCR 1120.
- Michaud v Quebec (Attorney General)*, [1996] 3 SCR 3.
- Maranda v Richer*, [2003] 3 SCR 193.
- Phillips v Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97.

Proulx v Quebec (Attorney General), [2001] 3 SCR 9.

Quebec (Attorney General) v Laroche, [2002] 3 SCR 708.

Québec Inc v Quebec (Régie des permis d'alcool), [1996] 3 SCR 919.

R v AM, [2008] 1 SCR 569.

R v Araujo, [2000] 2 SCR 992.

R v Arp, [1998] 3 SCR 339.

R v Asante-Mensah, [2003] 2 SCR 3.

R v Bartle, [1994] 3 SCR 173.

R v Beare; *R v Higgins*, [1987] 2 SCR 387.

R v Beaulieu, [2010] 1 SCR 248.

R v Belnavis, [1997] 3 SCR 341.

R v Bernshaw, [1994] 1 SCR 254.

R v Boersma, [1994] 2 SCR 488.

R v Borden, [1994] 3 SCR 145.

R v Buhay, [2003] 1 SCR 631.

R v Campbell, [2011] SCC 32.

R v Caslake, [1998] 1 SCR 51.

R v Chaisson, [2006] 1 SCR 415.

R v Chow, [2005] 1 SCR 384.

R v CIP Inc, [1992] 1 SCR 843.

R v Clayton, [2007] 2 SCR 725.

R v Clement, [1996] 2 SCR 289.

R v Colarusso, [1994] 1 SCR 20.

R v Collins, [1987] 1 SCR 265.

R v Cook, [1998] 1 SCR 1113.

R v Cornell, [2010] 2 SCR 142.

R v Curragh Inc, [1997] 1 SCR 537.

R v Debot, [1989] 2 SCR 1140.

R v Dersch, [1993] 3 SCR 768.

R v Duarte, [1990] 1 SCR 30.

R v Duguay, [1989] 1 SCR 93.

R v Durette, [1994] 1 SCR 469.

R v Dymont, [1988] 2 SCR 417.

R v Edwards, [1996] 1 SCR 128.

R v Erickson, [1993] 2 SCR 649.

R v Evans, [1996] 1 SCR 8.

R v Feeney, [1997] 2 SCR 13.

R v Fitzpatrick, [1995] 4 SCR 154.

R v Fliss, [2002] 1 SCR 535.

R v Garofoli, [1990] 2 SCR 1421.

R v Généreux, [1992] 1 SCR 259.

R v Genest, [1989] 1 SCR 59.

R v Golden, [2001] 3 SCR 679.

R v Goldhart, [1996] 2 SCR 463.

R v Gomboc, [2010] 3 SCR 211.

R v Grant, [1993] 3 SCR 223.

R v Grant, [2009] 2 SCR 353.

R v Greffe, [1990] 1 SCR 755.

R v Hamill, [1987] 1 SCR 301.

R v Hape, [2007] 2 SCR 292.

R v Harrison, [2009] 2 SCR 494.

R v Heywood, [1994] 3 SCR 761.

R v Hufsky, [1988] 1 SCR 621.

R v Jacoy, [1988] 2 SCR 548.

R v Jacques, [1996] 3 SCR 312.

R v Jarvis, [2002] 3 SCR 757.

R v Jones, [1986] 2 SCR 284.

R v Kang-Brown, [2008] 1 SCR 456.

- R v Kokesch*, [1990] 3 SCR 3.
R v Lachance, [1990] 2 SCR 1490.
R v Ladouceur, [1990] 1 SCR 1257.
R v Law, [2002] 1 SCR 227.
R v Loewen, [2011] SCC 21.
R v MRM, [1998] 3 SCR 393.
R v Maccooh, [1993] 2 SCR 802.
R v Mann, [2004] 3 SCR 59.
R v McKarris, [1996] 2 SCR 287.
R v McKinlay Transport Ltd, [1990] 1 SCR 627.
R v Mellenthin, [1992] 3 SCR 615.
R v Meltzer, [1989] 1 SCR 1764.
R v Mills, [1986] 1 SCR 863.
R v Mills, [1999] 3 SCR 668.
R v Monney, [1999] 1 SCR 652.
R v Morelli, [2010] 1 SCR 253.
R v National Post, [2010] 1 SCR 477.
R v Nolet, [2010] 1 SCR 851.
R v O'Connor, [1995] 4 SCR 411.
R v Osolin, [1993] 4 SCR 595.
R v Patrick, [2009] 1 SCR 579.
R v Patriquin, [1995] 4 SCR 42.
R v Pires; R v Lising, [2005] 3 SCR 343.
R v Plant, [1993] 3 SCR 281.
R v Pohoretsky, [1987] 1 SCR 945.
R v RJS, [1995] 1 SCR 451.
R v Rodgers, [2006] 1 SCR 554.
R v SAB, [2003] 2 SCR 678.
R v Scott, [1990] 3 SCR 979.
R v Sharpe, [2001] 1 SCR 45.
R v Shearing, [2002] 3 SCR 33.
R v Shepherd, [2009] 2 SCR 527.
R v Shoker, [2006] 2 SCR 399.
R v Silveira, [1995] 2 SCR 297.
R v Simmons, [1988] 2 SCR 495.
R v Sinclair, [2010] 2 SCR 310.
R v Solomon, [1997] 3 SCR 696.
R v Stillman, [1997] 1 SCR 607.
R v Strachan, [1988] 2 SCR 980.
R v Tessier, [1991] 3 SCR 687.
R v Tessling, [2004] 3 SCR 432.
R v Therens, [1985] 1 SCR 613.
R v Thompson, [1990] 2 SCR 1111.
R v Wholesale Travel Group Inc, [1991] 3 SCR 154.
R v Wiggins, [1990] 1 SCR 62.
R v Wijesinha, [1995] 3 SCR 422.
R v Wiley, [1993] 3 SCR 263.
R v Wilson, [1990] 1 SCR 1291.
R v Wise, [1992] 1 SCR 527.
R v Wong, [1990] 3 SCR 36.
R v Yorke [1993] 3 SCR 647.
Reference re Assisted Human Reproduction Act, [2010] 3 SCR 457.
Reference re Motor Vehicle Act (British Columbia) S 94(2), [1985] 2 SCR 486.
RJR-MacDonald Inc v Canada (Attorney General), [1995] 3 SCR 199.

<i>Ruby v Canada (Solicitor General)</i> , [2002] 4 SCR 3.	<i>United States of America v Dynar</i> , [1997] 2 SCR 462.
<i>Schreiber v Canada (Attorney General)</i> , [1998] 1 SCR 841.	<i>United States of America v Kwok</i> , [2001] 1 SCR 532.
<i>Smith v Canada (Attorney General)</i> , [2001] 3 SCR 902.	<i>Weatherall v Canada (Attorney General)</i> , [1993] 2 SCR 872.
<i>Starr v Holden</i> , [1990] 1 SCR 1366.	<i>Winnipeg Child and Family Services v KLW</i> , [2000] 2 SCR 519.
<i>Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)</i> , [1990] 1 SCR 425.	<i>Vancouver (City) v Ward</i> , [2010] SCC 27.

Appendix D – Section 24(2) Variable List

Category 1 – Activism under the Traditional Vision

Judicial Stability – Here it was measured whether the Court was ready to retract from its own or former decisions. When the Court affirms the decisions of all lower Courts this is scored as being the lowest level of activism. When the Court overturns a previous decision and overturns legislation and creates new law, the case is scored as a 10, or the highest level of activism.

- The Courts affirm the decisions of both lower Courts = 1
- The Courts affirm the decisions of the lower Courts but make any changes to the previous decisions = 2
- The Courts overturn a decision made by lower Court but affirms a decision by the appeal Court = 3
- The Courts affirm a decision made by the lower Court but overturn a decision made by the appeal Court = 4
- The Courts overturn both lower Court decisions = 5
- The Courts change a law = 6
- The Courts go beyond overturning lower Court decisions and overturn legislation as unconstitutional = 7
- The Courts implement new tests or increase or change previously existing tests = 8
- The Courts overturn a previous Supreme Court decision but do not create any new law = 9
- The Courts overturn a Supreme Court previous decision and overturn legislation and create new law = 10

Interpretation – Does a Court interpret a legal text in possible contradiction with assumed original intent of the *Constitution* or its plain linguistic meaning? The decisions that interpret the law for its original meaning and avoid straying from the protections of the *Charter* will render lower numbers on the activism scale. Courts that use their position and power to interpret legal texts to suit their own intentions, straying from its original meaning, will be seen as highly activist.

The Supreme Court interprets section 24(2) as the safeguard against illegally obtained evidence and an important *Charter* protection =1

The majority interprets section 24(2) as a valued *Charter* protection, but not one that is without limits as prescribed by law =2

The concurring justices discuss the high valued *Charter* protections, however the majority does not =3

The majority interprets the *Charter* as it was intended, but the dissent does not =4

Majority of the Court interprets the *Charter* to their own ends, but still discusses original intent of *Charter* =5

Charter is interpreted by all Court members to their own ends =6

The majority of the Court interprets the *Charter* to their own ends but a dissent holds true to the original interpretation=7

The Supreme Court is open to overriding section 24(2) *Charter* protection in favour of other interests =8

The Supreme Court interprets section 24(2) as being easily overridden =9

The Supreme Court interprets section 24(2) in a way that is contradictory from being a high protection from illegally obtained evidence =10

Majoritarianism and Autonomy – Here it is measured whether the Court interferes with policies set by democratic processes and if the Court is willing to supply its own solution and/or policy?

The Court does not interfere with policies set by democratic policies and leaves all legislation alone =1

The Court discusses the constitutionality of legislation, but ultimately upholds it =2

The Court splits on the constitutionality of legislation, but ultimately upholds it =3

The concurring decision would “read down” the legislation to amend the law, but the majority upholds the law =4

The dissent of the Court “reads down” the legislation to amend the law =5

The majority of the Court “reads down” the legislation to amend the law =6

The dissent would strike down legislation, but the majority would not =7

The majority strikes down legislation, the dissent would not have done so =8

The entire Court strikes down legislation = 9

The Court strikes down legislation and applies their own solution =10

Judicial Reasoning: Process/substance – With this indicia it was measured how heavily the Court relies on strict legal and procedural grounds. Where the Court relies entirely on strict legal or procedural grounds in making a decision the case scored a 1. When the Court relies on open ended legal tests, such as reasonableness, the case scores a 10.

The Court relies entirely on strict legal and procedural grounds = 1

The Court relies entirely on both strict legal and procedural grounds and adopted case law tests = 2

The Court mostly relies on legal and procedural grounds, but discusses an open ended test =3

The Court relies more on legal and procedural grounds, but also uses an open ended test = 4

The Court relies equally on legal and procedural grounds and open ended tests = 5

The dissent uses more open ended tests than legal and procedural grounds, but the majority does not = 6

The majority uses more open ended tests than legal and procedural grounds, but the dissent does not = 7

The Court uses legal and procedural grounds only to inform their reasons for using open ended tests =8

The Court uses legal and procedural grounds to create a new open ended test =9

The Court relies entirely on open ended tests = 10

Threshold Activism – Here, it was measured the extent to which the Court was willing to forgive threshold hurdles. In this context, a rigorous application of threshold issue (in this section whether or not there is a temporal connection between the *Charter* violation and the remedy as outlined in s 24(2) of the *Charter*) would score a 1 (this is the main threshold issue in s 24(2) cases). Where the Court found reasons to allow for a bypass of the temporal connection, where previous cases have not, the case scored as a 10.

Courts entirely defer to the threshold issue – temporal connection =1

The Court interprets the temporal connection as important, but not always the most important factor =2

The temporal connection threshold is interpreted as being of substantial importance but the Court imposes limits on it =3

The majority of the Court interprets the temporal connection as exceedingly important, however the dissent varies from this view =4

There is no discussion of any thresholds =5

The dissent interprets the temporal connection as incredibly important; however, the majority feels it is not above being overridden =6

The temporal connection is seen by the Court as being a consideration, but not an important one =7

The temporal connection is deemed to be unimportant in the case at bar =8

The temporal connection is almost entirely overlooked in favour of other doctrines =9

The Court entirely ignores whether or not there is a threshold or temporal connection=10

Judicial Remit – This indicia asks whether the Court’s decision expands or redefines the jurisdiction of the Court. When the decision did not expand or redefine the jurisdiction of the Court, the case scored a 1. A decision that expanded the judiciary’s remit into areas previously immune from intervention was scored as a 10.

The decision does not expand or redefine the jurisdiction of the Court =1

The dissent would slightly redefine the jurisdiction of the Court = 2

The dissent would slightly expand the jurisdiction of the Court = 3

The decision does not expand the jurisdiction of the Court, but slightly redefines it =4

The decision does not expand the Court’s jurisdiction, but somewhat redefines it =5

The decision does not expand the Court’s jurisdiction, but redefines it entirely =6

The decision slightly expands the jurisdiction of the Court and slightly redefines it=7

The decision slightly expands jurisdiction and entirely redefines it =8

The majority entirely expands and redefines the jurisdiction, but the dissent would not =9

The decision entirely redefines and expands the jurisdiction of the Court = 10

Rhetoric – This indicia asks whether judicial decisions are used as platforms for expression of broader positions and values or whether the use of rhetoric was restricted to the explication of legal principles. The absence of legal rhetoric (usually correlating with shorter decisions) scored as a 1. High levels of extra-legal rhetoric combined with long discussions of political implications were scored as a 10.

No rhetoric by the Courts and a very short decision = 1

Minimal rhetoric, still a fairly short decision = 2

Some expression of broad positions and values, but still a relatively short decision = 3

Substantial expression of values and positions, decision is longer than 30 paragraphs = 4

The Court engages in brief discussion of non-legal principles as well as potential implications =5

The decision begins to become more about positions than law = 6

A lengthy decision (greater than 50 paragraphs); substantial discussion on non-legal issues =7

A long decision; broad positions as well as political ideology discussed =8

A very long decision (greater than 90 paragraphs) with substantial expression of non-legal principles and political values =9

Extremely long decision (greater than 100 paragraphs) and copious amounts of rhetoric used =10

Obiter Dicta - This indicia asks how far does the Court expand its opinion beyond the legal requirements of the specific case? When the Court did not delineate any *obiter* the case scored a 1. When the Court used extensive amounts of *obiter* and discussed issues not relevant to case a 10 was recorded.

Court does not discuss its opinion at all, no *obiter* = 1

Court does not expand its opinion beyond the case at bar = 2

Court briefly discusses potential ramifications of decision, but stays neutral = 3

Court discusses potential ramifications of decision at length, but stays neutral = 4

Court briefly discusses ramifications and appears to be expressing an opinion =5

Opinion clearly being expressed, ramifications expressed =6

Ramifications of decision discussed in detail, opinions extend beyond the case at bar =7

Court uses substantial amounts of *obiter* = 8

Court uses substantial amounts of *obiter* and discusses issues not relevant to the case at bar = 9

Court uses extensive amounts of *obiter* and discusses issues not relevant to case at bar = 10

Reliance on Comparative Sources - Here, it was examined how extensively the Court relied on foreign sources that are not legally binding in the domestic sphere. Where the Court used domestic law exclusively a 1 was scored. When the Court used comparative sources to create new legal conceptions with extensive comparative a 10 was scored.

The Court uses domestic law exclusively = 1

The Court makes minimal references to the UK's common law or texts written by non-judges to understand law, not to change it = 2

Use of American law to understand law but not to change it, with minimal reference = 3

Use of comparative law to justify existing domestic laws, still fairly minimal reference = 4

Use of comparative law justifying existing domestic laws , extensive reference = 5

Use of comparative law to justify changing existing laws, minimal reference = 6

Use of comparative law to justify changing existing laws, extensive reference = 7

Use of comparative law to create new legal tests = 8

Use of comparative law to create new laws, minimal reference = 9

Use of comparative law to create new laws, extensive reference = 10

Judicial Voices – Here the extent of other judicial decisions besides the majority decision was examined. A unanimous decision scored a 1. On occasions where there were two concurring and two dissenting judgments (the most judicial voices seen) the case scored a 10.

A unanimous decision = 1

One concurring decision with no additions to the overall law = 2

One concurring decision adding other law = 3

Two concurring decisions = 4

Two concurring decisions adding other law = 5

One dissent or three concurring decisions = 6

One concurring decision and one dissenting opinion = 7

One concurring decision adding other law and one dissent = 8

Two concurring judgments and one dissenting judgment or two dissenting judgments = 9

Two concurring judgments and two dissenting opinions = 10

Extent of Decision – Here it was examined whether the Court's ruling expressly applied to a single or specified set of circumstances or whether the law that resulted had broad implications for larger sections of society. If the Court simply applied the legal rules the case scored a 1. Where the Court created a new standard that affected broader populations the case scored a 10.

The Court simply applies the rules set forth in the criminal code = 1

When the Courts narrow their application to the case at bar = 2

Application to case at bar, discussion on potential future standing = 3

Application to one or two other cases = 4

Application to a few cases as well as discussion on future standing = 5

Creation of a new standard which applies only to case at bar = 6

Creation of a new standard which applies to a few cases = 7

Creation of a new standard with a broad scope = 8

Creation of new powers then used in later cases = 9

Creation of a new standard that is then adopted into the common law = 10

Legal Background – Here it was examined whether the legal framework on the basis of which the Court made its decision were inclusive and clear or whether the rules concerned were vague, complex, self-contradictory or incomplete. The absence of a clear rule essentially requires the judiciary to extend its decision beyond the former case law. Once the Court does not or cannot abstain from deciding decision making in the later cases will almost necessarily involve some creative judicial expertise and will thus be activist.

Legal framework is clear, rules are clear, decision does not extend beyond prior case law = 1

Legal framework is clear, rules are clear, decision slightly extends beyond prior case law = 2

Legal framework is clear, rules are clear, decision extends well beyond prior case law =3

Legal framework is clear, rules are not clear, but decision does not extend beyond prior case law =4

Legal framework is clear, rules are not clear and decision extends beyond prior case law =5

No clear framework or rules, but decision does not extend beyond case at bar =6

No clear framework or rules, Court adopts rules from other areas of law =7

No clear framework or rules, Court makes new rules = 8

No clear framework or rules, Court makes new rules that override old rules =9

No clear framework or rules, Court makes new framework for analysis = 10

Category 3 – Activism and the Protection of Core Values

Variables: Core Values Activism

Intervention and value content – Here it was examined if the subject matter under examination was highly value laden in its bearing on democratic principles and human liberties accepted domestically. Where the case dealt with important human rights issues and the Court appeared to assert its guardianship of the Constitution the case scored a 1. Where the Court declined to discuss the constitutional values at stake, the case scored a 10.

Unanimously high value context, *Charter* protections paramount =1

Majority discusses high value context, *Charter* protections paramount = 2

Majority discusses high value context, *Charter* extremely important dissent does not=3

In a concurring statement, a justice discusses high value context =4

No value context discussion, but *Charter* is interpreted purposively =5

Majority discusses value context, but determines that it is not above being overridden =6

Dissent discusses high value context, but majority does not =7

Little mention of values, *Charter* discussion easily overridden =8

No discussion of value context, brief discussion of liberties, mostly technical decision =9

No one discusses value context at all, technical decision, not about liberties= 10

Appendix E – Section 24(2) Case List

<i>Clarkson v The Queen</i> , [1986] 1 SCR 383	<i>R v Cook</i> , [1998] 2 SCR 597
<i>Mooring v Canada (National Parole Board)</i> , [1996] 1 SCR 75	<i>R v Cornell</i> , 2010 SCC 31
<i>Proulx v Quebec (Attorney General)</i> , [2001] 3 SCR 9	<i>R v Debot</i> , [1989] 2 SCR 1140
<i>R v A.M.</i> , [2008] 1 SCR 569	<i>R v Dersch</i> , [1993] 3 SCR 768
<i>R v Arp</i> , [1998] 3 SCR 339	<i>R v Duarte</i> , [1990] 1 S.C.R. 30
<i>R v Bartle</i> , [1994] 3 S.C.R. 173	<i>R v Duguay</i> , [1989] 1 SCR 93
<i>R v Beaulieu</i> , [2010] SCC 7	<i>R v Dymont</i> , [1988] 2 SCR 417
<i>R v Belnavis</i> , [1997] 3 SCR 341	<i>R v Edwards</i> , [1996] 1 SCR 128
<i>R v Black</i> , [1989] 2 SCR 138	<i>R v Elshaw</i> , [1991] 3 SCR 24
<i>R v Borden</i> , [1994] 3 SCR 145	<i>R v Evans</i> , [1993] 3 SCR 653
<i>R v Brown</i> , [2002] 2 SCR 185	<i>R v Evans</i> , [1991] 1 SCR 869
<i>R v Broyles</i> , [1991] 3 SCR 595	<i>R v Feeney</i> , [1997] 2 SCR 13
<i>R v Brydges</i> , [1990] 1 SCR 190	<i>R v Fliss</i> , [2002] 1 SCR 535
<i>R v Buhay</i> , [2003] 1 SCR 631	<i>R v Garofoli</i> , [1990] 2 S.C.R. 1421
<i>R v Burlingham</i> , [1995] 2 SCR 206	<i>R v Généreux</i> , [1992] 1 SCR 259
<i>R v Calder</i> , [1996] 1 SCR 660	<i>R v Genest</i> , [1989] 1 SCR 59
<i>R v Caslake</i> , [1998] 1 SCR 51	<i>R v Goldhart</i> , [1996] 2 SCR 463
<i>R v Clayton</i> , 2007 SCC 32	<i>R v Grant</i> , [1993] 3 SCR 223
<i>R v Cobham</i> , [1994] 3 SCR 360	<i>R v Grant</i> , 2009 SCC 32
<i>R v Colarusso</i> , [1994] 1 SCR 20	<i>R v Greffe</i> , [1990] 1 SCR 755
<i>R v Collins</i> , [1987] 1 SCR 265	<i>R v Hamill</i> , [1987] 1 SCR 301
	<i>R v Hape</i> , [2007] 2 SCR 292
	<i>R v Harper</i> , [2004] 1 SCR 827
	<i>R v Harrison</i> , 2009 SCC 34

<i>R v Hebert</i> , [1990] 2 SCR 151	<i>R v Pozniak</i> , [1994] 3 SCR 310
<i>R v Hynes</i> , [2001] 3 SCR 623	<i>R v Prosper</i> , [1994] 3 SCR 236
<i>R v I. (L. R.) and T. (E.)</i> , [1993] 4 SCR 504	<i>R v R.J.S.</i> , [1995] 1 SCR 451
<i>R v Jacoy</i> , [1988] 2 SCR 548	<i>R v Ross</i> , [1989] 1 SCR 3
<i>R v Jacques</i> , [1996] 3 SCR 312	<i>R v Schmautz</i> , [1990] 1 SCR 398
<i>R v Jarvis</i> , [2002] 3 SCR 757	<i>R v Silveira</i> , [1995] 2 SCR 297
<i>R v Kang-Brown</i> , [2008] 1 SCR 456	<i>R v Simmons</i> , [1988] 2 SCR 495
<i>R v Kokesch</i> , [1990] 3 SCR 3	<i>R v Sinclair</i> 2010 SCC 35
<i>R v Ladouceur</i> , [1990] 1 SCR 1257	<i>R v Singh</i> 2007 SCC 48
<i>R v Latimer</i> , [1997] 1 SCR 217	<i>R v Smith</i> , [1987] 1 SCR 1045
<i>R v Law</i> , 2002 SCC 10	<i>R v Smith</i> , [1992] 2 SCR 915
<i>R v Ling</i> , [2002] 3 SCR 814	<i>R v Stillman</i> , [1997] 1 SCR 607
<i>R v M.R.M.</i> , [1998] 3 SCR 393	<i>R v Strachan</i> , [1988] 2 SCR 980
<i>R v Mann</i> , [2004] 3 SCR 59	<i>R v Suberu</i> , 2009 SCC 33
<i>R v Manninen</i> , [1987] 1 SCR 1233	<i>R v Terry</i> , [1996] 2 SCR 207
<i>R v Matheson</i> , [1994] 3 SCR 328	<i>R v Therens</i> , [1985] 1 SCR 613
<i>R v McCrimmon</i> , [2010] 2 SCR 402	<i>R v Thompson</i> , [1990] 2 SCR 1111
<i>R v Mellenthin</i> , [1992] 3 SCR 615	<i>R v Tremblay</i> , [1993] 2 SCR 932
<i>R v Monney</i> , [1999] 1 SCR 652	<i>R v Wijesinha</i> , [1995] 3 SCR 422
<i>R v Morelli</i> 2010 SCC 8	<i>R v Wiley</i> , [1993] 3 SCR 263
<i>R v Nolet</i> 2010 SCC 24	<i>R v Wise</i> , [1992] 1 SCR 527
<i>R v Orbanski; R v Elias</i> , [2005] 2 SCR 3	<i>R v Wittwer</i> , [2008] 2 SCR 235
<i>R v Plant</i> , [1993] 3 SCR 281	<i>R v Wong</i> , [1990] 3 SCR 36
<i>R v Pohoretsky</i> , [1987] 1 SCR 945	<i>Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)</i> [1990] 1 SCR 425

Appendix F - Section 10(b) Variable List

Category 1 – Activism under the Traditional Vision

Judicial Stability – Here it was measured whether the Court is ready to retract from its own or former decisions. When the Court affirms the decisions

of all lower Courts this is scored as being the lowest level of activism. When the Court overturns a previous decision and overturns legislation and creates new law, the score of the case was a 10, or the highest level of activism.

The Courts affirm the decisions of both lower Courts = 1

The Courts affirm the decisions of the lower Courts but make any changes to the previous decisions = 2

The Courts overturn a decision made by lower Court but affirms a decision by the appeal Court = 3

The Courts affirm a decision made by the lower Court but overturn a decision made by the appeal Court = 4

The Courts overturn both lower Court decisions = 5

The Courts change a law = 6

The Courts go beyond overturning lower Court decisions and overturn legislation as unconstitutional = 7

The Courts implement new tests or increase or change previously existing tests = 8

The Courts overturn a previous Supreme Court decision but do not create any new law = 9

The Courts overturn a Supreme Court previous decision and overturn legislation and create new law = 10

Interpretation – Does a Court interpret a legal text in possible contradiction with assumed original intent of the *Constitution* or its plain linguistic meaning? The decisions that interpret the law for its original meaning and avoid straying from the protections of the *Charter* will render lower numbers on the activism scale. Courts that use their position and power to interpret legal texts to suit their own intentions, straying from its original meaning, will be seen as highly activist.

The Supreme Court interprets section 10(b) as the safeguard against denying counsel and an important *Charter* protection = 1

The majority interprets section 10(b) as a valued *Charter* protection, but not one that is without limits as prescribed by law = 2

The concurring justices discuss the high valued *Charter* protections, however the majority does not = 3

The majority interprets the *Charter* as it was intended, but the dissent does not = 4

Majority of the Court interprets the *Charter* to their own ends, but still discusses original intent of *Charter* = 5

Charter is interpreted by all Court members to their own ends = 6

The majority of the Court interprets the *Charter* to their own ends but a dissent holds true to the original interpretation = 7

The Supreme Court is open to overriding section 10(b) *Charter* protection in favour of other interests = 8

The Supreme Court interprets section 10(b) as being easily overridden = 9

The Supreme Court interprets section 10(b) in a way that is contradictory from being a high protection from the right to counsel = 10

Majoritarianism and Autonomy – Here it was measured whether the Court interferes with policies set by democratic processes and if the Court is willing to supply its own solution and/or policy?

The Court does not interfere with policies set by democratic policies and leaves all legislation alone = 1

The Court discusses the constitutionality of legislation, but ultimately upholds it = 2

The Court splits on the constitutionality of legislation, but ultimately upholds it = 3

The concurring decision would “read down” the legislation to amend the law, but the majority upholds the law = 4

The dissent of the Court “reads down” the legislation to amend the law = 5

The majority of the Court “reads down” the legislation to amend the law = 6

The dissent would strike down legislation, but the majority would not = 7

The majority strikes down legislation, the dissent would not have done so = 8

The entire Court strikes down legislation = 9

The Court strikes down legislation and applies their own solution = 10

Judicial Reasoning: Process/substance – With this indicia it was measured how heavily the Court relies on its decision on strict legal and procedural grounds. Where the Court relies entirely on strict legal or procedural grounds in making a decision the case scored a 1. Where the Court relies on open ended legal tests, such as reasonableness based assessments the case scored a 10.

The Court relies entirely on strict legal and procedural grounds = 1

The Court relies entirely on both strict legal and procedural grounds and adopted case law tests = 2

The Court mostly relies on legal and procedural grounds, but discusses an open ended test = 3

The Court relies more on legal and procedural grounds, but also uses an open ended test = 4

The Court relies equally on legal and procedural grounds and open ended tests = 5

The dissent uses more open ended tests than legal and procedural grounds, but the majority does not = 6

The majority uses more open ended tests than legal and procedural grounds, but the dissent does not = 7

The Court uses legal and procedural grounds only to inform their reasons for using open ended tests =8

The Court uses legal and procedural grounds to create a new open ended test =9

The Court relies entirely on open ended tests = 10

Threshold Activism – Here, it was measured the extent to which the Court was willing to forgive threshold hurdles. In this context, a rigorous application of threshold issues (in this case, whether or not a detention had taken place) as a gateway to accessing section 10(b) of the *Charter* would score a 1 (this is the main threshold issue in section 10(b) cases). Where the Court found reasons to allow for a bypass of detention, where previous cases have not, the case scored a 10.

Courts entirely defer to the threshold issue =1

The Court interprets threshold issue as important, but not always the most important factor = 2

The threshold is interpreted as being of substantial importance but the Court imposes limits on it = 3

The majority of the Court views the threshold as exceedingly important, however the dissent varies from this view = 4

There is no discussion of or any thresholds = 5

The dissent interprets the threshold as incredibly important; however, the majority feels it is not above being overridden = 6

The threshold is seen by the Court as being a consideration, but not an important one =7

The threshold is deemed to be unimportant in the case at bar=8

The threshold is almost entirely overlooked in favour of other doctrines =9

The Court entirely ignores the threshold question =10

Judicial Remit – This indicia asks whether the Court’s decision expands or redefines the jurisdiction of the Court. When the decision did not expand or redefine the jurisdiction of the Court, the case scored a 1. A decision that expanded the judiciary’s remit into areas previously immune from intervention was scored as a 10.

The decision does not expand or redefine the jurisdiction of the Court =1

The dissent would slightly redefine the jurisdiction of the Court = 2

The dissent would slightly expand the jurisdiction of the Court = 3

The decision does not expand the jurisdiction of the Court, but slightly redefines it =4

The decision does not expand the Court’s jurisdiction, but somewhat redefines it =5

The decision does not expand the Court's jurisdiction, but redefines it entirely =6

The decision slightly expands the jurisdiction of the Court and slightly redefines it=7

The decision slightly expands jurisdiction and entirely redefines it =8

The majority entirely expands and redefines the jurisdiction, but the dissent would not =9

The decision entirely redefines and expands the jurisdiction of the Court = 10

Rhetoric – This indicia asks whether judicial decisions are used as platforms for expression of broader positions and values or whether the use of rhetoric was restricted to the explication of legal principles. The absence of legal rhetoric (usually correlating with shorter decisions) was scored as a 1. High levels of extra-legal rhetoric combined with long discussions of political implications were scored at 10.

No rhetoric by the Courts and a very short decision = 1

Minimal rhetoric, still a fairly short decision = 2

Some expression of broad positions and values, but still a relatively short decision = 3

Substantial expression of values and positions, decision is longer than 30 paragraphs = 4

The Court engages in brief discussion of non-legal principles as well as potential implications = 5

The decision begins to become more about positions than law = 6

A lengthy decision; substantial discussion on non-legal issues = 7

A long decision; broad positions as well as political ideology discussed = 8

A very long decision (greater than 90 paragraphs) with substantial expression of non-legal principles and political values = 9

Extremely long decision (greater than 100 paragraphs) and copious amounts of rhetoric used =10

Obiter Dicta – This indicia asks how far does the Court expand its opinion beyond the legal requirements of the specific case? When the Court did not delineate any *obiter* the case scored a 1. When the Court used extensive amounts of *obiter* and discussed issues not relevant to the case a 10 was recorded.

Court does not discuss its opinion at all, no *obiter* = 1

Court does not expand its opinion beyond the case at bar = 2

Court briefly discusses potential ramifications of decision, but stays neutral = 3

Court discusses potential ramifications of decision at length, but stays neutral = 4

Court briefly discusses ramifications and appears to be expressing an opinion = 5

Opinion clearly being expressed, ramifications expressed = 6

Ramifications of decision discussed in detail, opinions extend beyond the case at bar = 7

Court uses substantial amounts of *obiter* = 8

Court uses substantial amounts of *obiter* and discusses issues not relevant to the case at bar = 9

Court uses extensive amounts of *obiter* and discusses issues not relevant to case at bar = 10

Reliance on Comparative Sources – Here, it was examined how extensively the Court relied on foreign sources that are not legally binding in the domestic sphere. Where the Court used domestic law exclusively a 1 was scored. When the Court used comparative sources to create new legal conceptions with extensive comparative referencing the case scored a 10.

The Court uses domestic law exclusively = 1

The Court makes minimal references to the UK's common law or texts written by non-judges to understand law, not to change it = 2

Use of American law to understand law but not to change it, with minimal reference = 3

Use of comparative law to justify existing domestic laws, still fairly minimal reference = 4

Use of comparative law justifying existing domestic laws, extensive reference = 5

Use of comparative law to justify changing existing laws, minimal reference = 6

Use of comparative law to justify changing existing laws, extensive reference = 7

Use of comparative law to create new legal tests = 8

Use of comparative law to create new laws, minimal reference = 9

Use of comparative law to create new laws, extensive reference = 10

Judicial Voices – Here it was examined the extent of other judicial decisions besides the majority decision. A unanimous decision scored a 1. On occasions where two concurring and two dissenting judgments were observed (the most judicial voices seen) the case scored a 10.

A unanimous decision = 1

One concurring decision with no additions to the overall law = 2

One concurring decision adding other law = 3

Two concurring decisions = 4

Two concurring decisions adding other law = 5

One dissent or three concurring decisions = 6

One concurring decision and one dissenting opinion = 7

One concurring decision adding other law and one dissent = 8

Two concurring judgments and one dissenting judgment or two dissenting judgments = 9

Two concurring judgments and two dissenting opinions = 10

Extent of Decision – Here it was examined whether the Court’s ruling expressly applied to a single or specified set of circumstances or whether the law that resulted had broad implications for larger sections of society. If the Court simply applied the legal rules the case scored a 1. Where the Court created a new standard that affected broader populations the case scored a 10.

The Court simply applies the rules set forth in the criminal code = 1

When the Courts narrow their application to the case at bar = 2

Application to case at bar, discussion on potential future standing = 3

Application to one or two other cases = 4

Application to a few cases as well as discussion on future standing = 5

Creation of a new standard which applies only to case at bar = 6

Creation of a new standard which applies to a few cases = 7

Creation of a new standard with a broad scope = 8

Creation of new powers then used in later cases = 9

Creation of a new standard that is then adopted into the common law = 10

Legal Background – Here it was examined whether the legal framework on the basis of which the Court made its decision were inclusive and clear or whether the rules concerned were vague, complex, self-contradictory or incomplete. The absence of a clear rule essentially requires the judiciary to extend its decision beyond the former case law. Once the Court does not or cannot abstain from deciding decision making in the later cases will almost necessarily involve some creative judicial expertise and will thus be activist.

Legal framework is clear, rules are clear, decision does not extend beyond prior case law = 1

Legal framework is clear, rules are clear, decision slightly extends beyond prior case law = 2

Legal framework is clear, rules are clear, decision extends well beyond prior case law = 3

Legal framework is clear, rules are not clear, but decision does not extend beyond prior case law = 4

Legal framework is clear, rules are not clear and decision extends beyond prior case law = 5

No clear framework or rules, but decision does not extend beyond case at bar = 6

No clear framework or rules, Court adopts rules from other areas of law = 7

No clear framework or rules, Court makes new rules = 8

No clear framework or rules, Court makes new rules that override old rules = 9

No clear framework or rules, Court makes new framework for analysis = 10

Category 3 – Activism and the Protection of Core Values

Variables: Core Values Activism

Intervention and value content – Here it was examined if the subject matter under examination was highly value laden in its bearing on democratic principles and human liberties accepted domestically. Where the case dealt with important human rights issues and the Court appeared to assert its guardianship of the *Constitution* the case scored a 1. Where the Court declined to discuss the constitutional values at stake, the case scored a 10.

Unanimously high value context, *Charter* protections paramount = 1
 Majority discusses high value context, *Charter* protections paramount = 2
 Majority discusses high value context, *Charter* extremely important dissent does not = 3
 In a concurring statement, a justice discusses high value context = 4
 No value context discussion, but *Charter* is interpreted purposively = 5
 Majority discusses value context, but determines that it is not above being overridden = 6
 Dissent discusses high value context, but majority does not = 7
 Little mention of values, *Charter* discussion easily overridden = 8
 No discussion of value context, brief discussion of liberties, mostly technical decision = 9
 No one discusses value context at all, technical decision, not about liberties = 10

Appendix G – Section 10(b) Case List

<i>British Columbia (Attorney General) v Christie</i> [2007] 1 SCR 873.	<i>R v Cook</i> , [1998] 2 SCR 597.
<i>Clarkson v the Queen</i> [1986] 1 SCR 383.	<i>R v Debot</i> , [1989] 2 SCR 1140.
<i>Dehghani v Canada (Minister of Employment and Immigration)</i> [1993] 1 SCR 1053.	<i>R v Elshaw</i> , [1991] 3 SCR 24.
<i>R v Bartle</i> , [1994] 3 SCR 569.	<i>R v Evans</i> , [1991] 1 SCR 869.
<i>R v Black</i> , [1989] 2 SCR 128.	<i>R v Feeney</i> , [1997] 3 SCR 1008.
<i>R v Borden</i> , [1994] 3 SCR 145.	<i>R v Grant</i> , [1993] 3 SCR 223.
<i>R v Brydges</i> , [1990] 1 SCR 190.	<i>R v Grant</i> , [2009] 2 SCR 353.
<i>R v Burlingham</i> , [1995] 2 SCR 206.	<i>R v Greffe</i> , [1990] 1 SCR 775.
<i>R v Cobham</i> , [1994] 3 SCR 360.	<i>R v Harper</i> , [1994] 3 SCR 343.
	<i>R v Harter</i> , [1995] 3 SCR 562.
	<i>R v Hebert</i> , [1990] 2 SCR 151.
	<i>R v I. (L.R.) and T. (E.)</i> , [1993] 4 SCR 504.

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| <i>R v Jacoy</i> , [1988] 2 SCR 548. | <i>R v Simmons</i> , [1988] 2 SCR 495. |
| <i>R v Latimer</i> , [1997] 1 SCR 217. | <i>R v Sinclair</i> , [2010] 2 SCR 310. |
| <i>R v M (M.R.)</i> , [1998] 3 SCR 393. | <i>R v Smith</i> , [1989] 2 SCR 368. |
| <i>R v Manninen</i> , [1987] 1 SCR 1233. | <i>R v Smith</i> , [1991] 1 SCR 714. |
| <i>R v Matheson</i> , [1994] 3 SCR 328. | <i>R v Strachan</i> , [1988] 2 SCR 980. |
| <i>R v McCrimmon</i> , [2010] 2 SCR 402. | <i>R v Suberu</i> , [2009] 2 SCR 460. |
| <i>R v Orbanski; R. v Elias</i> , [2005] 2 SCR 3. | <i>R v Therens</i> , [1985] 1 SCR 613. |
| <i>R v Pozniak</i> , [1994] 3 SCR 310. | <i>R v Thomsen</i> , [1988] 2 SCR 640. |
| <i>R v Prosper</i> , [1994] 3 SCR 236. | <i>R v Terry</i> , [1996] 2 SCR 207. |
| <i>R v Ross</i> , [1989] 2 SCR 3. | <i>R v Tremblay</i> , [1987] 2 SCR 435. |
| <i>R v Schmautz</i> , [1990] 1 SCR 398. | <i>R v Whittle</i> , [1994] 2 SCR 914. |
| | <i>R v Willier</i> , [2010] 2 SCR 429. |
| | <i>R v Woods</i> , [2005] 2 SCR 205. |

Appendix H – Section 9 Variable List

Category 1 – Activism under the Traditional Vision

Judicial Stability – Here it was measured whether the Court is ready to retract from its own or former decisions. When the Court affirms the decisions of all lower Courts this is scored as being the lowest level of activism. When the Court overturns a previous decision and overturns legislation and creates new law, the score of the case was a 10, or the highest level of activism.

- The Courts affirm the decisions of both lower Courts = 1
- The Courts affirm the decisions of the lower Courts but make any changes to the previous decisions = 2
- The Courts overturn a decision made by lower Court but affirms a decision by the appeal Court = 3
- The Courts affirm a decision made by the lower Court but overturn a decision made by the appeal Court = 4
- The Courts overturn both lower Court decisions = 5
- The Courts change a law = 6
- The Courts go beyond overturning lower Court decisions and overturn legislation as unconstitutional = 7
- The Courts implement new tests or increase or change previously existing tests = 8
- The Courts overturn a previous Supreme Court decision but do not create any new law = 9
- The Courts overturn a Supreme Court previous decision and overturn legislation and create new law = 10

Interpretation – Does a Court interpret a legal text in possible contradiction with assumed original intent of the *Constitution* or its plain linguistic meaning? The decisions that interpret the law for its original meaning and avoid straying from the protections of the *Charter* will render lower numbers on the activism scale. Courts that use their position and power to interpret legal texts to suit their own intentions, straying from its original meaning, will be seen as highly activist.

The Supreme Court interprets section 9 as the safeguard against denying counsel and an important *Charter* protection = 1

The majority interprets section 9 as a valued *Charter* protection, but not one that is without limits as prescribed by law = 2

The concurring justices discuss the high valued *Charter* protections, however the majority does not = 3

The majority interprets the *Charter* as it was intended, but the dissent does not = 4

Majority of the Court interprets the *Charter* to their own ends, but still discusses original intent of *Charter* = 5

Charter is interpreted by all Court members to their own ends = 6

The majority of the Court interprets the *Charter* to their own ends but a dissent holds true to the original interpretation = 7

The Supreme Court is open to overriding section 9 *Charter* protection in favour of other interests = 8

The Supreme Court interprets section 9 as being easily overridden = 9

The Supreme Court interprets section 9 in a way that is contradictory from being a high protection from the right to counsel = 10

Majoritarianism and Autonomy – Here it was measured whether the Court interferes with policies set by democratic processes and if the Court is willing to supply its own solution and/or policy?

The Court does not interfere with policies set by democratic policies and leaves all legislation alone = 1

The Court discusses the constitutionality of legislation, but ultimately upholds it = 2

The Court splits on the constitutionality of legislation, but ultimately upholds it = 3

The concurring decision would “read down” the legislation to amend the law, but the majority upholds the law = 4

The dissent of the Court “reads down” the legislation to amend the law = 5

The majority of the Court “reads down” the legislation to amend the law = 6

The dissent would strike down legislation, but the majority would not = 7

The majority strikes down legislation, the dissent would not have done so = 8

The entire Court strikes down legislation = 9

The Court strikes down legislation and applies their own solution = 10

Judicial Reasoning: Process/substance – This indicia measures how heavily the Court relies on its decision on strict legal and procedural grounds. Where the Court relies entirely on strict legal or procedural grounds in making a decision the case scored a 1. Where the Court relies on open ended legal tests, such as reasonableness based assessments the case scored a 10.

The Court relies entirely on strict legal and procedural grounds = 1

The Court relies entirely on both strict legal and procedural grounds and adopted case law tests = 2

The Court mostly relies on legal and procedural grounds, but discusses an open ended test = 3

The Court relies more on legal and procedural grounds, but also uses an open ended test = 4

The Court relies equally on legal and procedural grounds and open ended tests = 5

The dissent uses more open ended tests than legal and procedural grounds, but the majority does not = 6

The majority uses more open ended tests than legal and procedural grounds, but the dissent does not = 7

The Court uses legal and procedural grounds only to inform their reasons for using open ended tests =8

The Court uses legal and procedural grounds to create a new open ended test =9

The Court relies entirely on open ended tests = 10

Threshold Activism – Here, it was measured the extent to which the Court was willing to forgive threshold hurdles. In this context, a rigorous application of threshold issues (in this case, whether or not an arbitrary detention had taken place) as a gateway to accessing section 9 of the *Charter* would score a 1 (this is the main threshold issue in section 9 cases). Where the Court found reasons to allow for a bypass of detention, where previous cases have not, the case scored a 10.

Courts entirely defer to the threshold issue =1

The Court interprets the threshold issue as important, but not always the most important factor = 2

The threshold is interpreted as being of substantial importance but the Court imposes limits on it = 3

The majority of the Court views the threshold as exceedingly important, however the dissent varies from this view = 4

There is no discussion of or any thresholds = 5

The dissent interprets the threshold as incredibly important; however, the majority feels it is not above being overridden = 6

The threshold is seen by the Court as being a consideration, but not an important one =7

The threshold is deemed to be unimportant in the case at bar =8

The threshold is almost entirely overlooked in favour of other doctrines =9

The Court entirely ignores the threshold question =10

Judicial Remit – This indicia asks whether the Court’s decision expands or redefines the jurisdiction of the Court. When the decision did not expand or redefine the jurisdiction of the Court, the case scored a 1. A decision that expanded the judiciary’s remit into areas previously immune from intervention was scored as a 10.

The decision does not expand or redefine the jurisdiction of the Court =1

The dissent would slightly redefine the jurisdiction of the Court = 2

The dissent would slightly expand the jurisdiction of the Court = 3

The decision does not expand the jurisdiction of the Court, but slightly redefines it =4

The decision does not expand the Court’s jurisdiction, but somewhat redefines it =5

The decision does not expand the Court’s jurisdiction, but redefines it entirely =6

The decision slightly expands the jurisdiction of the Court and slightly redefines it=7

The decision slightly expands jurisdiction and entirely redefines it =8

The majority entirely expands and redefines the jurisdiction, but the dissent would not =9

The decision entirely redefines and expands the jurisdiction of the Court = 10

Rhetoric – This indicia asks whether judicial decisions are used as platforms for expression of broader positions and values or whether the use of rhetoric was restricted to the explication of legal principles. The absence of legal rhetoric (usually correlating with shorter decisions) was scored as a 1. High levels of extra-legal rhetoric combined with long discussions of political implications were scored at 10.

No rhetoric by the Courts and a very short decision = 1

Minimal rhetoric, still a fairly short decision = 2

Some expression of broad positions and values, but still a relatively short decision = 3

Substantial expression of values and positions, decision is longer than 30 paragraphs = 4

The Court engages in brief discussion of non-legal principles as well as potential implications = 5

The decision begins to become more about positions than law = 6

A lengthy decision; substantial discussion on non-legal issues = 7

A long decision; broad positions as well as political ideology discussed = 8

A very long decision (greater than 90 paragraphs) with substantial expression of non-legal principles and political values = 9

Extremely long decision (greater than 100 paragraphs) and copious amounts of rhetoric used = 10

Obiter Dicta – This indicia asks how far does the Court expand its opinion beyond the legal requirements of the specific case? When the Court did not delineate any *obiter* the case scored a 1. When the Court used extensive amounts of *obiter* and discussed issues not relevant to the case a 10 was recorded.

Court does not discuss its opinion at all, no *obiter* = 1

Court does not expand its opinion beyond the case at bar = 2

Court briefly discusses potential ramifications of decision, but stays neutral = 3

Court discusses potential ramifications of decision at length, but stays neutral = 4

Court briefly discusses ramifications and appears to be expressing an opinion = 5

Opinion clearly being expressed, ramifications expressed = 6

Ramifications of decision discussed in detail, opinions extend beyond the case at bar = 7

Court uses substantial amounts of *obiter* = 8

Court uses substantial amounts of *obiter* and discusses issues not relevant to the case at bar = 9

Court uses extensive amounts of *obiter* and discusses issues not relevant to case at bar = 10

Reliance on Comparative Sources – Here, it was examined how extensively the Court relied on foreign sources that are not legally binding in the domestic sphere. Where the Court used domestic law exclusively a 1 was scored. When the Court used comparative sources to create new legal conceptions with extensive comparative referencing the case scored a 10.

The Court uses domestic law exclusively = 1

The Court makes minimal references to the UK's common law or texts written by non-judges to understand law, not to change it = 2

Use of American law to understand law but not to change it, with minimal reference = 3

Use of comparative law to justify existing domestic laws, still fairly minimal reference = 4

Use of comparative law justifying existing domestic laws, extensive reference = 5

Use of comparative law to justify changing existing laws, minimal reference = 6

Use of comparative law to justify changing existing laws, extensive reference = 7

Use of comparative law to create new legal tests = 8

Use of comparative law to create new laws, minimal reference = 9

Use of comparative law to create new laws, extensive reference = 10

Judicial Voices - Here it was examined the extent of other judicial decisions besides the majority decision. A unanimous decision scored a 1. On occasions where two concurring and two dissenting judgments were observed (the most judicial voices seen) the case scored a 10.

A unanimous decision = 1

One concurring decision with no additions to the overall law = 2

One concurring decision adding other law = 3

Two concurring decisions = 4

Two concurring decisions adding other law = 5

One dissent or three concurring decisions = 6

One concurring decision and one dissenting opinion = 7

One concurring decision adding other law and one dissent = 8

Two concurring judgments and one dissenting judgment or two dissenting judgments = 9

Two concurring judgments and two dissenting opinions = 10

Extent of Decision - Here it was examined whether the Court's ruling expressly applied to a single or specified set of circumstances or whether the law that resulted had broad implications for larger sections of society. If the Court simply applied the legal rules the case scored a 1. Where the Court created a new standard that affected broader populations the case scored a 10.

The Court simply applies the rules set forth in the criminal code = 1

When the Courts narrow their application to the case at bar = 2

Application to case at bar, discussion on potential future standing = 3

Application to one or two other cases = 4

Application to a few cases as well as discussion on future standing = 5

Creation of a new standard which applies only to case at bar = 6

Creation of a new standard which applies to a few cases = 7

Creation of a new standard with a broad scope = 8

Creation of new powers then used in later cases = 9

Creation of a new standard that is then adopted into the common law = 10

Legal Background - Here it was examined whether the legal framework on the basis of which the Court made its decision were inclusive and clear or

whether the rules concerned were vague, complex, self-contradictory or incomplete. The absence of a clear rule essentially requires the judiciary to extend its decision beyond the former case law. Once the Court does not or cannot abstain from deciding decision making in the later cases will almost necessarily involve some creative judicial expertise and will thus be activist.

Legal framework is clear, rules are clear, decision does not extend beyond prior case law = 1

Legal framework is clear, rules are clear, decision slightly extends beyond prior case law = 2

Legal framework is clear, rules are clear, decision extends well beyond prior case law = 3

Legal framework is clear, rules are not clear, but decision does not extend beyond prior case law = 4

Legal framework is clear, rules are not clear and decision extends beyond prior case law = 5

No clear framework or rules, but decision does not extend beyond case at bar = 6

No clear framework or rules, Court adopts rules from other areas of law = 7

No clear framework or rules, Court makes new rules = 8

No clear framework or rules, Court makes new rules that override old rules = 9

No clear framework or rules, Court makes new framework for analysis = 10

Category 3 – Activism and the Protection of Core Values

Variables: Core Values Activism

Intervention and value content – Here it was examined if the subject matter under examination was highly value laden in its bearing on democratic principles and human liberties accepted domestically. Where the case dealt with important human rights issues and the Court appeared to assert its guardianship of the *Constitution* the case scored a 1. Where the Court declined to discuss the constitutional values at stake, the case scored a 10.

Unanimously high value context, *Charter* protections paramount = 1

Majority discusses high value context, *Charter* protections paramount = 2

Majority discusses high value context, *Charter* extremely important dissent does not = 3

In a concurring statement, a justice discusses high value context = 4

No value context discussion, but *Charter* is interpreted purposively = 5

Majority discusses value context, but determines that it is not above being overridden = 6

Dissent discusses high value context, but majority does not = 7

Little mention of values, *Charter* discussion easily overridden = 8

No discussion of value context, brief discussion of liberties, mostly technical decision= 9

No one discusses value context at all, technical decision, not about liberties = 10

Appendix I – Section 9 Case List

- Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.
- Caisse populaire Desjardins de Val-Brillant v Blouin*, [2003] 1 SCR 666.
- Canada 3000 Inc., Re; Inter-Canadian (1991) Inc. (Trustee of)*, [2006] 1 SCR 865.
- Canada (Attorney General) v McArthur*, 2010 SCC 63.
- Charkaoui v Canada (Citizenship and Immigration)*, [2008] 2 SCR 326.
- Dumas v Leclerc Institute*, [1986] 2 SCR 459.
- Guimond v Quebec (Attorney General)*, [1996] 3 SCR 347.
- Law Society of British Columbia v Mangat*, [2001] 3 SCR 113.
- May v Ferndale Institution*, [2005] 3 SCR 809.
- R v A.M.*, [2008] 1 SCR 569.
- R v Asante-Mensah*, [2003] 2 SCR 3.
- R v B.(K.G.)*, [1993] 1 SCR 740.
- R v Bain*, [1992] 1 SCR 91.
- R v Beare; R. v Higgins*, [1988] 2 SCR 387.
- R v Brooks*, [2000] 1 SCR 237.
- R v Chaisson*, [2006] 1 SCR 415.
- R v Clayton*, [2007] 2 SCR 725.
- R v Conway*, 2010 SCC 22.
- R v Currie*, [1997] 2 SCR 260.
- R v Decorte*, [2005] 1 SCR 133.
- R v Duguay*, [1989] 1 SCR 93.
- R v Généreux*, [1992] 1 SCR 259.
- R v Grant*, [1993] 3 SCR 223.
- R v Grant*, 2009 SCC 32.
- R v Hape*, [2007] 2 SCR 292.
- R v Harrison*, 2009 SCC 34.
- R v Heywood*, [1994] 3 SCR 761.
- R v Hufsky*, [1988] 1 SCR 621.
- R v Jacques*, [1996] 3 SCR 312.
- R v Johnson*, [2003] 2 SCR 357.
- R v Kang-Brown*, [2008] 1 SCR 456.
- R v Knoblauch*, [2000] 2 SCR 780.
- R v Latimer*, [1997] 1 SCR 217.
- R v Loewen*, 2011 SCC 21.
- R v Luxton*, [1990] 2 SCR 711.
- R v Lyons*, [1987] 2 SCR 309.
- R v M (S.H.)*, [1989] 2 SCR 446.
- R v MacKenzie*, 2013 SCC 50.
- R v Mann*, [2004] 3 SCR 59.
- R v Mellenthin*, [1992] 3 SCR 615.
- R v Milne*, [1992] 1 SCR 697.
- R v Monney*, [1999] 1 SCR 652.
- R v Montour*, [1995] 2 SCR 416.
- R v Nasogaluak*, 2010 SCC 6.
- R v Noble*, [1997] 1 SCR 874.
- R v Nolet*, 2010 SCC 24.

R v Orbanski; R v Elias, [2005] 2 SCR 3.
R v Pearson, [1992] 3 SCR 665.
R v S.J.L., 2009 SCC 14.
R v Simmons, [1988] 2 SCR 495.
R v Storrey, [1990] 1 SCR 241.
R v Suberu, 2009 SCC 33.
R v Wilson, [1990] 1 SCR 1291.
RJR -
- *MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311.
Starr v Houlden, [1990] 1 SCR 1366.
Sunrise Co. v Lake Winnipeg (The), [1991] 1 SCR 3.
Travelers Insurance Co. of Canada v Corriveau et al., [1982] 2 SCR 866.
United States of America v Kwok, [2001] 1 SCR 532.
Vancouver (City) v Ward, [2010] SCC 27.
Winters v Legal Services Society, [1999] 3 SCR 160.