CHAPTER SIXTEEN

THE ADVENT OF THE CHARTER

I. INTRODUCTION

In the introduction to this book, we briefly described the constitutional renovation that Canada undertook in 1982. The 1982 amendments stand as the first major reconstruction of Canada's written constitution since 1867. One of the most important of these changes was the adoption of the *Canadian Charter of Rights and Freedoms* (the Charter), which we begin to study in this chapter and which occupies the rest of the book. This chapter is composed of two topics. The first is an introduction to the history of the Charter's adoption. This material situates the Charter in its historical and political context, both domestic and international. It also introduces the division of opinion over the substance of the Charter and the process of its adoption. The point of view of Quebec, the sole province not to have agreed to patriation, and the struggles of Indigenous peoples to have their voices heard, will also be examined. The second topic gives an overview of the ongoing debate about the legitimacy of judicial enforcement of constitutionally guaranteed rights and freedoms.

II. THE ADOPTION OF THE CHARTER

The Charter project formally began at a federal–provincial first ministers' conference in January of 1968. Then Justice Minister Pierre Trudeau, at the beginning of his political career, tabled a document entitled "A Canadian Charter of Human Rights," an excerpt from which follows. Among other things, it traced the historical origins and evolution of modern conceptions of human rights.

The Honourable Pierre Elliott Trudeau, Minister of Justice, A Canadian Charter of Human Rights, January 1968

in Anne Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History* (Toronto: McGraw-Hill Ryerson, 1989) at 51-53 (footnotes omitted)

Interest in human rights is as old as civilization itself. Once his primary requirements of security, shelter and nourishment have been satisfied, man has distinguished himself from other animals by directing his attention to those matters which affect his individual dignity.

In ancient times, and for centuries thereafter, these rights were known as "natural" rights; rights to which all men were entitled because they are endowed with a moral and rational nature. The denial of such rights was regarded as an affront to "natural" law—those elementary principles of justice which apply to all human beings by virtue of their common possession of the capacity to reason. These natural rights were the origins of the western world's more modern concepts of individual freedom and equality.

Cicero said of natural law that it was "unchanging and everlasting," that it was "one eternal and unchangeable law ... valid for all nations and for all times."

In the Middle Ages, St. Thomas Aquinas emphasized that natural law was a law superior to man-made laws and that as a result all rulers were themselves subject to it.

The Reformation brought sharply to the fore the need for protection of freedom of religious belief.

As the concept of the social contract theory of government developed in the 18th century, still greater emphasis came to be given to the rights of the individual. Should a government fail to respect natural rights, wrote Locke and Rousseau, then disobedience and rebellion were justified. Thus was borne the modern notion of human rights. So responsive were men to this notion that the greatest social revolutions in the history of the western world took place—one in America and the other in France—in order to preserve for individuals the rights which they claimed belonged to them.

This deep-seated desire for recognition of human dignity is reflected in the memorable words of the American Declaration of Independence:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness. That to secure these rights Governments are instituted among men, deriving their just powers from the consent of the governed, that whenever any form of Government becomes destructive of these ends, it is the right of the people to alter or abolish it and institute new Government ... .

The *Bill of Rights* in the United States, enacted as an amendment to the Constitution, serves to safeguard the individual from governmental intolerance of the "unalienable rights."

In France, the 1789 Declaration of the Rights of Man and the Citizen sought to achieve similar results. "Men are born and remain free and equal in respect of rights" it said. "The purpose of all civil associations is the preservation of the natural and imprescriptible rights of man. These rights are liberty, property and resistance to oppression."

In both the United States and France, there was embodied the idea that men shall not be deprived of liberty or property except in accordance with the law. This is a manifestation of the belief that men should be ruled by laws, not men; that a government has no more power than the people have agreed to delegate to it.

Monarchies, as well as republics, are influenced by these principles; the authority of kings, as well as presidents, is limited. Many of the Commonwealth countries which inherited a tradition of parliamentary sovereignty have introduced constitutional restrictions, denying to the parliament as well as to the monarch the power to interfere with certain of the subjects' liberties. Constitutional checks on the exercise of governmental authority are a natural development in a democratic society.

The events of the Second World War were disturbing proof of the need to safeguard the rights of individuals. It is not by accident that an overwhelming number of newly independent states have included within their constitutions comprehensive

bills of rights. Since 1945 considerable discussion has taken place in Canada as well concerning similar constitutional measures. The topic has been considered by the Canadian Bar Association, by parliamentary committees, and by numerous commentators. While no constitutional step has been taken, some legislative enactments designed to protect human rights have been passed into law. Parliament in 1960 enacted the *Canadian Bill of Rights*—a step of considerable significance and one which prepares the way for a constitutional enactment. Several provinces have introduced human rights legislation, and a committee engaged in revision of the Quebec Civil Code has recently proposed that a declaration of civil rights be included in the revised code.

These measures are all evidence of the interest of the Canadian people in some form of safeguard of individual liberty. To date, however, there does not exist in Canada any form of guarantee (beyond those few contained in the *British North America Act*) which a provincial legislature or Parliament, as the case may be, cannot repeal as freely as any other statute it has enacted. In this sense, no Canadian has the benefit of a constitutional protection as exists in dozens of other countries.

An entrenched bill of rights would offer this constitutional protection, although at the price of some restriction on the theory of legislative supremacy. It is suggested that this is not too high a price to pay. In fact the theory of legislative supremacy is seldom pressed to its full extent. Indeed, even in England, the birthplace of parliamentary government, fundamental liberties have been protected not only through the common law but also by means of such historic documents as *Magna Carta* (1215), the *Petition of Right* (1628), and the *Bill of Rights* (1689). The purpose of an entrenched bill of rights is simple and straightforward. It has been described as serving "to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech and a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

A constitutional bill of rights in Canada would guarantee the fundamental freedoms of the individual from interference, whether federal or provincial. It would as well establish that all Canadians, in every part of Canada, have equal rights. This would constitute a major first step towards basic constitutional reform.

Canada could not choose a more appropriate year than this one for the consideration of a constitutional bill of rights for Canadians. 1968 has been declared International Human Rights Year by the General Assembly of the United Nations. The General Assembly has done so as an acknowledgement that the centuries-old interest in human rights is now, in the mid-twentieth century, of universal scope. The preamble of the United Nations Charter declares that the peoples of the United Nations are determined "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women." As a reflection of this determination, the United Nations in 1948 adopted the Universal Declaration of Human Rights. Since that date some 15 separate conventions or treaties have been sponsored by the UN dealing with particular rights of a more specialized character. Only last year, however, were those rights which are generally regarded as "fundamental" formulated into two Covenants, (The International Covenant on Economic, Social and Cultural Rights; The International Covenant on Civil and Political Rights) open for signature and ratification by all states.

It is the hopeful expectation of the General Assembly that in 1968 an aroused awareness by all peoples will result in government action everywhere. Canada has the opportunity to take a lead in this respect.

Alan Cairns, Charter Versus Federalism: The Dilemmas of Constitutional Reform

(Kingston: McGill-Queen's University Press, 1992) at 12-20 (footnotes omitted)

Interpretations of our recent constitutional discontents have focused overwhelmingly on domestic factors. Demands and responses, inputs and outputs, have been conceived in an insular fashion, almost as if Canadians inhabited a separate planet under their total control, and so minimal attention has been paid to our location in an international network of states and peoples. ...

In contrast, the pervasive international dimension to our struggles has received little concentrated attention.

The Erosion of Britishness

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For the Fathers of Confederation, parliamentary responsible government was a positive heritage that differentiated Canada from the United States and gratifyingly confirmed the evolutionary nature of Canadian constitutional development. ... In the post-1945 period, the status of parliamentary government in Canada was weakened by the relative decline of the country of its origin—as a world power, as a centre of empire, and as an economic leader. ...

British parliamentary supremacy no longer seemed so central to Canadian identity as the prestige and status associated with connection to the United Kingdom eroded. Although as late as the 1950s, opposition to a growing support for a Canadian Bill of Rights could still be justified in terms of defending our British heritage, and by tarring a Bill of Rights with the stigma of Americanism, by the 1970s such arguments appeared strained. By the time of the 1980-1 Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada, dealing with the proposed constitutional resolution to be transmitted to Westminster, the remaining defenders of parliamentary supremacy were clearly in retreat. The dominant thrust of the interveners was to strengthen the Charter. ...

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Growing support for a Charter in Canada was facilitated by removal of specific impediments. In this connection, the abolition of appeals to the Judicial Committee of the Privy Council in 1949 made a little-noticed indirect contribution to the lessening of support for parliamentary supremacy and to the provision of a positive environment in which Charter support could more easily grow. ...

More generally, national support for a Bill of Rights in the 1950s was part of the historic colony-to-nation movement that had propelled successive steps in Canadian independence from Great Britain. In contrast to the overtly political purpose of constraining centrifugal pressures that drove the federal government's support for a Charter in the late 1960s and the 1970s, the earlier support had "less to do with leashing the provinces and more to do with the evolution of the symbolic basis of the Canadian Constitution from the authority of the British Parliament to that of the people of Canada." ...

The capacity of parliamentary government to sustain a sense of Canadian distinctiveness in North America was conditioned by time and circumstance. It appears in retrospect that the traditional, positive evaluation of parliamentary government, unconstrained by entrenched rights, was intimately linked to the status of the United Kingdom as a great power and to the related tendency for many English Canadians to define themselves as British as long as significant domestic prestige continued to

flow from the British connection. As that connection lost its instrumental value, Canadian support for the constitutional theory of parliamentary supremacy was weakened, along with a cluster of values, intellectual orientations, and practices that had previously given the Canadian constitution, and commentary on it, a distinctly British cast. ...

The weakened appreciation for this formerly potent symbol of Canadian constitutional identity created a gap in the constitutional symbolism of an almost completely autonomous nation. The Charter that emerged to fill that gap brought entrenched rights, judicial supremacy, and a greatly enhanced role for the written portion of the constitution—all of which further distanced Canadians from their British constitutional origins.

From the 1950s to the 1980s, the declining allegiance to the British parliamentary side of Canadian political life coincided with selective interest in and positive appraisal of American constitutional theory and practice.

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The International Rights Dimension

In 1968, Maxwell Cohen attributed the novel and dramatic Canadian interest in "human rights" to transformed international and domestic beliefs which had "altered totally beyond anything that could have been imagined two decades before." "Human rights," he continued, "became ... within the past twenty years, an important piece of 'debating' language ... part of the political dialogue, part of the debating experience of peoples in all parts of the world, even those in affluent societies."

The most influential catalyst of that transformed climate of Canadian and international opinion was the United Nations, one of whose purposes has been to foster respect for fundamental freedoms and human rights. Its 1945 Charter, followed by the Universal Declaration of Human Rights, adopted as a unanimous resolution of the General Assembly in 1948, and subsequent international covenants on Civil and Political Rights and on Economic, Social and Cultural Rights have been influential in channelling and stimulating a "rights" debate in Canada. ...

Initial Canadian responses to the inclusion of rights in the UN Charter, and to the subsequent Universal Declaration, were distinctly lukewarm. Canadian officials asserted the superior protection of rights under the British tradition, which they rather smugly contrasted with American experience, and also stressed the constitutional limitations of federalism in which some rights pertained to matters under provincial jurisdiction. Although the Special Joint Committee of the Senate and House of Commons of Canada on Human Rights and Fundamental Freedoms (1947-8) and the Special Committee of the Senate on Human Rights and Fundamental Freedoms (1950) were explicit responses to the requirement for an analysis of Canadian practice in the light of the Charter and the Universal Declaration, they did not result in a Canadian version of the Charter. Nevertheless, it was standard practice for advocates of a Canadian Bill of Rights from the late 1940s on to cite the UN Charter and the Universal Declaration in support of their position ... . Thirty years later, nearly all the civil liberties and human rights organizations that appeared before the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada (1980-1) stressed Canadian obligations under UN international covenants. Human Rights Commissioner Gordon Fairweather, after citing various UN instruments, by means of which Canada has "increased her accountability to the world community" asserted that such obligations could not be met without an entrenched Charter binding on both orders of government.

Thus the direct and indirect proselytizing on behalf of rights by the United Nations challenged regimes practising federalism and employing parliamentary supremacy

to modify their constitutional arrangements, as a Bill of Rights became an almost essential attribute of contemporary statehood. Accordingly, it is not surprising that a Bill of Rights has become virtually an automatic component of new constitutions, or that Bills of Rights have become increasingly comprehensive, or that an established state such as Canada, that had long existed without an entrenched Charter, has recently introduced one.

Peter Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms"

(1983) 61:1 Can Bar Rev 30 at 30-36 (footnotes omitted)

[This article explores two purposes of the Charter: (1) to contribute to national unity, and (2) to protect rights. The excerpt that follows is limited to the first purpose; it is included to give some understanding of the national political context of the making of the Charter.]

To understand the national unity rationale of the Charter, it is necessary to recall the context in which the federal government made a charter its number one priority for constitutional reform.

In the mid-1960's right up to the Confederation of Tomorrow Conference organized by the Premier of Ontario, John Robarts, in the fall of 1967, the Liberal Government in Ottawa was not interested in constitutional reform of any kind. Patriation with an amending formula [in what was known as the "Fulton-Favereau formula"] had been very nearly achieved in 1964. Since then only Quebec had been pushing for constitutional change. But Quebec had drastically raised the stakes. [Quebec politicians] insisted that the price of Quebec's support for patriation of the Canadian Constitution would be agreement on substantive constitutional reform giving Quebec more recognition and power as the French Canadian homeland. This demand of Quebec provincial leaders for major constitutional change reflected a wholly new phase in Quebec nationalism. Historically the constitutional position of Quebec leaders had been profoundly conservative. Their prime concern had been to preserve the rights they believed had been acquired for Quebec and French Canada in the constitution of 1867. But now, under the impetus of Quebec's "quiet revolution," the province's leading politicians had become constitutional radicals. So long as these Quebec demands for radical change were the central preoccupation of constitutional debate, it was not in the federal government's interest to encourage the process of constitutional reform. The proposals likely to dominate such a debate, if they went far enough to placate Quebec nationalism, would either go too far in weakening the involvement of the federal government in the life of Quebec or else give Quebec representatives in federal institutions such a privileged place as to alienate opinion in the rest of the country. So the Pearson government at first tried to respond to Quebec through pragmatic adjustments in fiscal and administrative arrangements and took a dim view of Premier Robarts' constitutional initiative.

However, the very success of the Confederation of Tomorrow Conference ... seemed to convince the Prime Minister and his Justice Minister, Pierre Trudeau, who was soon to succeed him, that a different strategy was needed. The constitutional issue could no longer be kept on the back burner. But if constitutional reform was to be seriously pursued, it was essential that Quebec's demands be countered by proposals designed to have a unifying effect on Canada. It was at this point that the federal government urged that a charter of rights be at the top of the constitutional reform agenda.

After the Confederation of Tomorrow Conference, Prime Minister Pearson suggested to the provincial governments "that first priority should be given to that part of the Constitution which should deal with the rights of the individual—both his rights as a citizen of a democratic federal state and his rights as a member of the linguistic community in which he has chosen to live." This was the position his government took at the Constitutional Conference in February 1968. Prime Minister Trudeau took exactly the same position. His government's paper prepared for the February 1969 Constitutional Conference repeated the commitment to a charter of rights as the first priority in constitutional change. "To reach agreement on common values," Trudeau argued, was "an essential first step" in any process of constitutional renewal. From this point until the final enactment of the *Constitution Act, 1982*, giving constitutional expression to fundamental rights including language rights was the Trudeau government's first constitutional priority. And throughout, the fundamental basic rationale for this constitutional strategy was the perceived value of such a measure as a popular and unifying counter to decentralizing provincial demands in the Canadian constitutional debate.

The Charter's attractiveness to the leaders of the federal Liberal Party as the centrepiece of their constitutional strategy was decisive in improving the political fortunes of the project of entrenching rights and freedoms in the Canadian constitution. Since World War II there had been a great deal of discussion of the Bill of Rights idea both within and outside Parliament. The prime stimulus of this discussion was international—the concern for human rights arising from the war against fascism and Canada's obligations under the United Nations Declaration of Human Rights. Domestic events also stimulated interest in a Bill of Rights. At the federal level, there was regret concerning the treatment of Japanese Canadians during the war and the denial of traditional legal rights in the investigation of a spy ring following the Gouzenko disclosures in 1946. At the provincial level the persecution of Jehovah's Witnesses by the Duplessis administration in Quebec, the treatment of Doukhabors and other religious minorities in the west and the repression of trade unionism in Newfoundland were major causes célèbres. There was also a touch of the national unity theme in the submissions made on a number of occasions to parliamentary committees on the implications of post-war immigration. The addition of such large numbers of new Canadians with no education or experience in liberal democratic values, it was argued, meant that Canada could no longer rely on the British method of protecting civil liberties. For such a heterogeneous population a written code was needed. Liberal leaders were not moved by these arguments for a Canadian Bill of Rights. The CCF was the only national party to commit itself to establishing a Bill of Rights. And it was under a Progressive Conservative government led by John Diefenbaker that a statutory Bill of Rights affecting only the federal level of government was enacted in 1960.

Pierre Trudeau, before he entered politics and joined the Liberal Party, expressed interest in a constitutional Bill of Rights. In 1965, as a legal academic writing a background paper on how to deal with the Quebec agitation for constitutional change, he placed a Bill of Rights in first place on his list of constitutional reform proposals. But the main thrust of his paper was to dissuade Quebecers from relying on constitutional reform to solve their problems of political and social modernization. His constitutional reform proposals were for "some day" in the future. Whenever a Bill of Rights was added to the constitution, he saw the abolition of the federal power of reservation and disallowance over provincial legislation as a logical quid pro quo. This emphasis on the connection between a constitutional Bill of Rights and the federal powers of reservation and disallowance underlines a constitutional charter's capacity for imposing national standards on the provinces. This link appeared again

in the Trudeau government's 1978 constitutional initiative but was not part of the constitutional package which contained the new Charter. To have made a change in powers a quid pro quo for a charter of rights would not have fitted in very well with a political campaign in which the charter was being sold as part of a "people's package" and provincial premiers were being chastised for trying to swap rights for powers. In any event, by 1967 that distant day when constitutional reforms should be undertaken had suddenly arrived. Speaking to the Canadian Bar Association as Justice Minister in 1967 Trudeau announced his government's conclusion that a constitutional Bill of Rights proposal was "the best basis on which to begin a dialogue on constitution reform between the federal government and provincial governments," and he emphasized that in taking this approach: "Essentially we will be testing—and, hopefully, establishing—the unity of Canada."

After 1967 there were factors other than constitutional strategy which provided additional reasons for adopting a constitutional charter of rights. The application of the European Convention on Human Rights to the United Kingdom, Canada's accession to the International Covenant of Civil and Political Rights in 1976 and the enactment of human rights legislation by most of the Canadian provinces increased Canadian interest in a constitutional codification of basic rights. The invocation of the *War Measures Act* in 1970 and the excesses of the RCMP's Security Service stimulated civil libertarian interest in a constitutional Bill of Rights, as did the Supreme Court's generally narrow interpretation of the "Diefenbaker" Bill. But I doubt that any of these developments had much to do with the Trudeau government's commitment to the Charter—except insofar as they indicated greater public support for such a measure.

Aside from the political and strategic advantages of the Charter, it may also have had some purely intellectual or even aesthetic attractions for Mr. Trudeau and some of his colleagues. Federal government position papers put forward the view that the rational approach to the constitution was to begin with a statement of the fundamental values of the Canadian political community. This notion of constitutional rationality, of the constitution as a logical construct built on an explicit formulation of first principles, may be a manifestation of French rationalism and the civil law tradition with its penchant for deduction from codified principles in contrast with English empiricism and the inductive nature of common law. Even if there is some validity in this kind of ethnic stereotyping, it surely cannot account for the strength of the Trudeau government's political commitment to the Charter.

That commitment proved to be very strong indeed. A version of a constitutional Bill of Rights took pride of place in the Victoria Charter which Mr. Trudeau came so close to negotiating successfully with the provincial Premiers in 1971. Again in 1978 when, in response to the electoral victory of the separatists in Quebec, the federal government embarked on another serious programme of constitutional reform, a constitutional charter, albeit one which at first would not bind the provinces, was given a prominent position. But it was the inclusion of a constitutional Charter of Rights binding on the provinces in the package of constitutional change which Mr. Trudeau threatened to achieve, if necessary, unilaterally without provincial support that demonstrates how deeply he and his government believed in its benefits. At this point, when federal-provincial negotiations on the constitution were at an impasse, it would have been ever so much easier, from a political point of view, for the federal government to have proceeded simply with patriation and an amending formula. The insistence on coupling a constitutional charter with patriation shows how strongly the Trudeau government believed in the nation-building potential of a constitutional charter. They would risk dividing the country in order that it might become more united. This nation-building aspect of the Charter was the central thesis of Mr. Trudeau's final parliamentary speech on the Charter.

Lorraine Weinrib, "Of Diligence and Dice: Reconstituting Canada's Constitution"

(1992) 42:2 UTLJ 207 (footnotes omitted)

The story [of the Charter] began in earnest in the early 1960s, when the project was simply patriation with an amending formula in order to remove the last remaining legal vestige of colonial status—the exclusive power of the British Parliament at Westminster to amend the *British North America Act*. ...

The Report of the Royal Commission on Bilingualism and Biculturalism in 1967 broadened the agenda beyond patriation with an amending formula to include language rights in the political process, in government services at every level, and in minority language education. ... [T]his report ... precipitat[ed] the genesis of our current Charter in the form of a discussion paper, prepared under the name of then Minister of Justice Pierre Trudeau, for a federal–provincial meeting held in February 1968, proposing *A Canadian Charter of Human Rights*. ...

This stage of discussions culminated in a text prepared for the June 1971 First Ministers' Conference, in Victoria, British Columbia: the *Canadian Constitutional Charter, 1971*, known as the Victoria Charter. ...

A study of the Victoria Charter illuminates some of the distinctive features of the Charter as we know it. The range of rights in the Victoria Charter was more limited than Mr. Trudeau's initial proposal or the Charter's eventual formulation. The proposed text did not guarantee legal rights, economic rights, mobility rights or egalitarian rights. It extended protection to "political freedoms" only, including the fundamental freedoms of thought, conscience and religion; of opinion and expression; and peaceful assembly and association. The effect was to negate the exercise of government power rather than to require it. The text also affirmed universal suffrage and eligibility for elected office, free democratic elections, as well as other features of the parliamentary system. In addition, English and French were to become the official languages of Canada, with "status and protection" formulated in language rights in the political process, in the judicial system and in communication with government. There was, however, no provision for rights to minority language education.

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[There was also] an express provision for limitation of rights. This express limitation clause marked the text as one in the family of post second world war rights protecting instruments, which—unlike, for example, the *United States Bill of Rights*—set out express grounds for judicial limits upon otherwise protected interests.

As the excerpt above indicates, the drive to patriate the Constitution was initially motivated by a desire to reach agreement on a domestic amending formula or formulas that would not require the participation of Westminster. Two agreements on an amending formula nearly achieved success—the 1964 Fulton-Favreau formula and the formula proposed in the 1971 Victoria Charter. Both gave a veto to Quebec, but in the end, Quebec signed neither. The persistent failure to agree on a domestic amending formula was one of several factors that contributed to an emerging spectre of the possible secession of Quebec from the federation.

Jean Leclair, "Constitutional Principles in the Secession Reference"

in Nathalie Des Rosiers, Patrick Macklem & Peter Oliver, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) 1009 (footnotes omitted)

Tensions reached a climax when the *Parti Québécois* (PQ), a political party intent on seeking independence, took power in 1976 and held a referendum on a sovereignty-association proposal on May 20 1980. As the referendum question illustrates, the PQ did not seek straightforward secession, neither did it want to sever all economic ties with Canada:

> The Government of Quebec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Quebec to acquire the exclusive power to make its laws, levy its taxes and establish relations abroad—in other words, sovereignty—and at the same time to maintain with Canada an economic association including a common currency; any change in political status resulting from these negotiations will only be implemented with popular approval through another referendum; on these terms, do you give the Government of Quebec the mandate to negotiate the proposed agreement between Quebec and Canada?

The "No" side won the day with a little less than 60% of the votes cast. Six nights before the fateful day, the federal Prime Minister Pierre Elliot Trudeau, a Quebecer himself, addressed a huge crowd in Montreal (Quebec's metropolis), and pledged that, if the "No" side won, this would be "interpreted [by the central government and the other provinces] as a mandate to change the Constitution, to renew federalism." Referring to his cabinet, he stated: "I can make a most solemn commitment that following a NO vote, we will immediately take action to renew the constitution and we will not stop until we have done that." This pledge would soon come back to haunt him (and the rest of the country).

In the days that followed the referendum, the federal government immediately took action, trying to reach agreement with the provinces on a new constitutional package. These attempts having all met with failure, on October 2 1980, Ottawa announced its decision to proceed unilaterally. The United Kingdom Parliament would be asked to amend the Canadian constitution, even in the face of provincial opposition. The "patriation" proposal would include, among other things, an amending formula similar to the one introduced in the 1971 Victoria Charter, to which would be added the possibility of resorting to a referendum to bypass the need for provincial assent, and a Charter of rights and freedoms whose language rights guarantees clashed with the most controversial provisions of the *Charter of the French Language* adopted by the PQ in 1977 to make French the common public language of the province.

Eight of the ten provinces (including Quebec) objected to the proposal and three of them referred the question of the legality of Ottawa's unilateral action to their appeal courts. The latter's divided opinions paved the way for an appeal to the Supreme Court. In *Re: Resolution to amend the Constitution*, [1981] 1 SCR 753, at 808 (*Patriation Reference*), a majority of the Court recognized "the untrammelled authority at law" of Parliament to adopt a resolution unilaterally requesting amendments to the constitution. However, a differently constituted majority concluded that it would be "unconstitutional in the conventional sense" to do so without "at least [obtaining] a substantial measure of provincial consent" (at 808, 805). A year later, in *Re: Objection by Quebec to a Resolution to amend the Constitution*, [1982] 2 SCR

793, the Court would unanimously conclude that Quebec had no conventional power of veto over constitutional amendments affecting its legislative competence. ...

The Court's decision forced an unwilling Prime Minister back to the table. However, the fragility of the alliance between the eight opposing provinces would soon be demonstrated. Prior to the Court's decision, in April 1981, the "Gang of Eight" had agreed upon a counter-proposal containing an amending formula according to which no provinces had a veto. Nevertheless, it provided that a province wishing to do so could opt out of any amendment transferring jurisdiction from the provinces to the federal parliament. Quebec's Premier, René Lévesque, leader of the now enfeebled PQ government, had agreed to abandon Quebec's veto only on condition that full financial compensation would be guaranteed to provinces opting out. In spite of this agreement, at the end of the hectic three days conference held in Ottawa in the first week of November 1981, in what would become in Quebec's myth-ideology "the night of the long knives," nine provincial premiers finally struck a deal with the federal government that left Quebec on the sidelines. They succeeded in brokering this agreement only by acquiescing to jettison the right to opt out with full compensation. Although René Lévesque and his government bear part of the responsibility for the constitutional isolation of Quebec during this episode, and although it is hard to imagine how a man who had dedicated his entire political life to seeking the independence of Quebec could have agreed to a new federal deal, it remains that the other provinces and the federal government took the (mis)calculated risk of amending the Canadian Constitution, and thus the Canadian State fabric, without the consent of Quebec's political elites.

On the night of the May 14, 1980, the federal prime minister had not specified how and in which direction he intended to steer the promised constitutional changes. Undoubtedly, however, a great number of Quebecers had not expected him to proceed without Quebec's approval. What some experienced as disappointment was felt by others as treason.

This is most unfortunate since most Quebecers did not object so much to the content of the constitutional reform, the *Canadian Charter of Rights and Freedoms* always having been enthusiastically embraced by Quebecers, as with the manner of its adoption. They objected to the fact that the province of Quebec was treated as just any other province. They were also concerned that Canada would from thence on, from a federal society, morph into one essentially made up of equal rights-bearing citizens gradually focussing their primary allegiance on the institutions of the Federal government rather than on their province's local institutions.

Marc E Gold, "The Mask of Objectivity: Politics and Rhetoric in the Supreme Court of Canada"

(1985) 7 SCLR (2d) 462 at 463-66 (footnotes omitted)

No one has explained adequately why the Quebec delegation was excluded from the meeting, although it seems clear why the other provinces were prepared to strike some deal with the federal government. Public opinion was shifting away from the provinces. Canadians supported the idea of patriation and favoured an entrenched Charter of Rights. The provincial governments were afraid to pay the political cost of appearing to act as obstructionists to a plan supported by a majority of their constituents. In any event, the Quebec delegation was kept in the dark about this crucial meeting and, to this day, no provincial official has explained the exclusion of Quebec to the government of Quebec itself. The inference is irresistible: the

provinces were willing to abandon Quebec in the interest of securing a deal, but were embarrassed to confront the government of Quebec with this decision until after it had been reached.

The political consequences to the government of Quebec were considerable. The government had failed to safeguard Quebec's interests in negotiations and was condemned by the opposition Liberals in the National Assembly. Nonetheless, the event could be turned to some political advantage with the Quebec electorate. In its most innocent light, the result might convince the people of Quebec that they could not trust the other provinces (read English Canada) to respect the position of Quebec: only the government of Quebec could be relied upon to defend the interests of the province. More cynically perhaps, the exclusion of Quebec provided the Parti Quebecois government with a powerful new weapon in its drive to secure the independence of Quebec. Having been roundly assailed for having joined the common front and abandoning the claim for a constitutional veto, the Parti Quebecois was given a new lease on life. Whether fueled by a genuine sense of betrayal at the hands of the other provinces, motivated by partisan political considerations or most likely by both, the government of Quebec was not about to let events unravel passively.

The Charter was intended to foster a new sense of Canadian patriotism, as the earlier extract from Peter Russell lays out. But did it achieve this purpose? Scholars, including Russell, doubt it. In the following excerpt, Sujit Choudhry examines the claim that the Charter was only partially successful in building this sense of Canadian patriotism. Among other developments, Choudhry ties the debate over the recognition of Quebec as a nation (or a distinct society) to the inability of the Charter to instigate a sense of national identity.

Sujit Choudhry, "Bills of Rights as Instruments of Nation-Building in Multinational States: The Canadian Charter and Quebec Nationalism"

in J Kelly & C Manfredi, eds, *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (Vancouver: UBC Press, 2009) 233 at 235, 241-47 (footnotes omitted)

[W]hile the *Charter* has been an effective tool for anglophone nation building, it has been unsuccessful in combating Quebec (read francophone) nationalism. Indeed, not only did the *Charter* not offset Quebec's nationalism, it may also have made things worse. This is a cautionary tale to plurinational polities faced with the same challenge as Canada—of building a common political identity against the backdrop of competing nationalisms and attempting to do so through a bill of rights.

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... [T]he *Charter* was also intended to function constitutively as the germ of pan-Canadian constitutional patriotism. As *Federalism for the Future* states, "a constitution is more than a legal document; it is an expression of how the people within a state may achieve their social, economic and cultural aspirations through the exercise and control of political authority."

In a federal state such as Canada, since citizens share these rights irrespective of language or province of residence, a bill of rights serves as a transcendent form of political identification—the spine of common citizenship that unites members of a linguistically diverse and geographically dispersed polity across the country as a

whole. Cairns puts this point well: "[T]he *Charter* fosters a conception of citizenship that defines Canadians as equal bearers of rights independent of provincial location. This legitimizes a citizen [sic] concern for the treatment of fellow Canadians by other than one's own provincial government."

Russell's skepticism of the constitutive effects of a bill of rights—which is shared by Dion—stems from an underlying skepticism regarding the efficacy of symbolic constitutionalism. For both individuals, a constitution can only become a source of political identification and the basis of a national identity because of its concrete effects on public policy. Subsequent experience has proven that Russell was right and wrong. Outside of Quebec, the *Charter* has generated a new pan-Canadian patriotism, likely much more quickly than even the most optimistic predictions suggested. However, within Quebec, the *Charter* has decidedly not had this effect. The *Charter* has not served to bind francophone Quebeckers to the Canadian constitutional order. Indeed, the sharply differentiated effect of the *Charter* on Canadian constitutional culture suggests that it may now be harder, because of the *Charter*, to build a unifying account of the Canadian constitutional order that transcends linguistic and regional divides.

The conflicting reactions to the Meech Lake Accord within and outside Quebec powerfully illustrate these points. Outside of Quebec, the public reaction to Meech Lake was very hostile ... . There were two points of criticism. The first was the process whereby the accord was reached. The proposed constitutional amendments were arrived at as the result of closed-door negotiations between the premiers and the prime minister. The complete package was then presented to the Canadian public as a *fait accompli*, a seamless whole that could not be altered for fear that the whole deal would unravel. As a legal matter, this approach grew out of the relevant procedures for constitutional amendment themselves, which required the consent of the two chambers of federal Parliament and the provincial legislatures.

During the Meech Lake process, citizens outside Quebec rejected this process for constitutional change by rejecting its underlying theory. They asserted themselves, not the governments, as the constituent actors in the constitutional process. ... The *Charter* had transformed Canadians outside Quebec into constitutional actors and the basic agents of constitutional change. As the Charlottetown process made clear, Canadian constitutional culture would not permit constitutional amendments without widespread public consultation.

The transformative effect of the *Charter* on constitutional culture also explains the hostile reaction to perhaps the central provision in the Meech Lake Accord—the distinct society clause. The clause would have mandated that the Constitution be interpreted to recognize "that Quebec constitutes within Canada a distinct society" and would have affirmed "[t]he role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec." ... [T]he precise legal effect of the clause was the subject of widespread contestation. Outside Quebec, the fear was that the clause would provide for the unequal application of the *Charter*[.] ...

Now the question is why the unequal effect of the *Charter* mattered at all. Canadian public policy has long been differentiated on a provincial or regional basis because of vast differences in demography and the structure of the economy. The answer was that for Canadians outside Quebec ... the potential for its unequal application across Canada was an assault on a basic, non-negotiable term of the Canadian social contract and the very identity of the country. ...

However, within Quebec, the view on the distinct society clause was exactly the opposite, rooted in a particular account of the history and origins of Canada. For Quebec, the adoption of federalism and the creation of Quebec was a direct response to the failure of the United Province of Canada, a British colony that resulted from

the merger of the previous colonies of Lower Canada (later Quebec) and Upper Canada (later Ontario), which existed between 1840 and 1867. The history here is complex. In brief, citizens of both Lower and Upper Canada elected equal numbers of representatives to a legislative assembly, although the largely francophone citizens of the former outnumbered the largely anglophone citizens of the latter. The language of government was meant to be English. The goal behind the merger and departure from representation by population was to facilitate the assimilation of francophones ... . As time went on, Upper Canada became more populous and demanded greater representation in the joint legislature, which was resisted by francophones who feared they would be outvoted on matters important to their identity. The result was political paralysis. Federalism was the solution—providing for representation by population at the federal level but also creating a Quebec with jurisdiction over those matters crucial to the survival of a francophone society in that province, such as education through institutions that operated in French.

So, to Quebec, Canada is unintelligible except against the backdrop of the idea that the institutions of federalism are designed to protect Quebec's linguistic distinctiveness. This idea is at the heart of the "two nations" or "dualist" theory of Canada. Yet, the odd thing about the Canadian Constitution is that it lacks express recognition of this fact and treats Quebec on a basis of juridical equality to the other provinces. On the symbolic front, the Constitution is absolutely silent on who Canadians were, or were not, to be. This silence may be nothing more than a function of the peculiar legal character and political function of the *British North America Act, 1867* (*BNA Act*) as a statute of the British Parliament that granted Canada extensive powers of internal self-government but not independence. It may also reflect a lack of agreement on such a shared account at the time Canada came into being. Yet ... whatever the reasons for this silence, the lack of such a statement did not come without its costs.

It was accompanied by a political culture outside of Quebec that refused to acknowledge the French-Canadian understanding of Confederation. ... The distinct society clause therefore mattered a great deal because it was the first time the Constitution would explicitly acknowledge a view of what Canada was for. ... Indeed, by the end of the Meech Lake process, the clause mattered much less for what it did than for what it said. And so the repudiation of the clause on the basis of a theory of Canada that was grounded in the *Charter* set up the *Charter* as an obstacle to, rather than as a central component of, how many Quebecers understood the nature of their relationship with Canada.

Now this is not the only reason that the *Charter* has failed to take in Quebec as the seed of pan-Canadian nationalism. Another strike against the *Charter* was the process whereby it was adopted, over Quebec's insistence that there was a constitutional convention granting it a veto over constitutional change. Patriation in the face of the asserted veto damaged the legitimacy of the 1982 Constitution in the eyes of many Quebecers. The claim of a veto for Quebec again derived from a constitutive account of the Canadian constitutional order, in which Canada was understood as a plurinational federation in which Quebec was a constituent actor. So any constitutional amendments that affected Quebec's ability to safeguard its linguistic identity (including its role in central institutions) would require its consent. ...

The second reason is language. The stated aim of the *Charter* project was to serve as a common basis of citizenship that transcended the linguistic divide. The principal mechanism for doing so was minority language education rights provisions. These provisions ... communicated a conception about the place of language in Canada, with two components. First, they were designed to inculcate a self-understanding in francophones that Canada as a whole was their home, not simply Quebec, and a

corresponding set of understandings for anglophones in Quebec. Second, by detaching linguistic identity from a province of residence, by opting for personality over territoriality as the basis of language of education, and by granting a right for linguistic minorities to choose their linguistic identity, the *Charter* adopted a stance of neutrality on matters of linguistic choice.

This position challenged the very legitimacy of linguistic nation building by Quebec. Moreover, this constitutional choice was likely to be non-neutral in its effect on Quebec's ability to protect and promote the French language. Although the minority language rights provisions apply symmetrically to francophone minorities outside Quebec and the anglophone minority in Quebec, they are rather unequal in their impact ... [because] the economic pressures for francophones to assimilate are great. What this means is that for Quebec to continue as a French-speaking community in the modern world, it must adopt linguistic policies that in other provinces are unnecessary. The symmetrical character of the minority language education rights provisions conceals a lack of symmetry in fact. This lack of symmetry is symbolically important because it marks a repudiation of Quebec's understanding of what Canada is for.

Conclusion: Bills of Rights as Nation-Building Instruments in Plurinational Places

Had the *Charter* been effective at combating Quebec nationalism and serving as the glue of a pan-Canadian national identity, the last twenty-five years of constitutional politics would not have happened. There would have been no Meech Lake Accord, no Charlottetown Accord, and no referendum in 1995 in which the country came close to break-up because of the threat of a unilateral declaration of independence in the event of a yes vote. ...

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It is very difficult for bills of rights on their own to serve a constituting role in defining a new political identity. Contrary to those who argue for the possibility of a pure "constitutional patriotism" based on the commitment to universalistic principles of political morality, ... [t]he Canadian experience tells us that in plurinational places, ... [t]he task is not simply to situate a bill of rights in a contingent historical and political context. The task is to do so in a context in which the existence of competing nationalisms makes the dominant question of constitutional politics the conflict between competing national narratives. If ... [a bill of rights is meant to stand apart from and transcend] these competing narratives, a plurinational context is a particularly difficult environment in which to do so. Indeed, there is the danger that rather than transcending those national narratives, a bill of rights will be drawn back into it. This is what has happened in Canada.

In 1981, then Prime Minister Trudeau convened the Special Joint Committee on the Constitution. During the hearings, which were televised for the first time, many provisions were debated. The following extract from Lorraine Weinrib explains how these hearings had an impact on the drafting of the institutional provisions of the Charter, including ss 1 and 33.

Lorraine E Weinrib, "Canada's Charter of Rights: Paradigm Lost?"

(2002) 6 Rev Const Stud 119 at 120, 132-40, 144-45, 147-48
(footnotes omitted)

With the adoption of the *Canadian Charter of Rights and Freedoms, 1982*, Canada joined the family of nations operating under a postwar regime of rights-protection. This step marked the culmination of decades of discussion about the nature of rights and, as the debate matured, the institutional structure necessary to protect rights effectively in Canada. The challenge was to transform Canada's federal, parliamentary democracy into a modern, rights-protecting polity. Unlike other states making this transition, Canada did not create a special constitutional court or reconstruct its political institutions. It vested the new judicial review function in the existing courts, and, in addition, marked out an innovative constitutional role for the established legislatures.

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Proposals to add a system of rights protection, to stand supreme over the routine exercise of public authority, precipitated discussions as to the comparative competence of courts and legislatures to serve the desired end with extensive reference to the experience of other countries as well as to Canada's international obligations.

In the final stages of the debate, the draft text delineating these functions attracted a remarkable degree of attention precipitating what was, in effect, an intensive national seminar on the substantive content and institutional structure of the modern constitutional state. Politicians wary of any reduction in their powers found themselves pitted against individuals and groups intent on securing precisely such restrictions. The question of institutional legitimacy figured so prominently that the final text of the *Charter* includes a complex array of institutional directives. These directives mark one of the distinctive features of the *Charter*. They set it apart from older texts such as the *United States Bill of Rights*, which does not refer to judicial review, as well as from modern rights-protecting instruments, which do formally establish judicial review but set down less institutional detail. Other countries, deliberating later on the same questions in their own national contexts, have considered the Canadian *Charter* as a distinctive model. ...

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The decades-long debate produced a fascinating series of proposals as to institutional role, some expansive and others restrictive. These rejected alternatives shed light on the final design. They demonstrate that in following a postwar trend, the *Charter* project did not ignore or dismiss concerns raised as to the legitimacy of judicial review of legislation in a democracy. On the contrary, those involved in the *Charter*'s genesis took that controversy very seriously and responded to it. ...

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The most important elements of the *Charter*'s institutional structure are to be found in two companion clauses: section 1, the guarantee and limitation clause, and section 33, the notwithstanding or override clause. ...

The historical material illuminates the ideas and models that informed the *Charter*'s distinctive institutional features. First, the limitation formula, following the postwar model of rights-protecting instruments, requires the state to formulate, as law, any exercise of power that limits guaranteed rights. The second is that the remedial aspirations for Canada's *Charter* adopt the postwar model of rights-protection, in which the normativity of the guaranteed rights offers only one level of constitutional guarantee. The other level is provided by the strict terms of the

> limitation formula, which carry the normative content of the guarantees into the strictures for permissible limitation. [The limitation formula will be examined in Chapter 17, The Framework of the Charter.] The third is that the legislative override or notwithstanding clause, which applies only to certain rights, ... gives courts the last word [for a maximum period of five years] unless the constitutional context is transformed or the extraordinary consensus necessary for constitutional amendment is satisfied. [The notwithstanding clause will also be addressed in Chapter 17.]

NOTE: THE CONSTITUTION EXPRESS

The Special Joint Committee also heard from several groups, including Indigenous peoples. As Louise Mandell and Leslie Hall Pinder recall:

> Before Christmas 1980, hundreds of Indigenous peoples scraped together funds and boarded a train in Vancouver, which they called the Constitution Express. The Express rolled across the country, picking up supporters and support along the way, making headlines day after day. When the train pulled into the Ottawa station, Trudeau announced that the Special Joint Committee on the Constitution, which had previously excluded Indigenous participation, would extend its timetable to February 1981 to hear from Indigenous representatives.

See Louise Mandell & Leslie Hall Pinder, "Tracking Justice: The Constitution Express to s 35 and Beyond" in L Harder & S Patten, eds, *Patriation and Its Consequences* (Vancouver: UBC Press, 2015) 180 at 189.

In her work, Kiera Ladner shows that Indigenous leaders "found creative ways to force the players to acknowledge their existence, address their issues, and offer them a seat at future constitutional tables": see "An Indigenous Constitutional Paradox: Both Monumental Achievement and Monumental Defeat" in L Harder & S Patten, eds, *Patriation and Its Consequences* (Vancouver: UBC Press, 2015) 267 at 268. Ladner argues that the "attainment of constitutional change by Indigenous peoples was a monumental achievement given the assimilationist (even racist) context or paradigm within which such change was achieved" (at 268). But it was also viewed as "a monumental defeat." As Ladner writes, "Despite all of the efforts to place their issues on the constitutional table and protect Indigenous rights (ultimately through the inclusion of sections 25 and 35 of the Constitution Act 1982), most Aboriginal organizations viewed the amended constitution as a major defeat" (at 270).

For an overview of the debates held during the Joint Committee, see also Adam Dodek, *The Charter Debates: The Special Joint Committee on the Constitution, 1980-81, and the Making of the Canadian Charter of Rights and Freedoms* (Toronto: University of Toronto Press, 2018).

III. THE MERITS OF ENTRENCHMENT AND THE LEGITIMACY OF JUDICIAL REVIEW

As Lorraine Weinrib wrote in "Canada's Charter of Rights: Paradigm Lost?" (above at 120):

> [T]he *Charter* effected a revolutionary transformation of the Canadian polity from legislative supremacy to constitutional supremacy. The transformation changed the role of every public institution. The Supreme Court became the major agent of this transformation, mandated to bring the entire legal system into conformity with a complex new structure of rights-protection.

This transformation has not been without controversy. The following readings introduce you to the intense and prolific debate on the legitimacy of rights-based judicial review within Canada's democratic system of government. Some commentators reject the Charter altogether because it transforms the democratic structure of Canadian politics. Others praise it for the same reason.

These readings build on the introduction to judicial review and its legitimacy found in Chapter 2, Judicial Review and Constitutional Interpretation. Note the ways in which debates about the wisdom of entrenchment have turned into debates about the appropriate methodology for judicial interpretation of the Charter. Note as well the very different political orientations of the Charter critics—both the right and the left have mounted strong critiques of the Charter.

William A Bogart, Courts and Country: The Limits of Litigation and the Social and Political Life of Canada

(Toronto: Oxford University Press, 1994) at 256-70 (footnotes omitted)

In bluntest terms, two very different models of democracy are at stake. The first recognizes the power of the ballot that is curbed by independent and tenured judges who ensure that rationality and principle are never ejected by impetuous legislatures, rigid bureaucracies, and a dulled citizenry. In this model, courts will shelter the disadvantaged, who will harness that rationality and principle. The second model places its confidence in those who can claim the power of the ballot. Realistic about democracy's foibles, it is even more reserved about using judicial intervention to solve them. In this model, judges' independence and tenure make them unaccountable, élitist, and, at present in any event, unrepresentative. The apprehension is that far from invigorating democracy, judicial review will sap it with regressive decisions, progressive decisions that nonetheless blunt popular responses to societal problems, and barriers to access because of the costs of litigation. In this second model, those who seek social reform may have the most to lose in the courts. ...

The Case for the Charter

A fundamental argument favouring an entrenched bill of rights is that such a document allows individuals, particularly those with minority interests, to seek vindication in an open, public, and responsive process as opposed to legislators who may be unresponsive and, in any event, are more attentive to majority concerns ... . Coupled with this argument is a claim that the coming of the Charter signals the full maturity of the Canadian legal system. This development, the end goal of which is an entrenched Charter, explains the Canadian courts' spotty record with the *Bill of Rights*. ...

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Other more cautious bases for accepting the Charter stipulate certain conditions for its implementation. One condition rests on it being construed only to protect democracy's functioning and not to review substantive decisions made by elected officials. Fundamental to this view is the assertion that the Charter does not oblige a court "to test the substantive outcomes of the political process against some theory of the right or the good, but, instead, its focus is to assure the integrity of politics by buttressing the opportunities for public debate and collective deliberation." ...

Another condition to the acceptance and therefore justification of judicial review under the Charter is the existence and use of s. 33, which allows judicial

decisions under most of the provisions of the Charter to be overridden by the competent legislative body. ...

The Case Against the Charter

In contrast, those who are opposed or at least indifferent to the Charter point out that the Charter and its accompanying judicial role did not come about because of the documentation of widespread abuse, nor did it arise from popular outcry. It was born as a device to shore up the centralizing tendencies that Pierre Trudeau believed were vital to enhance Quebec's stake in the nation and to check the forces of separatism led by his rival, René Lévesque. ...

Those who are opposed are hardly conspiratorial since many of them can agree about little else except their antagonism towards the document. The politics of many of them are left. For some of those so inclined, the vehemence against the judges arises because their role subverts any possibility of true democracy, which "means the greatest possible engagement by people in the greatest possible range of communal tasks and public action." In this conception, the Charter is a "reflection of the inherent contradiction of liberal ideology. ..."

What is the basis for this leeriness, which ranges from scepticism to unbridled antagonism? Though presented in different forms, the arguments can be summarized in three points. The first concerns substantive outcomes and claims that the elected members of government and their agencies have been the more effective vehicle for improving the lives of most Canadians in many circumstances. The second relates to process and asserts that the best chance for a vigorous, responsive, and respected democracy comes from elected representatives. The third is about the costs of access to the courts which privilege the powerful and organized and thus allow them disproportionate use of judicial review, either to dismantle legislation and programs or to shield themselves from attack by government or other groups. These three points are comparative. This is not to deny that courts have sometimes acted in admirable ways or that there have been some progressive—even visionary—judges: on the Supreme Court alone names such as Rand, Laskin, Dickson, and Wilson easily come to mind. Nor is it to claim that legislatures and their agents have always reached just outcomes by adequate processes. What is contended is that relatively, the chance for greatest justice will come from legislatures. ...

The first argument claims that assistance of the disadvantaged and the poor, as well as ordinary citizens, has more often happened because of legislative action. Whether in health, occupational safety, workers' rights, housing, peace and order in the streets, or other aspects of life, the advancement has come because of the popular support of political will. In this view, government, while open to searing criticisms about waste and inefficiency, has also been the agent of civilizing and progressive change. It has mediated between those who wish *laissez-faire* and the enrichment of the few (regardless of the consequences) and those who insist upon a basic claim to entitlement for all. Conversely, this argument contends that the historical record reveals that courts, rather than achieving conditions to nurture and protect ordinary people in their everyday lives, have instead been uncaring or actively hostile. The explanation for this lies in an embrace of liberal ideology and an active suspicion of the political process as intrusion upon the purity of the judge-made common law that did not develop to meet these ends. State regulation and programs, designed to be responsive to the concerns of such people, have often been cut back under the guise of interpretation of statutes when in reality it was to allow the ideas of the judiciary to hold sway. ...

The second argument urges that for democracy not to be sapped but invigorated, basic decisions affecting the people must be made by elected representatives. This point does not suggest that such a process has not led to mistakes, sometimes horrible ones, such as our failure to save as many Jews as we could have in the Second World War. The tragedies that beset our [Indigenous peoples] is surely another. Nor does it suggest that there are not major impediments to popular participation. What it argues is that concerted efforts should be exerted to eliminate them and that we should not rely upon a small unelected corps. Unlike the first argument, the concern here is not so much that judges will impose their views on a democratic majority. Rather, the worry is that critical, social, and political questions will be translated into legal issues that will be left to judges and lawyers instead of the citizenry working out acceptable and supportable solutions.

In this view, even a cycle of progressive and enlightened decisions entails costs, although the results may be desirable. There may be benefits, but they come from a small group of judges and lawyers who are bound together by a limited set of ideas and attitudes and who impose conclusions rather than persuade and build consensus among the electorate. The danger is that the basis for having citizens make their own decisions and face future issues will be eroded, and that the resentment felt by having solutions handed down will make future progress even more difficult and may even contribute to regressive backlash. ...

The third point focuses upon the costs of any court response. The contention is that whatever meaning is possible in interpreting the Charter, it will inevitably come to be slanted towards the rich and the organized. Obviously, access to the political and bureaucratic processes is imperfect, but it is not as expensive and complicated and is available without necessarily being mediated through the language of the law, a discourse largely available only to lawyers.

Andrew Petter, "Immaculate Deception: The Charter's Hidden Agenda"

(1987) 45 Advocate 857 at 857-63 (footnotes omitted)

My purpose in this short essay is to put forward an argument that does not enjoy a great deal of currency on the "Charter circuit" these days. It is an argument that most lawyers do not wish to hear. And some may regard as downright impolite.

The argument is that, while sold to the public as part of a "people's package," the Canadian *Charter of Rights and Freedoms* is a regressive instrument more likely to undermine than to advance the interests of socially and economically disadvantaged Canadians. The reasons for this lie partly in the nature of the rights themselves and partly in the nature of the judicial system which is charged with their interpretation and enforcement.

I. The Nature of Charter Rights

The first thing that must be recognized about the Charter is that it is, at root, a 19th century liberal document set loose on a 20th century welfare state. The rights in the Charter are founded upon the belief that the main enemies of freedom are not disparities in wealth nor concentrations of private power, but the state. Thus one finds in the Charter little reference to positive economic or social entitlements, such as rights to employment, shelter or social services. Charter rights are predominantly negative in nature, aimed at protecting individuals from state interference or control with respect to this matter or that.

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The negative nature of the rights embodied within the Charter reflects what John Hart Ely refers to as a "systematic bias" in favour of the interests of the "upper middle-class, professional class from which most lawyers and judges, and for that matter most moral philosophers, are drawn." These people see their social and economic status most threatened by the regulatory and redistributive powers of the modern state. It is not surprising therefore that they regard as "fundamental" those values that afford them protection from such state powers. But, as Ely observes, "watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food or housing: those are important sure, but they aren't *fundamental*."

This "systematic bias" is reinforced by a highly selective view of what constitutes the state. The presumption underlying the Charter is that existing distributions of wealth and power are products of private initiative as opposed to state action. Never mind that these distributions depend for their existence and legitimacy upon a panoply of state sponsored laws and institutions. They are nevertheless viewed as outside politics and beyond the scope of Charter scrutiny. Thus far from being subject to Charter challenge, such distributions comprise the "natural" foundation upon which Charter rights are conferred and against which the constitutionality of "state action" is to be judged.

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The negative nature of Charter rights combined with this selective view of state action remove from Charter scrutiny the major source of inequality in our society—the unequal distribution of property entitlements among private parties. At the same time, they direct the restraining force of the Charter against the arm of the state best equipped to redress fundamental economic inequalities—the democratic arm, consisting of the legislature and the executive.

The irony of this will not be lost on those with a sense of history. The victories that have been won in this century on behalf of workers, the unemployed, women and other socially and economically disadvantaged Canadians are victories that have been achieved, for the most part, in the democratic arena. They are victories that have been won by harnessing the powers of the modern state to redistribute wealth and to place limits on the exercise of "private" economic power.

Thus workers have been granted the collective bargaining rights they now enjoy by virtue of legislation overriding common law rules that protected employers' liberty and privity of contract and that treated trade unions as illegal conspiracies. The economic benefits guaranteed to the unemployed flow from redistributive policies of modern government. The lot of women has been advanced, to the degree that it has, by means of legislative intervention in the form of labour standards legislation, minimum wage laws and human rights codes.

This is not to imply that these responses have been comprehensive or adequate. In my view they have not. The point is simply that where there has been progress, with few exceptions it has come in the democratic rather than the judicial arena. Such progress has been achieved through political action aimed at displacing the common law vision of unbridled individual autonomy with a countervision of collective social responsibility. Put simply, the negative conception of liberty imposed by the courts to protect the interests of the "haves" in society has been partially supplanted by a positive conception of liberty imposed by legislatures to further the interests of the "have-nots."

Yet the Charter now threatens to slow, or even reverse, this process. The rights and freedoms in the Charter are predicated on the same hostility to legislative action, and the same reverence for individual autonomy, that animated the common law. I am not suggesting that the present legislative regime of social and economic

regulation will suddenly be eliminated under the Charter. The political costs of doing so are, thankfully, too great for the courts to contemplate. What the Charter is more likely to do is to enable the courts to chisel away at certain aspects of the regime, and to erect barriers to future innovation.

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This does not mean that there will be no "progressive" Charter decisions. Undoubtedly there will be some, although the bulk of such decisions will involve the courts in upholding legislation—in other words doing nothing. Additionally, there will be a few decisions in which the Charter is used to enhance legislative protections, for example by striking down an obsolete or inappropriate exemption in a regulatory regime. Such cases, however, will be the exception rather than the rule. Indeed, the very notion of looking to the courts to improve legislation is somewhat perverse. Most legislation, after all, was enacted to counteract the laissez-faire individualism of court-made, common law. Courts, even today, remain suspicious of, and at worst hostile to, the "eccentric principles of socialist philanthropy" upon which the welfare state is founded. Thus to look at the courts to repair flaws in the existing regulatory regime is a bit like taking one's car to be fixed by an auto wrecker.

In addition to eroding existing and stymieing future social and economic regulation, the Charter will serve to weaken the impetus for further legislative reform by diverting resources from the political to the judicial arena. Women's groups, for example, are raising millions of dollars to engage in Charter litigation, a considerable portion of which is being used to defend from Charter challenge legislation that is beneficial to women. The money, time and energy devoted by such groups to the Charter are money, time and energy that will be taken away from lobbying and other forms of political action.

II. The Nature of the Judicial System

The regressive impact of the Charter is exacerbated by the nature of the judicial system that is charged with its interpretation and enforcement. There are two features of this system that make it a particularly inappropriate forum for advancing the interests of the disadvantaged. The first is the cost of gaining access to the system; the second is the composition of the judiciary itself.

[T]he process of vindicating one's rights under the Charter is an extremely expensive one. ...

[Such costs] represent a major obstacle to disadvantaged Canadians who wish to pursue their Charter rights in court. ... [B]eyond the confines of criminal law, the effect of having chosen the courts as the adjudicative forum for resolving Charter claims is to favour those who command substantial economic resources.

The institutional barrier created by money not only denies the disadvantaged access to the courts; in doing so, it serves to shape the rights themselves. ...

If the issues raised in non-criminal Charter cases tend to represent the interests of those with economic resources in society, the interpretation of rights will necessarily respond to and, over time, will reflect those interests. ...

Consider ... the Charter right to freedom of expression. The opportunity to raise a claim concerning this right will be restricted to those who can command sufficient resources to bring an action in court and who consider it economically or politically worthwhile to do so. Litigation concerning this right is thus more likely to be brought by economically powerful interests in society, such as business interests, for whom the costs of litigation are small in relation to the potential economic gains. But if litigation relating to freedom of expression disproportionately represents the interests

of business, the jurisprudence surrounding freedom of expression will come to reflect business concerns.

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There might be less cause for concern on this score if the judiciary had an equal understanding of, and empathy for, the problems of all segments of Canadian society. Unfortunately, there is no reason to suppose that this is the case. There are few public institutions in this country whose composition more poorly reflects, and whose members have less direct exposure to, the interests of the economically and socially disadvantaged. Canadian judges are "exclusively recruited from the small class of successful, middle-aged lawyers" and, if not of wealthy origin, most became wealthy or at least achieved a degree of affluence before accepting their judicial appointments. The majority made their name in private practice where they held themselves out as business people and shared business concerns. Furthermore, unless they practiced criminal or family law, much of their professional time was spent catering to the needs of the business community. In short, there is nothing about the Canadian judiciary to suggest that they possess the experience, the training or the disposition to comprehend the social impact of claims made to them under the Charter, let alone to resolve those claims in ways that promote, or even protect, the interests of lower income Canadians.

At a more fundamental level, the attitudes of lawyers and of judges tend to reflect the values of the legal system in which they were schooled and to which they owe their livelihood.

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From this perspective, one can see that property rights—the body of "natural" rules governing the ownership and exchange of property—is the core political value underlying the common law.

This does not imply that the desire to protect property is the sole force driving Canadian judiciary. What it does imply, however, is that deep in the judicial ethos there exists a special concern and reverence for property rights—a concern and reverence that over the course of time will guide and constrain judicial decision-making in Charter cases.

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The assumption of lawyers that property rights flow from a "natural" system of private ordering is also significant. This assumption reinforces the dichotomy between private and state action that underlies the Charter, thus making it more difficult for individuals to mobilize the Charter against underlying social disparities. Judges conceive their role under the Charter not as interest balancing, which they view as the preserve of politics, but rather as one of policing the boundary between the "natural" zone of individual autonomy (represented by the market) and the "unnatural" activities of the state (represented by the regulatory and redistributive instruments of modern governments). Thus the bias that judges bring to their task augments the bias of the Charter itself: "liberty" is represented by those things that expand the zone of individual autonomy by limiting the ability of the state to "interfere" in the lives of individual Canadians. The task of the judge is to interpret the Charter generously so as to "secur[e] for individuals the full benefit of the Charter's protection." Hence narrow Charter interpretations are "bad" while expansive interpretations are "good."

What is conveniently forgotten in all of this is that the liberty of many Canadians is better protected by the regulatory and redistributive policies of the state than by the market (assuming "liberty" includes the liberty to be clothed, housed and fed, and the liberty not to be preyed upon by those who command social and economic power). [Emphasis in original.]

As you read the Supreme Court of Canada's Charter decisions in subsequent chapters, consider whether the left's critique of the Charter as articulated by Petter is justified. To what extent has the Court attempted to respond to this critique?

Further readings providing a critique from the left include Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev ed (Toronto: Thompson, 1994); Allan C Hutchinson, *Waiting for Coraf: A Critique of Law and Rights* (Toronto: University of Toronto Press, 1995); Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

In the early years of the Charter, the main criticisms of entrenchment and judicial review came from the political left (as reflected in the piece by Petter, above), raising concerns that the Supreme Court of Canada would use the Charter to restrain socially desirable regulation and economic redistribution. Criticism about illegitimate "judicial activism" has also come from the political right, however, with contentions that the Court is acting undemocratically by forcing unwilling majorities to accept the rights of unpopular minorities: see Ted Morton & Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough, Ont: Broadview Press, 2000), discussed further below, for an example of this wave of criticism of judicial activism. In 1997, Peter Hogg and Allison Bushell, responding to these increasing charges of "judicial activism," added a new strand to the debates about the legitimacy of judicial review—the idea of judicial review under the Charter as a form of "dialogue" between courts and legislatures.

Peter W Hogg & Allison A Bushell, "The Charter Dialogue Between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)"

(1997) 35 Osgoode Hall LJ 75 at 79-91 and 104-5 (footnotes omitted)

A. The Concept of Dialogue

The uninitiated might be excused for believing that, given the deluge of writing on the topic, everything useful that could possibly be said about the legitimacy of judicial review has now been said. However, one intriguing idea that has been raised in the literature seems to have been left largely unexplored. That is the notion that judicial review is part of a "dialogue" between judges and legislatures.

At first blush the word "dialogue" may not seem particularly apt to describe the relationship between the Supreme Court of Canada and the legislative bodies. After all, when the Court says what the Constitution requires, legislative bodies have to obey. Is it possible to have a dialogue between two institutions when one is so clearly subordinate to the other? Does dialogue not require a relationship between equals?

The answer, we suggest, is this. Where a judicial decision is open to legislative reversal, modification, or avoidance, then it is meaningful to regard the relationship between the Court and the competent legislative body as a dialogue. In that case, the judicial decision causes a public debate in which *Charter* values play a more prominent role than they would if there had been no judicial decision. The legislative body is in a position to devise a response that is properly respectful of the *Charter* values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded. Examples of this will be given later in this article.

B. How Dialogue Works

Where a judicial decision striking down a law on *Charter* grounds can be reversed, modified, or avoided by a new law, any concern about the legitimacy of judicial review is greatly diminished. To be sure, the Court may have forced a topic onto the legislative agenda that the legislative body would have preferred not to have to deal with. And, of course, the precise terms of any new law would have been powerfully influenced by the Court's decision. The legislative body would have been forced to give greater weight to the *Charter* values identified by the Court in devising the means of carrying out the objectives, or the legislative body might have been forced to modify its objectives to some extent to accommodate the Court's concerns. These are constraints on the democratic process, no doubt, but the final decision is the democratic one.

The dialogue that culminates in a democratic decision can only take place if the judicial decision to strike down a law can be reversed, modified, or avoided by the ordinary legislative process. Later in this article we will show that this is the normal situation. There is usually an alternative law that is available to the legislative body and that enables the legislative purpose to be substantially carried out, albeit by somewhat different means. Moreover, when the Court strikes down a law, it frequently offers a suggestion as to how the law could be modified to solve the constitutional problems. The legislative body often follows that suggestion, or devises a different law that also skirts the constitutional barriers. Indeed, our research, which surveyed sixty-five cases where legislation was invalidated for a breach of the *Charter*, found that in forty-four cases (two-thirds), the competent legislative body amended the impugned law. In most cases, relatively minor amendments were all that was required in order to respect the *Charter*, without compromising the objective of the original legislation.

Sometimes an invalid law is more restrictive of individual liberty than it needs to be to accomplish its purpose, and what is required is a narrower law. Sometimes a broader law is needed, because an invalid law confers a benefit, but excludes people who have a constitutional equality right to be included. Sometimes what is needed is a fairer procedure. But it is rare indeed that the constitutional defect cannot be remedied. Hence, as the subtitle of this article suggests, "perhaps the *Charter of Rights* isn't such a bad thing after all." The *Charter* can act as a catalyst for a two-way exchange between judiciary and legislature on the topic of human rights and freedoms, but it rarely raises an absolute barrier to the wishes of the democratic institutions.

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A. The Four Features [of the Charter] That Facilitate Dialogue

Why is it usually possible for a legislature to overcome a judicial decision striking down a law for breach of the *Charter*? The answer lies in four features of the *Charter*: (1) section 33, which is the power of legislative override; (2) section 1, which allows for "reasonable limits" on guaranteed *Charter* rights; (3) the "qualified rights," in sections 7, 8, 9 and 12, which allow for action that satisfies standards of fairness and reasonableness; and (4) the guarantee of equality rights under section 15(1), which can be satisfied through a variety of remedial measures. Each of these features usually offers the competent legislative body room to advance its objectives, while at the same time respecting the requirements of the *Charter* as articulated by the courts.

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Section 33 of the *Charter* is commonly referred to as the power of legislative override. Under section 33, Parliament or a legislature need only insert an express

notwithstanding clause into a statute and this will liberate the statute from the provisions of section 2 and sections 7–15 of the *Charter*. The legislative override is the most obvious and direct way of overcoming a judicial decision striking down a law for an infringement of *Charter* rights. Section 33 allows the competent legislative body to re-enact the original law without interference from the courts.

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When a law that impairs a *Charter* right fails to satisfy the least restrictive means standard of section 1 justification, the law is, of course, struck down. But the reviewing court will explain why the section 1 standard was not met, which will involve explaining the less restrictive alternative law that *would* have satisfied the section 1 standard. That alternative law is available to the enacting body and will generally be upheld. Even if the court has a weak grasp of the practicalities of the particular field of regulation, so that the court's alternative is not really workable, it will usually be possible for the policymakers to devise a less restrictive alternative that is practicable. With appropriate recitals in the legislation, and with appropriate evidence available if necessary to support the legislative choice, one can usually be confident that a carefully drafted "second attempt" will be upheld against any future *Charter* challenges.

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Dialogue seems an apt description of the relationship between courts and legislative bodies [in these cases]. Certainly, it is hard to claim that an unelected court is thwarting the wishes of the people. In each case, the democratic process has been influenced by the reviewing court, but it has not been stultified.

[Hogg and Bushell do recognize that there are certain circumstances in which there are "barriers" to dialogue and in which courts will have the last word. These include situations where, because the issue is so controversial, political forces make it impossible for the legislature to fashion a response to the Court's Charter decision. An example they provide of the latter is the situation that arose after the Supreme Court of Canada's decision in *R v Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 90, excerpted in Chapter 22, The Right to Life, Liberty, and Security of the Person, which struck down the restrictions on abortion in the *Criminal Code*. Although the Court's decision left open the possibility that a less restrictive abortion law could be upheld, the divisiveness of the abortion issue precluded the formation of any democratic consensus, and no new legislation was enacted.

Hogg and Bushell then go on to discuss, in greater detail, their research in which they looked at the sequels to all cases (65 in number) in which laws had been struck down by the Supreme Court of Canada for violations of the Charter. They found that legislative action followed in the vast majority of cases, and that the typical outcome was new legislation that accomplished the same legislative objective, but which was more protective of rights. In two cases, the Court's ruling was effectively reversed by the legislature: once by invoking s 1, and once by invoking s 33.]

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D. Dialogue May Occur Even When Laws Are Upheld

This article focussed primarily on the legislative changes that have followed decisions striking down laws for a breach of the *Charter*. However, it should be noted that judicial decisions can occasionally have an impact on legislation even when the Court does not actually strike down any law.

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... [I]t is a mistake to view the *Charter* as giving non-elected judges a veto over the democratic will of competent legislative bodies. Canada's legislators are not indifferent to the equality and civil liberties concerns which are raised in *Charter* cases,

and do not always wait for a court to "force" them to amend their laws before they are willing to consider fairer, less restrictive, or more inclusive laws. The influence of the *Charter* extends much further than the boundaries of what judges define as compulsory. *Charter* dialogue may continue outside the courts even when the courts hold that there is no *Charter* issue to talk about.

VI. Conclusion

Our conclusion is that the critique of the *Charter* based on democratic legitimacy cannot be sustained. To be sure, the Supreme Court of Canada is a non-elected, unaccountable body of middle-aged lawyers. To be sure, it does from time to time strike down statutes enacted by the elected, accountable, representative legislative bodies. But, the decisions of the Court almost always leave room for a legislative response, and they usually get a legislative response. In the end, if the democratic will is there, the legislative objective will still be able to be accomplished, albeit with some new safeguards to protect individual rights and liberty. Judicial review is not "a veto over the politics of the nation," but rather the beginning of a dialogue as to how best to reconcile the individualistic values of the *Charter* with the accomplishment of social and economic policies for the benefit of the community as a whole.

In 2007, Hogg, Thornton (née Bushell), and Wade K Wright wrote a follow-up to the 1997 study above. The authors noted that since the original 1997 study, 14 of 23 cases in which courts had invalidated legislation for being constitutionally impermissible elicited some response from the competent legislative body. While the numbers were not as overwhelming as those reported in 1997, they provided evidence that Charter dialogue still factored prominently in the development of Canadian legislation: see Peter W Hogg, Allison AB Thornton & Wade K Wright, "Charter Dialogue Revisited: Or 'Much Ado About Metaphors'" (2007) 45 Osgoode Hall LJ 1, together in that same issue of the journal (devoted to the theme of "Charter Dialogue: Ten Years Later") with commentaries by other scholars and a reply; see also Rosalind Dixon, "The Supreme Court of Canada, Charter Dialogue and Deference" (2007) 47 Osgoode Hall LJ 235.

The concept of judicial review under the Charter as part of a democratic dialogue between courts and legislatures is further explored in Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue*, rev ed (Toronto: Irwin Law, 2016). Roach argues that the American debate about judicial activism has been inappropriately imported into Canada, without a recognition of the fundamental structural differences between the Charter (and other modern bills of rights) and the American *Bill of Rights*. In Canada, he argues, because of the presence of ss 1 and 33, which explicitly allow governments to limit and even override rights, judges do not have the last word on controversial issues of social policy. In Roach's view, the Charter has created "a fertile and democratic middle ground between the extremes of legislative and judicial supremacy." He writes (at 332):

> A constructive and democratic dialogue between courts and legislatures under a modern bill of rights such as the *Charter* can improve the performance of both institutions. The independent judiciary can be robust and fearless in its protection of rights and freedoms, knowing that it need not have the last word. The legislature will be encouraged to consider whether it can pursue its objectives in a manner more respectful of rights and to establish rules in legislation to authorize and justify the conduct of the police and other state officials. ... The democratic dialogue between courts and legislatures under a modern bill of rights such as the *Charter* can avoid the monologues and unchecked power that may be produced by either unfettered legislative supremacy or unfettered judicial supremacy. It is especially necessary to diffuse

power in countries where the parliamentary system of government, combined with tight party discipline, gives governments more or less absolute power between elections. Strong courts are needed to balance the power of strong legislatures.

He worries, however, about the negative impact that allegations of excessive "judicial activism" may have on the important role courts must play in this "dialogue" (at 332-33):

> The greatest danger in the dialogue between courts and legislatures is not excessive judicial activism, because legislatures can and will correct judicial overreaching on behalf of minorities and the unpopular. The result will be a self-critical and democratic dialogue, even if judicial decisions do not prevail. If, however, the Court is too weak in protecting the rights of minorities and the unpopular, it is less likely that elected governments will do more. The result can be a complacent and majoritarian monologue that is less truly democratic. Excessive judicial deference will allow legislatures and officials to act without being questioned by the Court about the effects of their actions on the most unpopular among us. The sense that courts will not challenge questionable laws may inhibit their reform, especially if those adversely affected by the law have little political power. The greatest danger of the judicial activism debate is that it may produce excessive judicial deference. If this happens—and there are signs that it may be happening in Canada, and that misperceptions about the Canadian experience have dampened enthusiasm for judicial review in other places—then the democratic and dialogue potential of the *Charter* will be squandered by the unnecessary importation of an American-style judicial activism debate based on the false dichotomy of judicial supremacy or legislative supremacy. This failure would be a tragedy not only for Canada but for other countries as well. It might mean that we will all continue to spin our wheels in the two-century American debate about judicial activism, one that ignores the potential under modern bills of rights with parliamentary forms of government to have the benefits and the responsibility of both judicial activism and legislative activism.
>
> The answer to unacceptable judicial activism under a modern bill of rights is legislative activism and the assertion of democratic responsibility for limiting or overriding the Court's decisions. Citizens can enjoy the benefits of judicial activism without the costs of judicial supremacy.

In the *Vriend* decision, excerpted immediately below, the Supreme Court of Canada directly addressed the appropriate relationship between courts and legislatures.

Vriend v Alberta

[1998] 1 SCR 493, 1998 CanLII 816

IACOBUCCI and CORY JJ (Lamer CJ and Gonthier, McLachlin, and Bastarache JJ concurring):

[129] Having found the exclusion of sexual orientation from the *IRPA* to be an unjustifiable violation of the appellants' equality rights, I now turn to the question of remedy under s. 52 of the *Constitution Act, 1982*. Before discussing the jurisprudence on remedies, I believe it might be helpful to pause to reflect more broadly on the general issue of the relationship between legislatures and the courts in the age of the *Charter*.

[130] Much was made in argument before us about the inadvisability of the Court interfering with or otherwise meddling in what is regarded as the proper role of the legislature, which in this case was to decide whether or not sexual orientation would be added to Alberta's human rights legislation. Indeed, it seems that hardly a day

goes by without some comment or criticism to the effect that under the *Charter* courts are wrongfully usurping the role of the legislatures. I believe this allegation misunderstands what took place and what was intended when our country adopted the *Charter* in 1981-82.

[131] When the *Charter* was introduced, Canada went, in the words of former Chief Justice Brian Dickson, from a system of Parliamentary supremacy to constitutional supremacy ("Keynote Address," in *The Cambridge Lectures 1985* (1985), at pp. 3-4). Simply put, each Canadian was given individual rights and freedoms which no government or legislature could take away. However, as rights and freedoms are not absolute, governments and legislatures could justify the qualification or infringement of these constitutional rights under s. 1 as I previously discussed. Inevitably, disputes over the meaning of the rights and their justification would have to be settled and here the role of the judiciary enters to resolve these disputes. ...

[132] We should recall that it was the deliberate choice of our provincial and federal legislatures in adopting the *Charter* to assign an interpretive role to the courts and to command them under s. 52 to declare unconstitutional legislation invalid.

[133] However, giving courts the power and commandment to invalidate legislation where necessary has not eliminated the debate over the "legitimacy" of courts taking such action. ... [J]udicial review, it is alleged, is illegitimate because it is anti-democratic in that unelected officials (judges) are overruling elected representatives (legislators) ... .

[134] To respond, it should be emphasized again that our *Charter*'s introduction and the consequential remedial role of the courts were choices of the Canadian people through their elected representatives as part of a redefinition of our democracy. Our constitutional design was refashioned to state that henceforth the legislatures and executive must perform their roles in conformity with the newly conferred constitutional rights and freedoms. That the courts were the trustees of these rights insofar as disputes arose concerning their interpretation was a necessary part of this new design.

[135] So courts in their trustee or arbiter role must perforce scrutinize the work of the legislature and executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen. All of this is implied in the power given to the courts under s. 24 of the *Charter* and s. 52 of the *Constitution Act, 1982*.

[136] Because the courts are independent from the executive and legislature, litigants and citizens generally can rely on the courts to make reasoned and principled decisions according to the dictates of the constitution even though specific decisions may not be universally acclaimed. In carrying out their duties, courts are not to second-guess legislatures and the executives; they are not to make value judgments on what they regard as the proper policy choice; this is for the other branches. Rather, the courts are to uphold the Constitution and have been expressly invited to perform that role by the Constitution itself. But respect by the courts for the legislature and executive role is as important as ensuring that the other branches respect each others' role and the role of the courts.

[137] This mutual respect is in some ways expressed in the provisions of our constitution as shown by the wording of certain of the constitutional rights themselves. For example, s. 7 of the *Charter* speaks of no denial of the rights therein except in accordance with the principles of fundamental justice, which include the process of law and legislative action. Section 1 and the jurisprudence under it are also important to ensure respect for legislative action and the collective or societal interests represented by legislation. In addition, as will be discussed below, in fashioning a remedy with regard to a *Charter* violation, a court must be mindful of the role of the

legislature. Moreover, s. 33, the notwithstanding clause, establishes that the final word in our constitutional structure is in fact left to the legislature and not the courts (see P. Hogg and A. Bushell, "The *Charter* Dialogue Between Courts and Legislatures" (1997), 35 *Osgoode Hall L.J.* 75).

[138] As I view the matter, the *Charter* has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a "dialogue" by some (see Hogg and Bushell, *supra*). In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives (see Hogg and Bushell, *supra*, at p. 82). By doing this, the legislature responds to the courts; hence the dialogue among the branches.

[139] To my mind, a great value of judicial review and this dialogue among the branches is that each of the branches is made somewhat accountable to the other. The work of the legislature is reviewed by the courts and the work of the court in its decisions can be reacted to by the legislature in the passing of new legislation (or even overarching laws under s. 33 of the *Charter*). This dialogue between and accountability of each of the branches has the effect of enhancing the democratic process, not denying it.

[140] There is also another aspect of judicial review that promotes democratic values. Although a court's invalidation of legislation usually involves negating the will of the majority, we must remember that the concept of democracy is broader than the notion of majority rule, fundamental as that may be. In this respect, we would do well to heed the words of Dickson C.J. in [*R v Oakes*, [1986] 1 SCR 103, 1986 CanLII 46], at p. 136:

> The Court must be guided by the values and principles essential to a free and democratic society, which I believe to embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

[141] So, for example, when a court interprets legislation alleged to be a reasonable limitation in a free and democratic society as stated in s. 1 of the *Charter*, the court must inevitably delineate some of the attributes of a free and democratic society. ... [In this respect] Dickson C.J.'s comments remain instructive ... .

[142] Democratic values and principles under the *Charter* demand that legislators and the executive take these into account; and if they fail to do so, courts should stand ready to intervene to protect these democratic values as appropriate. As others have so forcefully stated, judges are not acting undemocratically by intervening when there are indications that a legislative or executive decision was not reached in accordance with the democratic principles mandated by the *Charter* ... .

[Justice Iacobucci went on to deal with the remedial issue, and concluded that the appropriate remedy was to "read in" discrimination on grounds of sexual orientation. That portion of the judgment is found in Chapter 25, Enforcement of Rights.]

In *Sauvé v Canada (Chief Electoral Officer)*, 2002 SCC 68, however, the Court seemed to frame its support for dialogue in narrower terms (at para 17):

> [T]he fact that the challenged denial of the right to vote followed judicial rejection of an even more comprehensive denial, does not mean that the Court should defer to Parliament as part of a "dialogue." Parliament must ensure that whatever law it passes, at whatever stage of the process, conforms to the Constitution. The healthy and important promotion of a dialogue between the legislature and the courts should not be debased to a rule of "if at first you don't succeed, try, try again."

See Rosalind Dixon, "The Supreme Court of Canada, Charter Dialogue and Deference" (2009) 45:2 Osgoode Hall LJ 235 at 286. As Sigalet, Webber, and Dixon explain, "This quip prompted one scholar to describe the judgment as 'the day dialogue died'": see Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, "Introduction: The 'What' and 'Why' of Constitutional Dialogue" in Geoffrey Sigalet, Grégoire Webber & Rosalind Dixon, eds, *Constitutional Dialogue* (Cambridge: Cambridge University Press, 2019) 1 at 6 (footnotes omitted).

Ted Morton and Rainer Knopff, strong critics of "judicial activism," have argued that the dialogue theory is flawed and does not remove their fundamental concerns about the undemocratic nature of judicial review. In their book *The Charter Revolution and the Court Party*, also discussed above, Morton and Knopff argue that Hogg's defence of judicial review as a form of dialogue between legislatures and courts is too simplistic because it fails to recognize the "staying power" of a new, judicially created policy *status quo*, "especially when the issue cuts across the normal lines of partisan cleavage and divides a government caucus" (at 162). One example they give is the political aftermath of the 1988 *Morgentaler* decision, in which the Supreme Court struck down the restrictions on abortion in the *Criminal Code* on the basis that they violated s 7 of the Charter. The government introduced new legislation recriminalizing abortion, but with less onerous requirements. The legislation was ultimately defeated in the Senate, however, because both the pro-choice and pro-life minorities voted against the compromise legislation.

For a direct response to Morton and Knopff's critique of the Charter revolution, see Peter Hogg, "The Charter Revolution: Is It Undemocratic?" (2001) 12:1 Const Forum 1. Here is Hogg's answer to their criticisms of the dialogue concept (at 5-7):

> The compatibility of the *Charter* with democracy is reinforced by the notion of judicial review as a "dialogue" between the Supreme Court of Canada and the legislatures. ...
>
> This idea of a dialogue between courts and legislatures is a serious challenge to the Morton-Knopff thesis. If *Charter* decisions are ultimately reviewable by elected legislative bodies, using the distinctively Canadian vehicles of sections 1 or 33, then it becomes much less significant whether the decisions have been achieved through the efforts of the Court Party or have been made in disregard of popular sentiment. In the last few pages of the book, the authors grapple with this problem. Professors Morton and Knopff acknowledge that the dialogue theory is "undoubtedly true in the abstract," but they say that it is "too simplistic." It is too simplistic because it "fails to recognize the staying power of a new, judicially created policy status quo." By this they mean that once the Court has spoken, governments may find it expedient to leave the issue alone, thus preserving the judicial decision.
>
> One of the two examples Morton and Knopff provide of "the staying power of the new judicially-created policy status quo" is the aftermath to the *Morgentaler* decision, which struck down the therapeutic abortion provisions of the *Criminal Code* on the ground that they offended section 7 of the *Charter*. The Government of Canada introduced a new bill to recriminalize abortion, but with less onerous requirements for legal therapeutic abortions. The new bill was passed by the House of Commons and then defeated in the Senate on a tie

vote. To be sure, the *status quo* created by the Supreme Court of Canada (no regulation of abortion) was preserved. But this example could as easily be treated as a case of dialogue since the Government did propose a substitute law for the one struck down and very nearly succeeded in enacting it.

The other example they provide is the aftermath of the *Vriend* decision, where the Supreme Court of Canada added sexual orientation to the grounds of discrimination for which a remedy was available under Alberta's *Human Rights, Citizenship and Multicultural Act*. The Government of Alberta mused publicly about restoring the old version of the statute by invoking section 33, but eventually decided not to do so, thus leaving the new ground of sexual orientation in the *Act*. The authors comment that the judicial ruling had "raised the political costs of saying no to the winning minority" and the Government concluded that "the safest thing was to do nothing." But what does this example show? Only that it is politically difficult to directly reverse a decision of the Supreme Court of Canada on an equality issue. Is that not as it should be? Reversal is possible in a case where there is a sufficiently strong popular revulsion of the Court's ruling, and this is an exceedingly important safeguard ... .

... The decision of the Government of Alberta not to attempt to reverse the *Vriend* decision was probably based on a correct judgment that popular support was lacking for such a move. The fact that the move was legally possible and was seriously examined by the Government means that the sequel to *Vriend* could easily be regarded as an example of dialogue rather than as an example that contradicts the dialogue idea[.] ...

In the great majority of *Charter* cases, there is no political impulse to directly reverse the judicial decision. Usually, the attitude of the government whose law was struck down is not one of hostility to the Court's civil libertarian concern; rather, the issue for the government is (as it was after *Morgentaler*) the crafting of a new law that accommodates the Court's concerns while preserving the legislative objective ... .

To return to the Morton-Knopff thesis, in the majority of *Charter* cases, the "staying power of a new judicially created policy status quo" is not very strong at all. In those rare cases where government simply cannot abide the Court's interpretation of the *Charter*, reversal is usually legally possible, and can be accomplished politically where public opinion is particularly strong, as *Ford* and *Daviault* demonstrate. Where public opinion is less strong or is divided, government may choose to leave the decision in place, as *Vriend* demonstrates.

The important point about the idea of dialogue is that judicial decisions striking down laws are not necessarily the last word on the issue, and are not usually the last word on the issue. The legislative process is influenced by but is not stopped in its tracks by a *Charter* decision. The ultimate outcome is normally up to the legislative body.

There has been a veritable avalanche of scholarship on dialogue theory since Hogg and Bushell first wrote their article in 1997. While their thesis has often been subject to criticism, dialogue theory continues to attract interest. As Sigalet, Webber, and Dixon explain in their introduction to *Constitutional Dialogue*, referenced above (at 4-5):

> Although the Canadian debate over "dialogue" began with Hogg and Bushell's avowedly descriptive appeal to the idea of dialogue, the Canadian debate now involves the explicit development of "dialogue theory," which is rooted in a deeper set of normative concerns for the democratic legitimacy of judicial decisions striking down or altering political decisions made by elected legislatures.

In *Re BC Motor Vehicle Act*, [1985] 2 SCR 486, 1985 CanLII 81 (more fully excerpted in Chapter 22), Lamer J commented on the doubts surrounding the legitimacy of judicial review

being unpersuasive because, in his view, the decision to entrench the Charter was taken by "the elected representatives of the people of Canada." As he further explained (at para 16):

> [The] argument [that the judiciary is not representative] was heard countless times prior to the entrenchment of the *Charter* but ... has in truth, for better or for worse, been settled by the very coming into force of the *Constitution Act, 1982*. It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.

There is a close link between the courts' perception of the legitimacy of their role and their general approach to rights adjudication. Despite the protests of Lamer J, concerns about the legitimacy of Charter-based judicial review, and the competence of the courts to address complex social and political issues, have almost certainly affected their approach to the interpretation of particular rights and to the justification of limits under s 1.