# Hiebert, Janet. *Charter Conflicts*. Montreal: MQUP, 2002.

***Thesis and Summary:***

Hiebert’s central argument in *Charter Conflicts* is that “Parliament shares responsibility for interpreting the Charter”, an argument which is both normative (i.e. ideally, all legislation would be carefully considered in terms of Charter rights and conflicts before being passed) and empirical (i.e. Parliament *does* in fact consider the Charters when legislating).

According to Hiebert, the executive thinks carefully about the risk of Charter challenges when drafting legislation (the justice minister is responsible for these risk assessments, giving him/her added power in the Charter era). Parliament, on the other hand, is largely left out of the process, and the Charter review carried out by the Justice Committee is inadequate. This weakens the position of the government when it defends legislation against Charter challenges.

Hiebert rejects the arguments of those on both extremes of the Charter debate: those who (following Dworkin) conceive of rights as trumps and judges as best or even exclusively equipped to interpret those rights, and those who lament all forms of judicial activism and defend a very narrow view of the judicial role. Instead, Hiebert advocates a “relational approach”, which gives responsibility for the Charter to both Parliament and the courts. To make the relational approach work, Hiebert argues, Parliament must be more rigorous in considering the Charter implications of legislation, and the courts be more sensitive to the extent to which Parliament has considered those implications when rendering their judgments.

To give some empirical weight to her arguments, Hiebert then turns to five case studies. The example of the SCC’s ruling in *RJR-MacDonald Inc.* (1995) was, she argues, an example of a failure of shared responsibility: the court insinuated itself into the legislative role (on a right of marginal importance – tobacco advertising as free expression) and Parliament’s policy was then distorted by undue fear of Charter challenge. However, the case of sexual assault trials is more promising; in those trials, courts have accepted the role of Parliament in interpreting the Charter, and Parliament has been willing to challenge the court’s decisions by drafting new legislation. In the case of debates about DNA acquisition, Hiebert suggests that governments are sometimes too inclined to “wave the Charter flag” in order to eliminate opposition without actually considering the deeper arguments made by opponents. Gay and Lesbian equality debates reveal a final principle of the relationship: if legislatures delay unnecessarily, courts will become increasingly impatient, and increasingly active, in their responses to those legislatures.

***Methodology and Theoretical Perspective***

Theoretically, Hiebert’s approach is primarily normative: she is presenting a case for a particular relationship – which she calls “shared responsibility” – between Parliament and the courts when interpreting the Charter. Hiebert’s argument is designed to chart a course between Charterphiles and Charterphobes. Hiebert’s empirical evidence provides examples of the complications involved in bringing this relationship about. But the primary concern, once again, is normative: in order to avoid the possibility that Parliament will renege on its responsibility to make difficult decisions in the context of representative, democratic dialogue, we must argue that the responsibility for interpreting the Charter is shared by Parliament and the courts.

Methodologically, Hiebert employs a case-study approach, examining five case studies which she suggests are illustrative of the relationship between the executive/legislative and the judicial branches of government. Her focus is on SCC cases and government legislation; Hiebert admits that the secrecy involved in executive reviews of legislation (within the Department of Justice) prevents her from coming to a more detailed understanding of the effect of the Charter on legislation in Canada.

***Comparison with Other Readings and Contribution to the Literature***

Hiebert’s goal is to find a middle course between the pro-judiciary and anti-judiciary arguments which have dominated in the literature. Unlike Morton and Knopff, Hiebert is not opposed to judicial “activism” *per se*, and sees the courts as playing a crucial role in the interpretation of the Charter (and her discussion of gay and lesbian rights, together with her criticism of constitutional literalists, indicates that she thinks the court can take an expansive view to its interpretive role). However, like Morton and Knopff, Hiebert worries that a judicial-centric approach to the Charter will tempt Parliaments to avoid difficult decisions until forced by the courts to make them.

Beyond her interesting normative arguments about the proper relationship between Parliament and the courts, Hiebert’s case studies are a useful contribution to our understanding of the extent to which the Charter has affected the various branches of government. Hiebert’s case studies suggest that the executive has been profoundly affected by the Charter; the Justice Department considers the Charter while drafting legislation (and even before the legislation is drafted). The increasing inclusion of preambles within legislation is a testament to the government’s awareness of the relationship between that legislation and the Charter. The legislature has been less affected by the Charter, Hiebert suggests, because of the limitations of the cabinet-dominated (or PM-dominated) and strictly-disciplined environment of the House (like many others, Hiebert calls for an increased role for the legislature, particularly by strengthening its committees).

***Relevant Exam Questions***

This book is relevant for any general questions about the Charter and judicial “activism”. It will be particularly useful for questions about the Charter’s effect on Parliament and the post-Charter relationship between Parliament and the courts.

***Detailed Notes:***

*Introduction*

ix-xi This book examines the Charter’s effect on legislative decisions:

1. The Charter has changed the political environment and the climate of governing
2. Only a fraction of legislative initiatives are subject to Charter litigation; whether and how the Charter constrains state power depends on how legislators view their responsibility under the Charter
3. Judgment of whether the Charter is helping or hurting in Canada is closely linked to how it affects political behaviour; is it a convenient refuge for elected politicians? or does it mean that Parliament will become part of a dialogue on rights, giving more sensitive thought to their implementation
4. If legislative decisions are based on careful consideration of rights and values, and the judiciary invalidates those decisions, the s.33 override might gain more public acceptance

xii The normative position of the paper: Parliament shares responsibility with the judiciary for determining how the Charter should direct social conflicts; rejecting a judicial-centric approach for resolving Charter conflicts; this is not so much an anti-judiciary position as a pro-Parliament position, since only Parliament can define what programs and services are needed for the public interest

*Chapter One: Political Scrutiny of Charter Conflicts*

3-4 Judicial review creates tensions for parliamentary systems, though an emphasis on parliamentary supremacy today might seem odd; to say that the entrenchment of the Charter is an abandonment of this principle, though, is to underestimate the continued importance of Parliament in resolving Charter conflicts

4-7 The Canadian Bill of Rights: attempted to infuse political decision making with a greater sensitivity to rights; it was supposed to prompt government to think about rights when developing legislation (and the justice minister was supposed to report inconsistencies with the Bill of Rights); the strength of the Bill of Rights was supposed to rest on self-scrutiny and parliamentary evaluation; in fact, however, self-scrutiny was much less vigorous before the Charter, partly because there was no real threat of judicial nullification

7-10 Judicial scrutiny under the Charter: the minister of justice has a similar reporting requirement under the Charter, obliging him/her to certify that bills have been considered in light of the Charter. How it works: the department is responsible for drafting all government bills; they receive a memorandum with the objectives of the proposal and any Charter concerns, and Justice lawyers then undertake “risk assessments” concerning the Charter (sometimes in numerical terms); initially, public officials resented the justice department’s new power, but once legislation started to be nullified, they changed their tune

10-11 Human Rights Law Section of the justice department tries to encourage Charter discussion as early as possible; another form of anticipating judicial review is the increasing use of legislative preambles which state the intentions of the law; because of the necessity of a report to parliament (the justice minister has to do this if he/she feels the bill conflicts with charter), there’s a strong incentive to work things out in advance

11-12 Donald Savoie’s argument about the centralization of power in the hands of the Prime Minister; fine, but a shortcoming is that it doesn’t consider the Charter’s affect on power relations, or the significance of bureaucratic judgments on Charter issues – since Justice has a monopoly on Charter advice, it has a stronger influence than other depts.

12-14 So why haven’t there been any reports to Parliament? Some (such as Russel) say it’s because of the inherently limited nature of the executive checking itself. But you also have to consider two other factors:

1. The government is reluctant to appear indifferent toward the Charter; pragmatically, risky legislation would be vulnerable to political embarrassment and Charter challenge if even the government admitted that it was opposed to the Charter
2. Unless a bill is patently inconsistent with the Charter, it can usually get through, especially because of section one of the Charter

15-18 That’s executive scrutiny; what about Parliamentary evaluation? It’s basically impossible for Parliament to determine the risks of Charter conflict due to the secrecy of the executive review process; this is a problem because of the philosophical nature of Charter conflicts: valid differences of opinion exist and Parliament could play a role in this, but Parliament is very weak in the post-Trudeau era

Bills are assessed in terms of the Charter by the Justice Committee (House of Commons Standing Committee on Justice and Legal Affairs) and the Standing Senate Committee on Legal and Constitutional Affairs; but they are often pressed for time and information and are denied requests for access to information

This affects the judicial review; judges may be reluctant to believe that Charter concerns were really considered by Parliament, which weakens the government when trying to defend legislation against Charter challenge

*Chapter Three: The Legitimacy Debate*

22 A good critique of Smith: it’s impossible to set aside normative considerations in this debate, since empirical and normative considerations get all mixed together here

23-33 Critique of the extreme position in defense of fundamental rights: basically, this position (e.g. Lorraine Weinrib) claims that judges are better equipped than legislators for the task of figuring out the meaning of rights and the legitimacy of state actions; Ronald Dworkin is the epitome of this position; this position assumes wrongly that Parliament is always the one threatening rights, and it overlooks the philosophical (what she means is *contested*) character of judgments about rights; the possibility of a very real and legitimate *range* of reasonable interpretations illustrates the ongoing importance of Parliament

33-42 Critique of the extreme position which is skeptical of the Charter: Morton, Knopff, Manfredi invoke liberal constitutionalism to assess judicial power: they worry that judicial review interferes with democratic responsibilities to make difficult choices between competing perspectives; most of these critics argue that this requires a narrow judicial approach, but this overlooks (again) the discretionary quality of legal judgments as well as the various problems entailed in any claims about liberal “neutrality”

43-51 The Alternative: Shared Responsibility: a dialogic model of the relationship between the legislature and the judiciary; it is implicit in the work of Peter Russell and others, but there are lots of problems with the dialogic model; the constitutional responsibility should instead be considered in relational terms; coordinate responsibility

*Chapter Three: A Relational Approach to Charter Judgments*

52 Both Parliament and the courts have valid insights, but their judgments may be different; each body must satisfy itself that its judgment respects Charter values

53-55 Different vantage points and different responsibilities:

1. Parliament: consideration of rights is part of, but not the singular or discrete focus of, legislative judgment; the Charter is incorporated into a larger policy inquiry; Parliament must have an important responsibility to interpret rights and resolve conflicts between rights; this is more than just “Charter-proofing” legislation
2. Judiciary: enters the dispute later and is only concerned with whether the legislation is consistent with the Charter

60-61 Parliament must be especially cautious when it turns out that a piece of legislation has violated a “core right”, one of the fundamental rights which allow for democratic self-government in Canada

62-64 Use of the legislative override: extremely contested and controversial, but a relational approach allows us to understand when it might be appropriate; the override should not be used pre-emptively

65-71 What changes when we view the Charter in relational terms?

1. Parliament: The government should encourage more robust parliamentary scrutiny of bills when they have Charter implications by alerting Parliament about legislation which incurs a substantial Charter risk; a report should form a key part of second-reading debate and committee debate, and committees should have time
2. The Courts: The courts should distinguish core rights from marginal rights, and the courts should be sensitive to whether the government has consciously reflected on Charter values and undertaken measures to reconcile conflicts

*Chapter Four: Tobacco Advertising*

73 This is an excellent piece of ammunition for Charter critics, since the SCC’s 1995 ruling in *RJR-MacDonald Inc.* elevated tobacco advertising to constitutionally protected expression, suggested that their judgment is superior to Parliament, and Parliament responded very meekly to the invalidation of the Tobacco Products Control Act of 1989

74 The legislation was written in such a way as to suggest that the Charter had been considered and that the matter was one of substantial concern; the Court, since a 1990 reference case, had emptied “expression” of any meaning, claiming that the Charter protects all expression regardless of the message

77-79 Justice McLachlin’s majority ruling was problematic and troubling for a number of reasons, not the least of which was her suggestion that the legislation should have proceeded in a different fashion

79-80 Just La Forest’s dissenting judgment suggested that Parliament had a reasonable basis after twenty years of research and experimentation to assume what they did, and reminded the majority that courts are not specialists in policy making

80-84 It is worrisome that Parliament’s strategy was evaluated against judicial interpretations of whether the means were more restrictive than another hypothetical possibility

84-88 Parliament introduced a weaker version of the legislation that had been struck down; the health minister explained that policy developers had examined the court decision line by line, particularly McLachlin’s speculative comments about lifestyle advertising; basically the SCC distorted the policy issue in this case

89 After threats from the tobacco industry, the legislation was amended to allow for sponsorships which had been received before April 1997 (e.g. race sponsorships)

90 All in all, this is an example of a *failure* of shared responsibility: the government did not contest the claim that tobacco advertising constituted expression, and judges evaluated the legislation on whether the objective was rationally connected to the means; this led to policy distortion on an issue which is an extremely marginal rights claim

*Chapter Five: Sexual Assault Trials*

91-94 After the SCC struck down the rape-shield provisions in the criminal code, Parliament introduced a new law with a preamble which explained the significance of the legislation; this preamble is a more honest way to justify a piece of legislation than relying on government lawyers to speculate later about the reasoning behind the bill

97-99 In the *Daviault* case, the majority ruled that extreme intoxication can be a defense (when one is so intoxicated as to be akin to an automaton); public reaction was overwhelmingly critical, and even got a critical comment from the U.S. State Department; especially critical because five individuals got acquittals within six months of the decision

102-07 The government responded with Bill C-72, which was focused on the equality rights of women; implicitly (but quite boldly) critical of the SCC; made it clear that intoxication cannot be used as a defense; Allan Rock made it clear that the department had thought long and hard about the constitutional implications (and had abandoned an earlier plan to introduce “criminal intoxication” into the criminal code); the committees heard three scientists, all of whom claimed that the courts had misunderstood the concept of automatism, and so the legislation expressed doubt about the basic assumption underlying the court’s decision

The bill contained a lengthy preamble, and Rock expressed hope that the preamble would be useful to the courts

109-12 Bill C-46 was another example of a response to the courts; some have called it a point by point repudiation of the majority judgment; in challenges of the bill, the courts have recognized that Parliament does have a valid role in interpreting how the Charter applies to social conflicts

*Chapter Six: Regulating the Collection and Uses of DNA*

140-43 There is a tension between law-enforcement objectives (which emphasize the need for DNA samples in order to investigate crimes) and privacy and search/seizure objectives; the problem is that a polity may be giving too much responsibility to courts to determine reasonable answers to legislative questions; the result is that Parliament is tempted to renege on its responsibility to make principled decisions

This issue, in the end, was a poor example of the process, and there was a lack of careful political judgment about reconciling conflicting values; need to defend the legislation with assumptions, values, and objectives rather than merely “waving a charter flag”

*Chapter Seven: Rules and Exemptions for Search Warrants*

150 The *Feeney* decision: police need warrants to enter a private dwelling, except in cases of “hot pursuit” and other unspecified cases; the minority opinion diverged substantially, in fact illustrating incredible range of possibility for interpreting Charter; basically what happened was that the court read into the Criminal Code a warrant requirement for searches of homes

154-56 Bill C-16 amended the Criminal Code to address the *Feeney* ruling, but allowed for a much larger range of conditions under which no warrant is required; the bill was rushed through because they wanted to do it before the suspension of the court’s judgment (six months) expired; thus the government’s approach was not as risk-averse as in the case of the DNA data bank, suggesting that Parliament does not accept a judicial-centric view of constitutional judgment

*Chapter Eight: Equality Claims of Lesbians and Gay Men*

180 The legislative delays on these issues resulted in frustration in the court, and the SCC made decisions in 1998 (*Vriend v. Alberta*) and 1999 (*M v. H*) which made it clear that the court was no longer willing to defer to legislative inaction

199 Although legislatures are better suited than courts to undertake consultation, dialogue, and research, but if they are too slow in changing social policy, courts will become impatient and more active in proffering remedies

*Chapter Nine: Assessing the Charter’s Influence*

201 The skeptical claim is that a bill of rights is either ineffective (because the courts alone cannot enforce their decisions when others do not agree with them) or unnecessary (because the other branches of government will adequately change with the times)

203 The judicial and political reaction to the equality claims of gays and lesbians challenges the skeptical thesis: governments have generally waited to be compelled by judicial rulings before they’ll make changes to be more inclusive

209-10 The Charter has significantly influenced the way the judiciary understands its role, seeing itself as the guardian of the constitution

216-17 The Charter has provided an incentive for broader reflection on whether its values are actually being respected in legislative choices

*Conclusion*

218-19 The Charter has had a significant impact on legislative agendas; the argument in the book is for shared parliamentary and judicial responsibility in resolving Charter conflicts. The reason for shared responsibility is to prevent Parliaments from reneging on their responsibility to make decisions about compelling legislative purposes

223-24 A judicial-centric approach is characterized by risk-aversion and charter-proofing on the part of legislatures, which can be seen in the case of the DNA debates; another lesson is that more time is required than is sometimes provided by the Supreme Court