

Have the debates about “the Charter Revolution” diverted academic attention away other important issues about the courts and the judicial system?

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## 1 Introduction

The *Canadian Charter of Rights and Freedoms* is notable in that it takes away before it gives; before enumerating specific rights and freedoms — including ‘fundamental freedoms’, democratic rights, mobility rights, legal rights, equality rights, and language rights — it lays out the proviso that it guarantees them “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”. Section 1 of the *Charter* immediately introduces the courts into the process of deciding on the limits pertaining to rights, both further entrenching the established rule of the courts as evaluators of laws and extending that obligation by making the role so plain. As a result, it is neither unsurprising nor inappropriate that substantial scholarly attention has been directed at the ‘Charter Revolution’ and that the *Charter* will remain central in future discussions of the appropriate role and conduct of the different components of Canada’s governments, federal and provincial. Furthermore, the historical and legal context in which the *Charter* is situated have enduring importance for the functioning of Canada’s democracy, in particular insofar as the chances of future constitutional amendment have been constrained by the means through which constitutional reform was achieved. The high level of academic attention devoted to the *Charter* is justified by the legal and historical importance of its origins, because of how it reflects and extends the ambiguous relationship between the government of Canada and the first nations, and because of how subsequent legislative history has re-affirmed the importance of the *Charter*.

## 2 The *Charter* as part of Trudeau's patriation package

The *Charter* should be understood within the broader context of Canadian constitutional history and law. The *Charter* was introduced alongside a series of other important constitutional changes, ultimately brought into force through the repatriation of the constitution in 1982. The process through which these changes were negotiated altered the relationship between the provinces and the federal government, as well as between the various provinces themselves. When seven of the premiers in the 'Gang of Eight' broke with Quebec during the negotiations, it led to a compromise in which further constitutional change became very difficult. As explained by Peter Russell:

“[T]o nail down the lid on Quebec's constitutional vulnerability, the amending formula itself and a few other matters (most importantly, the monarchy and the composition of the Supreme Court) were made subject to the rule of unanimous provincial consent. So, what Blakeney often referred to as 'the tyranny of unanimity' would be briefly lifted to put through a change in the amending process very much against Quebec's interests and then reimposed to ensure that the whole process would be difficult, if not impossible to change in the future.”<sup>1</sup>

Furthermore, future constitutional amendments would need to be approved by provincial legislatures following the patriation of the constitution. This process — which was circumvented for the patriation itself — would prove a significant hurdle for future attempts at amendment, such as at Meech Lake in 1987 and Charlottetown in 1992.<sup>2</sup> In addition to new procedural barriers to constitutional amendment, the 'Kitchen Accord' which succeeded the 'Gang of Eight' created enduring resentment in Quebec. The depth of betrayal felt by some Quebecers is illustrated by the use of the term 'Night of the Long Knives' to describe the dissolution of the 'Gang of Eight' at the November 1981 constitutional conference in Ottawa.

An even stronger demonstration of Quebec's objection to the patriation process came with the resolution of 25 November 1981. Passed 70 to 38 by the Quebec legislature, it attempted to 'veto' the patriation process. While the attempt was ultimately quashed by both the Quebec Court of Appeal and the Supreme Court of Canada, it did underscore the degree of resistance within that province and demonstrated how much Canadian constitutional politics had shifted from the French-English compact model that prevailed at the time of confederation. Even prior to Quebec's rejection, the legal and political importance of patriation was highlighted by the Supreme Court's decision to rule for the first time on live television — demonstrating the

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<sup>1</sup>[6] p.121

<sup>2</sup>Interestingly, one of the reforms proposed at Meech Lake and Charlottetown was a mechanism for providing greater provincial input into the appointment of Supreme Court justices.[1] p.66 Arguably, this is a further demonstration of the centrality of the Supreme Court in Canadian politics and federal-provincial interaction in the post-*Charter* era.

degree of public interest in the proceedings. The court’s finding that constitutional amendment required only a ‘substantial degree’ of consent quashed the notion of a Quebec-only veto and established the conditions for the subsequent ‘Kitchen Accord’.

Despite the initial Quebecois rejection of patriation, the *Charter* has played a significant role in mediating the post-1982 relationship between the province of Quebec and the federal government. Notably, the 1998 *Quebec Secession Reference* provided important guidance on what would be required for Quebec to leave the federation, and what process would need to be followed to achieve that outcome.<sup>3</sup>

### 3 Section 25

The curious treatment of aboriginal rights in the *Charter* is further cause for seeing the ‘*Charter* Revolution’ as legally and politically significant. To begin with, the text specifically asserts that rights granted in the Royal Proclamation of 1763 are guaranteed. This bolsters the doctrine, which has been employed in Canadian courts, that the Crown has a government-to-government relationship with the First Nations and that this relationship has ongoing legal ramifications in areas like a duty to consult and accommodate and control over natural resources. The text of the *Charter* also guarantees “any rights or freedoms that now exist by way of land claims agreements or may be so acquired”.

This approach is curious insofar as it asserts the continued existence of legal obligations between the federal government at First Nations peoples, without providing guidance, clarification, or enumeration of exactly what those obligations are. Arguably, this arrangement was the consequence of political wrangling between interest groups, some of whom sought to exclude any reference to First Nations rights in the *Charter* and others that sought either a more expansive discussion or the avoidance of establishing a *Charter* in the first place.<sup>4</sup>

Post-*Charter* jurisprudence has included a number of important cases that established the character of the modern legal standing of aboriginal groups in Canada. These include *Guerin* (1984), *R. v. Sparrow* (1990), *Van der Peet* (1996), and *Delgamuukw v. British Columbia* (1997).<sup>5</sup> On the basis of the 1982 *Constitution Act*, the Supreme Court of British Columbia also rejected a challenge to the *Nisga’a Final Agreement*, through which the provincial government granted 2,000 square kilometres of land and significant autonomy to the Nisga’a people in 1999.

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<sup>3</sup>[2] p.90-1

<sup>4</sup>[6] p.122

<sup>5</sup>[2] p.87

## 4 The life of the *Charter* in jurisprudence

Writing from a comparative perspective, Ran Hirschl highlights the importance of the Constitution Act of 1982 in prompting an evolution in the Canadian judicial review process.<sup>6</sup> Hirschl highlights the remaining possibilities for academic work on the *Charter* and its aftermath, identifying “great potential” that “remains for the most part unexploited”. He also describes the attention that has been paid to Canadian constitutional reform in other similarly-structured states including Israel, South Africa, Britain, and New Zealand.

Unlike the 1960 Diefenbaker *Canadian Bill of Rights*, the 1982 *Charter* is not simply a bill enacted by parliament. It is a constitutional document, and has been accorded considerable attention by the courts. In *R. v. Oakes* (1986), the Supreme Court was called upon to evaluate two constitutional questions: whether the reverse onus assumption in contemporary narcotics trafficking laws violated the presumption of innocence guaranteed in Section 11 of the *Charter*, and whether (in the event of such a violation), the law could be ‘saved’ under Section 1. The *Oakes* precedent is an important component of the pattern of interaction through which the decisions of governments and the decisions of courts have shaped the implementation of the *Charter*.<sup>7</sup>

Another notable demonstration of how the rights-based philosophy of the *Charter* has been more broadly accepted into Canada’s political culture comes from the 2005 *Civil Marriage Act*, which legalized same-sex marriage across Canada. Prime Minister Paul Martin’s February 16, 2005 speech to the House of Commons is saturated with rights-oriented language:

“The *Charter* was enshrined to ensure that the rights of minorities are not subjected, are never subjected, to the will of the majority. The rights of Canadians who belong to a minority group must always be protected by virtue of their status as citizens, regardless of their numbers. These rights must never be left vulnerable to the impulses of the majority.”<sup>[4]</sup>

Both federal and provincial laws have been found to be *ultra vires* and declared to be without force and effect on the basis that they contradict the *Charter*.<sup>8</sup> In other cases, laws have been upheld on the basis that the *Charter* infringement is within ‘reasonable limits’ and thus saved by Section 1.<sup>9</sup> The *Charter* has been a key vehicle through which the propriety of Canadian laws are assessed, and a key mechanism through which the Canadian judiciary shapes the functioning of Canadian society. Hirschl describes this reciprocal

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<sup>6</sup>[2] p.77

<sup>7</sup>[5] p.200-3

<sup>8</sup>For instance, when *R. v. Morgentaler* (1988) struck down the provision of the Criminal Code of Canada which prohibited abortion. See: [9] p.4-5, 143

<sup>9</sup>For instance, laws against hate speech and obscenity were upheld on the basis in *R. v. Keegstra* (1990) and *R. v. Butler*, (1992).

process as “judicial review as dialogue” — an ongoing pattern of interactions through which the courts and legislatures engage in “healthy democratic conversation” mediated through the *Charter*.<sup>10</sup>

## 5 Conclusions

During the negotiations that preceded the patriation of Canada’s constitution, the desire for an explicit guarantee of individual rights and freedoms persisted as the one issue with major public support.<sup>11</sup> Ultimately, the *Charter* did much to entrench Pierre Trudeau’s perspective on the nature of the Canadian polity, with “the individual Canadian citizen as the bearer of the most fundamental constitutional rights” — an assertion that diminished Canada’s status as a federation of provinces each vested with responsible government and enhanced the direct relationship between Canadians and a federal government bound to respect specific enumerated rights.<sup>12</sup> The special role of the Quebec government as the administrator of a distinctive Quebecois culture was not recognized, and the *Charter* constrained the future options of provincial governments, despite compromises like the ‘notwithstanding clause’ in Section 33.

The means through which patriation was achieved — and the accompanying changes to Canada’s formula for constitutional amendment — arguably do a great deal to explain Canada’s subsequent constitutional paralysis. For better or for worse, features of Canada’s system of government like the composition of the senate are now highly difficult to change, and Quebec’s exclusion from the patriation process arguably constitutes an important cause of the continuing political divide between the province and the rest of Canada. In addition, the *Charter* clearly has importance as the basis of important subsequent legal decisions, and insofar as it illustrates (and perhaps influences) some of the complexities of the legal relationship between Canada’s government and First Nations.

Deciding whether academic attention has been overly focused on one issue or another may be a hopeless task. By definition, we do not know what sort of research would have been produced in a world where research agendas were different. That being said, there is a compelling case that the *Charter* is a central element in contemporary Canadian politics and law, and thus that academic attention devoted to its fulsome understanding has not been wasted.

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<sup>10</sup>[2] p.83-4

<sup>11</sup>[7] [8]

<sup>12</sup>[3] p.60

## References

- [1] Lori Hausegger, Matthew Hennigar and Try Riddell, *Canadian Courts: Law, Politics and Process* (OUP, 2009)
- [2] Ran Hirschl, “Canada’s Contribution to the Comparative Study of Rights and Judicial Review” in White, Simeon, Vipond and Wallner, eds., *The Comparative Turn in Canadian Political Science* (UBC Press, 2008), pp. 77-98
- [3] Rainer Knopff and F.L. Morton, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000)
- [4] Paul Martin, “Address by Prime Minister Paul Martin on Bill C-38 (The Civil Marriage Act)” [URL]
- [5] David Robertson, *The Judge as a Political Theorist* (OUP, 2010)
- [6] Peter Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 3rd edition. (Toronto: University of Toronto Press, 2004)
- [7] Peter Russell, “Canada’s Charter: A Political Report” *Public Law* (1988): 385
- [8] Robert Sheppard and Michael Valpy, *The National Deal: the Fight for a Canadian Constitution* (Macmillan Canada, 1984)
- [9] Donald Songer, *The Transformation of the Supreme Court of Canada* (Toronto: University of Toronto Press, 2008)