IN DEFENCE OF PRINCIPLES

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IN DEFENCE OF PRINCIPLES
NGOs and Human Rights in Canada

Andrew S. Thompson

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TO ALISON, ELISE, AND AMY ...
BUT ESPECIALLY ALISON

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Preface and Acknowledgments

This book began in the summer of 2000, although I didn't know it at the time. From 1999 to 2000, I was briefly on staff at Amnesty International Canada, serving as its interim media officer while the full-time occupant of that position was on secondment to the organization's international secretariat in London, England. In July 2000, I was asked to attend hearings at the Supreme Court of Canada in *United States v. Burns,* a case involving the potential extradition of two Canadians to the United States to face the death penalty (see Chapter 3). There, I witnessed some of Canada's finest legal minds – including David Matas, who was representing the organization – attempt to convince the court that the section of Canada's extradition treaty with the United States that allowed the minister of justice the discretion to decide whether to place conditions on an individual's surrender was unconstitutional. Although at the time I did not fully appreciate the significance of what I was witnessing, those events at the country's highest court sparked my interest in both the emergence of ideas or norms about rights and the role of non-state actors and institutions in championing and ultimately codifying those same ideas or norms into law.

Like many projects, this book began as one thing and ended up as another. My original intention was to analyze the influence of four human rights organizations at the Supreme Court of Canada that intervened in three precedent-setting *Charter* cases involving the rights of refugee claimants to

due process and procedural fairness; free expression and protection of vulnerable minorities from messages of hate; and the rights to life, security of the person, and freedom from cruel and unusual treatment and punishment as they related to capital punishment and Canada's extradition treaty with the United States. But the book soon came to be about more than this. As it progressed, my focus shifted. What emerged was a broader study of what scholars in Canada and elsewhere have come to call the "age of rights" or "rights revolution."

Abstract human rights principles, because of their ethical character, are often spoken of in absolute terms. In practice, however, they are anything but. When they are tested by real, often difficult cases involving moral ambiguity and tremendous material considerations, even respect for claims considered to encompass fundamental or "first order" rights is far from assured. In each of the three case studies featured in this book, acceptance and adoption of a claim were context specific and subject to backsliding, inherent tensions, contradictory pulls, and even unintended consequences. Cumulatively, they reveal the capriciousness of ideas about human rights, even in countries such as Canada that have a strong tradition of the rule of law, a judiciary that possesses the constitutional authority to engage in judicial review, and a vibrant civil society.

In this sense, the book is a product of the post-9/11 period. In the first decade since that fateful day, advanced liberal democracies around the world, including Canada, have responded to the threat posed by transnational terrorism with a systematic weakening of human rights standards, including the ones mentioned above. And though this book was written at a time when seemingly well-established rights were contested and disregarded, its purpose is not to be dismissive of Canada's rights revolution. The three case studies also reveal the resilience of these ideas that define the ways in which governments treat their citizens, a resilience that is due in no small measure to the advocacy of non-governmental organizations prepared to defend principles, often at a considerable cost.

This book would not have been possible without the help, guidance, and support of a number of people and organizations. I would like to thank the Osgoode Society for Canadian Legal History, the Social Sciences and Humanities Research Council of Canada, and the Ontario Graduate Scholarship for the financial support that each gave to this project. I would also like to thank the staff at Library and Archives Canada (LAC) in Ottawa and the International Institute for Social History in Amsterdam for their assistance

in tracking down documents necessary for my research. The book also could not have been written without the assistance of the organizations featured in its pages. I would like to express sincere appreciation to Amnesty International Canada, B'nai Brith, the Canadian Civil Liberties Association, and the Canadian Council of Churches for granting me permission to review their files. I would like to especially mention Bob Goodfellow, the executive director of Amnesty International's office in Ottawa, for arranging a number of the interviews that I conducted throughout the research and Gina Hill, the former president of the organization, for reading drafts of some of the chapters.

I would also like to extend my gratitude to Andrew F. Cooper for including me in so many of his projects, all of which taught me a great deal about the work of NGOs; James Walker, whose own pioneering work has influenced so much of my thinking, for helping me to articulate my ideas and see "the forest through the trees"; Brian Orend and Irving Abella for their constructive feedback; and, most of all, John English, who has given me and my family so much. He has mentored me, inspired me, challenged me, and shown me the world. For this, I am truly humbled and forever grateful.

To the entire Department of History at the University of Waterloo, I would like to say thank you. There is a saying that it takes a village to raise a child. The same holds true for graduate students: it takes an entire department to raise them. That I have been raised so well is a testament to the calibre of the professors who walk the hallways of Hagey Hall. I would like to mention especially P. Whitney Lackenbauer, who not only read early drafts of several of the chapters but also has come to be one of my closest friends during the few years that I have known him.

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David Drummond for designing the cover. I would also like to thank the three anonymous peer reviewers, whose collective criticisms have had such a positive influence on my thinking and the final product.

Finally, I would like to thank my family. To my parents, Mary and Carl, thank you for all of your support and advice. To my younger brother Alan, thank you for making me laugh throughout the trials and tribulations of writing this book. To my older brother Simon, thank you for all of your help with the research for Chapter 2; your insights have been invaluable. And I would like to thank my wife, Alison. You have been a tireless partner who has seen me at my best and through my worst. Without your love, I would not be where I am today.

Abbreviations

ACLU	American Civil Liberties Union
AI	Amnesty International
CARDP	Coalition against the Return of the Death Penalty
CCC	Canadian Council of Churches
CCLA	Canadian Civil Liberties Association
CCP	Court Challenges Program
CCR	Canadian Council for Refugees
CJC	Canadian Jewish Congress
CSIS	Canadian Security Intelligence Service
CUSO	Canadian University Students Overseas
FCSS	Federation of Canadian Sikh Societies
IAB	Immigration Appeal Board
IACHR	Inter-American Commission on Human Rights
ICCHRLA	Inter-Church Committee on Human Rights in Latin America
ICCPR	*International Covenant on Civil and Political Rights*
ICCR	Inter-Church Committee for Refugees
ICEFRD	*International Convention on the Elimination of All Forms of Racial Discrimination*

ICESCR	*International Covenant on Economic, Social, and Cultural Rights*
ICRC	International Committee of the Red Cross
IISH	International Institute for Social History
IRB	Immigration Refugee Board
IRO	International Refugee Organization
IRPA	*Immigration and Refugee Protection Act*
JCRC	Joint Community Relations Committee
LAC	Library and Archives Canada
LEAF	Women's Legal Education and Action Fund
LTTE	Liberation Tigers of Tamil Eelam
NJPRC	National Joint Public Relations Committee
NGOs	non-governmental organizations
NPD	National Democratic Party
OAS	Organization of American States
POC	prisoner of conscience
RSAC	Refugee Status Advisory Committee
SIO	senior immigration officer
UDHR	*Universal Declaration of Human Rights*
UNRRA	United Nations Relief and Rehabilitation Agency
VOV	Victims of Violence Society
WCC	World Council of Churches

IN DEFENCE OF PRINCIPLES

Introduction
In Defence of Principles

We live, to quote the philosopher Norberto Bobbio, in an "age of rights," a time in history characterized by the emergence of norms that define the entitlements and protections that all individuals, by virtue of being human beings, are guaranteed in their pursuit of self-fulfillment.[1] And, as Micheline Ishay argues in her aptly titled book *The History of Human Rights: From Ancient Times to the Globalization Era,* human rights norms are "part of a cumulative historical process."[2] This is a book about the age of rights and the cumulative historical process. More specifically, it is a history of the emergence, advancement, and defence of three human rights norms in Canada in the post–Second World War era – procedural rights for refugees, parameters on free expression for the purpose of confronting hate propaganda, and abolition of the death penalty – and the public interest groups (or non-governmental organizations [NGOs] as they are also known) that championed them, including as "*Charter* rights" at the Supreme Court of Canada, all in the hopes of securing and strengthening a human rights jurisprudence in Canada. Although the focus is on events that took place in Canada, this book's significance is broader. At its core, it is about unavoidable tensions. It is about the inherent dilemmas that all liberal parliamentary democracies encounter when governments attempt to reconcile the seemingly irreconcilable demands of individual rights and freedoms with the rights and protection of the collective, when judiciaries struggle to find a balance between the two, and when rights groups lobby to ensure that

the latter, even in times of real or perceived emergency, are not permitted to overshadow the former.

Although the roots of modern human rights norms date back centuries,[3] it was the rise of fascism in Europe and the Second World War with all its horrors that truly ushered in the modern era of human rights. Historians point to events such as US president Franklin Delano Roosevelt's famous "Four Freedoms" speech to Congress on 6 January 1941, which marked the US entry into the war, the drafting of the UN *Charter,* which made the link between the protection of human rights and international peace and security, and the respective adoptions of the UN *Genocide Convention* and *Universal Declaration of Human Rights* (*UDHR*) on 9 and 10 December 1948 as the beginning of a new era in modern history. What emerged was a new way of thinking about the relationship between the state and its citizenry, especially, though not exclusively, in liberal democracies around the world. The purpose of this "rights" dialogue was simultaneously to limit the state's authority to encroach on political and civil freedoms and to compel it to play a positive role in supporting and protecting its citizenry.[4]

Canadian historians have begun, in recent years, to chart the emergence and internalization of this international rights consciousness in Canada, identifying three stages to Canada's age of rights. The first stage began sometime during the first few decades of the twentieth century and coincided with advances at the international level. For much of this period, English Canadians tended to see rights as an American phenomenon that interfered with British conceptions of parliamentary supremacy and utilitarianism, while in Catholic Quebec conceptions of individual liberal rights were considered to be at odds with the anti-democratic political culture that went hand in hand with the province's social and religious conservatism. Ross Lambertson, Stephanie Bangarth, and Dominique Clément argue separately that it was during the 1930s and 1940s that a nascent human rights movement began to emerge in Canada. It consisted of *ad hoc* civil libertarian and egalitarian organizations founded in response to specific incidents of repressive and discriminatory state practices. Increasingly, these groups came to rely on the international discourse of rights as a strategy to secure greater legal protections against arbitrary government authority.[5] Moreover, as James Walker and Constance Backhouse both show, it was also during this early period that significant advances were made in the struggle for greater racial equality. Gradually, the scientific racism of the late nineteenth century

and early twentieth century slowly gave way to more progressive views. Equally significant was the emergence of a trend whereby aggrieved individuals and groups began to turn to the nation's courts, including the Supreme Court of Canada, to challenge discriminatory laws and policies and to secure greater minority rights and protections.[6]

According to Lambertson, the second stage began with the passing of the 1960 *Bill of Rights* and ended with the patriation of the Constitution in 1982.[7] The 1960s and 1970s were a time marked, paradoxically, by both rapid change and stifling inertia, great promise and dashed hope. Scholars such as Michael Ignatieff and Alan C. Cairns look back on the 1960s as the beginning of a "rights revolution," a movement whereby citizens in the democratic West, including Canadians, began increasingly to see themselves as "rights bearers" and employed rights discourse to challenge systemic inequities within societies.[8]

Again, this new awareness was bolstered by events at the international level. In 1966, the United Nations opened for signature the two covenants that make up the *International Bill of Rights* – the *International Covenant on Civil and Political Rights* (*ICCPR*) and the *International Covenant on Economic, Social, and Cultural Rights* (*ICESCR*) – which, along with other key treaties, defined both the scope and the legal status of the international human rights regime. These documents, in the words of the famous scholar of human rights Jack Donnelly, "recaptured, in a substantially purified form, the morally appealing idea of adherence to shared standards of justice as a condition for full membership in international society."[9] This was also the era in which NGOs came to be seen as legitimate, and at times even influential, actors within the international system, taking up the mantle as the natural champions and defenders of the ideals codified in international human rights law.[10]

In Canada, Pierre Elliott Trudeau's arrival in Ottawa captured the imagination of the country at a time of great social upheaval characterized by the Quiet Revolution and nationalist movement in Quebec, the proliferation of identity-based social movements, and the baby boom generation's growing disenchantment with political authority.[11] A civil libertarian who had witnessed the heavy-handedness of Maurice Duplessis, Trudeau, first as justice minister and then as prime minister, believed that the state should not "infringe on the conscience of the individual" and that this relationship should be reflected and codified in Canadian law.[12] The liberalization of Canada's divorce laws to include the concept of "marriage breakdown" in

1967 and subsequent reforms to the *Criminal Code* of 1969 relating to the legalization of contraceptives and family-planning materials, the decriminalization of homosexual intercourse between consenting adults, and the legalization of therapeutic abortions in cases where pregnancy threatened the "life or health" of the woman (all of which were embodied in his famous quotation "the state has no place in the bedrooms of the nation") marked a stark break from the past. Together, they represented a new, more inclusive and equitable vision of Canada, one in which the country's laws not only distinguished between "sin and crime" but also were founded on the primacy of the individual and equality of opportunity and reflective of a modern, pluralistic, and increasingly secular nation.[13]

This growing rights culture slowly began to be reflected in the judicial branch of government, specifically the Supreme Court of Canada. From its founding in 1875, the Supreme Court had been a relatively minor institution, its rulings, according to historians James Snell and Frederick Vaughan, unimaginative, conservative, and, above all, overly deferential to the tradition of parliamentary supremacy.[14] But the 1970s marked the beginning of a "coming of age" of sorts for the court. Signs began to appear that it was willing to become a significant player in the rights revolution and use its authority as a check on the laws and policies of the executive and legislative branches of government. In *R. v. Drybones* (1970), the Supreme Court boldly, and uncharacteristically, struck down section 94 of the *Indian Act,* which prohibited Aboriginal people from being intoxicated off reserve lands. It ruled that the act infringed on sections 1(b) and 2 of the 1960 *Bill of Rights,* which protected "the right of the individual to equality before the law and the protection of the law" and stipulated that all laws, unless otherwise stated by Parliament, must conform to the legal rights codified in the bill.[15] According to Snell and Vaughan, the turning point for the court was Trudeau's controversial decision in December 1973 to promote Bora Laskin to the position of chief justice. They contend that, despite being the court's second most puisne justice at the time, Laskin "provided much-needed intellectual vigour [to the court] and ... a philosophical position in constitutional law and civil liberties much akin to the prime minister's."[16] Two years later the court was given control of its docket, thereby giving it the ability to decide which cases it would hear and, by extension, which rights it would choose to advance.

Still, change at Canada's highest court came slowly. Much to the dismay of civil libertarians and equality-seeking groups who hoped that the court would be an instrument of progressive change, *Drybones* proved to be the exception, not the rule. In three high-profile cases in the mid- to late 1970s

– *Lavell v. A.-G. Canada* (1973), *Morgentaler v. The Queen* (1975), and *Bliss v. A.-G. Canada* (1979) – the court reverted back to its traditional conservatism, refusing to use the *Bill of Rights* to strike down statutes considered discriminatory toward women. According to political scientist Christopher Manfredi, the decisions had the cumulative effect of galvanizing the women's movement in Canada, prompting it to become more and more engaged with the activities of the courts.[17] The decisions also dashed any hope that the 1960 *Bill of Rights* might take on a quasi-constitutional status.[18]

As noted above, the coming into force of the *Charter of Rights and Freedoms* on 17 April 1982 marked the third stage in the age of rights for Canadians. A long-standing priority of Trudeau's,the constitutionally entrenched *Charter* was both a product of the emergence of a rights consciousness in Canada and an assertion of Canadian sovereignty.[19] As Cairns first observed, Canadians' sense of self had changed dramatically in the decades after the Second World War. At least in English Canada, the sense of identity and community that came with being part of the British Empire no longer resonated with the majority of the Canadian public. Britain's decline in world influence following the collapse of the Empire after the Suez Canal Crisis of 1956-57 and the decolonization movement of the 1960s, along with diminishing economic ties between Canada and the United Kingdom, meant that British traditions, notably the notion of parliamentary supremacy, were "no longer central to Canadian identity."[20] The vacuum left behind by the loss of "Britishness" was replaced by an ethos of "rights" legitimized by the emergence of an international human rights law regime at the United Nations, an ethos that Cairns argues not only "provided domestic groups with a powerful rights rhetoric" for advancing claims but also "suggested the criteria by which [the state's] performance could be judged." In essence, the *Charter* was Ottawa's answer to "the domestic effects of international forces."[21]

As John Saywell notes, through the *Charter* the Supreme Court was given "a clean slate on which to write its constitutional prescriptions,"[22] which in turn created a new opening for Canadian interest groups to advance their rights claims. Prior to 1982, the Supreme Court had been reluctant to grant interest groups intervener status, preferring instead to limit involvement to only the parties directly involved in the dispute.[23] Only in the 1970s, as its conservative culture was beginning to wane, did the court begin to allow third-party interveners, first in *Lavell* and then again in *Morgentaler*.[24] But after 1982, the Supreme Court revisited the rules governing third-party interventions. The change in thinking was in part a reflection of the court's unfamiliarity with the new Constitution, but it was also a response to growing

calls to enlist the expertise of a wide range of voices to help give meaning to the *Charter*'s ambiguous language, the underlying rationale being that interest group interventions would help to ensure that the courts interpreted the Constitution and crafted their decisions in a manner reflective of the growing diversity within Canadian society. Concurrently, some of the more activist members of legal academe began to advocate "strategic litigation," an American phenomenon that involved the "long-term program of litigation in selected cases in order to influence the development of jurisprudence favourable to one's interests,"[25] the underlying premise being that the courts could be a viable vehicle for "righting the wrongs" of Canadian society.

Still, during the years immediately following introduction of the *Charter,* the Supreme Court wavered on the question of whether to allow third-party interventions at its proceedings. In 1983, interest groups that had participated in a case heard before a lower court were given an automatic right to participate in the appeal at the Supreme Court. This inclusiveness did not last long. Believing that hearings should remain between the principal parties involved in the dispute, the court rescinded the new rule the same year and began to turn away interest group applications for interventions in 1984.[26] Many NGOs were disappointed with the court's reversal. In the mid-1980s, A. Alan Borovoy, general counsel of the Canadian Civil Liberties Association, lobbied the Canadian Bar Association's Supreme Court Liaison Committee to permit interveners to "participate in important public interest litigation" on the grounds that NGOs could offer "nuanced alternatives" that would otherwise be unavailable to the court.[27]

The campaign for greater interest group participation spurred an internal debate among the justices of the Supreme Court. Madam Justice Bertha Wilson, Canada's first female Supreme Court justice, was supportive of the idea of opening the court up to a broad range of third-party interveners. Her position was not surprising given her views about the law and the role of judges in society. According to her biographer, Ellen Anderson, Wilson believed in a "sort of sociology of law," which advocated interpreting the law "contextually," meaning according to perceived realities.[28] But Wilson's enthusiasm for expanding the number of voices in the courtroom was not shared by all of her colleagues. Justices Jean Beetz and Willard Estey remained hesitant. Their concern was that interest groups would become "permanent fixtures of the Court," a prospect that they believed would undoubtedly add to the "length and complexity of the appeals."[29] As Robert Sharpe and Kent Roach note, Chief Justice Brian Dickson initially sided with

Beetz and Estey but gradually became more "receptive to a more liberal policy."[30]

By the mid-1980s, the pendulum had swung in favour of the Wilson and Dickson camp. In May 1987, the Supreme Court modified the rules governing intervention once again. This time it required that applicants demonstrate to the court their interest in the case as well as the usefulness and distinctiveness of their submissions. Factums were to be limited to twenty pages, and any intervener that wished to make an oral argument would have to seek special permission from the court to do so. In addition, the court interpreted the new rules in a fairly broad manner, adopting the position that any group with a history of involvement with the issue at stake would meet the criteria governing interventions. The result was not insignificant. By the late 1980s, the Supreme Court had effectively removed the barriers that had previously prevented interest groups from accessing the court for the purposes of social activism. Despite initial reservations, the stage had been set for NGOs to become "permanent fixtures" of the court.

The problem with revolutions – even bloodless rights revolutions – is that they are contentious and divisive. Throughout the 1980s, particularly around the time of the Meech Lake Accord, as Canadians seemed to be in an identity crisis and national unity was in jeopardy, critics began to question whether the *Charter* had been good for Canada. Although some viewed the Constitution as an important safeguard against government abuse,[31] others began to see it as an instrument for reframing political and moral questions into "legal" issues. They feared a shift in political power away from Parliament and into the hands of activist courts that used "rights" to justify judicial review. They warned against a reorientation in the way in which policy was made in Ottawa and saw evidence of a centralizing effect in which federal preferences trumped provincial autonomy.[32]

Nor did interest groups fare well in this backlash against the *Charter* and the courts, as the notion of strategic litigation came increasingly under fire. The prevailing view among observers of the courts was that the *Charter* had afforded a new "political commodity" to various groups, namely, the "ability to make a credible claim that some right, privilege or other entitlement is protected" by the Constitution.[33] Although many conceded that judicial oversight was one way to alert governments and the public to flaws in the "legislative calculus," there was a common perception among many scholars on the conservative end of the political spectrum that interest groups – predominantly civil libertarian and "equality-seeking" groups that engaged in

"legal mobilization" – were using the courts to initiate "end-runs" around Parliament to further their particular political and social agendas, a practice that they viewed as elitist, irresponsible, and, above all, undemocratic.[34] Indeed, Cairns suggests that one of the most dramatic effects of the *Charter* on Canada's political culture has been that, in granting the courts exclusive jurisdiction over the Constitution's interpretation, it has encouraged the creation of "new groups of court watchers and interveners" whose narrow aim is to secure judicial decisions that are "sensitive to their constitutional interests" at the expense of the majority.[35]

University of Calgary political scientists F.L. Morton and Rainer Knopff have taken this idea a step further. They argue that the "Charter Revolution" has given rise to the "Court Party," a loose alliance of judges, lawyers, law schools, journalists, and "equality-seeking" and other interest groups with considerable resources at their disposal (much of which comes from state coffers), who together have sought to "reengineer society" through the judiciary rather than through the "traditional political party and bureaucratic channels" of government. According to this thesis, these actors have not only politicized the judiciary but also cultivated a highly divisive and fractious political climate that favours absolutist solutions over compromise and negotiation. Whether this is true remains the subject of considerable debate. Morton's and Knopf's ideas have been challenged, both directly and indirectly, by scholars on the left, notably Miriam Smith in her writings on the role of the courts in the struggle to advance the group rights of gays and lesbians in Canada.[36] Nevertheless, regardless of whether it has been used as an instrument of the right or the left, few would argue that the *Charter* has not fundamentally transformed the Canadian political landscape.

The purpose of this book is not to weigh in on the debate about the ideological leanings – or "value judgments," to quote Madam Justice Beverley McLachlin – of the Supreme Court in the *Charter* era.[37] Nor is it to comment on the privileged nature or legitimacy of these third-party interventions, whether their presence enhances or undermines Canadian democracy, federalism, or national unity. Nor for that matter is it to comment on *which* set of rights – libertarian or egalitarian – the court is more predisposed to favour (or reject) or whether the *Charter* has unduly transformed the processes of government or elevated the importance of the individual at the expense of the collective good. Rather, the purpose is to deepen understandings of the "age of rights" by charting the emergence, advancement, and

defence of a particular standard of behaviour, principally through the advocacy of four "principled" and influential public interest organizations – the Canadian Council of Churches (CCC), the Canadian Jewish Congress (CJC), the Canadian Civil Liberties Association (CCLA), and Amnesty International (AI) Canada – including through their respective interventions in three precedent-setting cases at the Supreme Court – *Singh et al. v. MEI* (1985), *R. v. Keegstra* (1990), and *Kindler v. Canada (Minister of Justice)* (1991). At its core, this book is about the roles of principled ideas about rights, of the non-governmental actors that champion them, and of the state institutions that rule on their merit and apply them to real situations. It is about the process through which the parameters on the range of activities that governments can morally and legally engage in are defined as states attempt to further and protect individual liberties as well as the collective well-being. In sum, it is about the struggles associated with fulfilling the promise and ideals of the age of rights, struggles that confront not just Canada but also all liberal parliamentary democracies.

International relations theory offers a useful beginning point for understanding the process by which certain ideas about rights are adopted. In the 1990s, scholars of human rights and international relations grew dissatisfied with the realist framework that saw state behaviour and political change at the international level only as the calculus of power. They began to reexamine how and why international human rights were advanced in a world-system founded on the primacy and sovereignty of the nation-state. What emerged was the constructivist school of thought that attempted to provide an answer to the question of why states pursue policies that do little to advance their immediate material interests. Constructivists began to suggest that norms – collective moral expectations or social constructions that attempt to establish the parameters of appropriate conduct – matter when trying to understand state behaviour, because understandings of "oughtness," as Martha Finnemore and Kathryn Sikkink suggest, not only regulate state action but are central to state identity as well.[38] And as Ted Hopf observes, constructivism "assumes that the selves, or identities, of states are a variable; they likely depend on historical, cultural, political or social context," its advocates "believing in the power of knowledge, ideas, culture, ideology, and language, that is, discourse."[39] Constructivists such as Thomas Risse and Sikkink stress not only the importance of the "power of principle" and the "battleground of ideas" – the cumulative process by which norms about appropriate conduct are formed, debated, contested, and, in some

cases, accepted – but also the non-state actors whose "principled commitment" has led them to become champions of particular norms.[40] Accordingly, the aim of these "norm entrepreneurs" is to *persuade* or *socialize* state actors for the purposes of, to quote Ignatieff, "rais[ing] the bar on the morally permissible."[41] "Human rights" – the "social expectations that have been codified to some degree in formal international legal instruments" – are the vehicle through which this process can occur.[42]

Finnemore and Sikkink have developed a theoretical framework, which they call the "norm life cycle," to explain the progression and adoption of certain ideas.[43] They identify three stages in the life cycle. The first stage involves the emergence of the norm and attempts on the part of norm entrepreneurs to convince state officials to conform to the norm by calling attention to key "issues by using language that names, interprets, and dramatizes them." This is followed by a second stage of "norm cascade" or general acceptance among a wide range of constituents. The third stage is realized only when the norm becomes "internalized," meaning that it becomes so well established that it acquires a "taken-for-granted quality and [is] no longer a matter of broad public debate."[44] Similarly, Ann Marie Clark suggests that this third stage is often realized when a norm is codified into law.[45] All three acknowledge that the process from emergence to codification is neither smooth nor inevitable. "Success" depends on a whole host of factors, including the receptiveness of the executive, legislative, and judicial branches of the state to "appeals of principle" by norm entrepreneurs in their deliberations about the scope and limits of rights.

The particular "rights" featured in this book were chosen for a variety of reasons. First, all of the rights involve political and civil rights, or first-generation rights as they are also known, that deal with questions of violence, specifically the protection from or the appropriate response to both the threat of violence and real acts of violence.[46] Second, in all three Supreme Court cases, the public interest groups felt compelled to intervene; indeed, to ignore the events at the court would have betrayed the values and ideals that were central to their respective identities. Their stands were principled and idealistic, at times uncompromising and even categorical. Yet they were not so doctrinaire that their positions were removed from the environments around them. All four had built up considerable expertise and experience with the issue being debated and in the process had struggled with their respective stances. Although none minimized the contentiousness of what they were saying, each paid a high price for participation that went well beyond the financial cost of intervention. And third, all three

cases deal explicitly with the inherent dilemmas and governance challenges that free societies must come to terms with in order to remain free.

The chapters are organized chronologically according to the order in which the trials occurred and can be read in sequence or independently, as each is meant to stand on its own. Each chapter consists of a history of both the interest group and the law that would eventually be contested at the Supreme Court, the institution that, as the final arbiter and interpreter of the *Charter,* is central to the process of legitimizing norms.

Chapter 1 is an account of the Canadian Council of Churches' efforts to secure norms relating to the rights of refugees, a cause it first took up after the Second World War. In the late 1970s and early 1980s, the CCC attempted unsuccessfully to obtain reforms to the *Immigration Act, 1976,* that would have allowed for greater procedural protection for refugee claimants. Aligning themselves with a group of concerned immigration lawyers and human rights organizations, CCC member churches argued that the law was overly cumbersome and rigid and highly susceptible to inaccurate assessments. Among other concerns, they called on the federal government to provide claimants with an oral hearing before the body responsible for the final decision. They found little success. For its part, the Canadian government contended that the added financial costs and a growing backlog of claims would bankrupt the system.

Eventually, the CCC turned to the Supreme Court of Canada to resolve the matter in the *Singh* case of 1984-85. This was in many respects a last resort for the CCC and its allies. *Singh* was the culmination of a relationship gone sour, the product of the frustrations felt by a refugee advocacy community whose criticisms of the *Immigration Act, 1976,* had fallen on deaf ears. In *Singh,* the Supreme Court considered whether sections 45, 70, and 71 of the *Immigration Act, 1976,* were in contravention of section 2(e) of the *Canadian Bill of Rights* and section 7 of the *Charter.* At issue was whether claimants should be guaranteed the right to an oral hearing before those who were responsible for deciding their fate. Working alongside the counsel for the Federation of Canadian Sikh Societies (FCSS), the CCC was able to convince the court to award oral hearings not only to all seven appellants but also to all claimants who go through the system. The Mulroney government responded to *Singh* with a series of sweeping reforms (many of which remain in place), the aims of which were to limit access to the system and deter human smuggling. Consequently, for the CCC, as well as for the rest of Canada's refugee advocacy community, *Singh* was a short-lived victory. The

case and the events that followed not only revealed the limits of Canadian tolerance toward refugees but also highlighted one of the central and most difficult tests facing liberal democracies that are destination points for those seeking a better life: how to resolve the seeming incompatibility of principles of fairness, compassion, and legal obligations to protect the security of the individual with the state's duty to maintain control of its sovereignty.

Chapter 2 charts the emergence of norms related to the protection of vulnerable minorities from pronouncements of hate through disputes between the Canadian Jewish Congress and the Canadian Civil Liberties Association relating to the controversial 1970 hate propaganda law. Of the two, the CJC's role was more pronounced; indeed, the law came about in large part at the behest of the organization, which had been calling for such legislation since the early 1950s. Its position rooted in the collective historical experiences of the Jewish community in Canada and abroad, the CJC adopted the argument that hate speech constituted a "misuse" of the principle of freedom of expression, one that undermined the very health and well-being of the democratic system, and as such was grounds for being restricted. In turn, the CCLA provided a strong counterweight to the CJC's arguments, its main positions being that ideas were the engine that drove social change and that it was better to confront hate through open public debate than through the courts. The result was a law that not only offered an uneasy balance between two competing rights but also codified the arguments that freedom of expression was accompanied by an obligation not to use speech to undermine the well-being of society and, in turn, that state intervention was justified in cases where this responsibility was ignored.

Both organizations defended their respective positions in *Keegstra,* a case that was deeply hurtful to Canada's Jewish community. At issue was whether Canada's hate propaganda law was constitutional, specifically whether section 281.2(2) of the *Criminal Code of Canada,* which prohibited the "wilful promotion of hatred" in situations in which there was no obvious call for violence, violated the right to freedom of expression found in section 2(b) of the *Charter* and whether section 281.3(a), which allowed for the "defence of truth," contravened James Keegstra's constitutional right to be innocent until proven guilty, as defined by section 11(d) of the Constitution. More generally, the court was asked to determine whether the limits on individual freedom of expression were reasonable in order to protect vulnerable minorities from group defamation. In a controversial four to three decision, the majority on the bench ruled that the law was unconstitutional but could be upheld because of section 1 of the *Charter,* which allows for

reasonable limits on rights, provided that they are "demonstrably justified in a free and democratic society." The split reflected not only the two philosophical positions put forth by the two organizations but also the contentiousness that had surrounded the law from its inception. That the decision favoured the state was, in part, an expression of a period in which litigation in the name of a multicultural and pluralistic Canada was seen as a viable and acceptable avenue for redressing inequities within society and an emerging consensus that the effects caused by hate did not need to be physical to cause harm. Although the ruling reaffirmed the validity of the law, the case – the entire ordeal, for that matter – did little to resolve the larger question of at what point a free society can no longer in good conscience tolerate controversial and harmful expressions and must use coercive measures to limit the very democratic principles that it hopes to preserve.

Finally, Chapter 3 examines Amnesty International Canada's championing of the norm of abolition of the death penalty, including its relationship to Canada's extradition law.[47] Canada first became a *de facto* abolitionist country in the early 1960s. But in 1976, Minister of Justice Warren Allmand introduced Bill C-84, which called for the complete repeal of the death penalty from the *Criminal Code of Canada*. At the time, the legislation was highly divisive, sparking a heated debate about competing visions of Canadian justice. The bill passed in a free vote but only by a narrow margin of six votes; opponents of Bill C-84 put little stock in the outcome. Led by Tory back-bencher Bill Domm, the MP for Peterborough, Ontario, the formal campaign for reinstatement coincided with the Mulroney government's victory at the polls in 1984. On 13 February 1987, a motion for reinstatement was brought before Parliament. AI Canada and its supporters responded by launching a multi-pronged public awareness campaign, the aim of which was to discredit arguments in favour of the death penalty. The motion was eventually defeated, although the margin of victory remained narrow at twenty-one votes. Despite the victory, there remained little conclusive evidence that capital punishment offended Canadian sensibilities.

This ambivalence was the central issue in *Kindler,* a trial in which the constitutionality of Canada's 1976 extradition treaty with the United States was called into question. Wildly unpopular with Canadians, including Domm, the case involved the extradition to the United States of two violent fugitives, Charles Ng and Joseph Kindler, both of whom the Canadian government had agreed to extradite without first seeking assurances that neither would receive the death penalty if returned. Although extradition to stand trial was not in dispute, at issue was whether returning the two men

to face potential execution was in violation of the *Charter of Rights and Freedoms. Kindler* dealt with the fundamental issue of how liberal states respond when confronted by those who pose a direct threat to their society and whether such situations ever warrant infringing upon the individual's rights to security and life in order to protect the public. Central to the case was the question of whether their extradition to face possible execution would "shock the conscience of Canadians." AI Canada contended that it would. It attempted to convince the court that unconditional extradition would contravene both domestic and international law. The court, however, was unpersuaded, ruling four to three in favour of the federal government. Indeed, the case was as much a reflection of the absence of clear norms about the merits of capital punishment at the time of the trial, either within Canada or the international community than it was about defining the limits of permissible state behaviour. It was an absence that checked the Supreme Court from using the *Charter* as an instrument that interfered unduly with the Canadian government's ability to conduct its bilateral relations with its neighbours.

Bobbio has written that the study of human rights "will not have any historical importance if it is not accompanied by the study of the conditions, the means and the situations in which a given right can be implemented."[48] This book – through an examination of the ideas, actors, and institutions through which human rights norms have been advanced in Canada – is an attempt to do just that. Its aim is to better understand the reasons why certain claims about the way in which individuals should be treated have been either respected or disregarded and the roles of judiciaries and civil society actors in liberal parliamentary democracies in influencing the long and tumultuous journey from "oughtness" to "is."