Contested Constitutionalism

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Edited by James B. Kelly and Christopher P. Manfredi

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Reflections on the *Canadian Charter of Rights and Freedoms*

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To Michèle and Fiona
To Paula and Sophie

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Introduction

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Should We Cheer? Contested Constitutionalism and the *Canadian Charter of Rights and Freedoms*

James B. Kelly and Christopher P. Manfredi

More than twenty-five years after its controversial entrenchment as part of the Trudeau government's "people's package," the critical debate surrounding the *Canadian Charter of Rights and Freedoms* continues.[1] What began as a concern that the *Charter* would lead to the "Americanization" of Canada through an empowerment of the Supreme Court of Canada and the formalization of constitutional supremacy[2] has now become a consideration of the implications of *Charter* dialogue between the Supreme Court of Canada, Parliament, and the provincial legislatures.[3] The initial attempt to strengthen Canadian unity through a national statement on rights and freedoms[4] has now become a consideration of the appropriateness of the Court in divisive policy debates such as same-sex marriage, the constitutionality of public health care, the accommodation of religious freedom in public education, and the co-existence of the *Charter of the French Language* and the Canadian *Charter*.[5] Finally, what began as a concern that the *Charter* would centralize the federation[6] has now become a demonstration of a concern that the asymmetrical application of the *Charter* comes at the expense of equal public services among the provinces and notions of equal citizenship.[7] Instead of transcending the institutions of the federation and unifying Canadians, the *Charter* has become embedded in its institutions and the fundamental political and constitutional debates of the Canadian state. Controversy continues – but for reasons very different from those surrounding the *Charter*'s entrenchment in 1982.

Shortly after the patriation of the *Constitution Act* in 1982, an edited volume – *And No One Cheered* – captured academic views on the agreement entrenched without the consent of the Quebec National Assembly.[8] In many ways, the contributors to *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* all ask whether the *Charter* should be cheered as a positive addition to the constitutional system. It is not surprising that the answers to this simple question vary among the volume's contributors, who present a diversity of approaches to understanding the *Charter*.

This volume presents a critical reflection on the *Charter* after more than twenty-five years and focuses on three themes: governance and institutions; policy-making and the courts; and citizenship and identity. Peter Russell remarked that before its introduction in 1982, the *Charter* "represents a further flight from politics, a deepening disillusionment with the procedures of representative government and government by discussion as means of resolving fundamental questions of political justice."[9] The selected themes analyze the implications of this flight from parliamentary politics that now co-exists with judicial politics.[10] Perhaps more importantly, this volume refrains from being a celebration of the *Charter* and, instead, seeks to understand whether it is in fact the "dangerous deed" that Donald Smiley suggested the 1982 agreement represented for Canadian constitutionalism.[11]

Constitutionalism and the Supreme Court of Canada

The contributors to this volume, therefore, consider the implications of the judicialization of politics and whether the growth and influence of the Supreme Court of Canada has strengthened the institutions of Canadian democracy, increased the tenor of policy discourse, and strengthened notions of citizenship and identity. The judicialization of politics refers to the greater participation by the judiciary in fundamental policy debates that occur when courts determine the constitutionality of public policy by their consistency with rights and freedoms.[12] Further, this phenomenon occurs when decision-making processes incorporate judicial values and frame policy debates as involving competing rights discourses "so that debates as to the wisdom of legislation have been replaced by debates about constitutional compliance."[13]

Evidence of the judicialization of politics is found in the former Chrétien government's defence of the *Anti-Terrorism Act* introduced in 2001.[14] Then minister of justice Anne McLellan defended the proposed *Anti-Terrorism Act* before a parliamentary committee as a measured approach that balanced security with freedom in a manner consistent with the *Charter*: "I wish to assure this Committee that this bill has been subject to a very thorough review on *Charter* grounds and that its measures have been designed so that they will respect the values embodied in the *Charter*, and, we expect, survive legal challenges."[15] The Chrétien government's defence of the *Anti-Terrorism Act* supports Alec Stone Sweet's conclusion that "governing with judges also means governing like judges"[16] because it was premised on its compliance with legal values and the *Charter*. While this phenomenon is suggested to transfer decision making authority from the parliamentary to the judicial arena, Russell cautions that the effects should not be overstated: "The main impact of a constitutional bill of rights on the political system, if Canada's experience is a guide, may be less of a transfer of power to the judiciary than a general transfer of the nature of political life."[17] Indeed, the *Charter* has

produced two approaches to governing with rights: parliamentarians who govern like judges when they design legislation that is constitutionally compliant and members of the judiciary who govern like parliamentarians when they base constitutionality on the reasonable limits clause of the *Charter*, since this act requires the judiciary to establish the characteristics of a free and democratic society as the justification for limiting a right or freedom. Governing like parliamentarians occurs most explicitly, however, when the judiciary employ remedies that effectively amend statutes determined unconstitutional by the court in question.

While the introduction of the *Charter* is viewed as the emergence of the judicialization of politics, it has been a constant feature of Canadian federalism since the early days of Confederation. The decline of the Senate as an effective intra-state institution regulating disputes between the two orders of government and integrating provincial interests into federal institutions resulted in political actors using the courts to mediate inter-governmental conflict.[18] The judicialization of politics began with the rise of the provincial rights movement under the leadership of Ontario premier Oliver Mowat in the 1870s, which challenged federal domination in provincial areas of jurisdiction as being inconsistent with the federal principle before the Judicial Committee of the Privy Council (JCPC), the imperial body that served as Canada's highest court until 1949.[19] This structure continued during the Great Depression when the JCPC ruled the *Employment and Social Insurance Act ultra vires* (beyond their power),[20] requiring the Parliament of Canada to seek a formal constitutional change to assume this responsibility from the provinces. Further, the federal government sought constitutional advice on whether it could abolish appeals to the JCPC and allow the Supreme Court of Canada to become the highest court of appeal in 1947.[21]

The judicialization of politics intensified, however, during the period of mega-constitutional politics in Canada, starting in the 1960s.[22] The Supreme Court of Canada was drawn into fundamental debates between the national and provincial governments through increasing use of the reference procedure, which allows either level of government to submit constitutional questions to their highest court for resolution. In this period, the Supreme Court of Canada decided whether the federal or provincial governments had ownership over offshore mineral resources,[23] determined the constitutionality of the *Anti-Inflation Act* introduced by the Parliament of Canada,[24] considered whether the federal government had the ability to alter the composition of the Senate,[25] whether Quebec possessed a historical veto over constitutional change,[26] and, finally, whether the federal government could unilaterally patriate the Constitution.[27] While contemporary critics of the judicialization of politics attribute its rise to the fact that the courts were acting as strategic political actors, Rainer Knopff, Dennis Baker, and Sylvia LeRoy argue in Chapter 4 that it should not be forgotten that the

courts were first used by the governments of Canadian federalism to achieve strategic policy victories in periods of inter-governmental conflict.

Judicial Power and the *Charter*

Although the judicialization of politics has been present throughout Canadian constitutional politics, it has significantly changed since the *Charter*'s introduction. There are a number of factors that account for this transformation: constitutional provisions explicitly authorizing judicial participation in public policy; judicial approaches to governing with the *Charter*; changing approaches to governance by parliamentary actors; and, finally, greater recourse to the courts by citizens seeking policy changes denied by parliamentary politics.[28] Unlike the *Canadian Bill of Rights*, which is a statutory document applicable only to the federal government that did not authorize judicial review, a more robust judicial role is authorized by the *Constitution Act, 1982*, of which the *Charter* is a significant component. Section 52 of the *Constitution Act, 1982,* articulates the principle of constitutional supremacy by establishing that "[t]he Constitution of Canada is the supreme law of Canada" and, further, authorizes judicial invalidation of inconsistent laws as unconstitutional because "any law that is inconsistent with the provisions of the Constitution is, to the extent of that inconsistency, of no force or effect."[29]

The scope of judicial review, therefore, is significantly different from that which existed under the *British North America Act, 1867, (BNA Act)*, where judicial review was confined to the division of powers and the Supreme Court of Canada articulated its role as the umpire of federalism.[30] In this role, the Court evaluated government action for its consistency with the division of powers and whether the governments of Canadian federalism acted *intra vires* (within their power) or *ultra vires* (beyond their power). Today, the Supreme Court of Canada articulates its role as the "guardian of the Constitution," and the validity of government action is determined largely by its consistency with the *Charter*. Thus, the judicialization of politics is captured in how the Court has evolved as an institution and how it conceptualizes its role as constitutional guardian in relation to the *Charter* and not simply as the umpire of federalism.

While section 52 of the *Constitution Act, 1982,* does not explicitly authorize judicial determinations of constitutionality, section 24 of the *Charter* clearly establishes the judiciary as the institution to remedy laws determined "of no force or effect" under the *Constitution Act, 1982*. Section 24(1) provides that once a right or freedom guaranteed in the *Charter* has been infringed, an individual "may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."[31] Thus, there is tremendous discretion available to the judiciary in fashioning remedies that are *appropriate and just in the circumstances,* and this has been

an important basis of judicial power since 1982. The range of remedies employed by the Supreme Court of Canada, however, demonstrates that the *Charter*'s introduction has not transferred sole decision-making authority from Parliament to the Court but has resulted in what Russell suggests would be a general transformation of political life. Three remedies have been employed by the Court when statutes have been found to violate the *Charter*: invalidation, suspended declarations of unconstitutionality, and, finally, judicial amendment of legislation through the reading-in/reading-down provision, or what Christopher Manfredi refers to as micro-constitutional amendment.[32]

The most common remedy employed by the Supreme Court of Canada remains the invalidation of legislation as being inconsistent with the *Charter*. This is arguably the least political remedy employed by the Court since it simply determines that an act is unconstitutional because it is a violation of the *Charter* and invalidates the act, rendering it immediately "of no force or effect." The remaining remedies are clearly political acts on the part of the Court, with suspended declarations representing an indirect political remedy and micro-constitutional amendments being a direct political remedy of an unconstitutional statute. The use of a suspended declaration of unconstitutionality is an indirect political remedy because the Court is conscious of the implications of invalidating a particular statute and factors the political context into its remedy. Instead of immediate invalidation, the Court determines that an act is unconstitutional but suspends its judgment for a period of time to allow the responsible legislative body an opportunity to draft amendments before the suspended decision expires.

This remedy was employed in *R. v. Swain,* when the Court invalidated section 542(2) of the *Criminal Code,* which provided for indefinite incarceration of individuals found not guilty by reason of insanity.[33] The Court determined that this provision violated the principles of fundamental justice protected under section 7 of the *Charter* since the designation not criminally responsible (NCR) due to mental capacity required periodic review to determine its continued applicability to an individual. Recognizing that the invalidation of this provision under section 24(1) would release individuals detained in psychiatric institutions into the general public, as their continued detainment would no longer be constitutional, the Court suspended its decision for six months. During this period, the *Criminal Code* was amended to provide for periodic review of individuals detained via section 542(2) to ensure its consistency with the principles of fundamental justice. Indeed, in a subsequent challenge to the amended section 542(2), the Court upheld its constitutionality, finding the provision "carefully crafted to protect the liberty of the NCR to the maximum extent compatible with the person's current situation and the need to protect public safety."[34]

The use of suspended declarations of unconstitutionality by the Supreme Court of Canada increased significantly during the second decade of *Charter* review and saw Kent Roach challenge the position that Canadian judges were engaged in American-style remedial activism as "the courts have often deferred to governments with gentle, patient, flexible remedies."[35] Indeed, the use of suspended declarations challenges the notion that the *Charter*'s introduction has transferred final decision-making authority to the Court. While suspended declarations do limit the force of judicial power, this remedy does, to a limited degree, result in the politicization of the judiciary since it requires a court to move beyond a consideration of the legal merit of an argument to the political merit of temporarily sustaining an unconstitutional policy to offset the potential implications to the public good that invalidation would produce, as the *Swain* decision demonstrates.

The third – and most controversial – remedy, a micro-constitutional amendment, sees the Supreme Court of Canada transition from a legal actor to a constitutional framer and a policy architect. The Court functions as a constitutional framer when it alters the text of the *Charter* either through sections of the document that authorize judicial amendment or through judicial review that changes the meaning of rights and freedoms. The Court functions as a policy actor when it amends legislation through the reading-in/reading-down remedy created by the courts through section 24(1) of the *Charter* because this remedy changes the architecture of public policy to ensure its constitutionality. Further, the ability under section 24(2) of the *Charter* to exclude in criminal proceedings evidence that "undermines the reputation of justice" is another dimension of the Court as a policy architect because the Court – and not Parliament – establishes the rules governing the constitutional gathering of evidence by the police.

The Supreme Court of Canada as constitutional framer is limited to section 15(1) since equality rights are enumerated (defined) *and* analogous (undefined). The placement of the phrase "in particular" before the enumerated grounds in section 15(1) was included to ensure that, as was not the case in previous drafts of the *Charter*, this protection was open-ended as the listed grounds were simply illustrations of the characteristics protected against discrimination.[36] Thus, equality rights provide for a micro-constitutional amendment because the provision was drafted to allow for new grounds to be added through judicial review if the courts determine that an emerging characteristic is analogous – or similar to – the existing enumerated categories.[37] This construction resulted in sexual orientation being added to section 15(1) in *Egan v. Canada* because the Court determined this characteristic to be analogous to the enumerated grounds for protection: "[I]t is a deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs, and so falls within the ambit of s. 15 protection

as being analogous to the enumerated grounds."[38] The Court has acted as a constitutional framer in three additional instances involving section 15(1): recognizing citizenship,[39] marital status,[40] and off-reserve band status as analogous grounds.[41] While the micro-constitutional amendment of equality rights clearly demonstrates the judicialization of politics in the post-*Charter* period, there is a strong textual basis to justify the Court acting as a constitutional framer with equality rights.

The controversy sounding the Supreme Court of Canada as a post-entrenchment framer of the *Charter* generally involves the alteration of rights or freedoms where they are not authorized by the text. The explicit rejection of the legislative intent of section 7, the principles of fundamental justice, represents the most telling example of micro-constitutional change by the Court in direct opposition to legislative intent. Unlike the *Canadian Bill of Rights,* which provides for the protection of legal rights in accordance with the due process of law, the *Charter* provides similar protection but in accordance with the principles of fundamental justice. The term "principles of fundamental justice" was used instead of "due process" to avoid a substantive interpretation of legal rights and to ensure a narrower, procedural approach.[42] This approach to section 7 was categorically rejected by the Court in *Reference re B.C. Motor Vehicle Act,* when it refused to be bound by the legislative intent of the principles of fundamental justice articulated before the Special Joint Committee on the Constitution of Canada by then justice minister Jean Chrétien and his officials.[43] According to Justice Antonio Lamer, "[i]f the newly planted 'living tree' which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth."[44] While opinions are divided on a substantive approach to section 7, the debate on micro-constitutional amendments is generally more about policy *outcomes* and less about institutional *procedures*.

The issue of freedom of expression demonstrates the ability of the judiciary to change the meaning of entrenched rights simply through case law and highlights the controversy surrounding judicialized policy outcomes. Freedom of expression has been given the largest and most liberal interpretation by the Supreme Court of Canada, evolving from a right protecting expression that is considered to be essential to a democratic society to "all content of expression, irrespective of the meaning or message sought to be conveyed."[45] Indeed, the Court has extended section 2(b) to include hate literature,[46] solicitation for the purposes of prostitution,[47] and tobacco advertising[48] and has ruled that "[t]he possession of child pornography is a form of expression protected by s. 2(*b*) of the *Charter*."[49] While the Court ruled in *R. v. Sharpe* that child pornography had a much lower level of protection than

political expression, the Court included the possession of child pornography within the ambit of section 2(b) and acted as a policy architect, reading down the *Criminal Code* to ensure its constitutionality with the right to possess child pornography.

These controversial social matters divide the Court just as they divide Canadian society, none more so than the *Tobacco Products Control Act* (*TPCA*), which was introduced by the Parliament of Canada to prohibit tobacco advertising as a means to protect the health of Canadians by discouraging new smokers.[50] As a result of the expansive approach to freedom of expression, the *TPCA* violated section 2(b), and the Court elevated the ability of multinational corporations to advertise cigarettes to the status of a fundamental freedom – a controversial decision given the peripheral connection between tobacco advertising and the expression necessary to facilitate a democratic society. While the Court was unanimous that the *TPCA* violated freedom of expression, a narrow majority (five to four) determined that the restriction did not constitute a reasonable limitation. The Court divided on the merits of the *TPCA* and the instruments chosen to advance the legislative intentions. The minority opinion accepted Parliament's policy justification that a total prohibition on tobacco advertising was necessary to achieve the objective of dissuading young smokers,[51] whereas the majority rejected that a total ban was necessary and disputed Parliament's assertion that a causal connection existed between tobacco advertising and consumption.[52] In particular, Justice Beverley McLachlin criticized the Crown for simply asserting the link between advertising and consumption and for failing to provide scientific evidence demonstrating causality.

If suspended decisions limit judicial power, then micro-constitutional amendments through the remedy of reading-in or reading-down provisions unquestionably politicize the judiciary. Similar to suspended declarations of unconstitutionality, the reading-in/reading-down remedy increased significantly during the second decade of *Charter* review by the Supreme Court of Canada and suggests, contrary to Roach's opinion, the emergence of American-style remedial activism, as it is not a gentle, patient, or flexible remedy.[53] This remedy sees the Court transition from being a *legal* actor concerned with questions of constitutionality to a *legislative* actor concerned with designing policy instruments that are constitutional – a subtle yet significant shift in the judicial function under the *Charter*.[54] Again, the issue of sexual orientation demonstrates the politicized nature of judicial review since the *Charter*'s introduction. The exclusion of sexual orientation as a protected ground against discrimination in Alberta's provincial human rights code was challenged as a violation of equality rights in *Vriend v. Alberta*.[55] At this time, several provincial human rights codes (Alberta, Newfoundland and Labrador, and Prince Edward Island) – which protect against discrimination in housing, employment, and education – did not recognize sexual

orientation as a protected category. At issue in *Vriend*, therefore, was not government action resulting in discriminatory treatment but, rather, government inaction or legislative silence resulting in discrimination.

Finding that the under-inclusion of the *Individual's Rights Protection Act* (*IRPA*) violated section 15(1) of the *Charter*, the Supreme Court of Canada employed the most controversial remedy created under section 24(1), reading sexual orientation into Alberta's human rights code.[56] In justifying this remedy, which denied Alberta the opportunity to decide whether and how to amend the *IRPA*, Justice Frank Iacobucci invoked the dialogue metaphor, arguing that the final word still rested with the provincial legislature: "Moreover, the legislators can always turn to s. 33 of the *Charter*, the override provision, which in my view is the ultimate 'parliamentary safeguard.'"[57] The judicialization of politics, according to the Court, is simply incorrect because of the structure of the *Charter*. According to Roach, "[w]hen the Court has the last word, it is because the legislature and the people have let it have the last word."[58]

This defence of judicial activism as a dialogue between courts and legislatures is the contemporary debate regarding the *Charter*. Dialogue as advanced policy discourse is refuted by Grant Huscroft as underestimating the ability of the Supreme Court of Canada to have the final word through judicial decisions that determine the legislative response enacted by Parliament: "Not only can the Supreme Court of Canada strike down legislation, it has the power to make its decisions stick – to preclude any legislative response other than enactment of the Court's decision – if it chooses to do so."[59] Similar to an earlier debate that considered whether judicial review by the JCPC or the Supreme Court of Canada centralized or decentralized the federation, the *Charter* dialogue debate considers whether judicial review is democratically enhancing or debilitating for the federation.

The Parliamentary Response to the *Charter*

During his presentation before the Special Joint Committee on the Constitution of Canada, which reviewed the draft *Charter*, Peter Russell remarked: "I believe that a Charter only guarantees a change in the way in which certain decisions are made. It does not guarantee rights or freedoms, it guarantees a change in the way in which decisions are made about rights and freedoms."[60] The judicialization of politics has also resulted because of the decisions by parliamentary actors on how to govern with the *Charter*. This is evident in the transformation of parliamentary debates from policy discourses to rights discourses, where legislation is defended in the public interest only when it is determined to be *Charter* compliant. Former justice minister Irwin Cotler defended same-sex marriage as constitutionally required because the Court, in *Reference re Same-Sex Marriage*, determined that it was constitutional: "We had judgments of courts in eight jurisdictions

that expressly held that the opposite-sex requirement for marriage was unconstitutional, a matter affirmed and referenced by the Supreme Court of Canada ... The court affirmed unanimously the constitutionality of that policy option of extending civil marriage to gays and lesbians as being not only consistent with the charter but indeed as flowing necessarily from it."[61] The judicialization of policy discourse by parliamentarians is further demonstrated by the government's reasoning about why civil unions would not be an acceptable policy alternative to same-sex marriage: "The courts have said that civil union is a lesser form of equality, and that individuals with access to civil unions but not civil marriages would be less respected under the law in terms of their values and their minority rights."[62]

By adopting the language of rights to justify policy in the public interest, parliamentarians govern like judges, and this further flight from politics is the result of elected officials "judicializing from within."[63] A review of parliamentary transcripts from the committee system reveals the presence of *Charter* dialogue between ministers and parliamentarians during the scrutiny of legislation and the legalization of policy debates. For instance, the parliamentary scrutiny of the *Anti-terrorism Bill* saw the minister of justice's certification that the bill was *Charter* compliant challenged by members of the committee and by witnesses called before the Justice and Human Rights Committee of the House of Commons. Discussions of the relationship between the *Charter* and the *Anti-terrorism Bill* dominated the proceedings of the parliamentary committee, and opposition to the bill was couched in the language of the *Charter*. Many provisions were argued to violate the *Charter* and to constitute an unreasonable limitation on section 7, the principles of fundamental justice.[64]

Judicialization from within is also evident inside the machinery of government and, according to James Kelly, from the emergence of the Department of Justice as a central agency that uses *Charter* compliance as a framework to evaluate whether policy is in the public interest.[65] For instance, the minister of justice is required to scrutinize all bills before they are introduced into the House of Commons and "report any such inconsistency to the House of Commons at the first convenient opportunity."[66] The Department of Justice is central to ensuring that legislation introduced into the House of Commons is, in the opinion of the minister of justice, *Charter* compliant, as the legislative initiatives of all government departments must be vetted by the Department of Justice for their *Charter* consistency before being sent to the Cabinet for discussion. The *Charter*, therefore, has had a transformative effect on the development of public policy, on the discourse surrounding public policy, and on the nature of parliamentary scrutiny. While former Chief Justice Brian Dickson argued that the *Charter* was not the dawn of a new era, the parliamentary response to the *Charter* suggests otherwise.[67]

Citizens and the *Charter*

Alan Cairns describes the *Charter* as the "citizens' constitution" and contrasts it with the "government's constitution" that existed before 1982. For Cairns, the *BNA Act* was a "government's constitution" because it simply distributed jurisdictional responsibilities between the governments of Canadian federalism and was largely silent about the rights of individuals.[68] Part of the popularity of the *Charter* is derived from the close personal attachment that many Canadians associate with this document. Indeed, the judicialization of politics is advanced by the status given to the *Charter* and the steps taken by citizens to defend their rights against government encroachment.

Charles Epp argues that the entrenchment of a bill of rights does not account for the judicialization of politics or the growing proportion of rights cases decided by supreme courts.[69] It is the use of litigation strategies by interest groups that, according to Epp, accounts for the increased involvement of the courts in policy debates. Epp refers to this process as the creation of a legal mobilization support structure that facilitates the transmission of societal demands to the courts for policy resolution. Indeed, the National Association for the Advancement of Coloured People is used to illustratrate that the judicialization of politics requires the presence of interest groups employing litigation in addition to lobbying strategies to achieve their policy goals.

The role of interests groups in advancing the judicialization of politics exists in Canada but in a somewhat different fashion than in the United States. The creation of the Court Challenges Program in 1977 by the Trudeau government facilitated the judicialization of politics since this program funded interest groups, such as Alliance Quebec, that challenged the language policies of the Parti Québécois government of Réne Lévesque. The parameters of the Court Challenges Program were broadened by the Mulroney government to include funding for equality rights-based litigation in the 1980s.[70] In Chapter 10, Troy Riddell analyzes the litigation strategies of minority language groups outside of Quebec. For instance, minority language education groups such as the Association canadienne-fraçaise de l'Alberta appeared as an intervenor in *Mahé v. Alberta,* a case involving the scope of section 23 of the *Charter* in regard to what level of services must be provided for French-language education in Edmonton.[71] In *Mahé*, the Supreme Court of Canada decided that a sliding scale approach must be adopted to determine what level of services are warranted by minority language communities – an approach that Christopher Manfredi contends makes "possible a significant degree of judicial management of education policy through remedial decrees."[72]

The interest group that has achieved significant policy victories through the courts is the Women's Legal Education and Action Fund (LEAF), a feminist interest group that appears as an intervenor in many cases involving

section 15 of the *Charter*. Indeed, feminist legal mobilization demonstrates the dual strategies – lobbying and litigation – that are characteristics of the judicialization of politics associated with the introduction of the *Charter*. The Special Joint Committee on the Constitution of Canada was successfully used by feminist organizations such as the National Action Committee on the Status of Women to challenge the draft *Charter* and the inclusion of procedural equality. Feminist organizations opposed the entrenchment of procedural equality because of their dissatisfaction with *Bliss v. Canada (Attorney General)* and *Attorney-General of Canada v. Lavell* – two Supreme Court of Canada decisions that undermined, according to feminist organizations, the progressive potential of equality rights to address the unfair treatment of women.[73] As a result of important presentations before the Special Joint Committee on the Constitution of Canada, advocating substantive equality and the inclusion of analogous grounds in addition to enumerated grounds, feminist organizations transformed equality rights and are largely responsible for the final wording in section 15(1).[74] Once substantive equality was entrenched, LEAF emerged as an organization committed to defending its interpretation of the *Charter* beyond the confines of section 15(1). LEAF has been successful in advancing its position in the following areas: freedom of expression and the regulation of pornography, reproductive rights, and sexual orientation.[75]

The issue of sexual orientation and the litigation strategy of the federal government are analyzed by Matthew Hennigar in Chapter 11. The involvement of EGALE Canada – which stands for equality for gays and lesbians everywhere – further illustrates the importance of the Canadian version of the legal mobilization support structure and its contribution to the judicalization of politics. EGALE has appeared as an intervenor in every major case involving sexual orientation, such as the recognition of sexual orientation as being analogous to the enumerated grounds of section 15(1) in *Egan*, the reading-in of sexual orientation into Alberta's human rights code in *Vriend* and *Reference re Same-Sex Marriage*. In fact, Miriam Smith contends that gay and lesbian groups in Canada have been more successful than their counterparts in the United States in framing this issue within the emerging policy discourse on equality.[76]

In recent years, the judicialization of politics has involved the health care system, as Christopher Manfredi and Antonia Maioni discuss in Chapter 7. The issue of freedom of religion within the public education system was also addressed in *Multani v. Commission scolaire Marguerite-Bourgeoys*, a 2006 case involving whether the ban on the kirpan – a Sikh religious dagger – in the public school system was an unreasonable limitation on freedom of religion.[77] In *Multani*, the school board banned authentic kirpans because of safety concerns but allowed Gurbaj Singh to wear a plastic or wooden kirpan under his clothes. In its decision, the Supreme Court of Canada found the actions

of the school board violated freedom of religion because the inability to wear an authentic kirpan required the appellant to choose between his religious beliefs and leaving the public school system: "Forced to choose between leaving his kirpan at home and leaving the public school system, Gurbaj Singh decided to follow his religious convictions and is now attending a private school. The prohibition against wearing his kirpan to school has therefore deprived him of his right to attend a public school."[78] Unable to find that this infringement constituted a reasonable limitation, the Supreme Court of Canada invalidated the decision of the school board.

The issue of reasonable accommodation of religious beliefs in public services is a contemporary debate, particularly in the province of Quebec with the launching of the Bouchard-Taylor Commission in 2007, which had a mandate to conduct public hearings and issue a report to Quebec's National Assembly. While the issue of reasonable accommodation has returned to the public domain, *Multani* was an important decision that raised this issue to the level of public consciousness. The ability to frame public discourse, therefore, is an important dimension of the judicialization of politics in Canada at the present time.

Organization of This Study

This study is organized into three sections: governance and institutions, policy making and the courts, and citizenship and identity. The selection of themes clearly demonstrates the importance of the Supreme Court of Canada after more than twenty-five years of *Charter* review. The initial analysis of the *Charter* at the period of entrenchment in 1982 generally involved whether the *Charter* would act as an instrument of national unity and, second, whether the *Charter* posed a challenge for provincial autonomy by centralizing the federation through rights-based review. The *Charter* debate now considers the complexity of the institutional response to the *Charter* by judicial, parliamentary, bureaucratic, and societal actors such as interest groups. Second, it considers the implications of the judicialization of politics for the policy process and the greater use of litigation by interest groups to achieve desired policy outcomes. Finally, the *Charter* and the *Constitution Act, 1982,* have altered conceptions of citizenship and identity by transforming individuals into rights bearers that can use the judicial arena to advance their conception of the community. The efforts by Aboriginals to have an inherent right to self-government recognized by the courts demonstrate the transformation of identity and citizenship since the entrenchment of the *Constitution Act, 1982*.

Governance and Institutions

The first part of this volume considers changing patterns of governance since the *Charter*'s introduction and the complex relationships created as a result

of *Charter* dialogue between courts and legislatures. In Chapter 2, Andrew Petter opens the volume with a critical appraisal of the legalization of politics and its impact on governance. Of particular concern for Petter is the changing policy discourse within parliamentary institutions and the machinery of government, which has taken a strong legal quality. Petter contends that the most significant changes are the transformation of rights from a political to a legal nature, as well as the resolution of competing rights claims in the judicial arena instead of the parliamentary arena. Petter is generally concerned that the legalization of politics has serious consequences for the framing of public policy and the resolution of competing policy claims when they are expressed as rights discourses, which privileges those with a legal background. For Petter, this dialogue comes at the expense of democratic engagement because it has led to the legalization of the policy-making process and the growing importance of the Department of Justice and the attorney general, a concern that is shared by James Kelly in Chapter 5.

Petter points to three important implications of *Charter* dialogue as rights discourse: the legalization of government policy making; the growing importance of the attorney general's independence by reason of *Charter* litigation; and, finally, the legalization of political advocacy and discourse by interest groups. In his conclusion, Petter acknowledges that the legalization of politics was foreseen at the *Charter*'s entrenchment but contends that now, after twenty-five years, it is well established. On the question of democratic dialogue, Petter ends with a caution for those who defend judicial review as an institutional dialogue between courts and legislatures: "It is, after all, not much of a dialogue, and hardly democratic, if the same legal norms and interpretations are driving decisions at both ends."[79]

In Chapter 3, Grant Huscroft presents a critique of the "mischief" of dialogue theory and argues that, in its present form, it cannot serve as a justification for judicial review under the *Charter*. At the heart of Huscroft's critique is a concern that dialogue theory obscures the dominance of the Supreme Court of Canada as a constitutional actor and downplays the structural influence of judicial decisions on legislative responses enacted by parliamentary bodies. Indeed, Huscroft contends that *Charter* dialogue cannot result in weak-form judicial review because it is premised on judicial supremacy and the dominant role of the Court in determining the meaning of constitutional guarantees. For Huscroft, the proponents of dialogue theory downplay the significance of judicial invalidation of legislation and how this drastically limits the policy responses available to Parliament or the provincial legislatures. To illustrate how judicial invalidation can frame a legislative response, Huscroft discusses the invalidation of tobacco advertising restrictions in *RJR-MacDonald Inc. v. Canada* and argues that the legislative response demonstrates the "mischief" of dialogue theory since Parliament simply followed the constitutional prescription offered by the Court in its

majority decision to save the offending legislation. As a result of the reluctance of elected officials to use the notwithstanding clause, Huscroft argues that Canada has strong-form constitutionalism because judicial decisions generally represent the final word on the meaning of the *Charter*.

The Supreme Court of Canada as a strategic actor in constitutional politics is explored by Rainer Knopff, Dennis Baker, and Sylvia LeRoy in Chapter 4. Adopting Peter Russell's thesis of "bold statescraft, questionable jurisprudence," Knopff, Baker, and LeRoy argue that legal reasoning as political rhetoric is a strategy adopted by the Supreme Court of Canada to justify decisions with questionable legal merit.[80] The authors contend that legal reasoning fails to explain controversial decisions by the Supreme Court of Canada, such as the *Reference re a Resolution to Amend the Constitution* (*Patriation Reference*), *Reference re Amendment to the Canadian Constitution,* or the *Reference re Secession of Quebec*.[81] Instead, Knopff, Baker, and LeRoy contend that the decisions must be understood as political calculations by judges to justify the outcomes for two audiences: the internal audience, such as the coalitions that the justices attempt to develop before a decision is rendered, and the external audience, such as the prime minister and premiers during the reference procedure or interest groups that participate as intervenors in *Charter* decisions.

For Knopff, Baker, and LeRoy, it is strategic calculation – and not legal merit – that explains judicial outcomes when judges court controversy: "Time and again, purely legal considerations fail to explain judgements. In fact, the legal surface is often perplexing in its own terms, and can be satisfactorily explained only in terms of unacknowledged political calculation with respect to external or internal audiences."[82] Viewing the Supreme Court of Canada as a strategic political actor has implications for *Charter* dialogue, as demonstrated by Knopff, Baker, and LeRoy in their analysis of prisoners' voting rights in *Sauvé v. Canada (Chief Electoral Officer)* and the legislative response that was revisited by the Supreme Court of Canada in the second *Sauvé* decision (known as *Sauvé I* and *Sauvé II*).[83] For Knopff, Baker, and LeRoy, strategic judicial decision making demonstrates the "mischief" of dialogue, as *Sauvé II* was less a dialogue between the Court and Parliament on whether any restrictions on prisoners' voting rights could be consistent with the *Charter* and more of an internal dialogue between the justices to preserve the Court's initial invalidation of the *Canada Elections Act* nine years earlier in *Sauvé I*.[84]

The last two chapters in the first part of this volume broaden the discussion of governance and institutions beyond the confines of the Supreme Court of Canada to consider the parliamentary response to the *Charter* (Chapter 5) and the unrealized potential of the notwithstanding clause for *Charter* dialogue and Canadian constitutionalism (Chapter 6). In Chapter 5, James Kelly argues that the characterization of dialogue between courts

and legislatures misrepresents the complexity of dialogue within Parliament and its dominance by the Cabinet through the machinery of government. Though Kelly disputes that *Charter* dialogue has undermined democratic engagement through the legalization of politics, he concludes that the Cabinet's decision to govern with the *Charter* from the centre has led to a further marginalization of Parliament as an institution. Agreeing with Andrew Petter that democratic engagement has been undermined by the *Charter*'s introduction, Kelly attributes this result to the political response to the *Charter* and not to the legalization of politics, as contended by Petter in Chapter 2.

The importance of *Charter* vetting by the Department of Justice on behalf of the Cabinet, and the lack of transparency in the *Charter* certification process by the minister of justice to Parliament, undermine the democratic engagement by parliamentarians outside the Cabinet – this is the basis of the democratic deficit as it relates to the *Charter* and not the Supreme Court of Canada's approach to *Charter* dialogue. Drawing upon the lessons of New Zealand and its parliamentary bill of rights, Kelly argues that the failure to link constitutional reform with parliamentary reform is the fundamental failure of the *Charter* project. Arguing that the next period of *Charter* analysis should be devoted to ensuring a transparent and parliamentary dialogue on the *Charter*, Kelly proposes three changes to the present cabinet-centred approach to the *Charter*: a reorganization of the Department of Justice to address its monopolization of *Charter* vetting within the machinery of government; the appointment of separate parliamentarians as attorney general and minister of justice within Cabinet; and, finally, the creation of a *Charter* scrutiny committee to allow parliamentarians to assess the internal Cabinet dialogue on the *Charter*. In this sense, Kelly challenges the reform agenda that has centred on the appointment of judges to the Supreme Court of Canada that is based on the experiences of the United States. Since the Canadian *Charter* operates within a parliamentary structure, more pertinent lessons can be drawn from the experiences of other Westminster democracies that have introduced bills of rights, such as New Zealand, the United Kingdom, and the Australian state of Victoria.

Part 1 concludes with Janet Hiebert's analysis of the notwithstanding clause and the competing narratives surrounding the inclusion of section 33 in the final version of the *Charter*, once the patriation issue returned to the institutions of executive federalism in November 1981. In Chapter 6, Hiebert argues that our understanding of the notwithstanding clause has been compromised by two dominant narratives as well as by our continued constitutional myopia that fails to recognize section 33 as part of a new constitutional understanding of bills of rights within the parliamentary tradition. For Hiebert, the legitimacy of the notwithstanding clause has been undermined by the narrative that views section 33 as a compromise

of political necessity within executive federalism, which allowed the Trudeau government to achieve substantial provincial consent, as required by the *Patriation Reference*. This perception of the notwithstanding clause as a suspect constitutional instrument is also the result of its inconsistency with the dominant constitutional view of the time, what Hiebert refers to as a compromise of principles – the position that bills of rights are legal projects that require both judicial review and judicial finality to ensure a robust level of rights protection. Instead of recognizing the value of section 33 as being consistent with alternative constitutional principles, it has been rejected as being inconsistent with the dominant "strong-form" view of bills of rights that existed twenty-five years ago.

For Hiebert, the dominant narratives obscure the fact that, by including section 33 as part of the *Charter*, Canada was at the forefront of a new model of constitutionalism in 1982 – a model based neither on judicial supremacy nor parliamentary supremacy, but one that allowed judicial and political conceptions of rights to co-exist. The value of section 33 can only be rediscovered, therefore, by returning to the views of the premiers who articulated an alternative model in which political mechanisms co-exist with judicial review for the protection of rights. Relying on the political philosophy of former Saskatchewan premier Allan Blakeney, Hiebert develops an alternative understanding of section 33 and links it to the contemporary debate surrounding "parliamentary" bills of rights in Australia, New Zealand, and the United Kingdom.

Policy Making and the Courts

The second part of this volume considers the growing role of the Supreme Court of Canada as a policy actor in the Canadian federation and focuses on the following areas: health care policy (Chapter 7); national security and the *Charter* (Chapter 8); official languages policy (Chapter 9); minority language education policy (Chapter 10); and same-sex marriage (Chapter 11). In Chapter 7, Christopher Manfredi and Antonia Maioni argue unequivocally that the distinction between law and politics does not exist, stating that "[t]he Supreme Court of Canada is, and always has been, a policymaking institution. Moreover, it makes policy not as an accidental byproduct of adjudicating legal disputes, but by explicitly determining which legal rules will produce the most socially beneficial results."[85] For Manfredi and Maioni, as for Knopff, Baker, and LeRoy, the significant increase in the policy-making functions of the Supreme Court of Canada is largely the result of discretionary choices made by its justices, which has seen the Court emerge as a strategic policy actor in health care and social policy.

To demonstrate the Court as a strategic policy actor, Manfredi and Maioni present an analysis of *Chaoulli v. Québec*, a 2005 decision that invalidated the restrictions on private health insurance as a violation of the Quebec

Charter of Human Rights and Freedoms but upheld the restrictions as consistent with the Canadian *Charter*.[86] The majority decision by Justice Marie Deschamp is described as "an unexpected reversal" because, unlike the lower court decisions, which considered the issue only in relation to the Canadian *Charter*, the decision made by Justice Deschamp was based on the Quebec *Charter*. Manfredi and Maioni are particularly critical of the use of the Commission on the Future of Health Care in Canada (Romanow Commission) and the Senate Standing Committee on Social Affairs, Science and Technology (Kirby Committee) by the majority decision. Instead of reviewing the merits of the previous decisions, the majority decision reframed the constitutional questions considered in *Chaoulli* and based its decision on social science evidence that was not presented – or challenged – before the lower courts. They argue that the recent judicial foray into health care policy in *Chaoulli* "lays the foundation for an even more aggressive judicial role in policymaking, especially in the health care field, during the Charter's next quarter century."[87]

Indeed, Manfredi and Maoini are concerned that the Supreme Court of Canada lacks the institutional capacity to participate in substantive policy debates such as public health care and, further, that the use of litigation narrows the range of policy alternatives available to decision makers, thus resulting in policy with structural weaknesses. As does Huscroft, Manfredi and Maioni suggest that the legislative response to *Chaoulli* by the Charest government demonstrates the continued presence of strong-form judicial review in Canada, as the Court's decision significantly narrowed the policy manoeuvrability available to Quebec, thus widening the scope of public-private partnerships in the health care sector and challenging the public monopoly on this public service.

In Chapter 8, Kent Roach considers the evolution of national security policy in Canada after more than twenty-five years of *Charter* review by the Supreme Court of Canada. In many respects, Roach's chapter is a defence of the Supreme Court of Canada and judicial activism in the context of national security policy. Roach challenges the critical position presented by Huscroft and argues that *Charter* dialogue has created a more robust policy context since the *Charter* has required Parliament to confront rights issues that it might otherwise have ignored. Using the *Anti-Terrorism Act*, Roach contends that without the *Charter*, the act would have been less restrained in the powers provided to the police to fight domestic and international terrorism and would not have provided important procedural safeguards for those accused of terrorist activities.[88] Thus, the dialogue on national security policy has increased accountability and respect for the rights of unpopular individuals such as terrorism suspects.

While Roach does acknowledge the virtues of the *Charter* in structuring national security policy, there are limitations with the present approach to

Charter dialogue. For instance, Roach is critical of the growing use of immigration law as anti-terrorism law because it allows the Canadian government to interact with foreign governments that may not respect the rights of those accused of terrorism offences. Since the challenge of terrorism is global in nature and requires the Canadian government to coordinate with foreign governments to defend against it, the virtues of the *Charter* may be limited to the domestic realm, which may prove to be peripheral to the development of security policy within an international context. For Roach, this may come at the expense of the rule of law and the rights of the accused. Within the domestic realm, Roach is critical of the attempts to "*Charter* proof" legislation as this may simply result in Parliament meeting the minimum standards established by the *Charter* and may place less emphasis on the effectiveness or workability of national security policy. While Roach is supportive of the Supreme Court of Canada rejecting calls for deference in national security policy, he is concerned that the present judicial-centred approach to understanding this policy area obscures the need for a continuous review of the agents of law enforcement. Finally, Roach calls for the greater empowerment of independent review bodies to ensure that the *Charter* is applied to the state's secret security activities.

The chapters by Graham Fraser and Troy Riddell consider the issue of language rights, the policy-making role of the Supreme Court of Canada, and interest groups that pursue litigation strategies. In Chapter 9, Graham Fraser – the commissioner of official languages – presents the entrenchment of official languages as the latest chapter in a national conversation on language that began with the joining of Upper and Lower Canada in 1841 and was reflected in the *Consitution Act, 1982,* and the language guarantees in section 133. Arguing that language rights are equality rights in the Canadian context, Fraser recounts the efforts by the Pearson government in the 1960s to ensure that Parliament reflected the equality of English and French as languages. This effort was followed by the establishment of the Royal Commission on Bilingualism and Biculturalism in 1963, which resulted in the *Official Languages Act* of the Trudeau government in 1969.[89] The entrenchment of language rights in the *Charter,* therefore, is suggested by Fraser to be the latest manifestation of the national conversation on language as an equality right.

As a former journalist who covered the constitutional politics surrounding the patriation of the Constitution, Fraser was originally opposed to the final agreement because Quebec was not a signatory. Reflecting the dominant criticism of the entrenchment period, Fraser argued that the *Charter*, through the empowerment of the courts, would lead to the "Americanization" of Canadian political institutions as it posed a serious challenge to existing parliamentary practices. In his chapter, Canada's official languages commissioner argues that these fears were misguided because the development of

language rights has been the result of a three-way dialogue between Parliament, the courts, and the provincial legislatures. While Quebec did not agree to constitutional changes in 1982, Fraser argues that section 23 (minority language education rights) is respectful of the ongoing language debate within Quebec, demonstrated by the recent decisions in *Solski (Tutor of) v. Quebec (Attorney General)* and *Gosselin (Tutor of) v. Quebec (Attorney General),* which upheld the constitutionality of the *Charter of the French Language* or Bill 101. This dialogue on language rights is significant, as it resulted in the *Official Languages Act* being amended in 2005 to provide minority language communities with legal recourse to ensure that the federal government advances their interests. Thus, according to Graham Fraser, the national conversation on language has emerged as a dialogue of respect between Parliament, the Supreme Court of Canada, and the provincial governments.

In Chapter 10, Troy Riddell presents a critical appraisal of minority language education policy outside Quebec and the role of legal mobilization and judicial decisions in transforming section 23. While Riddell acknowledges that significant policy changes have occurred, he argues that this was not an inevitable development, as the framers of the *Charter* explicitly refused to grant "management and control" responsibilities to minority language education groups because of provincial opposition. Noting that great variation existed among provincial government over the provision of minority language education policy before the *Charter*, Riddell contends that the landmark decision *Mahé v. Alberta* in 1990 represents a turning point and the beginning of homogenous policy responses by the provinces.[90] In this decision, the Supreme Court of Canada revised section 23 to include "management and control" for official minority language groups, and this action has led to the development of very similar minority language education regimes at the provincial level. Riddell uses minority languge education policy as a case study to demonstrate the policy impact of legal mobilization and judicial decisions. In his chapter, he argues that minority language policy changes are the result not only of "top-down" structural factors such as the entrenchment of section 23, judicial victories, and federal government funding for minority language education groups but also "bottom-up" structural factors such as the activities of minority language education groups, policy and legal discourse, and contingent historical dynamics. Thus, Riddell argues that minority language education policy cannot be explained solely by judicial victories but also by the judicial-societal nexus that has resulted in a significant transformation – and homogenization – of minority language education policy in a federal state.

In Chapter 11, Matthew Hennigar considers one of the most significant constitutional events that has occurred since the entrenchment of the *Charter* – the recognition of sexual orientation as an equality right protection and the subsequent extension of same-sex marriage to gay and lesbian couples

in 2003. Hennigar argues that it is unlikely that the framers of the *Charter* foresaw the development of equality rights in this direction. As minister of justice and the parliamentarian responsible for defending the draft *Charter*, Jean Chrétien resisted efforts to include sexual orientation as an equality right when the *Charter* was being drafted, although he did recognize this as a possibility through the analogous branch of section 15. Nearly twenty-five years later and following Chrétien's term as prime minister, Hennigar considers the Chrétien government's response to *Halpern v. Canada (Attorney General)* and *Barbeau/EGALE v. Canada (Attorney General)*, the reversal of its opposition to same-sex marriage and the decision to refer a draft bill to the Supreme Court of Canada.[91] Instead of viewing the Supreme Court of Canada as a strategic actor, Hennigar adopts George Tsebelis' "nested games" approach to illustrate the government's litigation strategy as the product of decision making within several overlapping contexts or games: partisan competition in Canadian politics; the Liberal leadership contest; and Cabinet's desire to retain decision-making authority on this issue. While Hennigar acknowledges the significant rights issues raised by same-sex marriage, he contends that the litigation strategy pursued by the federal government was the result of six nested games that structured the Chrétien government's response to *Halpern* and *Egale*, eventually resulting in the submission of a draft same-sex marriage bill to the Supreme Court of Canada before it had been reviewed by the House of Commons.

Citizenship and Identity

The third part of this volume considers the impact of the *Charter* on conceptions of citizenship, changing notions of constitutionalism and the emergence of identity politics among Aboriginal nations and multinational Canada. In Chapter 12, Sujit Choudhry presents a critical analysis of former Prime Minister Pierre Elliott Trudeau's original justification for introducing the *Charter* – as an instrument of national unity that provided Canadians with a common set of values to transcend provincial identities. Using the recent debate on whether to recognize Quebec as a nation, initiated by Michael Ignatieff during the 2006 Liberal leadership convention, Choudhry argues that the reaction to this proposal demonstrates the mixed legacy of the *Charter* as an instrument of national unity. It is argued that the *Charter* has emerged as an instrument of national unity outside Quebec but has failed to confront Quebec nationalism, as envisioned by Trudeau. According to Choudhry, "[h]ad 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."[92] Indeed, the failures of the Meech Lake Accord, and the Charlottetown Accord, and the strong reaction against the concept of Quebec as a nation within Canada are argued to be the result of the *Charter* and the competing

patterns of national identity in Canada and Quebec that reinforce the centrifugal pressures of the federation. For Choudhry, Canada provides a cautionary tale for multinational states that envision a bill of rights as an instrument of national unity.

In Chapter 13, Guy Laforest argues that the Canada of the *Charter* has resulted in the internal exile of Quebecers within the federation. This internal exile occurs because the distinctive identity of Quebecers is not properly recognized in the *Constitution Act, 1982*. Perhaps more critically, Laforest contends that the *Charter* was intended to deny the specificity of Quebecers and represents a dangerous deed for the federal spirit and principle of Canada. For Laforest, this internal exile is especially troubling because it occurred at the hands of a Quebecer, Pierre Elliott Trudeau, after his emergence as a Canadian sovereigntist at the expense of his federalist credentials. To end the internal exile, Laforest argues that the *Charter* must be amended to recognize Quebec as a distinct society by altering section 1 to recognize Canada as a "free and democratic *federation*" rather than as a "free and democratic *society*." As well, Quebec should follow the example of other free and democratic federations, such as Spain and the Catalans, and adopt an internal constitution that recognizes its distinct status within the federation to end this internal exile.

In Chapter 14, Kiera Ladner and Michael McCrossan are critical of the road taken by the Supreme Court of Canada as it relates to Aboriginal rights. For Ladner and McCrossan, the judicialization of politics has not led to a re-imagining of the Canadian constitution to ensure its consistency with Aboriginal readings of the Canadian constitutional order. Instead, as argued in Chapter 14, although "the early literature signalled an acceptance of this reading and a commitment to decolonization, the courts have nevertheless abandoned the path set before them in favour of sustaining Canada's colonial legacy."[93] In a damning analysis of the impact of judicial review, Ladner and McCrossan conclude that there is nothing to cheer since the Court's interpretation of the *Constitution Act, 1982,* represents a dangerous deed because it is fundamentally inconsistent with Aboriginal understandings of the Canadian constitutional order. For Ladner and McCrossan, "[s]imply put, the Court has rendered obsolete everything Aboriginal people fought to achieve in the *Constitution Act, 1982,* and in subsequent constitutional negotiations."[94] Indeed, the authors contend that the Supreme Court of Canada has developed questionable Aboriginal rights jurisprudence that is bold statecraft because it is fundamentally at odds with indigenous constitutional visions.

Conclusion

It is only fitting that the concluding contribution to this volume is presented by Peter Russell in Chapter 15. Much of the scholarship in what is now called

"law and politics" is derived from Russell's original research that considered the important role played by the Supreme Court of Canada in the evolution of Canadian constitutionalism. More than twenty-five years ago, Russell agreed with Donald Smiley that the *Charter*, as it related to Canadian democracy, was a dangerous deed. For Russell, questions of social and political justice would be transformed into technical legal issues resolved by those with a legal background. Further, the policy-making role of courts would weaken the "sinews of Canadian democracy" because Canadians would abdicate the resolution of policy conflicts to the courts. Russell concludes that the *Charter* has not been a dangerous deed.[95] At times, there have been bold statescraft and questionable jurisprudence by all actors that govern with the *Charter*: Parliament, the courts, and citizens. The dangerous deed is assuming that the *Charter* is solely responsible for the significant transformation of Canada's governing institutions, the public policy process, and conceptions of citizenship and identity.

In his chapter, Russell asks whether there are more serious threats to Canadian democracy than the judicialization of politics and whether the *Charter* has affected the quality of democracy in ways hoped for and those not anticipated at the time of entrenchment of the *Constitution Act, 1982*. He challenges that judicial decisions close off political debates, and he presents both a critique and defence of *Charter* dialogue. For Russell, judicial decisions have not only closed off debates between parliamentarians because of their reaction to the *Charter,* but they have also resulted in robust debates among Canadians on important social issues. Using same-sex marriage as an illustration of this dialogic dichotomy, Russell contends that political considerations on the part of both the Liberals and Conservatives have resulted in rather muted responses to the courts, and *Charter* dialogue has suffered because of the parliamentary response to same-sex marriage. While Russell acknowledges that "Charter patriotism" has resulted in a more rights-conscious and democratic constitutionalism, he argues that the *Charter* has not been the "quick fix" for national unity alluded to by Pierre Trudeau during the latter part of mega-constitutional politics.[96]

Finally, Russell identifies what he believes is the most pressing challenge to Canadian democracy since the *Charter*'s entrenchment – the growing centralization of power within the office of the prime minister and the central agencies that support this parliamentarian. Indeed, he admonishes the academic community for overlooking this development: "It is remarkable that the debate and discussion about the dangers to democracy posed by judicial activism showed so little awareness of centralization of power that was occurring in our parliamentary system."[97] In doing so, Russell suggests that the debate must come full circle – the flight from parliamentary politics that occurred during the first twenty-five years of the *Charter* must return to a consideration of parliamentary institutions as the cause

of Canada's democratic deficit and not the judicialization of politics. Failure to do so, moreover, may represent the dangerous deed of the *Charter* for the next twenty-five years.

Notes

1 *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.
2 Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada* (Toronto: Thompson Educational Publishing, 1984), 5.
3 Peter W. Hogg and Allison A. Bushell, "The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the Charter Isn't Such a Bad Thing after All)," *Osgoode Hall Law Journal* 35 (1997): 75-124.
4 Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," *Canadian Bar Review* 61 (1983): 31-43.
5 Allan Hutchinson, "Condition Critical: The Constitution and Health Care," in Colleen M. Flood, Kent Roach, and Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005), 101-15; F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000), 33-58; and Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal and Kingston: McGill-Queen's University Press, 1995), 125-49. *Charter of the French Language*, R.S.Q. c. C-11.
6 Donald Smiley, "A Dangerous Deed: The Constitution Act, 1982," in Keith Banting and Richard Simeon, eds., *And No One Cheered: Federalism, Democracy and the Constitution Act* (Toronto: Methuen, 1983), 78 and 90.
7 Lorne Sossin, "Towards a Two-Tier Constitution? The Poverty of Health Rights," in Flood, Roach, and Sossin, *supra* note 5, 161-83; and James B. Kelly, "The Courts, the Charter, and Federalism," in Herman Bakvis and Grace Skogstad, eds., *Canadian Federalism: Performance, Effectiveness and Legitimacy*, 2nd edition (Don Mills: Oxford University Press, 2008), 58-59.
8 Banting and Simeon, *supra* note 6. *Constitution Act, 1982* (U.K.), 1982, c. 11, s. 59.
9 Peter H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of Canadian Courts," *Canadian Public Administration* 25:1 (1982): 32.
10 Peter H. Russell, "Canadian Constraints on Judicalization from Without," *International Political Science Review* 15:2 (1994): 165.
11 Smiley, *supra* note 6, 74.
12 Torbjörn Vallinder, "The Judicialization of Politics – A World-Wide Phenomenon: Introduction," *International Political Science Review* 15:2 (1994): 91.
13 Danny Nicol, "The Human Rights Act and the Politicians," *Legal Studies* 24 (2004): 453.
14 *Anti-Terrorism Act,* S.C. 2001, c. 41.
15 The Honourable Anne McLellan, Minister of Justice and Attorney General of Canada, *Notes for the Minister of Justice's Appearance before the House of Commons Justice and Human Rights Committee, Bill C-36 – Anti-Terrorism Act* (October 18, 2001), cited at http://www2.parl.gc.ca/HousePublications/Publication.aspx?DocId=652657&Language=E#T1535.
16 Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (Oxford: Oxford University Press, 2000), 204.
17 Russell, *supra* note 10, 166.
18 Michael Lusztig, "Federalism and Institutional Design: The Perils and Politics of a Triple-E Senate in Canada," *Publius: The Journal of Federalism* 25:1 (1995): 42.
19 Robert C. Vipond, *Liberty and Community: Canadian Federalism and the Failure of the Constitution* (Albany: SUNY Press, 1991), 151-59.
20 *Attorney General of Canada v. Attorney General of Ontario (Employment and Social Insurance Act Reference)*, [1937] A.C. 327. *Employment and Social Insurance Act,* cited in Peter H. Russell, Rainer Knopff, and Ted Morton, eds., *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1990), 97-100.

21 *Attorney General of Ontario v. Attorney General of Canada (Reference re Abolition of Privy Council Appeals),* [1947] A.C. 128.
22 Peter H. Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* 2nd edition (Toronto: University of Toronto Press, 1993), 88.
23 *Reference re Offshore Mineral Rights of British Columbia,* [1966] S.C.R. 663.
24 *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373. *Anti-Inflation Act,* cited in Peter H. Russell, Rainer Knopff, and Ted Morton, eds., *Federalism and the Charter: Leading Constitutional Decisions* (Ottawa: Carleton University Press, 1990), 162-78.
25 *Reference re Legislative Authority of Parliament to Alter or Replace the Senate*, [1980] 1 S.C.R. 54.
26 *Re: Objection to a Resolution to Amend the Constitution (Quebec Veto Reference),* [1982] 2 S.C.R. 793.
27 *Reference re a Resolution to Amend the Constitution*, [1981] 1 S.C.R. 753.
28 James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005), 3-20.
29 Section 52(1) of the *Constitution Act, 1982* (U.K.), 1982, c. 11, s. 59, cited in Peter W. Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 2000), 1147.
30 *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5.
31 Section 24(1) of the *Constitution Act, 1982,* cited in Hogg, *supra* note 29, 1133.
32 Christopher P. Manfredi, "Institutional Design and the Politics of Constitutional Modification: Understanding Amendment Failure in the United States and Canada," *Law and Society Review* 31:1 (1997): 114.
33 *R. v. Swain*, [1990] 1 S.C.R. 933 at 934. *Criminal Code*, R.S.C. 1985, c. C-46, s. 264.
34 *Winko v. B.C. (Forensic Psychiatric Institute),* [1999] 2 S.C.R. 625 at 686.
35 Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001), 152.
36 The equality rights provision in the *Canadian Charter of Rights and Freedoms* reads as follows:

> 15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

37 Kelly, *supra* note 28, 98.
38 *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 5.
39 *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143.
40 *Miron v. Trudel,* [1995] 2 S.C.R. 418.
41 *Corbiere v. Canada*, [1999] 2 S.C.R. 203.
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43 *Reference re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486.
44 Ibid., para. 53.
45 *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123 at 1181 [*Reference re ss. 193 and 195.1(1)(c)*].
46 *R. v. Keegstra*, [1990] 3 S.C.R. 697.
47 *Reference re ss. 193 and 195.1(1)(c), supra* note 45.
48 *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R 199 [*RJR-MacDonald*].
49 *R. v. Sharpe*, [2001] 1 S.C.R. 45.
50 *Tobacco Products Control Act,* S.C. 1988, c. 20.
51 *RJR-MacDonald, supra* note 49, 310-11 (Laforest J.).
52 Ibid., 242 (McLachlin J.).
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62 Ibid., 5.
63 Vallinder, *supra* note 12, 93.
64 Bill C-36, *An Act to Amend the Criminal Code, the Official Secrets Act, the Canada Evidence Act, the Proceeds of Crime (Money Laundering) Act and Other Acts,* Standing Committee on Justice and Human Rights, 37th Parl., 1st Sess. (October 18, 2001), http://cmte.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=45196&Lang=1&PARLSES=371&JNT=0&COM=222.
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66 *Department of Justice Act,* R.S., 1985, c. J-2 at s. 4.1(1), cited at http://laws.justice.gc.ca/en/showdoc/cs/j-2///en?page=1.
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Part 1: Governance and Institutions

2
Legalise This: The *Chartering* of Canadian Politics

Andrew Petter

I fought the law and the law won.
– Sonny Curtis

In the period immediately following the enactment of the *Canadian Charter of Rights and Freedoms*,[1] a number of academic commentators predicted that a major impact of the *Charter* would be to legalise politics in Canada.[2] In my twenty-five years of experience with the *Charter* – as a government lawyer, as a constitutional law professor, and as a provincial cabinet minister – I have become ever more aware of how prescient these commentators were.[3] Since the *Charter* came into force in 1982, issues of rights in Canada have increasingly become identified and understood as being legal rather than political in nature. This development, which reflects a global trend in favour of legalising public affairs, has been encouraged by politicians as much as by lawyers and has produced two spheres of public discourse: a sphere of justice and rights that has become the primary domain of lawyers and courts and a sphere of policy and interests that remains the principal preserve of politicians and legislatures. Moreover, there can be no question as to which sphere dominates in the event of conflict. For all of the talk of "dialogue" between courts and legislatures, those who speak in the language of justice and rights have a huge rhetorical and political advantage over those who speak in the language of policy and interests.

The legalisation of politics has increased the stature and authority of lawyers and legal discourse within Canadian society and has diminished the importance and influence of politicians and democratic engagement. This shift can be seen most clearly in the context of *Charter* litigation where contentious issues of public policy, such as abortion, unemployment insurance, regulation of commercial advertising, Medicare, Sunday closing of retail stores, same-sex marriage, obscenity laws, judicial salaries, collective bargaining, the powers of customs officials, and even cruise missile testing,

have become subjects of legal argument and judicial decision making.[4] However, legal politics within the courts are only the tip of a much larger iceberg – one that shows no signs of diminishing due to global warming. The judicial arena is just one of many forums in which law and/or lawyers direct political debate and shape public policy in the name of upholding *Charter* rights. Indeed, it is no exaggeration to say that such influence has become pervasive within Canadian government and civil society. In the remainder of this chapter, I will draw upon my experiences and those of others to explore some of the ways in which this influence has manifested itself.

The Legalisation of Government Policy Making

As will be evident to those who have been engaged in public policy processes both before and after 1982, the *Charter* has significantly altered the way in which governments in Canada go about making decisions. The federal Department of Justice "now routinely reviews new legislation for potential Charter violations, and recommends to the responsible minister or parliamentary committee whether such limitations may be 'reasonable' and sustained under Section 1 analysis."[5] In addition, existing legislation is reviewed to ensure its consistency with new *Charter* decisions. Comparable legislative review procedures also exist in all provincial governments. Such processes, as Matthew Hennigar has observed, "[do] not occur within a legal vacuum, but typically [involve] bureaucratic actors attempting to gauge the courts' likely response to legislation, based on existing case law. To this extent, there is usually, if not always, an external judicial influence on internal legislative-executive discussions on constitutional rights."[6]

In addition to reviewing new and existing legislation to ensure its consistency with the *Charter*, government lawyers regularly incorporate their understanding of *Charter* requirements in the day-to-day guidance they give government employees, in the legal opinions they issue to ministries, in the advice they provide to the Attorney General, and in the decisions they make during the processes of legislative drafting. In these various ways, government lawyers, and the court decisions upon which they rely, exert huge influence on public policies without those policies ever being tested in court.[7] The extent of this influence is amplified by two related factors. The first is that government lawyers tend to be risk averse in their approach to the *Charter*. This means that, on the margins, they are more inclined to advise that a law or practice violates the *Charter* than that it does not. The reason for this is simple: a government lawyer is much more likely to be criticised for being wrong in predicting that a law or practice complies with the *Charter* than in predicting that it does not. This likelihood is in part because the latter advice, if heeded, will never get tested in court. Moreover, even if

advice of a *Charter* violation is ignored, government officials are not prone to being displeased because a law or practice that they were told was unconstitutional survives *Charter* challenge. On the contrary, they are likely to be delighted, as I was as Minister of Forests when a government lawyer successfully defended the ministry's handling of a forest tenure from a constitutional challenge that he had originally advised could not be defended. When the decision came down, I penned him a congratulatory note (though I refrained from doing so a second time when the decision was upheld on appeal). The second factor that amplifies the influence of policy advice provided in the form of *Charter* opinions is the reverence accorded such advice by public servants who are not lawyers. Given their lack of familiarity with the law and the legal system, non-lawyers within government are frequently intimidated by legal opinions, particularly those that speak of possible violations of constitutional rights. Thus, government officials generally go out of their way to accommodate such opinions in their decision-making processes.[8] As a result, *Charter* issues seldom reach the ministerial level, and, when they do, cabinet ministers themselves are disinclined to assume the political risk of proceeding with a policy that they are told is likely to violate the *Charter*.

In one of the rare instances where a cabinet of which I was a member decided to proceed with a policy in the face of an adverse *Charter* opinion, the decision was taken only because the policy in question – the imposition of strict spending limits on third parties in provincial election campaigns – was seen by ministers as being central to both the government's mission and to its ability to compete fairly in the next election. Even then, the decision to proceed might have gone the other way had I and other lawyers in cabinet not challenged the certitude of the legal opinion and persuaded the Attorney General to seek further legal advice on the matter from outside counsel (a course generally not welcomed by lawyers within ministries of the attorney general – or anywhere else for that matter).[9]

An exception to the tendency of cabinet ministers to heed legal advice relating to the *Charter* sometimes arises with respect to legal opinions advising that new policies are required. While cabinet ministers are loath to run the political risk of proceeding with government policies that the courts are likely to strike down under the *Charter*, the political calculus tends to be quite different with respect to policies that the *Charter* is said to require, particularly if those policies are controversial or do not accord with government priorities. In these situations, ministers may find it convenient to avoid incurring the political costs associated with implementing such policies by deferring their decisions and leaving the issues to be resolved by the courts. The British Columbia cabinet of which I was a member, for example, decided not to act on legal advice recommending that it introduce legislation giving

francophone parents greater control over their children's French language educational programs, preferring to wait until there was a court decision requiring it to do so.

Perhaps the most obvious example of politicians hiding behind the courts to avoid dealing with a contentious political issue raised by the *Charter* is the federal Liberals' handling of the same-sex marriage controversy.[10] In the years between 2000 and 2003, the government avoided dealing with this issue simply by saying that it was before the courts. Finally, after the British Columbia and Ontario Courts of Appeal determined that the *Charter* required civil rights of marriage to be extended to same-sex couples, and further appeal became politically unpalatable, Prime Minister Jean Chrétien announced that his government would propose legislation to recognize the union of same-sex couples across Canada. However, rather than bringing this legislation directly to Parliament for a vote, where it would have divided the Liberal caucus and created a difficult political situation in advance of a federal election, the government referred the draft bill to the Supreme Court of Canada to seek the Court's opinion concerning its constitutionality.[11] The Court reference provided a pretext for the government to delay parliamentary debate on the legislation for a further nineteen months, thereby diffusing the issue for a period that extended past the election. Moreover, when the Supreme Court of Canada finally issued its judgment supporting the constitutionality of same-sex marriage legislation, the government was able to rely upon that ruling to justify introducing such legislation in Parliament. In sum, by seeking a constitutional reference, the government succeeded both in delaying and diffusing a contentious political issue and in garnering constitutional legitimacy for its decision.

The Role of Attorneys General in Legalising Politics

Not surprisingly, the *Charter* has greatly enhanced the powers of attorneys general who, as chief law officers of the Crown, can use it to influence public policy. Such influence is frequently used without consulting cabinet and almost always without consulting the legislature. The most obvious example of this influence relates to decisions concerning the conduct of *Charter* litigation, such as which arguments to make in court and which cases to appeal. Although these decisions can have a profound impact upon government powers and legislation, final say over them resides with attorneys general rather than with cabinets or legislatures. Within the federal government, for example, decisions concerning appeals to the Supreme Court of Canada are the responsibility of the Attorney General of Canada and turn on an assessment of whether "the public interest *requires* an appeal."[12] The Attorney General (or sometimes the Deputy Attorney General) bases this decision upon advice received from the National Litigation Committee, which is composed of a number of senior Department of Justice lawyers.[13] It is true

that decisions concerning the conduct of *Charter* litigation at both the federal and provincial levels often involve attorneys general or their legal officers taking advice from other government officials. Government lawyers, for example, will commonly seek instructions from client ministries concerning whether, and on what basis, to defend a ministry policy that is attacked in court, as happened in relation to the forest tenure that became the subject of a constitutional challenge when I was Minister of Forests.

Similarly, attorneys general will sometimes seek advice from their cabinet colleagues and/or the premier or prime minister on civil litigation decisions affecting major public policy, such as whether to appeal a ruling striking down significant legislation. The federal Attorney General's decision not to appeal appellate court rulings striking down the common-law prohibition on same-sex marriage, for example, was discussed at the cabinet level and was ultimately announced by the Prime Minister.[14] As Attorney General of British Columbia, I spoke with both the Premier and cabinet before deciding not to appeal a trial court decision striking down the third-party election spending restrictions that were enacted following the cabinet deliberations referred to earlier in this chapter.[15] While my decision to forgo the appeal was influenced by legal considerations (particularly the existence of a case from another province that raised the same issue and was likely to reach the Supreme Court of Canada first), the political dimensions of the case were such that I did not feel comfortable making a final determination without first consulting the political executive.

While attorneys general and their law officers sometimes make decisions concerning *Charter* litigation in consultation with others in the executive branch, there are two things that need to be noted in evaluating the significance of these decisions on the legalisation of politics. The first is that such decisions are ultimately an attorney general's to make (although an attorney general would be foolish not to take seriously the advice given by cabinet on a highly contentious political issue such as same-sex marriage or election spending).[16] The second is that, regardless of the influence exerted on such decisions by other members of the executive branch, the decisions themselves remain artefacts of a legal process that involves the use of the *Charter* to shape public policy without legislative deliberation or oversight.

This process is well illustrated by the reaction of the Attorney General of Canada to the 1988 decision of the Federal Court in *Schachter v. Canada*.[17] The trial judge in this case held that a provision of the *Unemployment Insurance Act* providing fifteen weeks of parental leave benefits to adoptive parents contravened the guarantee of equality rights in section 15(1) of the *Charter* by not extending equivalent benefits to biological parents.[18] The Attorney General decided not to appeal this aspect of the decision, thereby leaving Parliament under a constitutional obligation to provide equal benefits to both groups of parents.[19] This obligation was addressed the following year

when the Minister of Employment and Immigration tabled Bill C-21, which proposed to provide parental leave benefits to all parents for ten weeks.[20] This proposal represented a major alteration in the statutory scheme, both by reducing benefits for adoptive parents and by granting new benefits to biological parents. Moreover, given the much larger numbers of biological parents, it required a substantial expenditure of public funds not previously authorized by Parliament.

The frustration felt by Members of Parliament (MPs) concerning the constitutional constraints placed upon them by the trial court decision in *Schachter* is evident from the remarks of Jean-Pierre Blackburn, MP, during committee debate on Bill C-21: "When we, as members of Parliament, want to introduce amendments, we feel there is always something hanging over our heads: namely the famous rule that our amendment may run counter to the Charter. I find this rather disturbing. It is like a form of blackmail. As soon as a member tries to move an amendment, he or she is told that it may not be in keeping with the Charter. This fear prevents us from working in the interest of all Canadians."[21] This same frustration seems to have been shared by then Minister of Employment and Immigration, Barbara McDougall, who, during that same committee debate, stated in relation to requests to restore the benefits being taken away from adoptive parents: "I am very sensitive to the situation of adoptive parents. We gave considerable thought to this problem when the Bill was being drafted. The problem still exist. [*sic*] In fact, there are two problems. There is the problem of the Charter of Rights and Freedoms, and that regarding the situation of natural parents and adoptive parents. In addition, the system is open and much more costly. We are trying to find a solution. Before my appearance here today, I had not found a solution. I am sorry, but that is simply the case."[22] What the Minister did not say was that the option of seeking to preserve Parliament's ability to provide differential benefits for adoptive parents by appealing the trial judge's ruling had been taken away by the Attorney General of Canada who, whether he consulted cabinet (as seems likely) or not, made the decision to accept this limitation on legislative powers without ever consulting Parliament.

Some attorneys general have gone even further in using their authority over *Charter* litigation to defeat legislative powers. Ian Scott, acting as Attorney General of Ontario, saw no problem conceding in court that certain legislative provisions violated the *Charter*.[23] In *Re Blainey and Ontario Hockey Association et al.,* he joined with the plaintiff in submitting that the *Ontario Human Rights Code* was unconstitutional in exempting sports organisations from its prohibition on sexual discrimination.[24] Similarly, in *Paul and Wright v. The Minister of Consumer and Commercial Relations,* he conceded that the *Vital Statistics Act* was unconstitutional in requiring a child to be given the

father's surname.[25] In the latter case at least, he took this stance after having introduced an amendment in the legislature that would have changed the law, but which had not yet been enacted. In the former case, however, he argued against the constitutionality of the provision without having tabled amending legislation, and, even more incredibly, he maintained this position in the Ontario Court of Appeal even after the impugned provision had been upheld by the trial judge.[26]

The *Charter* sometimes gives attorneys general the opportunity to challenge the constitutionality of laws outside provincial jurisdiction. As Attorney General of British Columbia, I asked the Director of Vital Statistics to withhold his decision to deny a marriage licence to a lesbian couple while I sought a court declaration that the federal common-law prohibition on same-sex marriage was unconstitutional. While I took this decision in the knowledge that the court action did not threaten provincial powers, and having sought and obtained the support of the Premier, there can be no question that it had profound political ramifications and was controversial amongst provincial legislators (including some in my own party).

The Legalisation of Political Advocacy and Discourse

Just as the *Charter* has changed the way in which governments make policy, it has also altered the way in which organised groups practise political advocacy.[27] Prior to the enactment of the *Charter*, the use of the courts to influence public policy by such groups was "exceptional." Since the enactment of the *Charter*, however, there has been a "transformation" through which interest group litigation has become "an established form of collective action" for all categories of organised interests.[28] Canadian feminists, for example, have committed huge amounts of time and energy to pursuing their political objectives through legal mobilisation, guided in large measure by lawyers working with the Women's Legal Education and Action Fund.[29] Groups, such as unions, corporations, civil libertarians, social conservatives, gay and lesbian rights organisations, market libertarians, religious bodies, anti-poverty advocates, and professional associations, have likewise invested heavily in *Charter* litigation. Moreover, given that the *Charter* is an instrument that can cut many ways, these groups have frequently found it necessary to participate in *Charter* cases to defend, as well as advance, their interests.

The inevitable consequence of the shift to litigation as a mechanism for political advocacy has been to increase the influence of law and lawyers within such organised groups.[30] This trend further feeds the tendency of such groups to look to courts rather than legislatures and governments to address their concerns. The overall impact, as Michael Mandel demonstrated in his examination of the court challenge brought against cruise missile testing by Operation Dismantle, is to downplay, or even demobilise, other forms of

political action.[31] This is partly because litigation consumes huge amounts of time and money that cannot then be devoted to public education, lobbying, and other grassroots initiatives. It is also because the legal forms and forums in which *Charter* issues are argued makes them less comprehensible and accessible to the public and drains them of their political meaning.

This process is exacerbated by the nature of the discourse that such litigation produces in the media and popular press. Lawyers and law professors, whose opinions and oratory prior to the *Charter* were confined mostly to courtrooms and classrooms, are now regularly asked to share publicly their constitutional views on any and all political issues. These views are invariably packaged as their legal understanding of how the issues in question ought best to be addressed by the courts under the *Charter*. When commenting on court judgments, such commentary is usually comprised of *ex-post facto* legal explanations of how and why a court reached a particular decision, with muted, if any, criticism of the outcome. This posture is hardly surprising, given that judges are regarded as the ultimate authorities on constitutional interpretation. Even lawyers and groups who lose a *Charter* case will generally try to find something positive to say about the court's judgment, if only to justify their efforts to their clients, their supporters, or themselves. Thus, when Operation Dismantle's *Charter* claim against cruise missile testing was unanimously dismissed by the Supreme Court of Canada, the group characterized the decision as "a victory for the strength of the Charter and the civil rights and liberties of Canadians" because it recognized a judicial power to review cabinet decisions.[32] Similarly, when a majority of the Supreme Court of Canada rejected Louise Gosselin's claim that cuts to her social assistance payments violated her *Charter* rights, the *Charter* Committee on Poverty Issues, which had intervened in support of her claim, issued a press release in which one of its members welcomed the views of the dissenting judges and expressed relief "that the majority accepted the possibility the Charter will be found in a future case to protect the right to adequate food, clothing and housing."[33]

The legalisation of political discourse generated by the *Charter* is not confined to political advocacy groups and constitutional pundits. Politicians regularly invoke the *Charter* to explain, criticise, and debate public policy. Cabinet ministers welcome opportunities to rely on the *Charter* to support legislative measures or government actions, particularly where they are politically controversial. Thus, when introducing the legislation giving British Columbia francophone parents greater control over their children's French language educational programs, the first words from the Minister of Education's mouth were: "This bill will enable francophones living in British Columbia to have management and control of their children's francophone educational program, as provided for in Canada's Charter of Rights and Freedoms. Courts have interpreted section 23 of the Charter as requiring

that francophone parents have management and control of francophone education, and this legislation is designed to provide that management and control through the Francophone Education Authority."[34] In the same vein, I should confess that my public explanation as Attorney General for seeking a court order declaring the common-law prohibition on same-sex marriage to be unconstitutional relied in large part upon a legal opinion that had been prepared by my Ministry and that I released to the media.

Opposition Members of the Legislative Assembly (MLAs) also commonly invoke the *Charter* to strengthen or legitimise their criticisms of government measures, as they did in British Columbia when challenging the introduction of laws prohibiting the publication of hate propaganda[35] and placing protective zones around abortion clinics (prohibiting harassment of people using or providing abortion services).[36] By invoking the *Charter*, these MLAs were able to give their criticisms a patina of constitutional legitimacy that made them less likely to offend the ethnic communities and the women that these measures were designed to protect.

The flip side of such *Charter*-based criticism is *Charter*-based justification, through which ministers and others defend a particular measure by relying upon the legal opinion that the measure complies with the *Charter*. This technique, which Kent Roach refers to as "Charter-proofing," was used extensively by the federal government when defending anti-terrorism legislation in the early part of this decade.[37] By claiming that the legislation had been reviewed and found by government lawyers to be consistent with the *Charter*, the government sought to conflate the question of whether the legislation was politically justifiable with the issue of whether it was constitutionally acceptable.

Politicians have also taken to using *Charter* discourse to try to manufacture political issues. Perhaps the most blatant example of this was Prime Minister Paul Martin's surprise promise during a leaders' debate in the 2006 federal election campaign to repeal the notwithstanding clause in section 33 of the *Charter*.[38] Martin clearly hoped that the ploy would create a wedge issue between himself and Conservative leader Stephen Harper, thereby diverting public attention from political difficulties he and his party were experiencing. As it turned out, the manoeuvre was too blatant and was widely interpreted as a disingenuous act of political desperation. This assessment was reinforced by the fact that Martin had previously vowed to invoke the notwithstanding clause, if necessary, to prevent courts from imposing same-sex marriage on religious organisations.[39]

Legalisation in Action – A Top Three List

I have thus far discussed with examples some of the ways in which the legalisation of politics in Canada has manifested itself under the *Charter*, including the explosion of *Charter* litigation in the courts; the increased

influence of lawyers within government; the enhanced powers of Attorney Generals; and the legalisation of political advocacy and discourse. I will now focus on three instances that demonstrate the degree to which Canadian politics has become legalised in recent years. At a time when *Charter* enthusiasts have been assembling their "top ten" lists of court cases to mark the twenty-fifth anniversary of the *Charter*, I offer the following as my "top three" list of political legalisms, presented in ascending order of audacity.

Number 3: Canada Takes the *Charter* to the United Nations

As a signatory to the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*), Canada is required to report periodically to the Committee on Economic, Social and Cultural Rights on what it is doing to fulfil its obligations under the *ICESCR*.[40] In the 1990s, as Canadian governments were embarking on major cutbacks to social programs, Canada turned to the *Charter* as evidence that it was meeting its *ICESCR* commitments. In its 1993 report to the Committee, for example, the Canadian delegation referenced the *Charter*'s capacity to encompass economic and social rights and the Supreme Court of Canada's use of the *ICESCR* in its interpretation of the *Charter*: "The Committee was informed that the *Charter of Rights and Freedoms* guarantees, in section 7, the right to security of the person and, in section 15, the equal benefit and protection of the law. It notes with satisfaction that Canadian courts have applied these provisions to cover certain economic and social rights, and that the Supreme Court of Canada has, on occasion, turned to the International Covenant on Economic, Social and Cultural Rights for guidance as to the meaning of provisions of the *Charter*."[41]

Five years later, when the 1998 report was due, the *Canada Assistance Plan* (*CAP*) had been replaced with a block transfer that gave provinces greater flexibility with respect to social programs. [42] This change posed a major problem for the Canadian delegation, as *CAP* had been highlighted in previous reports as a key instrument through which Canada was fulfilling its *ICESCR* obligations: "The Government informed the Committee in its 1993 report that *CAP* set national standards for social welfare, required that work by welfare recipients be freely chosen, guaranteed the right to an adequate standard of living, and facilitated court challenges to federally-funded provincial social assistance programmes which did not meet the standards proscribed in the *Act*."[43] Faced with the embarrassment of having to justify *CAP*'s elimination, the Canadian delegation again trotted out the *Charter* as evidence of Canada's continuing commitment to meeting its obligations under the *ICESCR*. According to its report, "the Canadian Charter of Rights and Freedoms plays a similar role at the domestic level regarding the protection of economic, social and cultural rights to that of the International Covenant on Civil and Political Rights at the international level."[44] The delegation went on to say that section 7 of the *Charter* "may be interpreted

to include the rights protected under the Covenant" and that the Supreme Court of Canada "has also held section 7 as guaranteeing that people are not to be deprived of basic necessities." It noted further that the "Government of Canada is bound by these interpretations."[45]

These efforts to use the *Charter* to demonstrate Canada's continuing commitment to its obligations under the *ICESCR* are disturbing for a number of reasons. First, they rely on selective and strained interpretations of *Charter* jurisprudence. Second, these same interpretations have been strongly opposed by Canadian governments in domestic courts. Third, it is not an isolated example. Canada has used the same tactic in relation to the *Convention on the Rights of the Child*, insisting in 1995 that *Convention* rights were subject to *Charter* protection, while arguing the opposite in court a few years later.[46] At a more fundamental level, these practices are disturbing because they show how the *Charter* can be used to legalise even international politics, allowing Canadian delegations to invoke legal interpretations of abstract constitutional rights as a substitute for real evidence of substantive social progress and as a smokescreen for political failings.

Number 2: Senators Take Their Report to the Supreme Court of Canada

In 2002, the Standing Senate Committee on Social Affairs, Science and Technology, chaired by Senator Michael Kirby, released its report on Canada's health care system.[47] The report recommended that governments establish a "health care guarantee" that would oblige them to provide patients with timely access to medically necessary health care within public or private health delivery systems. According to the report, failure to provide patients such a guarantee, while preventing them from purchasing medically necessary services, would violate their rights to life and security under section 7 of the *Charter*. The Kirby report was seen as a contender to the report of the Royal Commission on the Future of Health Care, also released in 2002 by Commissioner Roy Romanow.[48] The Romanow report placed greater emphasis on the need to maintain a single-payer model of health care insurance and called for sweeping changes and a "health covenant" to ensure the sustainability of a universally accessible, publicly funded health care system.

In 2003, Kirby and nine other Senators on his committee sought leave in their official capacity to make arguments as interveners before the Supreme Court of Canada in *Chaoulli v. Quebec (Attorney General),* which involved a *Charter* challenge to Quebec legislation prohibiting the sale of private health insurance in the province for core medical services.[49] Their application was contested by the respondent Attorney General of Canada on a number of grounds, including that it would create "a whole new forum for political discussion incongruent with the proper functioning and role of Parliament by allowing a particular group of parliamentarians holding a particular point of view a second forum to make their case, without the balance of divergent

legislators' views; it would also open the door to Senators or members of the House of Commons opposed to the views of their colleagues to also seek to intervene in order to put forward ... their own point of view."[50] The Court finessed these objections by granting intervener status to the Senators in their individual capacities, whereupon they proceeded to file arguments based on their report in support of the appellants and in opposition to the position of the Government of Canada. In particular, they submitted that, absent a "health care guarantee," the prohibition on private health insurance violated patients' rights under section 7 of the *Charter*.[51] These arguments ultimately found favour with three of the four majority judges, thereby contributing to the Court's decision to declare the Quebec legislation invalid.

Here we see an example of the legalisation of politics in its purest and most potent form. Members of an unelected Senate Committee, not content to influence public policy through normal parliamentary channels, transform their political recommendations into legal arguments in order to persuade an unelected court to make a constitutional ruling that undermines the policies of both an elected federal government and an elected provincial legislature. Moreover, given its inconsistency with the principles of the *Canada Health Act*, this ruling also served to undermine the policies of an elected House of Commons and of the very Parliament to which those Senators belong.[52]

Number 1: Law Professors Take the *Charter* to Parliament

It used to be that law professors were academic mortals like all others. However, that was before the *Charter.* Now law professors are exalted interpreters of constitutional rights, second only to judges – and a close second at that. Consider the case of the 134 law professors who, in 2005, signed an open letter to then Opposition Leader Stephen Harper. The letter told Harper that, if he opposed proposed government legislation extending the right to marry to same-sex couples and offered amendments to limit the definition of marriage to opposite-sex couples, it would be "legally necessary" for him to use the *Charter*'s notwithstanding clause. "You must be completely honest with Canadians about the unconstitutionality of your proposal," the letter went on to say: "The truth is, there is only one way to accomplish your goal: invoke the notwithstanding clause."[53]

What was extraordinary about this advice was that it came in the wake of a Supreme Court of Canada judgment in which the Court, while holding that same-sex marriage was constitutionally permissible, refused to say whether it was constitutionally *required.* One of the reasons given by the judges for refusing to address this issue was that it "ha[d] the potential to undermine the uniformity that would be achieved by the adoption of the proposed legislation."[54] Yet, as the judgment itself noted, such uniformity

would have been undermined only if the Court had concluded that same-sex marriage was *not* constitutionally required.[55] It is apparent, therefore, that the judges believed that the "potential" existed for the Court to reach this result – and the constitutional status of the prohibition on same-sex marriage remained an open question in their minds. Thus, while the law professors claimed to be certain that Harper's position was unconstitutional, the judges of the Supreme Court of Canada clearly signalled that they were not.

What makes the law professors' advice even more troubling is that, at the time the letter was written, Parliament remained the one major federal institution that had not yet been given a chance to consider the issue of same-sex marriage following appellate court judgments holding that it was constitutionally required. The Attorney General had considered the issue and decided not to pursue appeals. The cabinet and the Prime Minister had considered the issue and had decided to prepare draft legislation and refer it to the Supreme Court of Canada. The Supreme Court of Canada had considered the issue and had decided that same-sex marriage legislation was constitutionally permissible (but, as indicated earlier, not that it was constitutionally required). Given that the outcome of these various processes was to propose legislation to Parliament, one might have assumed that Parliament should have been given a meaningful opportunity to debate the legislation. One might particularly have thought that MPs, as the elected representatives of the people, should have been entitled to make their own best judgment on the merits of the legislation – including its constitutional merits. Yet, 134 law professors disagreed, suggesting that those opposed to same-sex marriage were not legally entitled to advance their position in Parliament without first conceding, by invoking the notwithstanding clause, that it contravened the *Charter*.

Now I have long been a supporter of the right of same-sex couples to marry. I was the first Attorney General in the Commonwealth to support such a right both by speaking out politically and by seeking a declaration in court under the *Charter*. I am also a law professor. However, the notion of law professors using their position as constitutional authorities to tell elected MPs that they are legally required to concede a breach of *Charter* rights in respect of a matter that was explicitly left open by the Supreme Court of Canada strikes me as more than a tad presumptuous. When I made this point at *The Charter @ 25* conference hosted by the McGill Institute for the Study of Canada in February 2007, a law professor who had signed the letter suggested to me that I was overreacting. The letter, she said, was simply a political strategy to support same-sex marriage rights. Excuse me? I believe that was my point! One hundred and thirty-four law professors engage in a political strategy by using their status as legal experts to challenge the constitutional capacity of elected MPs to advance a policy with which those

professors disagree. Sounds like a pretty compelling example of legalised politics to me.

Conclusion

The legalisation of politics foreseen by some commentators at the time of the *Charter*'s enactment has become well established in Canada over the past twenty-five years. This process has increased the influence of lawyers and legal discourse within Canadian society while diminishing that of politicians and democratic engagement. Moreover, such legalisation has not been confined to the judicial arena: it has had a profound influence on the way political issues are considered and treated within governments, legislatures, and society at large. One aspect of legalised politics that I find especially troubling is the use of the *Charter* by public officials as a means of escaping political responsibility. Having been in government, I understand how tempting it can be to invoke the *Charter* to bolster a political argument or to delay making a decision, and I have succumbed to this temptation myself on occasion. What disturbs me is that such tendencies seem to have become endemic and that politicians and other public officials are turning to the *Charter* with increased regularity to justify or avoid taking positions on contentious issues, to shift political responsibility to the courts, and to try to discredit the political views of others.

I have made no secret of my concern that these developments, combined with other forces, are contributing to an impoverishment of Canadian democracy.[56] It would be a mistake, however, to assume that all legalisation of politics is unnecessary and undesirable. To the extent that societies make defined commitments to values such as due process and the rule of law, it is important that we have lawyers, both inside and outside of government, charged with the responsibility of ensuring that elected and unelected officials adhere to these commitments. My concern for legalised politics, therefore, is not absolute but, rather, is directed at the use of law to address politically contested matters that ought, in my view, to be the subject of democratic engagement and decision making. This is a concern that I hope would be shared by others who espouse the values of democracy, including those who seek to justify judicial review on the basis that it forms part of a "democratic dialogue" with legislatures.[57] It is, after all, not much of a dialogue and hardly democratic if the same legal norms and interpretations are driving decisions at both ends.

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Notes

1 *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 [*Charter*].
2 See, for example, Peter H. Russell, "The Political Purposes of the Canadian Charter of Rights and Freedoms," *Canadian Bar Review* 61 (1983): 51; H. Glasbeek and M. Mandel, "The Legalisation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms," *Socialist Studies* 2 (1984): 84; and M. Mandel, *The Charter of Rights and the Legalisation of Politics in Canada* (Toronto: Wall and Simpson, 1989).
3 The author served as an articling student and lawyer with the Constitutional Branch of Saskatchewan Justice from 1982 to 1984; as law professor at Osgoode Hall Law School and the University of Victoria Law School from 1984 to the present; and as a Member of the Legislative Assembly of British Columbia from 1991 to 2001, where he held numerous cabinet portfolios, including Aboriginal Relations, Forests, Health, Finance, Inter-Governmental Relations, Advanced Education, and Attorney General.
4 It is true, of course, that judicial policy making on issues such as abortion and obscenity occurred prior to the *Charter* in the context of common law decision making and statutory interpretation. The judicial policy making that takes place under the *Charter*, however, is qualitatively different in that it is based on a constitutional mandate to give political meaning to open-ended rights and in that the policy-making authority of judges takes precedence over that of elected legislators.
5 Matthew A. Hennigar, "Expanding the 'Dialogue' Debate: Federal Government Responses to Lower Court Charter Decisions," *Canadian Journal of Political Science* 37 (2004): 16.
6 Ibid., 16-17.
7 James B. Kelly, *Governing with the Charter* (Vancouver: UBC Press, 2005), 245-49.
8 Janet L. Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Montreal and Kingston: McGill-Queen's University Press, 2002), 11-12.
9 The resulting legislation was subsequently challenged and struck down by the Supreme Court of British Columbia as being contrary to the guarantee of freedom of expression in section 2(b) of the *Charter: Pacific Press v. British Columbia (Attorney General)*, [2000] 5 W.W.R. 219. As explained later in this chapter, this decision was not appealed, but the same issue was later addressed by the Supreme Court of Canada in *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827, in which a majority of judges disapproved of the *Pacific Press* decision and held that similar third-party spending restrictions in federal legislation were justified under section 1 of the *Charter*.
10 For a fuller discussion of this issue, see Matthew Hennigar, "Reference re Same-Sex Marriage: Making Sense of the Government's Litigation Strategy," in this volume.
11 *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698.
12 Department of Justice Canada, *Federal Prosecution Service Deskbook* (Ottawa: Department of Justice Canada, 2000), Sec. 22.3, [emphasis in original].
13 Matthew A. Hennigar, "Why Does the Federal Government Appeal to the Supreme Court of Canada in Charter of Rights Cases? A Strategic Explanation," *Law and Society Review* 41 (2007): 231.
14 Ibid., 232; and Tonda MacCharles, "It Was an Issue of Rights," *Toronto Star* (October 2, 2004), Foundation Émergence, http://www.emergence.qc.ca/default.aspx?scheme=2484. This may have been done because the decision not to appeal was announced together with the decision to propose legislation recognizing the union of same-sex couples and to refer this legislation to the Supreme Court of Canada. See Canada, *Statement by the Prime Minister on Same Sex Unions* (June 17, 2003), Canada News Centre, http://news.gc.ca/web/view/en/index.jsp?articleid=62559&categoryid=9&do_as=true&view_as=search&df_as=17&mf_as=6&yf_as=2003&dt_as=17&mt_as=6&yt_as=2003&categoryid=9&do_as=true&view_as=content&df_as=17&mf_as=6&yf_as=2003&dt_as=17&mt_as=6&yt_as=2003&.
15 *Pacific Press v. British Columbia (Attorney General)*, [2000] 5 W.W.R. 219.
16 Matthew A. Hennigar, "Conceptualizing Attorney General Conduct in Charter Litigation: From Independence to Central Agency," *Canadian Public Administration* 51:2 (2008): 201.
17 *Schachter v. Canada*, [1988] 3 F.C. 515.

18 *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c. 48, ss. 32 (as amended by R.S.C. 1980-81-82-83, c. 150, s. 4) and 32(1) (as amended by R.S.C. 1980-81-82-83, c. 150, s. 5).
19 The Attorney General did appeal the remedy granted by the Federal Court, which extended the benefits to biological parents rather than strike the section down. This appeal had the effect of prolonging the trial judge's order that the operation of his judgment be suspended pending appeal. See *Schachter v. Canada*, [1992] 2 S.C.R. 679.
20 *An Act to Amend the Unemployment Insurance Act and the Employment and Immigration Department and Commission Act*, S.C. 1990, c. 40, s. 24.
21 Canada, House of Commons, *Minutes of Proceedings and Evidence of the Legislative Committee on Bill C-21*, 34th Parl., No. 12:2 (October 3, 1989) [English translation].
22 Ibid.
23 See Ian Scott, "Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s," *University of Toronto Law Journal* 39 (1989): 124-26.
24 *Re Blainey and Ontario Hockey Association et al*. (1985), 52 O.R. (2d) 225 (Ont. H.C.J.); *Ontario Human Rights Code*, R.S.O. 1980, c. 340, s. 2.
25 *Paul and Wright v. The Minister of Consumer and Commercial Relations,* unreported decision of the High Court of Justice of Ontario, December 9, 1985; *Vital Statistics Act,* R.S.O. 1980, c. 525 (as amended by R.S.O. 1981, c. 66, and R.S.O. 1983, c. 34).
26 *Re Blainey and Ontario Hockey Association et al*. (1986), 54 O.R. (2d) 5 (Ont. C.A.).
27 For a comprehensive analysis of interest group use of political advocacy, see Troy Riddell, "Explaining the Impact of Legal Mobilization and Judicial Decisions: Official Minority Language Education Rights outside Quebec," in this volume.
28 Gregory Hein, "Interest Group Litigation and Canadian Democracy," in P. Howe and P. Russell, eds., *Judicial Power and Canadian Democracy* (Montreal and Kingston: McGill-Queen's University Press, 2001), 222.
29 See Christopher P. Manfredi, *Feminist Activism in the Supreme Court of Canada: Legal Mobilization and the Women's Legal Education and Action Fund* (Vancouver: UBC Press, 2004); and Gwen Brodsky and Shelagh Day, *Canadian Charter Equality Rights for Women: One Step Forward or Two Steps Back?* (Ottawa: Canadian Advisory Council on the Status of Women, 1989).
30 See Miriam Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality Seeking, 1971-95* (Toronto: University of Toronto Press, 1999).
31 *Operation Dismantle v. The Queen,* [1985] 1 S.C.R. 441, cited in M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada,* revised edition (Toronto: Thompson Educational Publishing, 1994), 74-81.
32 Ibid., 78; *Toronto Star* (May 9, 1985), A1.
33 *Gosselin v. Quebec (Attorney General),* [2002] 4 S.C.R. 429, cited in Bonnie Morton, *Charter* Committee on Poverty Issues, "Gosselin Decision from Supreme Court," press release (December 19, 2002), http://dawn.thot.net/gosselin1.html.
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35 *Human Rights Amendment Act*, R.S.B.C. 1993, c. 27.
36 *Access to Abortion Services Act,* R.S.B.C. 1996, c. 1.
37 Kent Roach, "The Dangers of a Charter-Proof and Crime-Based Response to Terrorism," in Ronald Daniels, Patrick Macklem, and Kent Roach, eds., *The Security of Freedom: Essays on Canada's Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001), 131.
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41 United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic Social and Cultural Rights (Canada)*, Geneva, Doc. E/C 12/1993/5 (June 10, 1993) at para 93.

42 *Canada Assistance Plan,* R.S.C. 1985, c. C-1.
43 United Nations Economic and Social Council, Committee on Economic, Social and Cultural Rights, *supra* note 41, at para 19.
44 *Implementation of the International Covenant on Economic, Social and Cultural Rights,* Third Periodic Report: Canada, Doc. E/1994/104/Add.17 (January 20, 1998), at para. 8.
45 *Review of Canada's Third Report on the Implementation of the International Covenant on Economic, Social and Cultural Rights: Responses to the Supplementary Questions Emitted by the United Nations Committee on Economic, Social and Cultural Rights,* Doc. E/C/12/Q/CAN/1 (November 1998) on *Canada's Third Report on the International Covenant on Economic, Social and Cultural Rights,* Doc. E/1994//104/Add.17 (1994) at Question 53.
46 C. Scott, "Canada's International Human Rights Obligations and Disadvantaged Members of Society: Finally into the Spotlight?" *Constitutional Forum* 10:4 (1999): 107. *Convention on the Rights of the Child,* G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force Sept. 2 1990.
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48 Canada, Royal Commission on the Future of Health Care in Canada, *Building on Values: The Future of Health Care in Canada,* Final Report, http://www.hc-sc.gc.ca/english/care/romanow/hcc0086.html.
49 *Chaoulli v. Quebec (Attorney General),* [2005] 1 S.C.R. 791.
50 Ibid., Response of the Attorney General of Canada to the Motion for Leave to Intervene of Senator Kirby et al., 3, http://www.healthcoalition.ca/int-6.pdf.
51 Ibid., Factum of the Interveners Senator Michael Kirby et al. (March 12, 2002), http://www.law.utoronto.ca/healthlaw/docs/chaoulli/Factum_Senate.pdf.
52 *Canada Health Act*, R.S.C. 1985, c. C-6.
53 Open letter from Canadian law professors to Stephen Harper (January 25, 2005), http://www.law.utoronto.ca/samesexletter.html.
54 *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 at para. 69.
55 Ibid., para. 70.
56 For discussion of some of the other factors contributing to an impoverished Canadian democracy and what might be done to address them, see Andrew Petter, "Look Who's Talking Now: Dialogue Theory and the Return to Democracy," in Richard W. Bauman and Tsvi Kahana, eds., *The Least Examined Branch*: *The Role of Legislatures in the Constitutional State* (New York: Cambridge University Press, 2006), 519.
57 See, for example, Peter W. Hogg and Allison A. Bushell, "The *Charter* Dialogue between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn't Such a Bad Thing after All)," *Osgoode Hall Law Journal* 35 (1997): 75; and Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001).