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# The Canadian Charter of Rights and Freedoms: A New Constitutional order for Canada and Model for the World

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**"Let us celebrate the renewal and patriation of our Constitution, but let us put our faith, first and foremost, in the people of Canada who will give it life.[1]"**

— Pierre Elliott Trudeau, April 17, 1982



By Peter L. Biro*

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# Introduction

On the occasion of the *Charter's* 40th anniversary, Governor General Mary Simon called it "one of our nation's greatest achievements".[2] Apart from Confederation itself, it would hardly be hyperbole to characterize the *Charter* as Canada's greatest example of nation-building and, indeed, to think of it as the country's crowning achievement.

"Canada's most important national symbol." That is what 93% of respondents to a public opinion poll said about the *Canadian Charter of Rights and Freedoms* (the "*Charter*").[3] More important even than ice hockey, the Maple leaf, the national anthem, and the beaver!

And yet, there were plenty of Canadians who were not quite so eager to celebrate the *Charter* at 40.

There was Quebec which, under the Premiership of René Lévesque, refused to go along with the Patriation package, having been outmaneuvered by the Prime Minister and betrayed by the other provincial Premiers ready to do the deal without making the concessions which Lévesque would have required.[4] There were the folks, mostly out west, who viewed the *Charter* as a constitutional usurpation of democratic power, taking from the provinces and from the citizenry the power to decide questions of rights and assigning that power to the unelected, unaccountable, judiciary.[5]

There were the conservatives, who resented the judicial activism of the courts and who felt that judges had gone too far in expanding the definition and extending the application and ambit of constitutionally enumerated rights and freedoms far beyond what had originally been intended by the framers, thereby turning judges and courts into unaccountable legislators.[6]

And there were, as would be expected, those who complained that the courts had shown too much restraint and too little courage and initiative in defending and advancing the causes of rights, freedoms and justice—especially of the "social" variety—and had, therefore, failed to use the *Charter* as they believed it ought

to be used, if not also as it had been intended to be applied and exploited.[7]

There were also those liberal constitutionalists who lamented the increasingly "normal" use of Section 33 of the *Charter*—the notorious notwithstanding clause—as being antithetical to the values of liberal constitutional democracy.[8]

Finally, there were those who believed, as they had on the eve of the *Charter's* enactment, that the advent of the *Charter* spelled the end of what many considered a superior regime of constitutional law and politics, namely that of "legal federalism", otherwise understood as the contest over subject-matter jurisdiction established by the division of powers enumerated and constitutionally assigned to Parliament and the Provinces respectively.[9] Under the regime of legal federalism, individual rights and liberties were not expressly assigned to any level of government but would be protected only indirectly by resort to the argument that an impugned law was *ultra vires* the level of government (either Parliament or the legislatures) by which that law had been enacted rather than by reference to any enumerated right or freedom that had allegedly been infringed by the law.[10]

And while the vast majority of Canadians apparently believe that the *Charter* is the country's most notable and important national symbol, it is not at all clear that there is consensus on *why* it is important, culturally, legally and not least, politically, rather than purely symbolically. As we advance well into the twenty-first century and look to the future with the benefit of four decades of *Charter* practice and jurisprudence behind us, and with the scourge of democratic backsliding taking hold in liberal democracies around the world, this is an opportune time to consider the *Charter* within the history and architecture of Canada's constitutional framework, and to ponder what it means for Canadian constitutional democracy and, indeed, for Canadian civic culture broadly.

The *Charter* reflects the liberal individualist moral focus of its chief architect, Pierre Trudeau, but, as we shall see, this is not merely a function of Trudeau's personal passions or prejudices, but rather of his deeply considered response to the deleterious consequences of Quebec's political history of nationalism, collectivism and populist, clerical illiberalism, and to an abiding interest in the unity of the federation. In the result, and with the notable and consequential exceptions of Aboriginal rights and minority language and denominational education rights, the *Charter* does not explicitly address group or communal rights—except insofar as freedom of association and assembly are understood as communal rights. Nor, unlike many international and national human rights charters and conventions, does the *Charter* expressly protect social, economic and environmental rights. As for the "rights" and interests of non-human fauna, the *Charter* is entirely silent on these. Perhaps, one day, these interests may find vicarious recognition and protection via the exercise and elaboration of constitutionally acknowledged Aboriginal rights.

Canada's constitution (the "*Constitution*") is informed by four overriding values: liberal constitutional democracy, functional - though not necessarily "cooperative" - federalism, national unity, and "Reconciliation".

In this paper for the Trudeau Foundation Scholars, I will place the *Charter* in historical context, which, I submit, is actually the story of Canadian liberal constitutionalism, and I will endeavor to show that the *Charter* changed everything about the logic and dynamics of constitutional discourse in Canada by radically altering the relationship between the legislative and judicial branches of government, scaling back parliamentary supremacy, and placing the citizen smack in the middle of the action alongside government, all for the purpose of giving full expression to its early promise of a *Constitution* as "living tree", nurtured and animated by liberal democratic ideals.

I have organized the paper into the following five sections:

1. "A Constitution Similar in Principle to That of the United Kingdom": Parliamentary Supremacy and the Jurisdictional Contest
2. Rights and Freedoms Take Centre Stage: the *Charter*, the Individual, and the New Judicial Review
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# 01. "A Constitution Similar in Principle to That of the United Kingdom": Parliamentary Supremacy and the Jurisdictional Contest

For the first one hundred-and-twenty years of Confederation, there was no constitutionally entrenched, codified, Canadian law of human rights. The notable exception was with respect to language and denominational school rights[11] and even those were not viewed through the lens of individual rights. The original constitutional bargain was concerned principally with orderly and, to a degree, coordinated governance amongst the original Provinces (Canada - divided, upon Confederation, into Ontario and Quebec—and Nova Scotia and New Brunswick) over the territory of British North America. There were, of course, from the 1960s on, both federally and provincially enacted human rights laws; but none had constitutional status.[12]

Canada's pre-*Charter* constitutional litigation occurred within the framework of contested characterizations of the exercise of various powers by Parliament and the Provinces. All constitutional grievances against the exercise of federal and provincial power were framed as challenges to the jurisdiction of the government in question to enact laws or to take action with respect to a particular subject-matter.[13] The contest was over the question of whether the subject-matter—the "pith and substance"[14]—of the impugned legislation was properly within the class of enumerated powers assigned to either Parliament or to the Provinces in Canada's original constitution, *The British North America Act, 1867*, (the *BNA Act*).[15] The overriding concern of the framers was not for the particular interests of citizens qua "individuals", whether personal or corporate, but for the efficient management and government of the new federation, taking account of its regional diversity, its local commerce and politics, and its contested history. That overriding concern is perhaps best reflected in the words of the preamble to s. 91 of the that empower the Queen, on the advice of Parliament, "to make Laws for the Peace, Order and good Government of Canada".[16]

Nevertheless, individual interests are always at stake, even if not formally in issue. Laws passed and implemented

affect the lives and welfare of citizens; they are not mere exercises in the flexing of legislative muscle designed to test the definitions of constitutionally enumerated powers and the jurisdictional divisions thereof. The impact of government action on the lives of everyday people has always been a concern of the parties who came before the courts seeking protection and redress of some sort for restrictions on their religious, political, legal and cultural freedoms. But insofar as the grounds for constitutional challenges were concerned, individual rights and freedoms had no constitutional standing and, to the extent that they were even taken into account by the courts, they had to come in through the back door of legal federalism or, very occasionally—and never as the ratio decidendi—through the side door of an implied bill of rights analysis.[17]

And yet, Canada was a democracy from the start. It was a democracy that, before 1930, did not recognize women as legal "persons"[18], and did not recognize indigenous people as one of the country's founding peoples—not to say, its original people—but it was a democracy, nonetheless. As such, it came, ready-made, with certain norms and conventions which, though not codified in a constitutional document, nevertheless reflected the political values of a then modern western democracy.

The *BNA Act* describes Canada as a nation of provinces that "desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain *with a Constitution similar in principle to that of the United Kingdom*".[19] Thus does the model of a then modern western democracy assume the form of a constitutional monarchy operating as parliamentary democracy, with the monarch as constitutional Sovereign, and Parliament as the effective and accountable government.

As we know, the United Kingdom does not have a comprehensive written constitution. And yet it has a rich constitutional practice and a long constitutional history. The UK Constitution is an amalgam of statutes and conventions and practices that, although not codified in a single document, comprise the norms and principles and first order rules that are considered both foundational to and imperative for the governance of what, today, we understand to be a "free and democratic society".[20] These include, *inter alia*, the rule of law, judicial and prosecutorial independence, parliamentary supremacy (a term used interchangeably *with parliamentary sovereignty* and *legislative supremacy*), responsible government, and democracy itself. And they include core civil liberties such as freedom of speech and freedom of the press. They also consist of the prerogative writs, such as *habeas corpus*, developed and issued by the courts to ensure some measure of procedural fairness and to give standing to the liberty of each person. Much of what we accept as the core values of liberal democracy today emanates from centuries of common law, and of judges working out the implications of and extrapolating real-world meaning and application from *Magna Carta Libertatum* (the Great *Charter* of Freedoms).[21]

The Supreme Court of Canada, examining the "closely interlocked" relationship between law and convention, noted in

the *Patriation Reference* case, that the purpose of convention is "to ensure that the legal framework of the constitution will be operated in accordance with the prevailing constitutional values or principles of the period".[22]

Constitutional convention is broadly understood as prescribing the way in which existing legal powers are to be exercised—as with, the uncodified conventions governing the manner in which the Governor General in Council discharges her duties as set out in the written constitution. It is not always the case, however, that the written word precedes the convention. One could hardly point to a more important example of this than the convention that grounds all of Canadian constitutional democracy, namely, that of responsible government. After all, it was Lord Durham who, having been tasked with discovering the underlying causes of the rebellions of 1837 and of their aftermath, determined that the true culprits were, in fact, the various sources of conflict between the assemblies and executive councils for which the structural remedy was to be the implementation of responsible government.[23] In other words, Lord Durham identified what we might today understand as the democratic deficit in the system of political governance of the period, namely, that without responsible government, political conflict and social disharmony would run rampant because executive councils were not comprised of persons who enjoyed the confidence of a majority in the assembly.

Thus, was perhaps the most foundational of all Canadian constitutional conventions adopted here before the *BNA Act* was even conceived, let alone, drafted. And, like so much else of Canadian constitutional law, the convention of responsible government—which is, in reality, a super-convention comprising several discrete conventions—was not, of course, Lord Durham's brainchild, but rather a system that had previously evolved in the United Kingdom—forming part of the fabric of UK constitutional democracy, and designed to regulate or rather to resolve and harmonize the respective powers of the Crown and of the representative Parliament. Accordingly, at Confederation, when the *BNA Act* was passed, "a Constitution similar in principle to that of the United Kingdom" not only had meaning for the freshly minted Canadian politicians of the time; it had already gained some traction in the pre-Confederation governance of British North America.

In 1885 the British constitutional scholar, A.V. Dicey, published a comprehensive analysis of the British constitution entitled Introduction to the *Study of the Law of the Constitution*, in which he argued that parliamentary supremacy was "the dominant characteristic of [British] political institutions".[24] This meant that, in the UK, a unitary state with asymmetric devolutions of certain powers to regional governments, Parliament was supreme over all other government institutions, including executive and judicial bodies. Dicey's view of parliamentary sovereignty was accepted in Canada, both by virtue of the language in the preamble to the *BNA Act* and also as a matter of convention. The Canadian application—or rather, adaptation—of the principle to a federal system would engage the judiciary on

matters of jurisdiction but would otherwise preserve the supremacy of Parliament over all other institutions and entities.

Over the course of the century following Confederation, a number of important civil liberties cases have presented themselves to the courts, of necessity, in the form of constitutional challenges to the jurisdiction of the government, be it that of Parliament or of the Provinces, pursuant to the division of powers set out in ss. 91 and 92 of the *BNA Act*. In each such case, whether decided by the Supreme Court of Canada or by the Judicial Committee of the Privy Council, the matter would be brought, adjudicated and applied within the constitutional framework of parliamentary supremacy.

In August 1937, the federal government disallowed three Acts passed by the Alberta Legislature. Following the validation of Parliament's use of its disallowance power in those cases, the Alberta legislature passed three more Acts with a view to overcoming the grounds on which Parliament had disallowed the previous versions.[25] One of those bills, the A*ccurate News and Information Act*, required newspapers to print "clarifications" of stories considered inaccurate by the Social Credit Board, and to reveal their sources on demand. It also authorized the provincial government to prohibit the publication of any newspaper, any article by a given writer, or any article making use of a given source.[26] The federal government initiated a reference to the Supreme Court of Canada, asking the Court whether the legislation was *intra vires* (within the jurisdiction of) the Province.[27] The Court ruled the legislation *ultra vires* (outside the jurisdiction of) the Province on the basis that the pith and substance of the matter pertained to various subjects enumerated in s.91 of the *BNA Act* (matters within Parliament's exclusive jurisdiction).

But Chief Justice Lyman Duff went further and stated that,

> **the principle that the powers requisite for the protection of the constitution itself arise by necessary implication from *The British North America Act* as a whole; and since the subject-matter in relation to which the power is exercised is not exclusively a provincial matter, it is necessarily vested in Parliament.**

The *Constitution*, he continued,

> **contemplates a parliament working under the influence of public opinion and public discussion... [I]t is axiomatic that the practice of this right of free public discussion of public affairs, notwithstanding its incidental mischiefs, is the breath of life for parliamentary institutions.[28]**

Justice Cannon elaborated in his concurring opinion:

> **Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State within the limits set by the criminal code and the common law. Every inhabitant in Alberta is also a citizen of the Dominion. The province may deal with his property and civil rights of a local and private**

> **nature within the province; but the province cannot interfere with his status as a Canadian citizen and his fundamental right to express freely his untrammeled opinion about government policies and discuss matters of public concern.[29]**

Taken together, Duff and Cannon JJ's reasons came to be known as the *Duff Doctrine*, also described as the first iteration of the "*Implied Bill of Rights*" doctrine.[30]

The reasoning of Duff and Cannon JJ. was later expanded upon, albeit also in *obiter dicta*, in subsequent cases, including in a trilogy of Quebec cases (*Saumer v. City of Quebec, Switzman v. Elbling, Roncarelli v. Duplessis*)[31] in which it was invoked, with the approval of only a minority of the Court, on the grounds that provincial legislation[32] and administrative actions[33] infringed both freedom of religion and freedom of speech, and also that the Premier of the Province had acted arbitrarily and without authority and had violated the rule of law.[34] The majority of the Court, however, declined to decide those cases on the basis of the *Duff Doctrine* and opted instead to strike down the impugned legislation in question on legal federalism grounds.

It is arguable that, had the *Implied Bill of Rights* Doctrine gained traction with the majority of the Supreme Court and become the basis for the *ratio* in some important civil liberties cases, the impetus and the need to codify rights and freedoms in the *Constitution* would have been less intense.

There was one notable pre-*Charter* effort to enshrine human rights and civil liberties in a federal statute. In 1960, Prime Minister John Diefenbaker's government enacted the *Canadian Bill of Rights*, "An Act for the Recognition and Protection of Human Rights and Fundamental Freedoms".[35] Diefenbaker saw this initiative as achieving two great purposes for Canada: first, it would be something of bulwark against the scourge of racial discrimination—which he abhorred—and, second, it would serve the cause of national unity, transcending regional differences and rallying the country around a set of common core values.[36]

Inspired in part by the CCF's *Saskatchewan Bill of Rights*,[37] Canada's first and only previous human rights statute, enacted in 1947 on the initiative of then Premier Tommy Douglas, Diefenbaker was determined to give Canada a bill of rights with some teeth. The Saskatchewan statute contained no explicit enforcement mechanism and, of course, it applied only to Saskatchewan. Diefenbaker wanted a statute that would not only apply to Canada as a whole but would also be enforceable. There were, however, two obvious problems with the federal statute. First, being a statute of Parliament, it would only have application to matters within federal jurisdiction, not to those matters that were within the exclusive jurisdiction of the Provinces. Second, it would not have constitutional status and there were doubts—subsequently validated by the Supreme Court of Canada[38] and subject to one notable exception[39]—that a statute of Parliament could be used by litigants to strike down or invalidate other statutes. To do otherwise would undermine the tradition of parliamentary supremacy. This impediment to a fully

effective Canadian *Bill of Rights* was acknowledged by Mr. Justice Gerald Le Dain in his reasons in a 1985 *Charter* case:[40]

> **[A] court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, the courts have felt some uncertainty or ambivalence in the application of the Canadian Bill of Rights because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament.**

And with those reasons issued three years after the enactment of the *Charter*, Le Dain J. gave *ex post facto* validation to the need for a constitutionally entrenched bill of rights.

# 02. Rights and Freedoms take Centre Stage: the *Charter*, the Individual, and the New Judicial Review

On April 17, 1982, the Queen was present in Ottawa to sign and give Royal assent to Prime Minister Pierre Trudeau's long sought Patriation Package, which he referred to as the "people's package".[41] This consisted of the new *Canada Act, 1982*, which included amendments to the *BNA Act*, including its renaming as the *Constitution Act, 1867*, and, most notably, Schedule B, being the *Constitution Act, 1982*, of which Part I is the *Canadian Charter* of Rights and Freedoms.[42] (Also notable are Part II, the *Rights of the Aboriginal Peoples of Canada*, Part V, the amending formula, and Part VII, which includes s. 52, the supremacy clause.)

The advent of the *Charter* in 1982 ushered in two radical changes to Canada's constitutional landscape and culture. The first is the codification of individual—and group—rights and freedoms in the *Constitution*, thereby making the protection of civil liberties and of human rights and freedoms a major piece of the *Constitution's* purpose and mission-statement and giving the individual citizen standing to hold government accountable for its laws and actions, not merely on jurisdictional grounds, but on the substance of the laws themselves.

The second radical change was to the role of the judiciary and to its relationship with the legislative branch of government. With the *Charter* came a court that was mandated to evaluate and oversee the laws as to their content and effects and not merely as to their jurisdictional grounding. The judiciary would assume the responsibility not only of ruling on the validity of the laws and the propriety of government action, but also of declaring, for all to see and understand, whether the legislatures and their delegates had respected or had violated citizens' constitutionally enshrined rights and freedoms.[43]

The first thing one notices upon reading the *Charter* is the language in the preamble: "Whereas Canada is founded upon the principles that recognize the supremacy of God and the rule of law". At first blush, this presents a striking contrast to the preamble to the *BNA Act* with its reference

to a "Constitution similar in principle to that of the United Kingdom". This is not surprising, given that the 1982 Patriation Package stands as symbol of Canada's constitutional independence from the British colonial power. And yet, it also signals continuity by reinforcing the core values that informed the *BNA Act* by making explicit the supremacy of the rule of law, which was, after all, the overarching principle of the constitution of the United Kingdom. Still, one cannot fail to appreciate the radical effect of placing the supremacy of the rule of law in the *Charter's* opening language, thereby presenting the *Charter* as a fleshing out of and express extrapolation from the substantive content of "the rule of law" which, the drafters recognized, is intended for the protection and benefit of citizens—of actual human beings, rather than governments and institutions.

In the aftermath of the Duplessis era of conservative, nationalist, anti-communist, anti-unionist, and fervently Catholic, politics (in the Quebec of 1936-39 and 1944-59) and with the modernization project of Premier Jean Lesage's Révolution tranquille redefining Quebec's civic culture in the early 1960s, followed by soon-to-be premier, Daniel Johnson's constitutional provocation[44]—having run his campaign with the slogan, "*Égalité ou indépendance*"—Pierre Elliott Trudeau's political sensibilities were also being refined and his values and vision for Canada were coming into clear focus.[45] In a span of some twenty years, Trudeau went from being a young Quebec nationalist and an articulate defender of a decentralized federation[46], to becoming an unabashed anti-nationalist, a federalist with an educated certitude about the imperative of strong central government in Ottawa, and, not least, a passionate believer in and champion of the rights of the individual and of the concomitant need for a Canadian charter of human rights.[47]

The failure of the "implied bill of rights" doctrine to capture the imagination and allegiance of a majority of the Supreme Court, the judicial restraint of the Court, of its longstanding deference to the doctrine of parliamentary supremacy, and the obvious limitations—baked-in deficiencies—of a statutory bill of rights, and, of course, the increasingly rapacious appetite of the provincial governments to maximize, indeed, to enlarge upon, the scope of their own jurisdiction and powers within the federation, led Trudeau to the conviction that Canada needed constitutional reform.

For the sake of civil liberties, but also for the cause of national unity, Canada needed an activist Supreme Court[48] mandated by an activist *Constitution*. Lord Sankey's "living tree" doctrine[49] needed some real-world expression and validation, lest it be consigned to the footnote heaven of Canadian constitutional history. And, Trudeau, being "a progressive, as well as being a legal modernist" as John English noted in his biography of Trudeau, "believed that the law could take the lead in establishing social and economic justice".[50]

Thus, began a decade-and-a-half project to give Canada a constitutionally entrenched charter of rights and freedoms. Following several valiant attempts, and at least one close call in 1971,[51] and following serious consideration about going over the heads

of the Premiers to achieve the objective—with a Supreme Court Reference decision advising that, even if legal, it would breach constitutional convention to go that route,[52] and a most unforeseeable election comeback[53]—the Patriation Package, including its crown jewel, the *Charter*, was finally signed, sealed and delivered on April 17, 1982, and Trudeau's decades-long "magnificent obsession"[54] with constitutional reform was finally satiated!

## Section 1: A framework for liberal constitutionalism

Following its preamble, the *Charter* opens with what may be the most exalted passages in the history of liberal democratic constitution drafting[55]:

> **Section 1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.[56]**

Often referred to as the "reasonable limits" passage, because it lays out the principles applicable to the determination of how, when and whether *Charter* rights and freedoms may be limited or restricted, one must first acknowledge its starting point, which is not the limitation of rights and freedoms, but their guarantee! This is not mere fluff but is substantively central to the entire *Charter* project. For it serves notice that the protection of rights is the general rule, and the restriction of rights is not only the exception, but an exception governed by strict conditions that are not arbitrarily conceived or imposed, but that, above all else, honour the rule. That is, that, in contrast to section 33 (the notwithstanding clause) which we consider later in this paper, any restriction or limitation of rights and freedoms can be justified under section1 only if the basis for the exception is, in each specific instance, consistent with respect for the rule.

Thus, does section 1 contain, in hyper-condensed form, the very essence of liberal constitutional democracy. It then falls to the Court to unpack and elucidate that essence and this, not surprisingly, is not merely a matter of adding water and stirring! For the task at hand is not merely the analysis of discrete statutes evaluated against a backdrop of particular rights, but the discovery and exposition of the nature and real-world manifestation of a "free and democratic society". Over forty years of jurisprudence has endeavored, as though shifting the judicial gaze from shadows on the cave walls to the thing itself, to illuminate its landscape, with its creases, caverns, darkest corners and highest peaks.

But, complex and perpetually unfinished by design as this exercise inescapably is, it is not without operating instructions. The Supreme Court has worked out the framework—extrapolating from the precise language of section 1—within which the exercise is to be undertaken and has painstakingly developed the elements of the test that is to be applied in each instance in which a law or a government action is challenged on the basis that it is said to infringe or restrict the exercise of an enumerated right or freedom. This "section 1 test" has come to be known as

the "*Oakes* test", after the Supreme Court case[57] in which David Oakes challenged the validity of provisions under the *Narcotic Control Act* that provided that a person found in possession of a narcotic, absent of evidence to the contrary, must be convicted of trafficking the narcotic. Oakes argued that the presumption of trafficking violated the presumption of innocence guaranteed under section 11(d) of the *Charter*.

As section 32 of the *Charter* makes the *Charter* applicable only to government action,[58] section 1 places the onus of proof—that the limits on any rights or freedoms are "demonstrably justified in a free and democratic society"—on the party seeking to justify the limit, which is generally the government. Accordingly, the Court had to consider an appropriate test or analysis to establish whether the Government of Canada met the burden of justifying the reverse onus placed on Oakes under the provisions of the *Narcotic Control Act*.

The *Oakes* test, as modified in two subsequent decisions,[59] is comprised of two main elements:

First, the objective to be served by the measures limiting a *Charter* right must be sufficiently important ["pressing and substantial"] to warrant overriding a constitutionally protected right or freedom.

Second, the party invoking s. 1 must show the means to be reasonable and demonstrably justified. This involves a form of proportionality test involving three important components ["proportionality"].

> **The measures must be fair and not arbitrary, carefully designed to achieve the objective in question and rationally connected to that objective ["rational connection"].**
>
> **In addition, the means should impair the right in question as little as possible ["minimal impairment"].**
>
> **Lastly, there must be a proportionality between the effects of the limiting measure and the objective -- the more severe the deleterious effects of a measure, the more important the objective must be ["final balancing / proportionality"].**[60]

The new role for the Court under section 1 immediately comes into focus. No longer is the Court simply evaluating a law in the context of the regime of the division of powers laid out in sections 91 and 92 of the *Constitution Act, 1867* and ultimately deciding whether the subject matter is within the jurisdiction of the legislature. Now the Court is also holding the legislature to account on substantive grounds[61]. Is the purpose of the law of sufficient importance to warrant limiting rights? Are the limits on rights "reasonable"? Are the limits fair and rationally connected to the law's purpose? Could the government have chosen less deleterious measures to advance its objective? Is the importance of the objective commensurate with the extent and effects of the impairment?

Judicial review takes on a whole new dimension under the *Charter*, particularly when one considers that, in addition to holding government accountable—i.e., making it justify its impugned legislation—

the Court is also called upon to inquire into and, ultimately, define, the content of the rights and freedoms in issue.

The substantive rights and freedoms enumerated in the *Charter* comprise, in the aggregate, the core values of liberal democracy itself. Cass Sunstein summarized those core values in the following fashion. "Liberals believe in six things: freedom, human rights, pluralism, security, the rule of law and democracy."[62]

The list of *Charter* enumerated rights and freedoms is not exhaustive and there are categories of rights that were excluded for the list, such as the right of property ownership, economic rights such as the right to work, the right to social services such as healthcare[63], the right to enjoy cultural activities, the right to benefit from scientific achievements. But, on balance, the *Charter* contains all of the civil liberties, democratic rights, mobility rights, legal rights and equality rights that define and characterize a robust, pluralistic, liberal constitutional democracy and give expression to Sunstein's "six things".[64] It also includes protections and recognitions of rights that are particular to Canada's own historical, demographic, and cultural makeup: official languages, minority language education rights, recognition of Canada's multicultural heritage, and aboriginal rights.[65]

## The *Charter* as "activist": the "living tree" redux

The *Charter*—or, rather, the *Charter* jurisprudence—has brought about significant change in Canadian society over the course of its first four decades. As with all discussions about the evolution of the law, there is always the question of whether the law itself produces reforms or whether it recognizes and reflects the reforms already occurring in society. Community standards and social values are rarely, if ever, static; they are constantly evolving. A third way of thinking about law's role, value and effect was articulated by the *Charter's* chief architect almost a quarter century before its enactment:

> **The real purpose of laws, then, is to educate the citizen in the common good, and persuade him to behave in the public interest, rather than to command and restrain.**[66]

One can certainly see the activist in the author of this statement. But his "activism" is animated not by the cause of political agendas and social justice missions for their own sake, but by that of enlightenment, refinement and an overriding concern for the advancement of the public interest within a conception of the public or common good. In this sense, the law is understood as educator and shaper of the civic culture as a function of a certain public morality, however evolving it may be. The headlines and outlines of that morality are codified in the *Charter*; the courts give definition to the content of that public morality, but, ultimately, as Pierre Trudeau declared on April 17, 1982, it is the citizens of Canada who breathe life into the *Charter*.[67] They do this, fundamentally, in two ways. First, by living in a manner that reflects the values in the *Charter*. This is a messy, never-ending dance in which society experiments by testing limits,

taking stabs at real-world expressions of abstract codified concepts. Second, they do this by seeking judicial intervention, by challenging the meaning, application, and validity of laws and the institutions that implement and enforce them wherever the exercise and protection of *Charter* rights and freedoms may be in issue.

In the forty years of life with the *Charter*, the jurisprudence has exemplified aspects of each of the three manifestations, roles and effects that law can have: law as instrument of reform, law as recognition and reflection of changing societal values, and law as instrument of enlightenment and public education. This can be seen in the areas in which change occurred in concert with or as a function of the *Charter's* existence and operation.

These changes include, the heightened importance of due process under the law, (e.g., right to be secure against unreasonable search and seizure) and to the criminal law and the way in which crime is prosecuted;[68] the *Charter's* role in limiting police powers;[69] the recognition and provisional protection of women's reproductive rights;[70] the full recognition of the LGBTQ+ community;[71] the protection of fundamental freedoms, not through the back door of legal federalism or the side-door of an implied bill of rights, but through the front door of codified, constitutionally enshrined rights;[72] the definition and protection of democratic rights, including, for incarcerated persons;[73] the right to "life, liberty and security of the person"... "except" as "the principles of fundamental justice" otherwise commend or require;[74] equality rights and their expansion to "analogous grounds";[75] "substantive" equality;[76] substantive linguistic rights for francophones outside and anglophones inside Quebec (and also non-francophone / non-rights-holders) outside Quebec;[77] the admittedly fraught constitutional recognition of aboriginal rights;[78] a much more activist judiciary and a new and expanded role of the courts which has had an unintended, but hugely consequential, impact on the burden on the justice system and corresponding impact on the court's docket.[79]

The case law to date serves to validate one of Pierre Trudeau's essential theses about the particular nature, purpose and real-world manifestation of Canada's *Charter*, and, in the process, to give new life and meaning to the oft-contested words of Lord Sankey in the "Persons" case.[80] It is, indeed, the citizens of Canada who imbue the *Charter* with meaning, and not the text—or the judges who interpret it—alone. They give it meaning by testing its scope and definitions and by challenging its protective boundaries. They do this by living their lives in accordance with their own values and then by calling on the *Charter* to give those values and choices cover and validation when the laws purport to restrict and circumscribe them or have the effect of doing so. In responding to those calls, the judges have no alternative but to be mindful of the metaphor of the "*Constitution* as a living tree". Community standards are ever- evolving—or devolving, on occasion. Citizens in a post-Patriation world expect their constitution to be able to account for this, to accommodate it, to validate it, and to protect rights and freedoms in such a way as to bring them into harmony with societal values such as they are in the present day.

Two very consequential interpretive principles (I hesitate to call them doctrines) were established by the courts as they entertained *Charter* claims in light of the judiciary's understanding of its new responsibility to give full effect to the principles and purposes of the *Charter*. One could think of these as expressions of a new judicial activism, but that would not tell the whole story. In fact, they were attempts to discharge their constitutionally implicit mandate to read the *Charter* against the backdrop of a society that was also engaging with the *Charter* and that looked to the courts to legalize the citizen's experience, that is, to give juridical expression to the general will in accordance with a new rule book that would be nothing if not utterly sterile and out of touch with reality if it did not reflect society's aspirations and self-image.

The first such interpretive principle was that of giving substantive, "purposive" meaning to the definition of the *Charter's* enumerated rights and freedoms, rather than to define rights in a highly formalistic, overly modest and historically static way. This required the courts to understand the intent not merely of impugned legislation which they were called upon to rule on, but the purpose of the rights and freedoms themselves. This exercise required the courts to consider the kind of society such a given right or freedom could be intended to serve, describe or define. And beyond that, it involved consideration of what kind of society the *Charter* aimed—if at all—to promote and to help bring into being.[81] Purposive analysis, the cornerstone of *Charter* interpretation, requires that *Charter* rights be given a generous and liberal interpretation aimed at fulfilling the purpose of the right in question and of the *Charter* as a whole".[82]

The second such interpretive principle was that of considering not merely the purpose of an impugned law and of the *Charter* right or freedom that might be engaged or infringed by the law's enactment and implementation, but the effect of the impugned law on the aggrieved litigant, on society at large, and, beyond that, on the standing and actualization of the *Charter's* values broadly.[83] We have already seen that a consideration of the effect of an impugned law is an essential component of the analysis, under section 1 of the *Charter*, of whether a rights limitation is "reasonable" and can be "demonstrably justified in a free and democratic society". But the consideration of the effects of a law, both as to the extent of its impairment of a right and as to its effect on the citizen and society, is not confined to the section 1 analysis. Ultimately, it extends to an understanding of the right itself defined not only from within the four corners of the text that declares it, but from the contours of the legislation or government action that affects not only the exercise of the right, but also the quality of life of the affected member/s of society. In other words, to understand the meaning of the right or freedom in issue, it is necessary to understand how impugned laws and actions affect the right's exercise, in particular, and civic life and culture, more broadly. Nowhere has this been more important than in the jurisprudence under section 15—equality rights—of the *Charter*.[84]

This has had broad repercussions in society, especially in our human rights discourse and, indeed, in our application of human rights laws—and human resources policies—which have, increasingly, tended to evaluate the moral and legal character of conduct through the prism of the subjective experience of the aggrieved party rather than by reference to any demonstrable objective intention or purpose on the part of the delinquent or over-reaching actor (whether individual, corporate, or governmental).[85]

The Supreme Court's express concern with the "effects" of an impugned law on the exercise of rights and freedoms and on the real-world advancement of *Charter* values is profound and underscores the significance and impact of the *Charter* not merely as codified demarcation of the boundaries of permissible government action, but as constitutionalized, if passive, agent of nation-building.

The *Constitution* as "living tree" acquires fresh agency, particularly when understood through the lens of section 27 (interpretation of the *Charter* must be conducted "in a manner consistent with the preservation and enhancement of Canada's multicultural heritage [my emphasis]),[86] and which, while not conferring or enumerating any new rights or class of rights, commends to all—courts and policymakers alike—a mindfulness concerning Canada's particular cultural make-up.[87] It is a far cry from being a codified social justice imperative, but is far more than a mere constitutionalized preservation of the status quo.

Nevertheless, under the *Charter*, the judiciary has understood its mandate to move on from parliamentary supremacy—insofar as the litigation of rights and freedoms are concerned—except for one important qualification which significantly tempers any inclinations towards unfettered judicial supremacy: Section 33, the notwithstanding clause.

# 03. A Contest for "the Last Word": the Notwithstanding Clause and Constitutional Supremacy[88]

Section 33 of the *Charter* (the notorious "notwithstanding clause") provides:

(1) *(Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.*

Operation of exception

(2) *An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.*

Five-year limitation

(3) *A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.*

Re-enactment

(4) *Parliament or the legislature of a province may re-enact a declaration made under subsection (1).*

Five-year limitation

(5) *Subsection (3) applies in respect of a re-enactment made under subsection (4).*

On its face, this clause gives Parliament and the Provinces the power to override certain provisions in the *Charter* for a period of five-year terms in respect of their own legislation. But to say this is to say nothing, or worse, to say things that, if construed in any number of ways, are simply incorrect. The purpose, operation, and effect of this clause, as well as the preconditions necessary for its invocation, have all been the subject of intense deliberation and debate, but not, as of yet, of a great deal of judicial analysis. That, however, is bound to change soon as various proceedings in which the notwithstanding clause figures prominently (out of Quebec, Ontario and Saskatchewan) are currently before the courts.

In the forty-two years since the *Charter* was enacted, provincial and territorial governments have invoked the notwithstanding clause some twenty-six times in legislation, although they apparently used blanks on eight of those occasions, as the clause's invocation was promulgated and made effective in only eighteen of those twenty-six instances.[89]

Speaking in the House of Commons in November 1981 as he announced agreement between the First Ministers on the inclusion in the *Charter* of the notwithstanding clause, also known as the "override clause", then Justice Minister Chretien said of its purpose:

> **What the Premiers and Prime Minister agreed to is a safety valve which is unlikely ever to be used except in non-controversial circumstances by Parliament to override certain sections of the *Charter*. The purpose of an override clause is to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy."**[90]

It would be used, he explained, as a last resort to "correct absurd situations.[91]

Reflecting on the purpose of the notwithstanding clause some thirty years after the *Charter's* enactment—in which he had played an instrumental role—former Saskatchewan Premier Allan Blakeney explained that section 33 was intended as an instrument "to mediate the clash of *Charter* and non-*Charter* rights", all of which, he contended, were equally important to both the moral and legal interests at play in Canadian society and politics. Blakeney was adamant that the *Charter* was never intended to establish a hierarchy that would privilege the constitutionally enumerated rights and freedoms—such as freedom of expression, religion, assembly—over various unenumerated, moral rights which he understood principally as being social and economic rights—such as the right to food, shelter and healthcare. Instead, he insisted, the notwithstanding clause had as its purpose, to reserve to the legislative, executive and administrative arms of government, the responsibility and authority to advance and protect the non-enumerated rights "where the likely violation of a human right stems from the operation of economic and social systems".[92]

Former Alberta Premier Peter Lougheed, another of the *Charter's* key architects and one who was especially instrumental in the notwithstanding clause's inclusion, defended the notwithstanding clause on the basis that it preserved and gave continuing effect to Canada's tradition of parliamentary supremacy.[93] While Lougheed did not countenance the pre-emptive invocation of section 33—in fact, he later proposed a constitutional amendment prohibiting it as being "undemocratic" because such a practice would have what he assumed to be the unintended effect of precluding the judiciary from fulfilling its interpretive role in relation to the *Charter's* provisions—Lougheed was uncompromising in his position that the elected Parliament must be supreme over the appointed judiciary.

Thomas Axworthy has written about the "historic Canadian compromise" reached

in 1981 by Lougheed, Blakeney and the other First Ministers, save for Quebec's René Lévesque, which compromise is represented by and embodied in the agreement to, *inter alia*, include the notwithstanding clause in the *Charter*.[94] But, as with most compromises over thorny questions of principle, purpose and priority, the result is not always dispositive of meaning, interpretation and effect.

There have been numerous accounts of what, in the *Charter's* embryonic stages, may have been intended, expected and also discouraged in the way of section 33's invocation and use.[95]

While it had been assumed from the outset that the notwithstanding clause would be resorted to only responsively—that is, following a judicial declaration of constitutional invalidity—rather than pre-emptively, nothing about the text of section 33 requires only responsive use. And so, it would not be long before the one province that had not signed on to the Patriation deal, Quebec, invoked the notwithstanding clause not only pre-emptively—and, possibly, also retroactively—and with general application to all *Charter* provisions referenced in section 33, but with reference to its entire statute book rather than to only a specific piece of legislation.[96]

Some have advanced a distinctive Quebec theory of the notwithstanding clause—that is, to an approach to section 33 that is different in Quebec than elsewhere in the federation and that posits that "legislative overrides can be legitimately made, eve pre-emptively, in order to promote social justice or national identity".[97] Quebec's use of the notwithstanding clause has been explained as a sort of manifestation of Quebec's wounded national pride asserting itself in the wake of its betrayal by the other premiers in what came to be known as the "night of the long knives"[98] but also as evidence of Quebecers' actual love and embracing of the *Charter*. On this view, section 33 is an integral—if controversial—provision of the *Charter*, its invocation as a means of asserting Quebec's own identity and cultural purpose within Canada, serves as the mechanism that actually enhances the viability of Canadian federalism and advances the cause of national unity. Without the notwithstanding clause, the argument goes, Quebec secession would be all but certain.[99]

Whether the discrete use of section 33 in Quebec and, indeed, its use anywhere, squares with and even, possibly, enhances federalism, or whether it may actually produce the opposite effect certainly remain matters of contention and feed into the question of whether, in light of the diversity of theories about and use of the notwithstanding clause, we need some upgraded operating instructions for this extraordinary "tool" in the constitutional "toolbox"—as Premier Ford and his then Attorney General, Caroline Mulroney, once cavalierly referred to the notwithstanding clause.[100]

Changes to these operating instructions that have been proposed to date include ending pre- emptive invocation of the notwithstanding clause,[101] ending omnibus and blanket invocation,[102] requiring a legislative supermajority for promulgation of a notwithstanding clause invocation,

requiring additional reconsideration and invocation following a general election,[103] requiring a public referendum to ratify or override the notwithstanding clause invocation,[104] and restricting invocation to responses to decisions of the Supreme Court of Canada.[105]

Christopher Manfredi, who has previously proposed some of these changes, defends the notwithstanding clause as reflecting a political scientist's paradigmatic conception of judges and courts as essentially political actors and judicial policymakers and, therefore, as no more legitimate or authoritative arbiters of the balancing of competing rights and other political interests than are the legislatures. By the same token, Manfredi is especially troubled by the pre-emptive invocation of the notwithstanding clause because it deprives society of the benefit of a judicial statement on the meaning of a constitutional right and, in that sense, it runs contrary to the notion—explained at length by Dwight Newman[106]—of "coordinate" construction or interpretation, that is, of the notion that both courts and legislators have a legitimate and important role to play in the matter of rights interpretation and analysis. The notwithstanding clause, viewed in this framework, serves to remove from the judiciary the exclusive jurisdiction over declarations about how such balancing exercises ought to be resolved.

We are left to consider whether legislatures ought to pass discrete rules governing the use of the notwithstanding clause or whether those operating instructions should be given constitutional status by being inserted in the *Charter* itself. Or, if as some have argued,[107] the override is wholly inconsistent with what a liberal constitutional democracy requires in its basic law—particularly as we already have section 1 of the *Charter*, the "reasonable limits" clause, which lays out a regime for the justification of infringements that are neither inconsistent nor incompatible with what freedom and democracy require—might we not simply repeal the notwithstanding clause altogether? Easier said than done, of course, especially after *Charlottetown*,[108] when the amending formula was, arguably, supplemented by a new convention, namely, the possible requirement of a national consultative referendum. It is also understood, especially in light of the arguments of many, that repeal of the notwithstanding clause would be a non-starter in any constitutional negotiations.[109]

But against all such fantasizing, there exist the most serious and compelling arguments in support of section 33's contribution to a distinctively Canadian constitutional framework; one that Stephen Gardbaum referred to as the "Commonwealth Model",[110] a sort of third way between "strong-form constitutionalism" (judicial supremacy) and "weak-form constitutionalism" (parliamentary supremacy). In effect, it is one in which the *Constitution* regulates the matter of who, as between the judiciary and the legislature, has the last word on rights. On this understanding the *Constitution* itself is supreme.

This model is one in which a certain healthy skepticism about the political legitimacy of judicial review is baked

into the constitutional cake and that commends not only the retention of the notwithstanding clause, but, indeed, its more, not less, frequent use.

As we have noted, the notwithstanding clause is often thought of as exempting a federal, provincial or territorial law from the application of and protections afforded by certain sections of the *Charter* and as insulating an impugned law from any *Charter* scrutiny.[111] But, as Robert Leckey and others[112] argue, this may be conceptually incorrect, as resort to the remedies clause in the *Charter* is not necessarily precluded by invocation of the notwithstanding clause even if the ultimate remedy of striking down a law—under section 52(1) of the *Constitution Act, 1982* (the "supremacy clause")[113] would be foreclosed—and, further, that the court's authority and jurisdiction, indeed, its responsibility, to declare *Charter* infringements not saved by section 1, are not ousted or extinguished by the invocation of the notwithstanding clause. Accordingly, while a law that is found to limit or infringe a *Charter* right or freedom in respect of which the notwithstanding clause has been invoked is *not* "unconstitutional" because it has been rendered consistent with the *Charter* by resort to section 33[114] and will, therefore, not be struck down under section 52(1) as being of no force or effect, the Court retains a role in the case to inform and educate the citizenry.

This position has, not surprisingly, generated some controversy and there are scholars who argue that invocation of the notwithstanding clause effectively disposes of any further judicial review. Once a law has been insulated by a statutory resort to its continued operation notwithstanding any of the *Charter* rights and freedoms referred to in section 33(1), there is, they argue, "nothing further [for the court] to declare".[115]

A few short decades ago, Peter Hogg and Allison Bushell advanced the argument that there is a genuine "dialogue" of sorts that takes place between legislatures and courts in the context of constitutional challenges to laws, including where section 33 has been invoked.[116] Once a court pronounces on the constitutional validity of a law, the legislature may, in response, reconsider the law, modify it in some fashion, taking account of the court's understanding of where the line is drawn between consistency and inconsistency with the *Constitution*. The practice of pre-emptive invocation of the *Charter* has, contrary to the spirit of the dialogue theory, worked a sort of end-run around one half of the dialogue, unless the court's jurisdiction is never entirely ousted, leaving the court continuing responsibility to inform and educate the citizenry broadly. Ultimately, it becomes our collective responsibility as citizens to consider how the fall-out from these inquiries squares with the sort of constitutional democracy we think we have—and the sort we wish to have. In a private exchange I had in the summer of 2021 with the late historian and human rights scholar, Erna Paris, she bemoaned Quebec's Bill 96 (as it then was) along with the device that purports to insulate it from *Charter* scrutiny, as putting in doubt the question of whether Canada is, in fact, still a liberal democracy.[117]

In writing about section 33, Peter Russell wrote "that a democracy which puts its faith as much in its politically active citizenry as in its judges to be the guardians of liberty is stronger than one that would endeavour to vest ultimate responsibility for liberty and fundamental rights exclusively in its judiciary."[118] Russell was responding, in part, to John Whyte's critical essay on section 33, where he warned that "political authority will, at some point, be exercised oppressively; that is, it will be exercised to impose very serious burdens on groups of people when there is no rational justification for doing so."[119]

And in this vein, our most esteemed of Canadian parliamentarians, Eugene Forsey, said of the notwithstanding clause that,

> **[the notwithstanding clause] is a dagger pointed at the heart of our fundamental freedoms, and it should be abolished. Perhaps none of our legislatures will use the notwithstanding clause again. But it is there. And if this dagger is flung, the courts will be as powerless to protect our rights as they were before there was a *Charter* of Rights".**[120]

Notwithstanding the guardrails of sunset clauses, limited and provisional application of the override, and the fact that we still do conduct periodic general elections, the idea that section 33 establishes a regime of "coordinate interpretation" is disconcerting news in some quarters, particular within discrete and insular minorities and among defenders of political pluralism who understand only too well the harm to minority interests that can sometimes be produced by majorities—or rather, by legislatures purporting to reflect the standards and aspirations of majorities—by making the so-called "will of the people" manifest in laws. This may appear to be something of an irony given that the earliest charters and declarations of rights and freedoms, at least in the West, were intended to guard against the arbitrary and abusive exercises of power by the few at the expense of the interests of the many. From the *Magna Carta*[121] to the *Declaration of the Rights of Man and of the Citizen*,[122] neither minority interests nor political pluralism were discrete concerns, although the principles extracted from the original texts have inspired the drafting of subsequent rights charters and grounded the advancement of claims for the protection of minority rights, including freedom of expression, conscience and religion,[123] against the tyranny of unbridled majoritarianism.

Ultimately, whether the notwithstanding clause is found to have a salutary or a deleterious influence on the quality of Canada's civic culture and the state of our democracy, its importance in both modifying and moderating Canadian constitutionalism is undeniable. In the pre-*Charter* period, the country operated as a Parliamentary democracy under the doctrine of Parliamentary supremacy. The *Charter* changed that radically.

Peter Russell and Ted Morton explained:

> **Canada had already modified the Westminster model of parliamentary supremacy with an overlay of federalism and judicial review.**

> **However, the "exhaustion theory" held that both levels of government were supreme within their respective jurisdictions. The *Charter* appeared to challenge this supremacy and perhaps the structure of federalism itself.**[124]

What the notwithstanding clause contributed to the piece was a codified mediation, of sorts, between parliamentary supremacy on the one hand, and judicial supremacy, on the other, leaving us with the supremacy of the *Constitution* itself. This "third way" is what Gardbaum had referred to as the "Commonwealth model". I prefer to characterize that model as a form of "constitutional supremacy", leaving both the judiciary and the legislature with critical, if contested, roles in the recognition, interpretation and application of rights and freedoms. Above all, it is a constitutional call to Canadians to assume a collective civic responsibility to consider the nature and extent of the restrictions on rights and freedoms that society will justify and tolerate.

# 04. The Charter and Aboriginal Rights: "Reconciliation" and the Paradox of the "Colonial" Constitution

Arguably, no matter has been more prominent in Canada's national conversation, no issue has weighed more heavily on the nation's collective conscience, no project has been more urgently advanced on the nation's agenda in the new century, than those pertaining to Canada's relationship with its Indigenous peoples. We now speak of truth and reconciliation,[125] of the need for a national reckoning, and for acknowledgment and accountability. We also speak in aspirational terms. We are called to a new national project of nation building and of a new nation-to-nation engagement. We see in this mission the highest expression and fullest actualization of Canada's commitment to human rights.[126]

But no characterization of the issue, no metaphor or paradigm has become more dominant, indeed, no agenda more ubiquitous—in politics, in the academy, in the workplace, in popular culture, both in Canada and in the global political narrative—than that of "decolonization". All of Canadian history, it seems, is being recast within the framework of colonialism and the moral imperative to not only move forward on the basis of a different set of ground rules and societal arrangements, but also to go back in time, as it were, to undo all that colonialism has wrought. Against this narrative is the less subversive approach implicit in the "reconciliation" project which, while acknowledging the sins of the past, nevertheless, proceeds on a foundation established by the colonial powers and made contingent on the continued legitimacy of a doctrine that is utterly antithetical to actual reconciliation, namely, the "Doctrine of Discovery".[127]

The project of reconciliation also introduced another challenging feature to the rights discourse emerging in the *Charter* era, and that is a new tension between the enumerated rights and freedoms of individuals, on the one hand, and the less precisely defined, but equally legitimate and important, communal or collective rights of aboriginal peoples, including the right of self- government, acknowledged both in section 25 of the *Charter*[128] and in section 35 of the *Constitution Act, 1982*.[129]

Canada's new *Constitution* both anticipates and reflects the national preoccupation with aboriginal rights, with the new alignment of Canadian constitutional values with First Nations' grievances and aspirations. In section 25 of the *Charter* and section 35 of the *Constitution Act 1982*, the drafters do not so much define the substance of Aboriginal rights as they do paint lines on a canvas inside which the content and colour will be discovered and refined in the course of national inquiries and commissions, public protests and "standoffs", negotiations between First Nations and federal and provincial governments over control and exploitation of natural resources, and disputes and negotiations between and among First Nations *inter se*, and, of course, litigation before the courts.

Canada's national "reconciliation" project, such as it is, took on steam in the *Charter* era. It is not a one-off undertaking; it is not confined to the work and final report of the *Truth and Reconciliation Commission*, which issued ninety-four calls to action in connection with the residential school system and its impacts,[130] nor to that of the *National Inquiry into Murdered and Missing Indigenous Women and Girls*,[131] nor to any discrete proceeding or process. It is an ongoing, multi-pronged, national exercise. But it begins with the double-edged sword of section 25 of the *Charter*, which, with some qualification, has been found to operate as a shield against the abrogation or derogation "from any aboriginal, treaty or other rights or freedoms that pertain to aboriginal peoples"[132], and section 35 of the *Constitution Act, 1982* which explicitly protects Indigenous rights and self-determination.[133] Together, these two provisions work as part codification of the *status quo*, part door-opener to the evolution of a new relationship between Canada and First Nations governments and peoples. Not surprisingly, it is complicated!

Cases decided by the Supreme Court have carved out a duty on the part of the Crown—at both federal and provincial levels—to consult with First Nations on a wide range of matters when Indigenous lands, resources, traditional rights and practices, are in issue or when these conflict with the designs of the legislatures. The extent and the substance of that consultation are hotly contested matters and have turned on difficult questions of aboriginal title, both as to whether land and rights claims were inherent, and predated or were independent of treaty rights, and on the matter of Aboriginal consent to be bound agreement with the settlers and colonial powers. The Supreme Court has determined that the duty to consult is owed to a First Nation as a whole, not to an individual member.[134] The duty to consult and, possibly, to accommodate Aboriginal title, where title is asserted, but before title has been proven in court.[135] Once title has been proven, that duty goes further and any Government project or plan either requires the consent of the affected First Nation/s or, where such consent is not obtained, a justification of the infringement of title rights.[136]

What is clear is that, in the *Charter* era, the Government of Canada has recognized, if sometimes grudgingly, its obligations to take Aboriginal claims and rights seriously. And, while rights activists and others

may disagree, the Government's official statements—and the Supreme Court's declarations and findings in favour of the recognition of Aboriginal title to lands, and to rights of self-determination in a range of matters—indicate that the reconciliation train has left the station and is headed in the direction of real reform, even if the shape and substance of that reform is not yet fully known or determined.

Canada's official position on the "reconciliation" commitment is laid out in ten bold statements on the Government of Canada website:

The Government of Canada recognizes that:

1. All relations with Indigenous peoples need to be based on the recognition and implementation of their right to self-determination, including the inherent right of self- government.
2. Reconciliation is a fundamental purpose of section 35 of the *Constitution Act, 1982*.
3. The honour of the Crown guides the conduct of the Crown in all of its dealings with Indigenous peoples.
4. Indigenous self-government is part of Canada's evolving system of cooperative federalism and distinct orders of government.
5. Treaties, agreements, and other constructive arrangements between Indigenous peoples and the Crown have been and are intended to be acts of reconciliation based on mutual recognition and respect.
6. Meaningful engagement with Indigenous peoples aims to secure their free, prior, and informed consent when Canada proposes to take actions which impact them and their rights on their lands, territories, and resources.
7. Respecting and implementing rights is essential and that any infringement of section 35 rights must by law meet a high threshold of justification which includes Indigenous perspectives and satisfies the Crown's fiduciary obligations.
8. Reconciliation and self-government require a renewed fiscal relationship, developed in collaboration with Indigenous nations, that promotes a mutually supportive climate for economic partnership and resource development.
9. Reconciliation is an ongoing process that occurs in the context of evolving Indigenous-Crown relationships.
10. A distinctions-based approach is needed to ensure that the unique rights, interests and circumstances of the First Nations, the Métis Nation and Inuit are acknowledged, affirmed, and implemented.[137]

But, of course, the devil is in the details, or rather, in the messy way that the issues get worked out in litigation and in the reasons of the Supreme Court of Canada.

And against Canada's hopeful—some might say, cynical—position, leading Aboriginal rights advocates have a less sunny take on the Government's good faith and on the prospects for success of genuine reconciliation between Canada and its

Indigenous peoples. That Aboriginal rights gain express recognition in the *Constitution* would, at first blush, seem to be a good thing—especially for Canada's First Nations. But one might still ask, whose "constitution" is it? The contested place of the Doctrine of Discovery in Canadian law, past, present and future, underpins and orders the societal arrangements that, today, seem very much up for (re)negotiation. In fact, the question of whether and to what extent they were ever actually negotiated and consented to is at the root of the problem and remains part of the ongoing inquiry.

The *Royal Proclamation* of 1763,[138] sometimes referred to as the "*Indian Magna Carta*" and singled out in section 25 of the *Charter* recognizes that Aboriginal title has existed and continues to exist, and that all land would be considered Aboriginal until ceded by treaty. *The Royal Proclamation* acknowledged the inherent right of Aboriginal Peoples to self- determination and to the land. But the dark side of the Royal Proclamation is in its broad objective of legalizing the King's jurisdiction over all of the territories in what is now North America and in deeming those territories to have been uninhabited, unowned and not subject to any prior title claims, subject only to Aboriginal title. But there's the rub. Aboriginal title was subsequently treated as having been ceded by treaty or practice or simply not to have applied to large parts of the territories.

The Doctrine of Discovery (which originated from the Church as *Papal Bulls*)—or of *terra nullius*[139]—puts the *Royal Proclamation of 1763* in a somewhat less benign light when one considers that the King would not have been in the position to be in the slightest bit conciliatory or magnanimous to the Indigenous peoples had he not first understood that he was the Sovereign and, indeed, the owner, of all the lands over which others asserted claims and, as such, that he had started out with the upper hand.

But, of course, the Crown was not alone in the process of dispossession of lands and life from Indigenous peoples. The Catholic Church continued to participate in the project, without which it would not as easily have asserted its unfettered, unaccountable, power and jurisdiction over the bodies and minds of countless indigenous children consigned to the hell of the residential school system.[140] It bears noting that, on March 30, 2023, Pope Francis renounced the 530-year-old Doctrine of Discovery.[141]

But much of Canadian law is, in a sense, both rooted in and confirmatory of, the Doctrine of Discovery.[142] Without its legitimizing force, the King and his proxies could not have asserted jurisdiction and control over the affairs of British North America. There would be no such thing as Crown land, and private property rights, as they have evolved, and been asserted, litigated, and transmitted over the generations since Confederation, would have no public recognition and validity.

Even in instances in which the inherent Aboriginal right of self-determination has been affirmed by the Supreme Court and in which the practical effects have been salutary from the standpoints of Indigenous self-government and of the reconciliation called for by Canada's commitment to fully

implement *UNDRIP*,[143] colonialism manages to reassert itself—or, at least, to sneak in and find validation—in the very institutions that are being called upon to advance the cause of decolonization.[144] In a recent decision, the Supreme Court of Canada affirms that Indigenous nations have jurisdiction over child and family services and outlines national minimum standards of care. While the Court left open the possibility that Indigenous people have self-government rights protected under section 35 of the *Constitution Act, 1982*, it did not actually decide that Indigenous child welfare laws apply based on Indigenous peoples' inherent law-making authority. Instead, it grounded the decision in Parliament's right to legislate "over Indians and Lands reserved for Indians" under section 91(24) of the *Constitution Act, 1867*.[145]

And so, "reconciliation continues to fail", writes Aboriginal rights lawyer, Bruce McIvor, because it rests on a foundation of systemic racism. It is predicated on the denial of Indigenous Peoples' inherent rights and the willingness of the Canadian state to use violence to suppress Indigenous rights".[146]

> **Reconciliation continues to fail because it attempts the impossible—the reconciliation of a right with a lie. The right is the pre-existing interest Indigenous Peoples had and continue to have in their land and the right to make decisions about their land before and after the colonizers' arrival. This includes the right to benefit from their land and decide how their land should be used or not used. The lie is that through simply showing up and planting a flag, European nations could acquire an interest in Indigenous land and displace Indigenous laws.**[147]

McIvor concludes with a dark assessment of Canada and a challenge to the country, to its citizens and lawmakers alike:

> **The first step is acceptance. Acceptance that Canada is fundamentally a racist state. That it has been built on the denial of Indigenous Peoples' rights and humanity. That this denial is a shameful fact that runs through and binds together Canadian law.**[148]

The Canadian courts have not been indifferent to this devastating critique of our history. As Jeremy Patzer and Kiera Ladner have noted, the judiciary has grappled with it.

> **Over the past five to six decades—and especially in the forty years since the passage of the *Constitution Act, 1982*—the higher courts in Canada, led by the SCC, have worked diligently to weave an elaborate tapestry of legal doctrines in the hopes of offering a modern resolution to the disputes arising from colonial dispossession. However, they have done this with the loom of section 35 far more than they have with that of the *Charter of Rights and Freedoms*.**[149]

That McIvor's statement should go uncontested and unqualified by historians and observers of Canadian civil society is out of the question. There is more than one way to understand Canadian history and the colonial project, in particular. But that

it should be dismissed out of hand or go unacknowledged is even more unthinkable. Parliament has largely endorsed the substance of this statement[150] and the essential charge now informs the teaching of Canadian history in our public schools.[151]

But how can we use a constitution, the design and adoption of which was never agreed to by Indigenous Peoples and First Nations leaders, to give full expression to Aboriginal rights?

Section 32 states that the *Charter* applies only to governments (i.e., government recognized under the *Constitution*).[152] We must then consider whether some Aboriginal governments fall outside that definition, and, therefore, whether the *Charter* rights and freedoms can be used to impugn laws and actions of such governments.

The predicament is nicely illustrated with the following question: Does the *Charter* apply to all Indigenous governments, regardless of whether their authority is inherent or is derived from treaty (consent)? The matter is complicated—or clarified—by section 35 of the *Constitution Act, 1982*, which stands outside the *Charter*, and whose purpose the Supreme Court has said is to "recognize the prior occupation of Canada by organized, autonomous societies and to reconcile their modern-day existence with the Crown's assertion of sovereignty over them."[153]

An application of the *Charter* to governments that predate not only the *Charter*, but the *Constitution* itself, and, therefore, did not consent to it—and could not have done so—is hard to square with the notion that reconciliation is grounded in respect for the right of the Aboriginal peoples to self-determination. On the other hand, it seems non-controversial that the *Charter* itself should apply where the rights of self-government were recognized in a treaty. But in such cases, the courts will have to give deference to section 25 and to recognize that, while individual indigenous persons will be able to assert their *Charter* rights against their Aboriginal governments, the governments themselves will retain their integrity and relative autonomy *vis-à-vis* Canada and the Provinces.

Must we, as McIvor would seem to insist, yield to a mission of total decolonization to the point that the *Constitution* itself needs to be decolonized in order that reconciliation be accomplished? And what of the *Charter's* role and place in this mission? Is the *Charter* an obstacle to reconciliation or can it be an instrument—taken together with section 35 of the *Constitution Act, 1982*—of such an undertaking?

It bears remembering that the conversation about and around the matter of reconciliation does not take place in a vacuum. It occurs against the backdrop of a long history of evolving liberal constitutionalism, including the fresh new chapter—launched in 1982—of constitutional supremacy, which is still developing its sea legs. We need to consider to what extent the reconciliation project is consistent with that political tradition and, beyond that, what sorts of accommodations both Indigenous Peoples and non-indigenous Canadians are prepared to suffer to make reconciliation a mutually satisfactory reality.

Beyond the immediate challenge of reconciliation, there is, of course, the question of whether a new cooperative federalism that incorporates First Nations and Indigenous governments into the federalist project as equal parties—nation to nation—will ultimately bring Indigenous law and custom within the scope and substance of *Charter* application and interpretation. Will we have *Charter* jurisprudence that incorporates Indigenous notions of community and group identity into the *Charter's* understanding of equality of persons, and of "life, liberty and security of the person"?[154]

But first, Canada will have to demonstrate its commitment to the cause of reconciliation by accepting and discharging its moral, if not also its legal, obligations under the *United Nations Declaration on the Rights of Indigenous Peoples*.[155] There is no doubt that that undertaking will result in yet further clashes between individual rights claims—of both Indigenous and non-Indigenous Canadians—under the *Charter* and the claims of First Nations to govern unfettered by restrictions on their sovereignty and discretion resulting from application of the *Charter*.

Ultimately, as Thomas Axworthy put it so aptly and elegantly in a recent private exchange that we had, "to [b]e just in our own age should be the goal".[156] We must balance our acknowledgment of past injustices and of the corresponding lessons learned from history, against an appreciation and strengthening of the great institutions and traditions that have made Canada one of the most admired countries on earth. That balancing exercise ought to inform Canada's Reconciliation project.

# 05. The Charter in the World: "Influencer" Against the Forces of Democratic Backsliding?

> **You can't argue with the fact that the Canadian Supreme Court is now the go-to court for constitutional courts around the world, not the American Supreme Court. Our jurisprudence, our boldness, our creativity and vision, are what most post-modern, democratic, constitutional courts are following.**[157]
>
> *Supreme Court of Canada Justice (ret'd) Rosalie Abella*

It is a lamentable truth that Canada's influence in the world has waned considerably in the last two decades. Once a "middle power" respected abroad for our role in development, international peacekeeping, global security and intelligence, and the promotion of regional and global trade agreements. Canada also garnered respect for its ability to remain an unconditional friend to its allies while pursuing its own independent agenda on such matters as the environment, South Africa, and the war in Iraq.[158] As far back as 2005, when asked about where Canada had made a significant difference in the world, one European official replied, "Nothing comes to mind".[159]

But there is a notable and welcome exception to this trend, and that is in the field of constitutional law and, more specifically, in the area of *Charter* jurisprudence. This is largely a function of the *Charter's* own virtues, that is, of the brilliance of its crafting and drafting, of its articulate and comprehensive expression of the values of liberal constitutionalism and of the instruction manual for the implementation, operation and defense of those values meticulously laid out in the *Charter's* thirty-four sections. But much of the credit for the global interest in the *Charter* must go to the Supreme Court of Canada, both for its cutting-edge *Charter* jurisprudence, and also for its less well appreciated "judicial diplomacy".[160] Judges are increasingly engaged in direct dialogue and exchange activities with foreign judges and jurists, participating in public conferences and in private communications, sharing reflections, experiences and opinions

on matters ranging from substantive law, precedent and best practices.[161]

But, of course, what sets Canada apart in matters of constitutional jurisprudence is the *Charter* itself. The *Charter* has influenced the development of the constitutions around the world. "The *Charter* has replaced the American Bill of Rights as the constitutional document most emulated by other nations', wrote John Ibbitson on the occasion of the thirtieth anniversary of the *Charter's* signing.[162] Canada "has surpassed or even supplanted the United States as a global exporter of constitutional law".[163] Several countries, especially other former British colonies—but also others, such as Israel, Hong Kong and Eastern European countries—look to the *Charter* and the Supreme Court of Canada jurisprudence because these countries "see themselves as sharing the same goals and values as Canadian society".[164]

The *Charter*, particularly its entrenchment of democratic rights (ss.3-5), have been said to "operate as a template for other democracies".[165] Canada's experience with the *Charter* was looked to when the United Kingdom introduced, for the first time in modern British constitutional law, a rights-based framework in the form of *The Human Rights Act 1998*.[166] Of particular interest to the British drafters was Canada's unique model within which the relationships between the courts, Parliament, and the citizen function.[167]

The *Charter* itself has been an object of fascination, inspiration and, on occasion, selective and opportunistic misuse and abuse in the advancement of foreign domestic agendas, including some whose purposes were decidedly antagonistic to the values of liberal constitutionalism and the exalted place of judicial review.[168]

The important question of just how relevant the *Charter* to the cause of liberal democracy outside Canada's borders may, perhaps, best be appreciated not by reference to its influence on foreign constitution-building or on the jurisprudence of foreign constitutional courts, but by the state of liberal democracy itself throughout the world. And by that litmus test, the news is not encouraging.

Liberal democracy is everywhere under siege, threatened by forces seeking, even touting, the virtues of an "illiberal" order[169] and promising to dismantle or deconstruct the administrative state.[170] Throughout the West, populist parties are making substantial electoral inroads, in many cases, forming governments. While they each have their own historical and cultural distinctness, they share a marked antagonism to the distinguishing characteristics of liberal democracy: the protection of individual rights and freedoms, especially those of discrete and insular minorities in the face of an otherwise unimpeded majoritarianism, respect for an independent judiciary to provide constitutional oversight of the popularly enacted laws, the checks on executive power, and deference to a shared epistemic foundation, each of which have been represented as a sort of repudiation of the popular will.

It is not catastrophizing too much to declare that a dark age of illiberalism

is upon us. Notwithstanding the recent optimistic outlook of some observers of the human condition[171] we are witnessing, on a grand scale, an unmistakable retreat from the allegiance to liberal democratic principles throughout the West.[172] Liberal democracy is quickly losing ground to illiberal forms of government, even as they may try to pass under the cover of "democratic" labeling and nomenclature.[173]

We are living in an age in which reason, science and the pursuit of truth are no longer universally prized ends. Nor even are they accepted as reliable means to the attainment of our highest goals and the performance of our most important collective undertakings. The democratic character and the quality of "democracies" throughout the world are deteriorating at a rapid rate. *Freedom House's* 2019 report on the state of freedom and democracy in the world reported a decline in freedom for the 13th straight year and stated that this "pattern is consistent and ominous. Democracy is in retreat", including in countries traditionally considered liberal democracies. Freedom House's most disturbing finding is that there is a crisis of confidence in the political systems of consolidated democracies—longstanding, well established democracies—resulting in a consistent decline for the past fifteen years for the freedom score of these democracies.[174]

It is commonplace to find elected leaders and popular governments dispensing with the niceties of judicial independence, jurisdictional limitations on executive authority, the accountability functions of the fourth estate (a free press), opposition and minority representation, independent oversight and regulatory agencies. The demonization, vilification and ultimate delegitimization by autocratic leaders of their perceived political opponents and adversaries, indeed, of all who simply disagree, has become the dominant mode of discourse in many quarters. And that, compounded by our inclination in mass society to divide along ideological and religious lines, and facilitated by the modern technology of social and political communication, has produced an unprecedented level of toxicity in our political discourse and excessive gridlock in our legislatures. These conditions severely challenge our capacity for efficient, democratic self-government and render us especially vulnerable to the seduction and domination of aspiring populist demagogues who employ the jargon and symbols of democratic politics to confer on themselves the imprimatur of political legitimacy.

It is against this dark trend and undeniable reality that we ought to be evaluating Canada's role in the world and its potential to become an effective factor in the resistance to and reversal of the democratic backsliding that has taken on a quality of inevitability and that has dimmed our hopes for a new age of liberal constitutionalism.

Our *Charter* and the jurisprudence developed thereunder are rightly sources of Canadian pride. But to be influential on a global scale will require a political resolve on the part of both Canada and our international friends and partners. It cannot come to pass without a rehabilitation of

our standing in the world in other areas: development, national defence and global security, a more robust manufacturing and export sector and a corresponding improvement in Canadian trade policy and practice. And, as Alex Neve's study makes plain, we cannot be moral leaders on the global stage if we are not doing our part and walking the talk at home.[175]

# Conclusion

We have to think of the *Charter* not merely as a document concerned with the constitutional codification of human rights and civil liberties, but as a reordering of the entire constitutional regime. For not merely does the *Charter* entrench rights and freedoms in the *Constitution*, thereby giving individuals standing, for the first time, to challenge the validity and enforceability of laws on the grounds that their own rights and interests are compromised; it also radically alters the relationship between the legislative and judicial branches of government. With the *Charter*, we move from Parliamentary supremacy to something different; something uniquely Canadian: Constitutional supremacy, which, but for the inclusion of section 33 of the *Charter*, would have amounted to a variant of judicial supremacy insofar as *Charter* challenges were concerned. Instead, we have a hybrid form of constitutionalism that involves a complicated dialogue between the legislatures and the courts, a sort of *pas de deux* with the occasional twist and flourish in which either the legislatures or the courts have the last word, depending on whether the notwithstanding clause has been invoked.

Whether we also see the *Charter* as a vehicle for the advancement of political, environmental and social justice agendas—that is, as a facilitator of continuous renewal and redefinition of our societal arrangements and our always evolving conceptions of distributive justice—or whether we prefer that it remain an accountability instrument that operates as bulwark against government restriction of individual rights and liberties and as mechanism for the proper ordering of the relationship between the state and its citizens, remains very much an open question.

As we consider the challenges that our country faces and the aspirations that it harbours, we would do well to remember that the *Charter* cannot be made to do more work than it was designed to perform. It is, after all, essentially a statement of human rights and civil liberties principles, extended, in certain aspects, to communal rights and even political prerogatives. Not

every issue or challenge for Canada involves a matter to which the *Charter* can speak. It is true that *human rights* discourse has been the predominant civic, political and social justice paradigm of the post-war period in the West. In the process, we have tended to view every problem through the prism of human rights. And yet, there are social phenomena that cannot be explained or addressed within that framework or in the language of rights.

But nor need we be modest in our expectations of the *Charter*. Even as our *Constitution* has been eloquently criticized as carrying the DNA of colonialism in its essential makeup, our society is finding ways, through protest, through political discourse, and, of course, through litigation and judicial engagement with Canadians—especially with Indigenous peoples—to make the *Charter* say what the arc of justice and the march of history and progress require it to mean.

A new and enlarged constitution we were given in 1982. And while the resolution of our thorniest societal questions and conflicts cannot be achieved exclusively by resort to a document or to an institution, it remains for each of us, as liberal democratic citizens, to sustain that constitution, to "give it life", to water that "living tree", reaffirming its relevance by placing it in the service of our highest civic purpose, namely, the guarantee that we will continue to live and thrive in a free and democratic society.

# ENDNOTES

1. John English, *Just Watch Me: The Life of Pierre Elliott Trudeau, Vol 2: 1968-2000*, (Toronto: Vintage Canada, 2009), 527. From the speech given by Prime Minister Pierre Trudeau on the occasion of the Queen's signing of the Proclamation bringing the *Constitution Act, 1982* into force for Canada.
2. *Message from the Governor General on the occasion of the 40th anniversary of the Canadian Charter of Rights and Freedoms*, Press Release from Rideau Hall, April 17, 2022. https://www.gg.ca/en/media/news/2022/40th-anniversary-canadian-charter-rights-and-freedoms.
3. Star Editorial Board, "After four decades, we still must build on gains by Charter of Rights". *Toronto Star* April 23, 2022 https://www.thestar.com/opinion/editorials/after-four-decades-we-still-must-build-on-gains-made-by- charter-of-rights/article_b385a0ea-d334-585b-880c-e4665c1b2bcc.html ; see also Greg Quinn, "Survey finds we like the Charter of Rights more than hockey", *Calgary Herald*, October 1, 2015 https://calgaryherald.com/news/national/canadians-like-hockey-they-love-the-constitutional-bill-of-rights; see also Statistics Canada, "Canadian Identity, 2013": https://www150.statcan.gc.ca/n1/pub/89-652-x/89-652-x2015005-eng.htm
4. Pierre Elliott Trudeau, *Memoirs* (Toronto : McClelland & Stewart, 1993), 312-29. The "Patriation Package", which Trudeau called the "People 's package", was comprised of the patriation to Canada of the Constitution, a Charter of Rights and Freedoms, and an amending formula. There is another perspective on this and that is whether it was Levesque who betrayed his fellow premiers.
5. Chief among this group was Alberta Premier, Peter Lougheed, who was a firm believer in a decentralized federation with a generous reading of provincial powers under section 92 of the *BNA Act*, as it then was. Lougheed was also the premier who provisionally got the "Gang of Eight" premiers to go along with the "Alberta Formula"—that contained no *Charter*—in opposition to Trudeau's Patriation package, and who, ultimately, insisted on inclusion of an override clause—the notwithstanding clause—if the *Charter* was going to be included. See Trudeau, *supra* note 4.
6. E.g., conservative politicians and political science and legal scholars such as F.L. Morton, Preston Manning were two of the most vocal *Charter* critics; F.L. Morton, "After 40 years, the *Charter* is still one of the worst bargains in Canadian history: Rather than the people's party, today's progressives now see the people as the problem", *National Post*, April 14, 2022; F.L. Morton, *The Charter Revolution and the Court Party*, (Toronto: University of Toronto Press. 2000), and see, David Climenhaga, "Conservative distrust of the *Charter* still runs deep", *Rabble.ca*, April 18, 2022, https://rabble.ca/politics/canadian-politics/conservative-distrust-of-the-charter-still-runs-deep/
7. Miraj Trilsch, "The *Charter* at 40 – Who's still afraid of social rights?", *McGill University, Centre for Human Rights and Legal Pluralism*, June 22, 2022, https://www.mcgill.ca/humanrights/article/charter-40-whos-still-afraid-social-rights; Catherine Dauvergne, "How the Charter has failed non-citizens", (Trudeau Foundation) https://www.fondationtrudeau.ca/sites/default/files/u5/article_catherine_dauvergne.pdf

8. I discuss this in Part III of this paper: "A contest for the "last word": the notwithstanding clause, constitutional supremacy", and also in an op-ed, "Section 33 has no place in a liberal democracy. It ought to be repealed", *National Post*, June 15, 2021, https://nationalpost.com/opinion/peter-l-biro-section-33-has-no-place-in-a-liberal-democracy-it-ought-to-be-repealed See also, Deborah Coyne, *Canada's Faux Democracy: What are we going to do about it?* (e-book, July 2021) ch.5 https://deborahcoyne.ca/canadas-faux-democracy/#:~:text=The%20rise%20of%20Canada%E2%80%99s%20faux%20democracy%20represents%20a,practices.%20Costly%20court%20challenges%2-0will%20not%20be%20enough

9. Steven Penney and Colton Fehr, "The *Charter* made us more liberal and less democratic", *the Hub*, April 20, 2022 https://thehub.ca/2022-04-20/opinion-enacting-the-charter-made-us-more-liberal-and-less-democratic/; this view tracked that of original *Charter* skeptics like Peter Lougheed and Professor Peter Russell, for whom Parliamentary sovereignty and the Westminster model offered an ideal model of government for a Parliamentary democracy. They ultimately moderated their positions, but only on the basis that the notwithstanding clause would be included in order to put the brakes on judicial activism and the excesses of judicial review.

10. See, Eugenie Brouillet and Bruce Ryder, "Key doctrines in Canadian legal federalism", in Peter Oliver, Patrick Macklem, Nathalie Des Rosiers, eds., *The Oxford Handbook of the Canadian Constitution*, (Oxford University Press, 2017) 415-32.

11. Peter Hogg identified several rights provided in various sections of the act that he termed the "small bill of rights": among them were section 93, which provides, notwithstanding provincial jurisdiction over education, the right to separate schools for either Protestant or Catholic minorities. Peter Hogg, *Constitutional Law of Canada*, (second edition, (Toronto: Carswell, 1985) 824.

12. *Saskatchewan Bill of Rights*, was Canada's first human rights statute, enacted in 1947 on the initiative of then Premier Tommy Douglas. Later came human rights statutes in Ontario (1962), Nova Scotia (1963), Alberta (1966), New Brunswick (1967), Prince Edward Island (1968), Newfoundland (1969), British Columbia (1969), Manitoba (1970) and Quebec (1975). In 1977, the federal government enacted the *Canadian Human Rights Act*.

13. See Brouillet and Ryder, *supra* note 10.

14. This refers to the dominant feature of a law, that is, to the essence of the matter with which the law is concerned so as to be able to properly determine whether the government enacting the law is *intra vires* its constitutionally assigned powers under ss. 91 and 92 of the Constitution Act. See Peter Hogg, *supra* note 11 at 312.

15. 30-31 Vict., c.3 (U.K.)

16. This refers to the preamble to section 91 (which lays out the powers assigned to Parliament):"91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces...," The "POGG" power has often been thought to ground Parliament's emergency powers and its jurisdiction over all matters deemed to be of "national concern" to the extent that such matters are not expressly enumerated in one of the subsections in ss. 91 and 92.

17. See Hogg, *supra,* note 11, at 636-38. The I*mplied Bill of Rights Doctrine* is discussed and explained later in this section of the paper, as an extension of the *Duff Doctrine*. The thrust of the doctrine, never adopted by a majority of the Court in any case, but articulated in obiter dicta in a few cases, is that the fundamentals of civil liberties and of liberal democracy were implicit in the law of Canada, both in some of the language in the preamble to the *BNA Act, 1867* and to the preamble of section 91 of the *BNA Act, 1867*, and the common law principle of the rule of law. See notes 26 to 33 below.

18. *Reference re meaning of the word "Persons" in s. 24 of British North America Act*, [1928] S.C.R. 276, reversed by the Judicial Committee of the Privy Council in *Edwards v. A.G. Can*. (1930) A.C. 124.

19. *Supra* note 14, "Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom..."

20. A phrase which I take express the overarching purpose and values of the *Charter* – See section 1 of the *Charter*.

21. The Charter of English Liberties granted by King John, June 15, 1215, "*Magna Carta*").

22. *Re: Resolution to amend the Constitution*, [1981] 1 S.C.R. 753 (*Patriation Reference* case).

23. Lord Durham, *Report on the Affairs of British North America*, 1839.

24. A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, (1885/ London: MacMillan, 1915 / Liberty Press, 1982)

25. *Bank Taxation Act 1937* (levying provincial taxes on banks' paid-up capital and reserve funds at punitive rates); *Credit of Alberta Regulation Act*, 1937; *Accurate News and Information Act 1937.*
26. Following the Great Depression and the total collapse of the banking system and the market economy of North America, the Alberta government of William Aberhart sought to establish a system of circulating credit that constantly reflected the economic capacity of Alberta to produce goods and services. The system was called "social credit". Its success, Eberhard thought, required a total belief by the citizens in and allegiance to, the system. As Cannon J. put it, "The Social Credit doctrine must become, for the people of Alberta, a sort of religious dogma of which a free and uncontrolled discussion is not permissible". The psychology of the project was all important as Eberhard had been convinced that the Eastern banking elites had been responsible for causing the depression and that the success of social credit depended on it being insulated from public criticism and from the flow of information which might cause Albertans to lose faith in its virtues.
27. *Reference Re Alberta Statutes - The Bank Taxation Act; The Credit of Alberta Regulation Act; and the Accurate News and Information Act*, [1938] SCR 100
28. *Ibid* at 132-34
29. *Ibid* at 146
30. Hogg, *supra* note 11 at 636-38
31. *Saumer v. Quebec* [1953]¨2 S.C.R. 299; *Switzman v. Elbling* [1957] S.C.R. 285; *Roncarelli v. Duplessis* [1959] S.C.R. 121.
32. *Ibid.*
33. *Ibid, Saumer.*
34. *Ibid, Roncarelli.*
35. *Canadian Bill of Rights* S.C. 1960, c.44.
36. In 1961, Diefenbaker shared what the *Bill of Rights* meant to him: "My advocacy of a Bill of Rights was to assure Canadians, whatever their racial origins or surnames, the right of full citizenship and an end to discrimination. This was basic to my philosophy of 'One Canada, One Nation", from John Diefenbaker on The Nation's Business, 21 June 1961; and Diefenbaker, One Canada: The Years of Achievement 251-55, cited in Rebecca Morris-Hurl, "Diefenbaker's Canada: A Vision for Human Rights and Multiculturalism in the Speeches from the Throne", *Canada and the Speeches from the Throne*. https://opentextbooks.uregina.ca/primeministers2020/chapter/johndiefenbaker/#sdfootnote21sym
37. Formally, *An Act to protect Certain Civil Rights*, SS 1947, c 35
38. Ritchie J in *Robertson and Rosetanni v. The Queen*, [1963] S.C.R. 65; and Cartwright J.'s dissent in *The Queen v. Drybones*, [1970] S.C.R. 282.
39. *The Queen v. Drybones*, *supra* note 37. The Supreme Court of Canada ruled that a provision of the Indian Act was "inoperative"—meaning no longer valid or in effect—because it violated section 1(b) of the *Canadian Bill of Rights*, which guarantees equality before the law.
40. *R. v. Therens*, [1985] 1 S.C.R. 613, per Le Dain J., at para. 48.
41. Pierre Elliott Trudeau, *supra* note 4, 328.
42. *Canadian Charter of Rights and Freedoms, s 7, Part 1 of the Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 a.
43. This is why, for example, Robert Leckey has argued that, even where s. 33 of the *Charter* (the notwithstanding clause) has been invoked, thereby disposing of the matter of the continued operation of impugned legislation, there is still a vital public interest in having judicial commentary on the effect of an impugned law on the exercise of *Charter* rights and freedoms. That public interest goes to the citizenry's ability to meaningfully participate in the democratic process. See, for example, Robert Leckey and Eric Mendelsohn, "The notwithstanding clause: Legislatures, courts, and the electorate", 72 2 *UTLJ* (2022), 189-215.
44. See Daniel Johnson, *Égalité ou indépendance*, (Québec : Éditions J. Didier, 1968), and English, *supra* note 1, at 130.

45. Trudeau's fascination with the Canadian constitution is traceable as far back as 1943 when he attended a lecture given by the legendary constitutional law scholar and poet, F.R. Scott, to a law class at l'Université de Montréal in which Scott is said to have advocated for the need for the Constitution's federal principle to be "construed by lawmakers as an instrument for realizing both the aspirations of their compatriots and the dual culture of Canada"; see Stephen Clarkson and Christina McCall, *Trudeau and our Times, Vol 1: The Magnificent Obsession* (Toronto: McLelland & Stewart, 1990), 245-46. Trudeau's views on the critical importance of constitutionally entrenched guardrails against "the unchecked domination of citizens' lives by all-powerful state mechanisms" was refined and cemented in his subsequent years studying at Harvard, Sciences Po, and London School of Economics; Ibid, 247-48.

46. John English, *supra* note 1, at 132-33.

47. *Ibid.* at 131, Trudeau as "individualist". "I saw the charter as an expression of my long-held view that the subject of law must be the individual human being; the law must permit the individual to fulfil himself or herself to the utmost." Pierre Trudeau, *supra* note 4, 322.

48. Which Trudeau began to refashion as such with the appointment to the Supreme Court of Canada of Justice Bora Laskin in 1970, elevating him to Chief Justice of the Court in 1973.

49. *Edwards v. A.G. Can.* (1930) A.C. (JCPC) 124, 136, The Constitution is a "living tree capable of growth and expansion within its natural limits"; also known as the "Persons case".

50. English, *supra* note 1, 133.

51. The Victoria Conference of 1971, which convened the First Ministers of Canada to consider Trudeau's first comprehensive patriation package, including a Canadian Charter of Rights and which, but for a last minute rejection of the deal by Quebec's Premier, Robert Bourassa, would have sealed the deal some ten years before our current Charter came into being. Isaac MacPherson, « Pierre Trudeau's Patriation of Canada's Constitution », MUSe,2022; Denis Lessard, « 50 ans de tiraillements Canada-Québec » *La Presse*, June 15, 2021.

52. *Supra* note 22.

53. Unforeseeable, that is, for most except for Jim Coutts, Trudeau's most senior political advisor at the time, having served as his Principal Secretary up until the 1979 election defeat, and who had read the late fall polling results and was already plotting to topple the Clark government in a confidence vote on the Budget. See Clarkson and McCall, *supra* note 45, 151-181.

54. Clarkson and McCall, *supra* note 45. At 11, the authors describe that "magnificent obsession" as Trudeau's "attempt to resolve through legalistic formulations Canada's contradictions as a nation".

55. While the conception and drafting of the *Charter* was a collective effort involving a number of federal and provincial politicians and bureaucrats, the lion's share of the credit must go to Roger Tassé, Canada's Deputy Minister of Justice in 1982, who has been called the "architect" of the *Charter*.

56. The clause is at once organizing principle for the approach to *Charter* interpretation and also grand statement about the requisite ordering—indeed, the very nature—of a liberal constitutional democracy.

57. *R. v. Oakes*, [1986] 1 S.C.R. 103.

58. 32. (1) This Charter applies a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

59. *R. v. Edwards Books & Art* [1986] 2 SCR 713, and *Irwin Toy v. Quebec* [1989] 1 SCR 927.

60. The last part of the second element is itself a proportionality test within the three-pronged proportionality test.

61. Nathalie Des Rosiers calls section 1 an "instrument of democratic accountability", "Section 1 of the *Charter*: An instrument of democratic accountability", in Peter L. Biro ed., *Constitutional Democracy Under Stress: A Time For Heroic Citizenship* (Oakville: Mosaic Press, 2020), 83.

62. Cass Sunstein, "Why I Am a Liberal", *New York Times*, Nov. 20, 2023 https://www.nytimes.com/2023/11/20/opinion/cass-sunstein-why-liberal.html

63. Some argue that these rights have found protection under section 7 jurisprudence (re "life, liberty and security of the person"), see, for example, *Chaoulli* v. Quebec (Attorney General) [2005] 1. S.C.R. 791.

64. All of these fundamentals are contained, explicitly for the most part, in ss 1-15 of the *Charter*.

65. Sections 25 (Aboriginal rights not affected), 26 (other rights not affected), 27 (multicultural heritage), 29 (rights of denominal and separate schools). It is noteworthy that "bi-culturalism", which is an authentic aspect of the French Canada and Quebec cultural and historical reality, does not figure anywhere in this new Constitution, other than in its greatly diminished form of linguistic protections.

66. Pierre Elliott Trudeau, "A State Made to Measure", in *Approaches to Politics*, (Toronto: Oxford University Press, 1970), 50; which originally appeared in French in a 1958 collection of Trudeau's essays edited by Jacques Hebert in the journal, *Vrai* under the title, "Les cheminements de la politique".

67. English, *supra* note 1, 527

68. *Hunter v. Southam Inc.* [1984] 2 SCR 145, right to be secure against unreasonable search and seizure; *R. v. Therens*, *supra* note 39, where the Court reasoned that the *Charter* required a more robust interpretation than did the *Bill of Rights*, because the right to counsel had obtained constitutional status; the right to counsel at trial and at investigative detention, access to justice for victims, privacy and security, unreasonable search and seizure and exclusion of evidence that would bring administration of justice into disrepute, *R. v. Collins*, [1987] 1 SCR 265; speedier justice (*R. v. Askov*, [1990] S.C.J. No. 106, [1990] 2 S.C.R. 1199), full and robust pre-trial disclosure (*R. v. Stinchcombe*, [1991] 3 S.C.R. 326), and the right to know the case against oneself. (*Charkaoui v. Canada (Citizenship and Immigration)*, [2007] 1 S.C.R. 350, at para. 21 (S.C.C.)). See the Hon. Marc Rosenberg, "Twenty-Five Years Later: The Impact of the *Canadian Charter of Rights and Freedoms* on the Criminal Law", Supreme Court Law Review, 2nd Series, vol. 45 (Markham, ON: LexisNexis Canada , 2009), https://www.ontariocourts.ca/coa/about-the-court/publications-speeches/twenty-five-years-later/

69. *Ibid*, Rosenberg.

70. *R. v. Morgentaler*, [1988] 1 S.C.R. 30. Decriminalizing abortion—but not actually legalizing or regulating it. The Court kicked it back to Parliament, and Parliament chose to do nothing. Accordingly, it is incorrect to say that Morgentaler established the positive right to an abortion—or a "right of a woman to choose", although most observers acknowledge that section 7 of the *Charter* would place strong limits on the extent of potential regulation of abortion.

71. *Vriend v. Alberta*, [1998] 1 S.C.R. 4931998—sexual orientation read into human rights legislation—analogous (as distinct from an enumerated) ground of discrimination, ultimately grounding the claims to other rights and entitlements, such as marriage equality, pension rights; see *Reference re: Same Sex Marriage* [2004] 3 S.C.R. 689.; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)* [2000] 2 SCR 1120.

72. Freedom of conscience and religion, *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; religious freedom in school, *Multani v Commission scolaire Marguerite-Bourgeoys* [2006] 1 S.C.R. 256, freedom of expression and the justified limits thereupon, *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989], in the context of hate speech, 1 SCR 927, *R. v. Keegstra*, [1990] 3 SCR 697, in the context of the balancing of press freedom and the right to a fair trial, *Dagenais v. Canadian Broadcasting Corp*, [1994] 3 SCR 835, in the context of equality rights as applied to free speech and the discriminatory limitation applied the LGBTQ2 community, *Little Sisters Book and Art Emporium*, freedom of association and the right to strike, *Saskatchewan Federation of Labour v. Saskatchewan* [2015] 1 S.C.R. 245.

73. *Working Families Coalition (Canada) Inc. v. Ontario (Attorney General)*, 2023 ONCA 139, the right to "meaningful participation" in the democratic process; *Sauvé v. Canada (Chief Electoral Officer)*, [2002] 3 S.C.R. 519, an inmate's right to vote.

74. S.7, Life, liberty and security of the person - right to procedural and substantive fairness, *RE B.C. Motor Vehicle Act*, [1985] 2SCR 486; medical assistance in dying, *Carter v. Canada (Attorney General)* [2015] 1 SCR 331.

75. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143

76. *Eldridge v. British Columbia* (Attorney General), [1997] 3 S.C.R. 624

77. *Mahe* v. Alberta, [1990] 1 SCR 342; *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, [2020] 1 SCR 678; *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*, (2023), SCC 31, and requiring a meaningful consideration of how the decision will impact relevant *Charter* values, even when no *Charter* right is directly infringed.

78. Aboriginal title, *Delgamuukw v. British Columbia*. [1997] 3 S.C.R.1010, Aboriginal treaty rights, *R. v. Marshall* [1999] 3 S.C.R. 456. I call this a double-edged sword. On the one hand, there is the recognition of aboriginal rights rooted in aboriginal law, self-government, statutory recognition (pursuant to the *Indian Act*), treaty rights, consent and inherent rights; on the other hand, there are the strictures of submission to a colonial system, and the "colonizer's" constitution, and the paradoxes of being both "protected" and constrained. We discuss this in more detail later in the paper.

79. Not only are the courts more "activist"; they are, actually, more "active"—with the addition of *Charter* cases to their dockets. As per F.L. Morton, Peter Russell and Michael Withey, "The Supreme Court's First One Hundred *Charter of Rights* Decisions: A Statistical Analysis", *Osgoode Hall Law Journal* 30.1 (1992) 1-56, "The *Charter* has changed the composition of the Supreme Court's case load. Table 1 shows that, since the Court's first *Charter* decision in May 1984, the volume of *Charter* cases has steadily increased. Since 1987, it has constituted nearly one-quarter of the Court's annual output of decided cases. Significantly, the corresponding percentage for the United States Supreme Court is almost identical." Judges had a new role within our constitutional framework, inescapably becoming policymakers. As the expositors of the content of rights, society's human rights and civil liberties "complaints department" and adjudicators of public grievance, as well as serving as the accountability mechanic under section 1, the judiciary took on a vastly enhanced significance in society.

80. *Edwards v. AG Canada, supra* note 49.

81. Peter W Hogg, "Interpreting the *Charter of Rights*: Generosity and Justification" (1990) 4:28 *Osgoode Hall LJ* 817 at 820. *Hunter v. Southam Inc.*,[1984] 2 SCR 145; *Reference Re B.C. Motor Vehicle Act*, [1985] 2 SCR 48; *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321 at para 116; *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment*; Colin Feasby, The Evolving Approach to Charter Interpretation, 2022 60-1 Alberta Law Review 35, 2022 CanLII Docs 3232, https://canlii.ca/t/7mxks

82. *R. v. Big M Drug Mart Ltd., supra* note 72, at para 116.

83. *Commission scolaire francophone des Territoires du Nord-Ouest v. Northwest Territories (Education, Culture and Employment)*

84. "The approach adopted and regularly applied by this Court to the interpretation of s. 15(1) focuses upon three central issues: (A) whether a law imposes differential treatment between the claimant and others, in purpose or effect; (B) whether one or more enumerated or analogous grounds of discrimination are the basis for the differential treatment; and (C) whether the law in question has a purpose or effect that is discriminatory within the meaning of the equality guarantee. The first issue is concerned with the question of whether the law causes differential treatment. The second and third issues are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1)". [my emphasis], *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497.

85. I elaborate on this in the third section of my essay, "Some thoughts about a liberal legal culture: Considering Canada's Anti-terrorism Act, the Constitution and the HR Revolution: in Howard Aster and Thomas Axworthy, eds, *Searching for the New Liberalism: Perspectives, Policies, Prospects* (Oakville: Mosaic Press, 2003), 111-134.

86. It is important to appreciate that section 27 does not confer or enumerate any substantive rights or freedoms but is intended as an interpretive provision only. Nonetheless, it represents an important statement about the pluralistic character of Canada, demographically and culturally, and also seems designed to give the courts something of a mandate to read cultural pluralism, as it were, into any inquiry concerning the way in which the exercise of the enumerated rights and freedoms is most fully manifested in a multicultural society—with regard for Canada's specific experience. See note 86 for examples of this.

87. *Roach v. Canada (Minister of State for Multiculturalism and Culture*, [1994] 2 F.C. 406 (F.C.A.); *Hak c. Procureur général du Québec*, 2021 QCCS 1466, at para. 638. Section 27 has been used in defining the content of freedom of conscience and religion under section 2(a) in a broad fashion to include indirect coercion (*R. v. Edwards Books and Art Ltd. et al*, [1986] 2 S.C.R.] 713) and to support a non-denominational approach to governing (*R. v. Big M Drug Mart Ltd.* [1985] 1 S.C.R.] 295; *R. v. Gruenke*, [1991] 3 S.C.R. 263. The Supreme Court has referred to the values of multiculturalism enshrined by section 27 as being related to a state duty of religious neutrality (*Mouvement laïque québécois v. Saguenay (City)*, [2015] 2 S.C.R. 3), Reference to section 27: re circumstances under which a woman may be permitted to wear a niqab while giving testimony at trial (*R. v. N.S.*, 2010 ONCA 670, aff'd, [2012] 3 S.C.R. 726; used to define the section 14 right to an interpreter to include more than just services in English and French (*R. v. Tran*, [1994] 2 S.C.R. 951; use of section 27 rejected regarding interpretation of minority language educational rights under section 23 (*Mahe v. Alberta*, [1990] 1 S.C.R. 342; *Reference re Public Schools Act (Manitoba)*, [1993] 1 S.C.R. 839); considered as not derogating from the special status conferred on English and French under section 16 of the *Charter* (*Société des Acadiens v. Association of Parents*, [1986] 1. S.C.R. 549); *R. c. Entreprises W.F.H. ltée*, [2001] R.J.Q. 2557 (C.A.), leave to appeal to SCC refused [2001] S.C.C.A. No. 625). Section 27 was rejected in interpreting the scope of freedom of expression under section 2(b) of the *Charter* in hate speech case but resorted to for the section 1 portion of the analysis. (*R. v. Keegstra*, [1990] 3 S.C.R. 697; and *Canadian Human Rights Commission v. Taylor*, [1990] 3 S.C.R. 892; *American Freedom Defence Initiative v Edmonton (City)*, 2016 ABQB 555; different result in *R. v. Zundel*, [1992] 2 S.C.R. 731 where, in finding section 2(b) Charter infringement is not justified under section 1, the majority rejected the reliance placed on section 27 by the minority). Section 27 has been found to be relevant to ensuring that a jury is representative of the diversity in Canadian society (*R. v. Brown (Application to prohibit Crown discrimination in peremptory challenges*) [1999] O.J. No. 4867 (Ont. Ct. Gen. Div.).

88. The notwithstanding clause is the subject of extensive investigation and analysis in Peter L. Biro, ed., *The Notwithstanding Clause and the Canadian Charter: Rights, Reforms, and Controversies*, (Montreal, London: McGill-Queen's University Press, 2024).

89. Caitlin Salvino, "A Tool of Last Resort: A Comprehensive Account of the Notwithstanding Clause Political Uses 1982-2021" (2022) 16 *JPPL* 1, and "Notwithstanding Minority Rights: Rethinking Canada's Notwithstanding Clause", in Biro, *supra* note 88, at 401.

90. 11 *House of Commons Debates*, 32nd Parl, 1st Sess, (20 November 1981) at 13042–13043 [Debates 20 November 1981].

91. 13 Debates 20 November 1981, *supra* note 5 at 13042-13043.

92. Allan Blakeney, "The Notwithstanding Clause, the Charter, and Canada's Patriated Constitution: What I Thought We Were Doing" (2010) *19 Constitutional Forum constitutionnel* 1.

93. Peter Lougheed, "Why a Notwithstanding Clause?" (1998), *Centre for Constitutional Studies)* at 3.

94. Thomas Axworthy, "The Charter at 40: An Historic Canadian Compromise", *Policy*, May 3, 2022 https://www.policymagazine.ca/the-charter-at-40-an-historic-canadian-compromise/

95. These are considered at length in Biro, *supra* note 88.

96. *An Act Respecting the Constitution Act, 1982*, C.Q.L.R., c-L-4.2, ss. 1, 2, 5-7, which applied the notwithstanding clause to Quebec's entire statute book, raising vexing questions about both the override's retroactive and pre-emptive use.

97. Guillaume Rousseau and François Côté, "Bill 21 and Bill 96 in Light of a Distinctive Quebec Theory of the Notwithstanding Clause: A Distinct Approach for a Distinct Society and a Distinct Legal Tradition", in Biro *supra* note 88, 231, at 232.

98. November 4 and the wee hours of November 5, 1981, when the "Gang of Eight" dropped one of its erstwhile members surreptitiously—Quebec—without Premier Lévesque's' advance knowledge, and came to a deal with Pierre Trudeau's team on patriation and the inclusion of a Charter with a notwithstanding clause, and which. See Brian Bird's account in "The Charter at Forty: The legacy of Pierre Elliott Trudeau", The Hub, March 4, 2022, https://thehub.ca/2022-03-04/charter-at-forty-the-legacy-of-pierre-elliott-trudeau. See Steve Paikin in Bill Davis : Nation Builder, And Not So Bland After All (Toronto: Dundurn, 2016), at 300-03, in which Paikin recounts how it was a late night call from Davis to Trudeau that caused Trudeau to relent and accept inclusion of the notwithstanding clause in the Charter in order to get the premiers to agree to the entire Patriation Package.

99. Pelletier's submissions to the Commission were cited by Radio-Canada, « L'ex-ministre libéral Benoît Pelletier témoignera en faveur de la loi sur la laïcité », September 25, 2020, https://ici.radio-canada.ca/nouvelle/1736368/ex-ministre-liberal-benoit-pelletier-temoignage-pour-faveur-loi-21-laicite, « La justification la plus logique du recours à la disposition de dérogation consiste à dire que celle-ci est une composante nécessaire du fédéralisme, que cette clause permet de préserver la diversité d'opinions, de valeurs et d'aspirations politiques qui font la richesse de la fédération. »

100. Fatima Syed, "Mulroney's reputation 'on the line', say critics, if she won't oppose Ford on notwithstanding clause", *National Observer*, September 18, 2018, https://www.nationalobserver.com/2018/09/18/news/mulroneys-reputation-line-say-critics-if-she-wont-oppose-ford-notwithstanding-clause. The cavalier phrase was used in the context of the Ontario government's introduction of the *Better Local Government Act*, 2018, S.O. 2018, c. 11 – Bill 5.

101. See Salvino in Biro *supra* note 88, at 401, and Christopher P. Manfredi, *Judicial power and the Charter: Canada and the paradox of liberal constitutionalism* (2nd ed., Oxford University Press 2001) 4 and 193.

102. Peter H. Russell, 'Standing Up for Notwithstanding' [1991] 29 *Alberta Law Review* 293 at 295.

103. Russell, *supra* note 102; Manfredi, *supra* note 101.

104. Scott Reid, "Penumbra for the People: Placing Judicial Supremacy under Popular Control", in Anthony Peacock, ed., *Rethinking the Constitution: perspectives on Canadian constitutional reform, interpretation and theory*, (Don Mills: Oxford University Press Canada, 1996) at 203.

105. Tsvi Kahana, 'The Notwithstanding Mechanism and Public Discussion: Lessons from the Ignored Practices of Section 33 of the Charter' [2001] 44 *Canadian Public Administration* 255.

106. Dwight Newman, "Canada's Notwithstanding Clause, Dialogue, and Constitutional Identities", in Geoffrey Sigalet, Gregoire Webber and Rosalind Dixon, eds., *Constitutional Dialogue: Rights, Democracy, Institutions* (Cambridge: Cambridge University Press, 2019), 209; and "Key Foundations for the Notwithstanding Clause in Institutional Capacities, Democratic Participatory Values, and Dimensions of Canadian Identities", in Biro, *supra* note 88, at 69.

107. Deborah Coyne, *supra* note 8; Eugene Forsey,"Is There a Threat to Our Rights?" a *Reader's Digest Forum*, compiled by C. Tower and P. Body, *Reader's Digest*, June 1989, 101-102

108. Coyne, *supra* note 8. *The Charlottetown Accord* of 1992 was a failed attempt by Prime Minister Brian Mulroney and all 10 provincial premiers to amend Canada's constitution. The goal was to obtain Quebec's consent to the *Constitution Act, 1982*. The Accord would have recognized Quebec as a distinct society; decentralized many federal powers to the provinces; addressed the issue of Indigenous self-government; and reformed the Senate of Canada and the House of Commons. The Accord had the approval of the federal government and all ten provincial governments. But it was rejected by Canadian voters in a referendum on 26 October 1992. https://www.thecanadianencyclopedia.ca/en/article/the-charlottetown-accord

109. Given the recent increased propensity of some Provinces to resort to the notwithstanding clause (Ontario and Saskatchewan, not to mention Quebec's use of the clause to support Bills 21 and 96), it is almost inconceivable that the amending formula (s. 38 of the *Constitution, Act 1982*) threshold requirements could be met. And it is arguable that this particular clause should not be amended without unanimous consent, although unanimous consent is not required under the current amending formula.

110. Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' 49 *The American Journal of Comparative Law* 707, 708-709, and 'Reassessing the new Commonwealth model of constitutionalism' [2001] *8 International Journal of Constitutional Law* 167, 168.

111. Coyne, *supra* note 8; the Government of Canada's own website states that invocation of s.33 "allows Parliament or the legislature of a province to derogate from sections of the *Charter*..." and "effectively precludes judicial review of the legislation under the listed Charter sections", https://justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art33.html

112. Grégoire Webber, Eric Mendelsohn & Robert Leckey, "The Faulty Received Wisdom around the Notwithstanding Clause," *Policy Options* (10 May 2019), policyoptions.irpp.org/magazines/may-2019/faulty-wisdom- notwithstanding-clause/; Leckey and Mendelsohn, *supra* note 43.

113. Primacy of Constitution of Canada: *Constitution Act, 1982*, section 52 (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

114. Robert Leckey, "Legislative Choices in Using Section 33 and Judicial Scrutiny", In Biro, *supra* note 87, at 111.

115. Maxime St-Hilaire, Xavier Foccroulle Ménard, and Antoine Dutrisac, "Judicial Declarations Notwithstanding the Use of the Notwithstanding Clause? A Response to a (Non-)Rejoinder", in Biro, *supra* note 87, at 132; and Maxime St-Hilaire and Xavier Foccroulle Ménard, Nothing to Declare: "A Response to Grégoire Webber, Eric Mendelsohn, Robert Leckey, and Léonid Sirota on the Effects of the Notwithstanding Clause", *Constitutional Forum*, Vol. 29 No. 1 (2020) 38-48.

116. Peter Hogg and Allison Bushell, "The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing after All)", 35 *Osgoode Hall LJ* (1997); and "*Charter* Dialogue Revisited: Or 'Much Ado About Metaphors", 45 *Osgoode Hall LJ* (2007).

117. Private exchange, June 3, 2021; see also Erna Paris, "After decades of playing Charter chicken, Canada is now home to what is effectively an illiberal democracy", *The Globe and Mail*, May 17, 2021.

118. Russell, *supra* note 102.

119. J.D. Whyte, "On Not Standing for Notwithstanding" (1990) 28 *Alta. L. Rev.* 347 at 355.

120. Forsey, *supra* note 107.

121. *Supra* note 21.

122. *Declaration of the Rights of Man and of the Citizen* (1789), National Constituent Assembly, adopted by the National Assembly during Its Sessions on August 20, 21, 25, and 26, and Approved by the King (Paris: Mondharre & Jean, 1789).

123. *Ibid.*, Articles 10 and 11

124. Russell and Morton, *supra* note 79, at 2.

125. Canada has marked a day, September 30, as its National Day for Truth and Reconciliation. https://www.canada.ca/en/canadian-heritage/campaigns/national-day-truth-reconciliation.html

126. *United Nations Declaration on the Rights of Indigenous Peoples Act* (S.C. 2021, c. 14). This act commits the Parliament of Canada to fulfill its obligations assumed by all states in accordance with UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly, 2 October 2007, A/RES/61 ("*UNDRIP*").

127. Described as follows by the Canadian Museum for Human Rights: "The Doctrine of Discovery was set out in a series of declarations by popes in the 15th century. These declarations (known as "papal bulls") provided religious authority for Christian empires to invade and subjugate non-Christian lands, peoples and sovereign nations, impose Christianity on these populations, and claim their resources. These papal bulls were written at a time when European empires were embarking on widescale colonial expansion." https://humanrights.ca/story/doctrine-discovery. And by the Assembly of First Nations, as follows: "The Doctrine of Discovery emanates from a series of Papal Bulls (formal statements from the Pope) and extensions, originating in the 1400s. Discovery was used as legal and moral justification for colonial dispossession of sovereign Indigenous Nations, including First Nations in what is now Canada. During the European "Age of Discovery", Christian explorers "claimed" lands for their monarchs who felt they could exploit the land, regardless of the original inhabitants. This was invalidly based on the presumed racial superiority of European Christian peoples and was used to dehumanize, exploit and subjugate Indigenous Peoples and dispossess us of our most basic rights. This was the very foundation of genocide. Such ideology led to practices that continue through modern-day laws and policies." Assembly of First Nations: *Dismantling the Doctrine of Discovery*, January 2018. https://www.afn.ca/wp-content/uploads/2018/02/18-01-22-Dismantling-the-Doctrine-of-Discovery-EN.pdf

128. Section 25: The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including, (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and (b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

129. Section 35 (1) The existing Aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed. (2) In this Act, *aboriginal peoples of Canada* includes the Indian, Inuit and Métis peoples of Canada. (3) For greater certainty, in subsection (1) *treaty rights* includes rights that now exist by way of land claims agreements or may be so acquired. (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons.

130. https://nctr.ca/about/history-of-the-trc/truth-and-reconciliation-commission-of-canada/

131. https://www.rcaanc-cirnac.gc.ca/eng/1675098194535/1675098209922; https://www.mmiwg-ffada.ca/

132. See Robert Hamilton, 'Self-Governing Nation or 'Jurisdictional Ghetto'? section 25 of the *Charter of Rights and Freedoms* and self-governing First Nations in Canada", 26 2 *Review of Constitutional Studies*, 279. In *R v. Kapp*, 2008 SCC 41, Justice Bastarache explains the tension between collective and individual rights in section 25. One approach gives primacy to *Charter* rights that, while not derogating from Aboriginal (group) rights, prioritizes the Charter right when it becomes impossible to reconcile the two. The second approach prioritizes the rights protected under section 25 while preserving the two. The first approach is referred to as an "interpretive prism", the second as a "shield" This second approach to section 25 results in a protection of communal or collective rights from diminution by the *Charter* rights of non-Indigenous Canadians, "while individual Indigenous persons would maintain their full suite of *Charter* rights in relation to their own governments" (Hamilton, at 289). Perhaps the most helpful explanation of how this tension is worked out comes from Justice Deschamps in *Beckman v. Little Salmon Carmacks First Nations*, 2010 SCC 53, at para 98. "The Aboriginal and treaty rights of the Aboriginal Peoples of Canada are recognized and affirmed in section 35() of the *Constitution Act, 1982*. The framers of the Constitution also considered it advisable to specify in section 25 that the guarantee of fundamental rights and freedoms to persons and citizens must not be considered to be inherently incompatible with the recognition of special rights for Aboriginal peoples. In other words, the first and second compacts should be interpreted not in a way that brings them into conflict with one another, but rather as being complementary."

133. Jeremy Patzer ad Kiera Ladner, "Charting Unknown waters: Indigenous Rights and the *Charter* at Forty", 26 2 *Review of Constitutional Studies*, 15, at 22. "A broad distinction between section 35 and the *Charter* is that, in their origins, while the former was by and large scrutinized by Indigenous leaders for its potential to protect Indigenous rights and self-determination, the latter was commonly scrutinized as a potential source of danger to the distinct, collective rights of Indigenous peoples."

134. *Behn v. Moulton Contracting Ltd.*, [2013] 2 S.C.R. 227

135. *Tsilhqot'in Nation v. British Columbia*, [2014] 2 S.C.R

136. *Ibid.*

137. *Principles respecting the Government of Canada's relationship with Indigenous peoples*, Government of Canada, 2021/09/01 https://www.justice.gc.ca/eng/csj-sjc/principles-principes.html.

138. From the website of the Government of Canada, Indigenous and Northern Affairs Canada, "250th Anniversary of the Royal Proclamation of 1763": "On October 7, 1763, King George III issued a Royal Proclamation establishing a new administrative structure for the recently acquired territories in North America. He also established new rules and protocols for future relations with First Nations people. "The Proclamation has two significant parts. First, it defined the land west of the established colonies as "Indian Territories", where First Nations people "should not be molested or disturbed" by settlers and where the Indian Department would be the primary liaison between the Crown and First Nations people; and second, in order to prevent any future abuse, the Proclamation prohibited colonial governors from making any grants or taking any land cessions from First Nations people and established a set of protocols and procedures for the purchasing of First Nations land." https://www.canada.ca/en/indigenous-northern-affairs.html

139. The presiding theory of the time was that Indigenous Peoples, because they were non-Christians, were not human and therefore the land was empty and uninhabited or was *terra nullius*. The Papal Bulls claimed all the lands and territories for Christendom (or for the Christian Crowns of Europe)

140. Sanya Mansoor, "The 'deplorable' History behind the Pope's apology to Canada's Indigenous Communities", *Time*, July 26, 2022. https://time.com/6200213/pope-apology-canada-history-indigenous-communities/

141. Joint Statement of the Dicasteries for Culture and Education and for Promoting Integral Human Development on the "Doctrine of Discovery", *Summary of Bulletin* Holy See Press Office, March 30, 2023

142. Bruce McIvor, *Standoff: Why Reconciliation Fails Indigenous People and How to Fix It* (Gibsons, BC: Nightwood Editions, 2021), 16-17.

143. *Supra* note 126.

144. *Reference re An Act respecting First Nations, Inuit and Métis children*, youth and families, 2024 SCC 5,

145. *Ibid.*, and also see Bruce McIvor, "The troubling basis for the Supreme Court's child welfare law decision", *First Peoples Law*, February 12, 2024. https://www.firstpeopleslaw.com/public-education/blog/the-troubling-basis-for-the-supreme-courts-child-welfare-law-decision

146. *Ibid* at 168

147. *Ibid* at 168-69

148. *Ibid* at 170

149. Patzer and Ladner, *supra* note 133, at 22.

150. Temitayo Olarewaju, "Residential school system recognized as genocide in Canada's House of Commons: A Harbinger of change", *National Post*. January 12, 2023.

151. The Ontario Government's approach is broadly representative of public education curriculum reforms across the country. On December 7, 2021, it issued this directive regarding "Indigenous education in Ontario': Every school board must have a full-time position dedicated to supporting Indigenous education in school boards. Leads work closely with senior board administration, including the superintendent responsible for Indigenous education, school board staff and Indigenous Education Councils. The leads support: improved Indigenous student achievement and well-being; and enhanced knowledge and awareness about First Nation, Métis and Inuit cultures, histories and perspectives for all students. https://www.ontario.ca/page/indigenous-education-ontario.

152. 32 (1) This Charter applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

153. *R. v. Desautel*, 2021 SCC 17, at para 22.

154. John Borrows, "Indigenous Constitutionalism Pre-existing Legal Genealogies in Canada" in, Peter Oliver, Patrick Macklem, and Nathalie Des Rosiers (eds), in *The Oxford Handbook of the Canadian Constitution*, (Oxford Academic, 2017); Hon. Mr. Justice Charles D. Gonthier, "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of Democracy" (2000) 45 *McGill L.J.* 567.

155. UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, adopted by the General Assembly, 2 October 2007, A/RES/61.; Alex Neve, "Closing the Implementation Gap: Federalism and Respect for International Human Rights in Canada", *IRPP Paper*, 2023, https://centre.irpp.org/research-studies/closing-the-implementation-gap/

156. Private correspondence between Thomas Axworthy and Peter Biro, February 21, 2024.

157. From the documentary film, *Without Precedent: The Supreme Life of Rosalie Abella*, Barry Averich, Director (Toronto, 2024).

158. Mikael Borres, "Maple is not in the middle: Canada's declining role as a middle power", *Spheres of Influence*" , (July 28, 2021), https://spheresofinfluence.ca/maple-is-not-in-the-middle-canadas-declining-role-as-a-middle-power/; "The decline of Canada's influence in the world – what is to be done for it?", (February 1, 2005). https://policyoptions.irpp.org/magazines/canada-in-the-world/the-decline-of-canadas-influence-in-the-world- what-is-to-be-done-for-it/

159. "The decline of Canada's influence in the world", *Ibid*.

160. Klodian Rado, "The Judicial Diplomacy of the Supreme Court of Canada and its Impact: An Empirical Overview", 2020 58-1 *Alberta Law Review* 1., Anne-Marie Slaughter, *A New World Order* (Princeton, Princeton University Press, 2005),74 and 243, describing the increasing prevalence of "global judicial conversation" and "global judicial human rights dialogue".

161. *Ibid*.

162. John Ibbitson, "The *Charter* proves to be Canada's gift to the world", *The Globe and Mail*, April 15, 2012; Omar Ha-Redey, "Canada is the World's Constitutional Superpower", Slaw, April 15, 2012; David Law and Mila Versteeg, "The declining influence of the United States Constitution", 87 *New York University Law Review* (June 2012) 762- 858; https://www.slaw.ca/2012/04/15/canada-is-the-worlds-constitutional-superpower/

163. *Ibid.*; Mark Tushnet, "The Charter's Influence Around the World." *Osgoode Hall Law Journal* 50.3 (2013) :527- 546.

164. Law and Versteeg *supra* note 162.

165. Liam Turnbull "Democracy and the Canadian Charter of Rights and Freedoms", Paper Presented at the University of Toronto Political Science Undergraduate Research Colloquium, March 8, 2017.

166. "The Impact of the Human Rights Act: Lessons from Canada and New Zealand", University College London, May 1999. https://www.ucl.ac.uk/constitution-unit/sites/constitution_unit/files/37_1.pdf

167. *Ibid.*

168. For example, in furtherance of his proposed judicial reforms scaling back the jurisdiction of the Supreme Court to strike down legislation passed by the Knesset, Israeli Prime Minister Benjamin Netanyahu frequently cited section 33 of the *Charter* (the notwithstanding clause) as an example of how a liberal democracy builds in safeguards against the excesses of judicial review. See Colby Cosh, "Israeli right looks to import their own notwithstanding clause, *National Post*, February 28, 2023. https://nationalpost.com/opinion/israeli-right-looks-to-import-their-own-notwithstanding-clause

169. Examples abound, but it seemed to begin with Hungary's Viktor Orban who first came on the scene as budding liberal reformist in 1989 and then morphed into an "illiberal" democrat and, finally, turned Hungary into what has been called, by the European Parliament, no less, an "electoral autocracy". In Turkey, Recep Erdogan's rise had a similar beginning and an even more similar trajectory. Now, we see these illiberal, right-wing, autocratic populists rising throughout Europe and South America. And let us not forget to include Donald Trump on the list.

170. This was, of course, Trump's project, as conceived and articulated by his erstwhile Senior Advisor and onetime campaign manager, Steve Bannon.

171. Cognitive and evolutionary psychologist, Steven Pinker, in particular, has led the field of optimists and positive thinkers who argue that things are looking up for human civilization, for the happiness index or quotient and for the demonstrable and significant reduction in violence in the world. Among many engaging studies worth considering, is his volume, *The Better Angels of Our Nature* (Viking Books, 2011). In it, he uses the phrase as a metaphor for four human motivations—empathy, self-control, the "moral sense", and reason—that, he writes, can "orient us away from violence and towards cooperation and altruism".

172. I explore this at length in "The Retreat of Liberal Constitutional Democracy and the Urgent Need for Heroic Citizenship", in Biro, *supra* note 61, 3-49.

173. All of the major democracy indexes have shown significant increases in democratic backsliding over the past number of years. While one can expect sharp declines in democratic freedoms in countries like China and Russia—and this, of course, has been borne out—what is most striking is the democracy deficits in so-called Western democracies, and the rise of the autocratic state (e.g., in India, which prides itself on being known as the "world's largest democracy"). See, as a representative example of most of the indexes, a breakdown of the trendlines in the Economist Democracy Index for 2022 https://en.wikipedia.org/wiki/The_Economist_Democracy_Index; also, Our World in Data: https://ourworldindata.org/grapher/democracy-index-eiu.

174. *Freedom in the World 2019: Democracy in Retreat*, Freedom House, https://freedomhouse.org/report/freedom-world/2019/democracy-retreat

175. Alex Neve, *supra* note 155.