

Federalism-e 2014



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Federalism-e introduction note

Chawki Bensalem

Federalism-e is an undergraduate peer-reviewed journal on the subject of federalism. Written and edited by undergrads for undergrads, we wish for you to see this work as a representation of the great opportunities that aspiring political scientists can be given in university. Aiming to be a truly Canadian journal, we accept submission from all around the country and in both official languages. In the same fashion, our editorial team is also drawn from a group of volunteer students all around the country who kindly gave up much of their time in order to edit and review submitted papers. *Federalism-e* is a volunteer effort and what that we are quite proud of. We're thus very proud to present to you this 15th edition of this e-journal and we hope that it will be a positive contribution to the academic community not only through the ideas that are brought to the table but also by inspiring students around the country to get involved while providing both contributors and staff with valuable insight into the world academic publications.

Federalism-e est une publication universitaire en sciences politiques ayant pour sujet le fédéralisme. Les articles et le travail d'édition étant aussi faits par des étudiants universitaires du baccalauréat, on peut réellement parler d'un journal par les étudiants et pour les étudiants. En tant que publication universitaire, *Federalism-e* représente une excellente opportunité d'acquérir de l'expérience dans le domaine de la publication autant pour les contributeurs que pour les éditeurs. Ce journal dont nous vous présentons la 15^{ème} édition est donc un effort collaboratif et regroupant des contributions venant de partout au Canada. C'est donc au nom de l'équipe éditoriale que nous vous présentons cette édition avec l'espoir qu'elle contribue de manière positive à la scène académique non seulement par les idées présentées mais aussi par les opportunités fournies à ceux qui ont bien voulu participer. Avant d'entrer dans le vif du sujet de cette publication, il nous semble nécessaire d'élaborer quelque peu sur notre conception du fédéralisme. En effet, il est de notre opinion en tant qu'éditeurs que de limiter nos réflexions sur le fédéralisme aux affaires

In the interest of providing a succinct idea of the journal, it is important for us to clarify that to define federalism purely in terms of governance is to narrow down the subject needlessly and squander many good opportunities for analysis. Federalism, in the way it defines society, is a subject that affects many walks of life and often in a way that would not appear obvious at first such as with gay rights, regional politics, mass media and legalism. Our selection of articles this year touch on such subjects and, we hope, will serve to not only educate all readers on federal governance but will also broaden views on how federalism can be relevant in so many aspects of our lives.

de gouvernance ne sert qu'à limiter la discussion sur le sujet. En effet, de par ses profonds effets sur la nature d'une société et de ses institutions, la gouvernance fédérale affecte de nombreux aspects de notre vie et ce d'une manière qu'il peut parfois être difficile à comprendre immédiatement. Certainement, les articles qui suivront nous démontrent comment le fédéralisme peut être pertinent dans des conversations sur les droits des homosexuels, le rôle des médias dans notre société et les questions légales. En présentant la sélection suivante d'articles, nous espérons donc aussi élargir les horizons intellectuels de nos lecteurs en leur offrant de nouvelles perspectives qui leur permettront de redéfinir leur définition du fédéralisme.

What is Federalism?

Travis Lane

Federalism is a governance system in which powers are divided between a central government and a number of regional entities such as states, provinces, sometimes Republics or any such combination of federal units.¹ The biggest distinguishing feature is not the nomenclature used of course but the fact that the aforementioned federal units retain some great degree of independence when it comes to managing their own affairs. One could almost say that a federation is thus a country composed of autonomous parts. Nowadays, states are overwhelmingly either federal or unitary in nature. A unitary system is one which has centralized institutions and can delegate power to the provinces, regions, or municipalities, but is not legally obligated to do so. Thus the power of the regions within a unitary system is in flux. While federal states, as stated above, have legislatively divided powers between the federal and provincial governments. In a unitary governance system, the central government can still grant the provinces, or regions, powers over their own area of influence, but they can be taken back at any time should the government wish for the constituent entities are naught but extensions of the state. AN excellent example is the upcoming reshuffle of French regions that will include redrawing of may interior borders. Such an initiative came from Paris and is under the sole influence of Paris.² In a federal system, the government must open the constitution; any attempt to modify the balance of power between federal government and its members implies a fundamental reworking of the state's legal framework making reform a rather lengthy and complicated affair. This paper will attempt to truly define what federalism is by examining the

¹ Stevenson, Garth, ed. *Federalism: The Canadian Encyclopedia* (2006).

² Ministère de l'intérieur, *Questions les plus fréquentes / La réforme / Réforme des collectivités territoriales*.

differences in federalism, federal governance systems, and federations. As well, this paper will examine the reasoning for why a state would choose a federal system.

Federal governance systems and federations are descriptive terms used to define particular forms of governing institutions.³ Federal governance systems are seen as states which allow regional self-rule and shared rule through common central and regional government institutions.⁴ The fact that non-democratic states can adopt federal governance structures allows for a much more inclusive group of states to be accepted a federal states and adds to what federalism is.

Why would a state choose a federal system? That answer can be provided through an analysis of what federal states are capable of doing. A federal state has the ability to be flexible and to adapt to changes within a state.⁵ The Center for Systemic Peace compiled a list of all intrastate and interstate conflict since 1946 and the results are that there is less intrastate violence within federal states.⁶ This could be due to the inherent ability of federal institutions. To further add to this argument, decentralized, federal approaches are currently being considered as solutions to the conflicts found around the world; in Afghanistan, Angola, Bosnia, Cyprus, and at least 6 others states.⁷ The constitutional division of powers in a multileveled government structure means that the federal governments needs not be responsible for everything within a state, instead it can delegate rather important responsibilities to the regional governments; leaving more time and resources for the federal government which enables it to better deal with national issues. For example, in Canada, the principle behind the current division or powers is

³ Ronald L. Watts. *Comparing federal systems in the 1990s*. (Kingston 1996), 6.

⁴ Ibid, 7.

⁵ John Gerring, Strom C. Thacker, and Carola Moreno. *Are Federal Systems better than Unitary Systems?* (2007).

⁶ Dr. Monty G. Marshall. *Center for Systemic Violence: Major Episodes of Political Violence 1946-2013* (2014).

⁷ Kristin M. Bakke, and Wibbels Erik, "*Diversity, Disparity, and Civil Conflict in Federal States* (2006), 1-50.

that responsibilities should go to the government which is the most apt to competently deal with it⁸. Thus regional issues, education and healthcare are, by and large, provincial responsibilities while defense, foreign affairs and currency affairs are federal responsibilities. Of course size, demography, and historical factors matter as to the applicability of a federal system over a unitary system and vice-versa, but a federal system does allow for a multitude of issues to be addressed simultaneously within the different structures of a federation. Yet, it is entirely reasonable to affirm that the federal state provides the administrative structure that allows for regional entities to duly pursue their often disparate interests while minimizing internal conflict that would arise from having a central government be the final authority on all matters of policy be they national or regional.

If one looks at ethnically and linguistically heterogeneous states such as Russia and Canada, it is clear that federalism provides a state with internal security and strong chances for internal conflict resolution, as well as government interaction with its population. Why federalism then? Not because it is a better system than a unitary system overall, but it is a system which is quite capable of addressing regional interests of a state of many sizes, demographics, and with historical challenges. In order that a definition of what federalism is, it is important to consider the disparity between the common view of what federalism seems to be and what it is actually comprised of. Federalism is not just the division of powers within a state, it is the legally, and constitutionally, binding separation of powers between federal and regional governance structures. Therefore it is a system which is adaptable and provides greater security

⁸ John Gerring, Strom C. Thacker, and Carola Moreno. *Are Federal Systems better than Unitary Systems?*

to a region and state while allowing for all regional and state issues to be addressed at their respective levels of government; regional, state, or interstate.

Qu'est-ce que le fédéralisme?

Le Fédéralisme se réfère généralement à une manière d'organiser le pouvoir dans une structure étatique. Dans une fédération, le pouvoir est partagé entre un gouvernement central et un certain nombre d'Unités fédérées. Au Canada, on parle de provinces et de territoires; Aux États-Unis, le terme d'états est utilisé et en Russie, pays comportant une structure multi-gouvernementale très versatile, le pouvoir est partagé entre Moscou et un mélange de sujets fédéraux consistant de Républiques, de provinces et de territoires qui possèdent des degrés variés d'autonomie

¹². Il existe plus de deux dizaines de fédérations mais elles ne sont pas définies par un type précis d'organisation. Il est donc quelque peu difficile de strictement définir un système fédéral étant donné la nature éclectique de l'organisation des pouvoirs dans les fédérations du monde. De par la structure des états modernes, la majorité des systèmes de gouvernance à l'international peuvent être classifiés comme étant soit fédéraux ou unitaires. Mais attention, ce n'est pas la simple présence de gouvernements régionaux qui définit une fédération! En effet, il n'existe pas d'états modernes qui ne font pas l'usage de subdivisions administratives. Plutôt, ce qui distingue l'état unitaire c'est que malgré toute forme de délégation par le gouvernement central, celui-ci n'aura généralement pas d'obligations légales par rapport à ses administrations de niveau régional ce qui fait de celles-ci des entités dépendantes pouvoir central. Dans un tel concept, le gouvernement national est libre de réorganiser ses régions ou de modifier les pouvoirs détenus par celles-ci. Un exemple récent est celui de la France qui a récemment

¹ Stevenson, Garth, ed. *Federalism: The Canadian Encyclopedia* (2006).

² *The Constitution of the Russian Federation*, (1993 Moscow), Ch. 3, Art. 65.

organisée son territoire selon une décision prise au niveau de Paris.³ De cette manière, tous pouvoirs délégués sont assujettis à une prérogative centrale. Vu du côté fédéral, cette distinction s'exprime par le fait que les pouvoirs et compétences des régions, ce que certains appelleraient privilèges, sont établis et protégés par la loi qui va définir les pouvoirs des différents niveaux de gouvernance. Dans un système fédéral, il faudrait en théorie amender ou remplacer le régime constitutionnel afin de modifier l'équilibre des pouvoirs entre la capitale et les régions. En d'autres termes, une fédération est un groupe d'états fédérés sous une bannière nationale mais qui demeurent indépendants pour tout ce qui attrait à leurs affaires internes. Nous allons donc ici tenter de mieux comprendre la nature des systèmes fédéraux ainsi que la raison pour laquelle une telle organisation des pouvoirs est parfois nécessaire et parfois préférable à un système unitaire.

Revenons un instant aux bases. Le terme de fédération est un descriptif qui implique la présence d'une forme particulière d'institutions servant à la gouvernance.⁴ Les systèmes de gouvernance fédérale permettent, dans le contexte d'un état, un certain degré d'autonomie des régions et du partage des pouvoirs entre celles-ci et le gouvernement fédéral.⁵ Qu'un état soit démocratique ou non ne devrait pas être un facteur dans notre analyse quant à l'organisation des pouvoirs dans un état.

Pourquoi une fédération? On peut répondre à cette question en étudiant ce que rends possible un état fédéral en termes de gouvernance. Une première chose qui vient à l'esprit est un

³ Ministère de l'intérieur, *Questions les plus fréquentes / La réforme / Réforme des collectivités territoriales*.

⁴ Ronald L. Watts. *Comparing federal systems in the 1990s* (Kingston 1996), 6.

⁵ Ibid, 7.

haut niveau de flexibilité et la capacité de tels états à s'adapter aux changements.⁶ Ayant fait une liste de tous les conflits armés depuis 1946, le *Center for Systemic Peace* a conclu que les états fédéraux sont moins assujettis à des périodes de violences internes. De plus, une approche basée sur la décentralisation et le fédéralisme a été considérée en ce qui attrait à la résolution de nombreux conflits à travers le monde; notamment en Afghanistan, en Angola, en Bosnie, à Chypre et dans une poignée d'autres états.⁷ La division des pouvoirs et l'usage de multiples échelons de gouvernements permettent l'attribution des responsabilités selon un principe qui veut que la prérogative revienne au palier gouvernemental le plus apte à gérer le dossier en question. Cela permet conséquemment la délégation de nombreuses tâches importantes aux entités régionales tout en permettant au gouvernement fédéral d'allouer ses ressources aux affaires qui sont de son domaine exclusif telle la défense où les affaires internationales ainsi que la signature de traités. C'est d'ailleurs le cas particulièrement au Canada⁸. Tout de même, cela ne veut pas non plus dire l'établissement de fédération partout dans le monde est une option viable où même nécessairement désirable. En effet, de nombreux facteurs tels la taille et la nature des populations, les conditions économiques et géographiques et la position géopolitique d'un état donné peuvent influencer dans le choix entre fédéralisation et centralisation. Selon nous, il est tout de même tout à fait raisonnable d'affirmer qu'un système fédéral fournit les structures institutionnelles nécessaires à un processus à travers lequel les ensembles régionaux souvent disparates de certains grands états peuvent poursuivre leurs propres intérêts tout en minimisant

⁶ John Gerring, Strom C. Thacker, and Carola Moreno, *Are Federal Systems better than Unitary Systems?* (Boston, 2007).

⁷ Kristin M. Bakke, and Wibbels Erik. *Diversity, Disparity, and Civil Conflict in Federal States* (2006).

⁸ Gerring, Thacker, and Moreno. *Federal Systems?*

les conflits internes qui seraient autrement présent dans une structure centralisée. Cela est encore plus vrai dans le contexte de fédérations multi ethniques.⁹

Loin de nous l'idée de promouvoir le fédéralisme à tout prix. Plutôt, nous essayons de démontrer que le fédéralisme est un système qui, dans le bon contexte, permet de fournir sécurité et stabilité interne à des états qui serait autrement très difficile à gouverner. Pour adéquatement définir le concept de fédéralisme, il est important de faire la distinction entre les notions de bases qui constituent le concept et les idées qui y sont associées. Le fédéralisme n'est pas la simple séparation des pouvoirs entre le centre et les régions. Loin d'être une simple question de décentralisation, le fédéralisme implique une indépendance partielle des unités fédérés et ce avec garanties constitutionnelles. C'est donc cette flexibilité, et de surcroît, la garantie légale donnée aux régions qu'elles resteront aux commandes en ce qui concerne leurs prérogatives qui contribue à un plus haut degré de stabilité dans les structures fédérales. On n'affirme pas ici que seuls les régimes fédéraux soient capables d'être flexibles où d'administrer leurs régions efficacement. Force est tout de même de reconnaître que le concept de fédération est articulé autour de ces questions cruciales. En effet, les réalités géographiques et socio-politiques de nombreux pays ont, à travers l'histoire, forcés leurs dirigeants à faire des choix par rapport à la manière de gérer leurs états. Il faut constater que dans les contrées les plus hétérogènes où possédant une forte tradition d'autogestion régionale, l'option fédérale et sa stabilité inhérente est une alternative très avantageuse.

⁹ Yonathan Fessha, *Ethnic Diversity and Federalism: Constitution Making in South Africa and Ethiopia* (Surrey 2010), 246.

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<http://www.queensu.ca/iigr/pub/archive/books/ComparingFederalSystemsInThe1990s-Watts.pdf>

Media from Concentrate: Portrayals of Québec Nationalism in Canadian Media

Tim Logan

“Diversity of opinion and aggressive news gathering tend to disappear with the disappearance of competition, and public opinion could thereby become more of a hostage to private interests than a master to public policy.”¹⁸ These were the words of a young entrepreneur named Conrad Black in 1969. He went on to control over 43% of Canadian circulation, along with 35% of the book market. Black argued against anti-concentration regulations by claiming they would constitute government infringement on press freedoms. The 1981 Kent Commission on newspaper ownership summed up the counterargument eloquently: “For the heads of such organizations to justify their positions by appealing to the freedom of the press is offensive to intellectual honesty.”¹⁹ Since then, a consensus has formed amongst journalists and those that study them that corporate ownership negatively affects content.

Should we care if newspaper content is being affected? How does this influence happen? How pervasive is it, and to what effect? These are the questions this paper addresses. It begins with a discussion of the media’s roles in modern democracies and threats to its ability to fulfil them. From there I move to an overview of the mechanisms of editorial control, the evidence for their existence, and their impacts on content. As there is little discussion of the impacts on coverage of domestic nationalism in the literature, I examine Québec’s Charter of Values to help fill this gap. Specifically, I ask two questions: what is the impact of ownership on media

¹⁸ John Miller, *Yesterday's News Why Canada's Daily Newspapers Are Failing Us* (Halifax 1998), 80.

¹⁹ Canada. Royal Commission on Newspapers and Tom Kent, *Royal Commission on Newspapers: [Report]* (Hull, 1981).

coverage of Québec nationalism? And to what extent is this impact mediated by market characteristics? I answer these questions with structural and manifest analyses of three Canadian newspapers: the *Globe and Mail*, owned by the Thomson family, and the *National Post* and *Ottawa Citizen*, two corporate papers owned by Postmedia. I have two hypotheses: first, that the *Post* and the *Citizen* will have a more conservative outlook on the Charter of Values than the *Globe*, and second, that the conservative impact of ownership on the *Citizen* will be less than that on the *Post*.

News media and democracy

If content is indeed affected by ownership, then Canada is in a precarious situation - today, the five largest corporations (Postmedia, Woodbridge, Quebecor, Power Corp, and Torstar) control 82% of daily newspaper circulation. In economics, it is standard to consider a market at risk of harm from oligopoly when the top four firms control more than 50% of the market, and Canada is well over this limit: Postmedia and Quebecor alone control 54% of daily circulation.²⁰ At the national level, two-firm concentration is 100%, with only the *National Post* and the *Globe and Mail* publishing. (The consensus among media scholars is that levels as low as 20% are cause for concern).²² Newspaper choices are thus very limited, yet also very relevant - 73% of Canadians read a daily newspaper at least once a week.²³ This large sphere of influence has profound implications for Canadian politics given the media's roles in modern democracies.

²⁰ Robert G. Picard, *Measures of Concentration in the Daily Newspaper Industry* (1988), 62.

²¹ Perry Rand Dyck, *Canadian Politics* (Toronto 2012), 157.

²² Robert G. Picard, *Press Concentration and Monopoly: New Perspectives on Newspaper Ownership and Operation*, (Norwood 1988), 204.

²³ *Faq | Newspapers Canada*, Newspapers Canada (accessed 18 November 2013).

First, the media function as watchdogs, observing public behaviour and watching for transgressions of social norms, morals, and laws.²⁴ Their focus is very wide, from politicians to businesses to other media sources and everything in-between. If certain parties are getting ‘free rides’ from the media, then they may not be held accountable for their actions - would Watergate have happened without Bob Woodward and Carl Bernstein? The threat of exposure and public shaming also acts as a disincentive towards bad behaviour.

Second, and perhaps most importantly, the media function as educators. As Johanna Dunaway writes, the media ought to “provide the public with sufficient information for evaluating leaders and governance and for making electoral choices.”²⁵ We obtain nearly all of our political information from the media, and as technology has enabled more people to participate in politics and be heard, being well-informed has become more and more important. And with information especially, quality is far more important than quantity.²⁶ The unity of a country may even depend on this information and the discussion it creates, as it did in Canada in 1980 and 1995, and as it may in Scotland in 2014.

Third, the media facilitate and mediate these discussions. Modern societies are large and complex, as are the issues facing them, which mean that a division of labour is almost certainly necessary. Few people have the time to thoroughly research these complex matters, so, we rely on the media to present the strongest available evidence on each side and then we make our decisions based on that. This need for public deliberation suggests a need for “professional

²⁴ Herbert J. Gans, *Deciding What's News: A Study of Cbs Evening News, Nbc Nightly News, Newsweek, and Time*, (New York 1979), 293.

²⁵ Johanna Dunaway, *Markets, Ownership, and the Quality of Campaign News Coverage* (2008): 1193.

²⁶ Michael Baranowski, *Navigating the New : A Political Media User's Guide*, 3. Miller, *Yesterday's News*, 81.

communicators” - in other words, a professional and dedicated media.²⁷ In addition to influencing the quality of these discussions, the media also play a large role in determining the subjects themselves.

The fourth role of the media is that of the agenda-setter. Agendas are “a ranking of the relative importance of various public issues,” and through their choice of topics, the media exerts a large amount of control over what is on people’s minds.²⁸ While they don’t always lead public opinion (since some issues like unemployment tangibly affect many people) they do in many cases simply because some issues affect only a small group.²⁹ In these cases, the media will necessarily lead public opinion because without coverage there would be no thought given to the matter and therefore no opinion would form.

So, the media determine what information we have, the arguments we see, and the topics *du jour*. The net result of this is that they have a powerful impact on public opinion. While some scholars argue to the contrary,[†] most of this work uses data from a time before concentrated media and interpretive journalism, which are the current context in Canada. As we will soon see, concentrated media tends to reduce the diversity of information and viewpoints available - this necessarily shapes public opinion in the long run, because information is the key to forming opinions. Agenda-setting also has ‘priming’ impacts: different sets of words trigger different mental associations and thus creates different opinions.³⁰ For example, contrast “the mission in Afghanistan” with “the war in Afghanistan”: one emphasizes purpose and a desire to help, the

²⁷ Benjamin I. Page, *Who Deliberates?: Mass Media in Modern Democracy* (Chicago 1996), 106.

²⁸ James Dearing, qtd. in Stuart Neil Soroka, *Agenda-Setting Dynamics in Canada* (Vancouver 2002), 6.

²⁹ *Ibid*, 10, 20.

[†] Soroka’s book on agenda-setting reviews the important works advancing this hypothesis.

³⁰ nePaul W. Nesbitt-Larking, *Politics, Society, and the Media*, (Peterborough 2007), 335.

other emphasizes violence. A by-product of this is that media influence peaks when a new issue or sub-issue appears and there is an opportunity to frame it in a certain way.³¹ The extent to which the media fulfils its roles therefore holds a large amount of sway over public opinion and politics as a whole. So, how well are these roles being performed?

Ownership and the roles of the media

Over the past twenty years, media in Canada and around the world have fallen victim to tabloidization and trivialization. Competition from supermarket gossip magazines such as *People* and *Us* and a declining emphasis on civic responsibility have bitten into their readership; in an effort to hold their place, newspapers' entertainment sections have swollen while their substantive news coverage has gradually been replaced with shallower, easily-digested 'human interest' stories. This shift was on full display in 1994 when the *New York Times* quoted the *National Enquirer* while reporting on the trial of O.J. Simpson. The very definition of what qualifies as news has radically changed, and the quantity of political information we receive has declined considerably.

So too has the quality of this information. Objectivity, the standard of excellence in the mid-20th century, has been eclipsed by interpretive reporting, where factual reporting is accompanied by subjective analysis. This creates a situation in which "people still trust newspapers ... and are largely unaware of the political diet being served up along with these other dishes."³² Declining revenues from readership and advertising have led to staffing cuts - and amongst the first to go are the political correspondents. When combined with the rise of

³¹ Soroka, *Agenda-Setting Dynamics in Canada*, 104.

³² David Taras, *Power and Betrayal in the Canadian Media* (Peterborough 2001), 217.

punditry and political activism amongst the journalists themselves, we end up in a situation of ‘activist presses’, wherein the press themselves become politicized actors, filling the gaps in their coverage with argumentation and opinion.³³ Now, this isn’t necessarily a bad thing: the news media in America has seen all of these changes, yet their marketplace of ideas still works “reasonably well (...) [Because] there is sufficient competition and diversity in the information system.”³⁴

Canada’s information system, on the other hand, is much more concentrated and therefore less competitive - so, how does concentration relate to diversity? There is disagreement on this in the literature - Hale, for example, finds no significant difference in editorials between chain and non-chain papers.³⁵ Some of the smaller papers purchased by Hollinger seemed to have actually improved in this field after changing hands.³⁶ Economies of scale could make more resources available to reporters and allow for better-researched stories, and maybe the organizational distance created between reporters and the new executives result in a “divorce of ownership and control.”³⁷ A larger, more powerful conglomerate might be better-equipped to stand up to manipulative advertisers.³⁸ And competition doesn’t insure diversity: McComb’s 1988 analysis of competing papers in Winnipeg and Montreal shows a remarkably high degree of similarity.³⁹

³³ Page, *Who Deliberates?* 116.

³⁴ *Ibid*, 124.

³⁵ Dennis F. Hale, *Editorial Diversity and Concentration* (Norwood 1988).

³⁶ James P. Winter, *Democracy's Oxygen: How Corporations Control the News* (Montreal 1997), 34.

³⁷ Nesbitt-Larking, *Politics, Society, and the Media*, 108.

³⁸ *Ibid*, 109.

³⁹ Maxwell E. McCombs, *Concentration, Monopoly, and Content* (Norwood 1988).

Unfortunately, these outlooks seem overly optimistic. Empirically, there is “plentiful evidence” from around the world that concentrated ownership leads to lower quality and less diversity.⁴⁰ Studies from the UK show the intervention of Rupert Murdoch into the content of his holdings there, while evidence from Italy shows that Silvio Berlusconi used his television empire to gain power and hold on to it.⁴¹ Bagdikian chronicles many interventions by owners in the United States, ranging in size from small-town Delaware to the support of McCarthyism by the Hearst chain,⁴² while Dunaway finds that corporate ownership decreases issue coverage in Congressional elections.⁴³ Hallock shows a decrease in local content due to corporate ownership and reviews other similar findings.⁴⁴ Returning to Canada, the Kent Commission also notes negative impacts of corporate ownership on diversity.⁴⁵ Like McComb, Candussi examines Montreal and Winnipeg, but after one paper in each town closed, leaving monopolies in both towns. He finds small but significant decreases in quality and newsholes (the space devoted to news coverage).⁴⁶ Soroka and Fournier, in an anonymous survey of Canadian journalists, find that 86% of them believe that concentrated ownership lowers quality and diversity of content.⁴⁷ It is fairly clear that concentrated ownership has real impacts on newspaper content - how, then, does this influence happen?

Causal links between ownership and content

⁴⁰ Gillian Doyle, *Media Ownership: The Economics and Politics of Convergence and Concentration in the UK and European Media* (London 2002), 19.

⁴¹ Ibid.

⁴² Ben H. Bagdikian, *The Media Monopoly* (Boston 1992), 41-42.

⁴³ Dunaway, *Markets, Ownership, and the Quality of Campaign News Coverage*.

⁴⁴ Steven M. Hallock, *Editorial and Opinion: The Dwindling Marketplace of Ideas in Today's News* (Westport 2007).

⁴⁵ Canada. Royal Commission on Newspapers and Kent.

⁴⁶ Winter Candussi, *Monopoly and Content in Winnipeg* (Norwood 1988).

⁴⁷ Stuart Soroka and Patrick Fournier, *With Media Ownership, Size Does Matter*, 12 February 2003.

David Radler, former president of Hollinger Incorporated and Conrad Black's right-hand-man, once said of the newspaper empire he oversaw: "I will ultimately determine what the papers say and how they're going to be run."⁴⁸ Radler's statement confirmed what Warren Breed wrote over fifty years ago: "Every newspaper has a policy, admitted or not."⁴⁹ Some owners, like Black, openly and explicitly dictate editorial policy to their employees.⁵⁰ Black "constantly injected political partisanship" into his acquisitions, and this culminated in his founding of the *National Post* in a publicly-trumpeted attempt to "unite the right."⁵¹ This overt trend continued even after Black sold his holdings to Israel Asper's CanWest in 2000 - in fact, the decrees only became more explicit. In 2001, CanWest subsidiaries across the country were ordered to run editorials written at company headquarters in Winnipeg, leading to a by-line strike at several CanWest papers, including the *Montréal Gazette*. Breaches of explicit policy are generally treated very harshly - for example, when the then-CanWest paper the *Ottawa Citizen* ran an editorial calling for the resignation of Jean Chrétien, one of Asper's personal friends, Asper fired its long-standing publisher. The resulting furor, helped along by a report from the *Globe and Mail* on plans to centralize news content (an example of media performing its watchdog function towards media sources), resulted in CanWest abandoning its explicit dictates.⁵²

Editorial policy remained, however, but now it was enforced indirectly, through what Breed calls "social control." Through reading their own newspaper, noticing patterns of feedback and corrections from the editors, story assignment, attending newsroom conferences with the

⁴⁸ Winter, *Democracy's Oxygen*, 86.

⁴⁹ Warren Breed, *Social Control in the Newsroom: A Functional Analysis* (1955), 327.

⁵⁰ Pamela J. Shoemaker and Stephen D. Reese, *Mediating the Message in the 21st Century: A Media Sociology Perspective* (New York 2013), 159.

⁵¹ Marc Edge, *Asper Nation: Canada's Most Dangerous Media Company* (Vancouver 2007), 3.

⁵² *Ibid*, 6-7.

publisher and other executives, and occasionally receiving rebukes from their superiors where necessary, reporters develop an understanding of what is accepted and what isn't through a process of 'policy osmosis'. There are powerful incentives for staff to follow this policy - promotions, perks, scoops, and leads all depend on writing the company line. And given the focus on costs that corporate owners universally bring, there are lots of opportunities for 'squeaky wheels' to be dismissed.⁵³ New hires are likely to conform to policy already as people tend to hire those that are similar in disposition to themselves. Executives hire similar senior staffs, who in turn hire similar editors, and so on down the ranks. Thus, "news becomes largely a management product, from hiring and promotion to assignment, framing, sourcing, editing, placement and so forth, in a process of newsroom socialization."⁵⁴

The clearest way the ownership's policy manifests itself in content is through the pulling of stories that contravene it. Usually this is done for vague reasons such as time or space constraints, but the message is sent to the reporter nonetheless. Less obvious but more common is a practice known as "slanting," which involves "omission, differential selection and preferential placement,"⁵⁵ along with the selection and shaping of quotations and facts used in the story itself.⁵⁶ For instance, CanWest used to replace all references to Palestinian 'militants' in Middle Eastern newswires with Palestinian 'terrorists'.⁵⁷

⁵³ Breed, *Social Control in the Newsroom: A Functional Analysis*, 330.
Shoemaker and Reese, *Mediating the Message* 159.

Winter, *Democracy's Oxygen*, 100.

⁵⁴ *Ibid*, 139.

⁵⁵ Breed, *Social Control in the Newsroom: A Functional Analysis*, 327.

⁵⁶ Page, *Who Deliberates?* 112-3.

⁵⁷ Edge, *Asper Nation*, 135.

By far the most subtle and insidious form of control happens through the journalists themselves - Gans calls this an “anticipatory avoidance of pressure” and it is essentially unconscious self-censorship.⁵⁸ Journalists, having learned the policy through osmosis, decide that it isn’t worth the effort to buck the trend, and simply ignore any story ideas that contravene newsroom norms - it is rare for experienced journalists to be put back into line by the “invisible hand” of control because, in effect, they have internalized it.⁵⁹ The power of this effect should not be underestimated: 25% of American journalists surveyed by Kohut admitted to have avoided a newsworthy story purposely and 41% of them admitted to self-censorship, yet only one-fifth reported overt rebukes from their superiors.⁶⁰ Soroka and Fournier’s survey of Canadian journalists reveals similar trends: more than 20% of journalists overall believe that the owner’s views influence news content, peaking at between 67% and 83% at three Postmedia papers (Postmedia is the successor to CanWest). While obedience to policy is not automatic and has been shown to be mediated by professional journalistic norms, it nevertheless remains highly significant.⁶¹

These impacts spread across many areas of reporting. Hallock, as already mentioned, finds a decrease in local coverage with corporate ownership, though this may be more due to a focus on capturing circulation and increasing revenue through entertaining story material while simultaneously slashing staffing levels to cut costs. Page shows that corporate media are more likely to take a hawkish stance on foreign policy.⁶² Meanwhile, Dyck argues that conglomerate-owned media in Canada are likely to have a pro-corporate bias and that most of these

⁵⁸ Gans, *Deciding What's News*, 270.

⁵⁹ Eric Fenn Elbott, *The Giants in Our Midst* (1992), 5.

⁶⁰ Andrew Kohut, *Self-Censorship: Counting the Ways* (2000), 42-3.

⁶¹ Breed, *Social Control in the Newsroom: A Functional Analysis*, 326.

⁶² Page, *Who Deliberates?* 116.

conglomerates have many diverse interests outside of media.⁶³ The Irving family in New Brunswick is an excellent example of this. They hold all of the English-language daily newspapers in the province, and, like most media families, the Irvings have other large interests - among other things, they own the largest oil refinery in Canada, forestry operations, and a frozen foods company. Their papers are known for failing to report on the sometimes-questionable activities of their sister companies. However, there is surprisingly no work done on the impacts of policy on coverage of domestic nationalist movements in Canada, especially given the key role of the media in the 1995 sovereignty referendum.

Research design and methodology

This paper examines the portrayals of Québec nationalism in Canadian media, specifically with reference to the recently-proposed «Charte des valeurs québécoises», or Charter of Values. The Charter, tabled in the National Assembly on 10 September 2013, has been interpreted as an attempt by the sovereigntist government of Québec to reignite the sovereignty movement and win support in rural Québec. As such, this makes it an ideal candidate for study, for two reasons. First, as noted by Soroka, the media's power to shape opinion on any given issue declines over time, and not only has this debate been relatively quiet over the past few years, but the Charter is a distinct sub-issue. This means that the media's power to frame the issue should be at its zenith, so their attempts to do so should be more obvious. Second, this is the first time Québec nationalism has achieved such a high level of salience with two national papers in existence: until 1998, the *Globe* was the only truly national paper in Canada.

⁶³ Dyck, *Canadian Politics*, 157.

I use the *Globe* as a baseline against which to compare the other two papers. It is regarded as being fairly centrist, which is sensible given that for most of its history it has had to appeal to the entire population. Moreover, the Thomsons have long taken a ‘hands-off’ approach to its management.⁶⁴ As centrists have less of a penchant for ideological bent, I expect to see the *Globe* use a fairly neutral tone in reference to the Charter.

The obvious counter to the *Globe* is the *National Post*, being the only other national paper. However, the *Post*’s parent company, Postmedia, has a long history of editorial meddling - its origins are in the distinctly conservative Southam newspaper empire, which was then bought by the radically conservative Conrad Black, and then sold to the similarly conservative Asper family. After CanWest went bankrupt, its print arm was spun off into Postmedia, a buying group assembled under the leadership of *National Post* CEO Paul Godfrey. His principle backers in the deal were two large and very conservative American hedge funds, Silver Point Capital and GoldenTree Asset Management. Godfrey himself is also quite conservative - he was close to Frank Miller, former Progressive Conservative premier of Ontario, and worked for Sun Media, another conservative media group, in the early 90s. Postmedia’s long history of conservatism and both direct and indirect editorial control make its papers ideal candidates for studying the effects of ownership. As conservatives in Canada have traditionally been extremely hostile towards Québec nationalism, I expect to find both a very negative tone towards the Charter, and significantly more content published on it.

⁶⁴ Nicholas Köhler and Anne Kingston, *Canada's Rich, Troubled Thomson Family*, The Canadian Encyclopedia <http://www.thecanadianencyclopedia.com/en/article/canadas-rich-troubled-thomson-family/> (accessed 18 November 2013).

Canadian Newswire, "Woodbridge Acquires Direct Ownership of the Globe and Mail", Canadian Newswire <http://www.newswire.ca/en/story/667019/woodbridge-acquires-direct-ownership-of-the-globe-and-mail> (accessed 27 November 2013).

While the *Ottawa Citizen* is not a national paper and so is not directly comparable to the *Globe* and the *Post*, it is also a Postmedia paper and should therefore have a similar level of conservative influence within its organizational structure. It differs, however, in that it is essentially a monopoly paper. As with the *Globe*, this should mean that it will moderate its stance in order to appeal to a broad segment of the population and prevent the entry of any new competitors. Therefore, comparing the *Citizen* to the *Globe* and *Post* will allow me to examine the extent to which market characteristics mediate ownership influences. Specifically, I hypothesize that the conservative-owned *National Post* and *Ottawa Citizen* will take a more conservative stance towards the Charter than will the *Globe and Mail*, although the impact of ownership on the *Citizen* will be moderated by market considerations.

To test my hypothesis I will use three content analyses: one structural and two manifest. The structural analysis is a count of articles and editorials published, as retrieved from a ProQuest database search limited to the period of 11 September-11 October 2013.[†] I discarded passing mentions and reclassified articles and editorials where necessary. The first manifest analysis is a coding of photos of PQ MNAs from the first 10 publishing days of the period. There are three possible categories for each photo, based on how the subject is depicted: “aggressive” (e.g., hostile, smug), “explaining,” (e.g., calm, open to discussion) or “neither.” As physical copies of the *Citizen* were unfortunately not available to me and PressDisplay only archives the past 30 days of it, it is excluded from this analysis. The third and final analysis is an automated dictionary-based measure of tone, using Soroka’s Lexicoder software (available at

[†] The exact search term was equal to “(Quebec Charter of Values)”, minus the quotations. The dates were chosen to represent a calendar month after the tabling of the Charter.

www.lexicoder.com) and the accompanying Lexicoder Sentiment Dictionary. Past work has shown results from this combination to align closely with human coding.⁶⁵ The articles and editorials are coded separately, accounting for negations. The measure of tone is equal to the average of (positive - negative - negated positive + negated negative)/(word count) for each piece. My working hypotheses are as follows:

WH1: The National Post will run the most articles and editorials on the Charter, followed by the Ottawa Citizen and then the Globe and Mail.

WH2: Photos in the National Post will portray the PQ as more aggressive than those in the Globe and Mail.

WH3: News articles and op-eds in the National Post will be the most negative in tone, followed by the Ottawa Citizen and then the Globe and Mail.

Results

	Paper		
	<i>National Post</i>	<i>Ottawa Citizen</i>	<i>Globe and Mail</i>
News articles published	36	28	39
Editorials published	7	2	10*

There was no significant difference in the number of news articles published between the three papers. The *Globe* published significantly more editorials than either the *Post* or the *Citizen* ($P < .05$).

⁶⁵ Lori Young and Stuart Soroka, *Affective News: The Automated Coding of Sentiment in Political Texts* (2012).

		Paper	
		<i>National Post</i>	<i>Globe and Mail</i>
Depiction in photograph	Aggressive	2**	1
	Neither	5**	1
	Explaining	0	5**
		7	7

The *Post* published significantly more photos depicting the PQ as aggressive or neither, while most of the photos in the *Globe* showed the PQ in an explaining fashion (all $P < .01$).

		Paper		
		<i>National Post</i>	<i>Ottawa Citizen</i>	<i>Globe and Mail</i>
average tone	News articles	-0.16%	-0.11%	-0.47%
	Editorials	+0.69%	-1.6%	-0.76%*

There was no significant difference in tone in news articles between the three papers. The editorials published in the *Globe* were significantly more negative in tone than those in the *Post* ($P < .5$); the sample of editorials from the *Citizen* was not large enough to establish significance.

Analysis

WH1

While largely not significant, the preliminary results of my structural analysis do not confirm my hypothesis. Rather, they offer support for Candussi's hypothesis that corporate media holdings have less substantive news coverage than non-corporate ones. However, average word counts as measured by Lexicoder were significantly higher for both Postmedia papers in both categories, thus offering some support for my hypothesis. This may be a reflection of what

appears to be the diminished newsholes of the Postmedia papers.[†] Smaller newsholes in Postmedia papers may imply that word count may be a better structural measure of importance in situations of corporate ownership than number of pieces run - this could be a starting point for further analysis in the future. Overall this analysis neither confirms nor disconfirms my hypothesis.

WH2

Though the number of cases for each paper was relatively small, the results of my first manifest analysis are highly significant. This result offers preliminary confirmation of the first part of my hypothesis, which the conservative ownership of the *Post* would result in its content being significantly more conservative than that of the *Globe*. More photos from both papers, along with the photos from the *Citizen*, would likely confirm it more firmly.

Additionally, it should be noted that the *Post* ran a fairly derogatory cartoon of Pauline Marois on its front page on 11 September, whereas the *Globe* ran an infographic illustrating what symbols would and would not be acceptable under the Charter. These were not included in the analysis as they were not photos, but they are nonetheless indicative of overall stances. The prevalence of cartoons on the front pages of both the *Post* (and potentially the *Citizen*), as opposed to the *Globe*, could be highly informative, given the explicitly ideological nature of political cartoons and the approvals needed to run them in that location. Also of interest is the density with which the *Post* ran photos - it stopped carrying photos alongside its articles three days before the *Globe*. Thus, the ‘intensity’ of the coverage of the Charter was higher in the *Post*

[†] While not rigorously collected, passing observations from the coding of photos in the *Post* suggest that this is indeed the case with at least that paper. There seemed to be significantly more human-interest stories in the *Post* than in the *Globe*.

than it was in the *Globe*, which may also imply that corporate papers have a shorter ‘attention span’ than non-corporate ones. This analysis constitutes a moderate confirmation of my hypothesis.

WH3

My second manifest analysis disconfirms my hypothesis - none of the differences in tone were significant, save the editorial tone difference between the *Globe* and the *Post*, which ran in an opposite direction to my expectations. This could imply that there is no relation in the broader population, which is unlikely given the preliminary significance of the results from the first manifest analysis. It is also conceivable that I wrongly predicted the direction of the effect; perhaps the centre is more concerned with Québec nationalism than the conservatives. Again, this is unlikely given the significance of my previous results. A third possibility is that this is a result of a small sample size, which is very well possible, especially given the number of editorials that were sampled; samples for analyses like this one are often much higher.

The fourth and most likely possibility is that confining the dictionary count to words co-occurring or occurring very close to “Charter” and the names of key PQ members would increase measurement validity and reliability to the point where significant results are obtainable. This is the approach used by Soroka, Cutler, Stolle, and Fournier in their study of news coverage around the federal parties and leaders during the 2011 Canadian election.⁶⁶ The general count I performed may have picked up tonal words and phrases not used specifically in reference to the Charter, which would negatively impact measurement validity and help to explain why

⁶⁶ Stuart Soroka et al., *Capturing Change (and Stability) in the 2011 Campaign*, (2011).

significant results were not obtained with a method that has proven highly effective in the past. There is, however, indication that the procedure was functional to an extent as the editorials were consistently coded as being more tonal than the news coverage. This analysis only weakly disconfirms my hypothesis because of questions surrounding measurement validity and reliability.

Conclusion

Overall, the results of my analyses moderately support my hypothesis: it appears that the influence exercised on newspaper content by the political views of owners extends to coverage of domestic nationalism in addition to the other areas where its impacts have already been explored. Given the negative reactions engendered by explicit decrees of editorial policy from both journalists and the public in the past, social control is the most plausible causal mechanism. This conclusion implies that we should be seriously concerned for Canadian politics, given the highly-concentrated nature of its media holdings, especially at the national level. If concentration is not reversed, newsholes and substantive coverage may continue to be reduced, thus imperilling the ability of Canadian news media to fulfil their roles, and, by extension, threatening the quality of Canadian democracy in the larger sense. In this way, Canadian news media resemble fruit juice made from a frozen concentrate: only satisfying if you have never tasted the real thing.

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Constitutionality and the Charter

The Judiciary vs. Framer's Intent

Daniel Attard

For decades there has been controversy surrounding many of the Supreme Court's judgments regarding equality rights, specifically those concerning sexual orientation. The debate stems from whether the Supreme Court has upheld basic civil and human rights through its interpretation of the *Charter* and the inclusion of sexual orientation leading to a more comprehensive and universal understanding of democracy, or whether this instance exemplifies a growing judicial tendency to define the *Charter*, rather than interpret it, moving Canadian society away from "framer's intent." In this sense, democracy is to be understood as the unilateral acceptance of civil rights, free from judicial discrimination and infringement by the political system and legal system. Since 1982, the Supreme Court has faced critics from all sides of the political spectrum, many claiming the court has weakened the *Charter*, and as a result, Canadian democracy. However, as this paper will examine, there is an overabundance of data disproving the framer's intent argument and justifies the legitimacy of the Court as the guardian of the Constitution. This essay will argue that the Supreme Court has upheld democratic universality through its modern interpretation of the *Charter* with regards to sexual orientation and equality rights, and that the Court has been an unbiased yet authoritative mediator between the ever-evolving Canadian society and the fundamental laws that govern it. Specifically, I argue that the analogous grounds of Section 15 justify the need for a modern interpretation of the *Charter*, and that judicial discretion simply allows for the protection of our modern society. As well, this essay finds that in most cases the Court's use of its remedial powers has been in reaction to the shortcomings of the legislature, as seen in cases such as *Vriend v. Alberta* [1998]. Finally, we will examine the case of *Egan v. Canada* as an example of the Court upholding the fundamentals

of law and remaining unbiased while extending the definition of equality rights. In the latter case, the argument made is that while the Court determined that sexual orientation was equal rights issue, it remained definitive on the issue of spousal rights and upheld the legal precedence regarding the definition of a spouse. The Court will always face contention within our political system; especially from those who feel its decisions oppose their own political beliefs and argue that democracy is jeopardized by a powerful judiciary. However, we must understand that in the case of equality rights, specifically sexual orientation, the Court has been a frontrunner among the institutions willing to protect individual rights and freedoms, while ensuring that the *Charter* is both protected and protects the public equally.

The idea of “framer’s intent” has been brought up by many political critics. This is the belief that the ‘framers’ or creators, of the *Charter of Rights* created the doctrine with an underlying set of rules or basic principles that all forthcoming laws must abide by, and as such, Canadian society must also adhere to. This notion stems from the belief that laws should not be malleable or at the very least quite difficult to change given the political whim of whatever party is sitting in Ottawa. It can be agreed that our laws, for the most part, must not be easily changeable; if they were every political party holding a majority government could manipulate the laws to enforce their mandate. However, it must be noted that certain laws must not be absolute as well and that in many cases society's conventions are self-benefiting and may call for amendments to certain statutes. This argument of course refers to the inclusion of sexual orientation as part of the equality rights section of the *Charter*. While some may argue that the acceptance of conventions as laws would be detrimental to society, one cannot help but feel as though conventions are a product of society, much like the laws that govern us as well. The

acknowledgement of equal rights in general was based on societal evolution and the growing calls for the need to protect people from segregation and discrimination based on a variety of factors, and as a result it became law. The point here is not to generalize, however, one can make the argument that most of the laws governing us have grown out of society's acceptance of certain norms and standards. Society plays a profound influence on Canadian law and it is hard for critics to suggest that our laws are set in stone and are being contorted by the court. Miriam Smith explains that prior to the Charter's creation, despite their growth in numbers, gay and lesbian organizations had been unsuccessful in obtaining human rights protections.¹ However, after the actual definition of equal rights through the *Charter*, these groups gained recognition and their numbers grew, eventually allowing them to advocate in greater numbers for legal protection.² The constant modernization is evidence that people have become more accepting of former taboo issues, which in this case deal with sexual orientation, and as such the laws adapt to these new societal customs. The role of the Supreme Court is to oversee and ensure the constitutionality of these laws and adapt them accordingly, in an attempt to advance the state of unilateral democracy.

In the following section, I suggest that the concept of framer's intent is inherently flawed. I refute the belief that the drafters of the Charter believed it should be a fixed document, closed to any interpretation. Section Fifteen of the *Charter* lists certain grounds for protection against discrimination, however the list is not absolute, and there exists what are known as "analogous grounds", for which individuals may be protected as well. This suggests that when drafting the *Charter*, the framers may have listed key factors of equality, however, the list is inherently

¹ Miriam Smith. *A Civil Society?* (Toronto 2005). 166-167.

² *ibid.*

incomplete and other factors may be added at a later time if deemed to be similar. These included, but are not limited to issues of equality, freedom from discrimination, marriage rights, and citizenship. As Anne Bayefsky has analyzed, “The legislative history of Section 15 reveals little positive conception as to the meaning of equality. What emerges is a picture of dissatisfaction with the past, a desire for change and few ideas on the part of the drafters as to what the future should hold”.³ The argument made here is that the very framers of the Constitution acknowledged that society would evolve and there would be a need for a modern interpretation of the laws. By leaving room for further interpretation it is an admission on the behalf of these individuals that the *Charter* is imperfect and would need to modernize with society eventually. Bayefsky goes on to state that “in [interpreting] section 15 it is important to probe the full potential of its language”.⁴ One can argue that the very creation of a Charter is evidence that society had progressed and many felt that there was a need to protect the rights or individuals through legislation, something that may not have been as pertinent an issue in the past. Therefore, the argument supporting framer’s intent and criticizing of the “living tree approach” is nullified by the fact that the framer’s version of the *Charter* recognizes certain analogous grounds and bestows remedial powers upon the judiciary (an issue to be discussed later). If the argument against this is that framers’ intent is being ignored, then one must wonder why the framers created the *Charter* as such, allowing for open-ended discussion, interpretation, and modernization. One must consider the reasoning behind the Court’s decision to incorporate sexual orientation as a protected ground under equal rights. As Anne Bayefsky has analyzed, one must consider which factors separate what should and should not be included under equal rights

³ Anne F. Bayefsky, *Defining Equality Rights under the Charter* (Toronto 1987) 106-107.

⁴ *ibid*

clause.⁵ She examines the nature of equality rights in Canada under the *Charter*, and explains that while there are certain grounds that must be protected against discrimination, there are also a variety of factors that may not fall into this category. The Supreme Court helps define these characteristics. She explains that it is the role of the judiciary to define equality rights in the *Charter*, which, in fact, is one of its most difficult tasks.⁶ Miriam Smith wrote that, “the entrenchment of the *Charter* in 1985, and, in particular, the coming into force of section 15 in 1985 – eventually attracted the mobilizing energies of the lesbian and gay communities... during this period, the lesbian and gay communities in Canada’s urban areas grew substantially and many more lesbians and gays chose to live their lives out of the closet”.⁷ She goes on to state that the cultural life of the numerous Canadian communities grew because of this.⁸ This analysis is evidence that not only did the Supreme Court enhance equal rights for these individuals, but the original *Charter*, the one drawn up by the framers themselves, both responded to the society of the time but also led to its evolution. The evidence indicates that the *Charter* was meant to ensure the equality of all persons, however, sexual orientation being a social taboo and not as accepted in society as today, was omitted at the time. This, however, does not mean it was never to be protected through section 15, which is why the role of the Supreme Court is to oversee and interpret the law, based on what civil and human rights, and in accordance to the just standards of law.

While the analogous grounds of Section 15 have allowed the Court to extend the definition of equal rights, it is important for us to analyze the actual powers allowing the Court to

⁵ Bayefsky, *Defining Equality*. 110.

⁶ Bayefsky, *Defining Equality*. 106.

⁷ Smith, *A Civil Society?* 73.

⁸ *ibid.*

do so. The following addresses the remedial powers of the Supreme Court and argues that in most cases, the Court's use of these powers has been in reaction to the limitations the legislature has put on Canadians by refraining to include certain rights in their decision-making, notably that of sexual orientation. Under Section 24(1) of the *Charter*, those who feel their rights have been infringed upon may seek a remedy from the court.⁹ In certain cases, such as *Vriend v. Alberta* [1998]¹⁰ and *M v. H* [1999]¹¹, the Supreme Court simply used its remedial powers to enhance the *Charter* both for the benefit of society and while remaining within its constitutional boundaries. When we are asked whether the Supreme Court has drifted away from framer's intent by incorporating sexual orientation into the *Charter*, we must answer no because the court has only acted within the boundaries of framer's intent, as it was the framers themselves who gave the courts the power to remedy instances of individual infringement. Mark MacGuigan has analyzed both judicial decision making and activism and states that, "in spite of the judge's role as a legislator, justice must be administered according to law, not according to the judge's individual sense of justice".¹² The point here is that the courts are not making laws according to their individual beliefs; they are working within the limitations placed upon them to advance the law and ensure its advancement.

For the framers to include such remedial powers would have to mean that these individuals knew that there would be future problems and instances of discrimination, therefore they placed the responsibility of rectifying these problems on the courts. One can argue that the interpretation of equality rights, specifically those concerning sexual orientation, is better off

⁹ Canadian Charter of Rights and Freedoms, s. 24(1).

¹⁰ *Vriend v. Alberta*, [1998] 1 S.C.R. 493

¹¹ *M. v. H.* [1999] 2 S.C.R. 3

¹² Mark R. MacGuigan, *Sources of Judicial Decision Making and Judicial Activism*. (Toronto 1987) 32-33.

sitting in the hands of the judiciary than the legislature. While the judiciary may be an appointed position, its judges are bound to the law and are mandated with ensuring the advancement of society and the settling of disputes within the confines of Canadian law. The legislature on the other hand, while also being confined to the law, is an ever-shifting collage of Canadian politicians with specific ideals and goals, bound to varying political ideologies. One can argue that sexual orientation would not have been as easily incorporated into the Charter had it been left up to the legislature, as this branch of government often takes much time and debate before coming to a clear decision, especially on such a controversial issue. Additionally, as opposed to the legislature, whose members are consistently running for re-election, the judiciary has little to gain from political intent and the politics of partisanship, including losing votes to unpopular decisions. Furthermore, the judiciary reacts only based on an increased demand or growth in public opinion. The Supreme Court will only take cases based on their relevance to the Canadian public, their precedence (if any), and their importance in the assurance of the fundamentals of justice. Therefore, one must conclude that the framers knew society would adopt new norms (hence the analogous grounds), and that the courts would be the most unbiased body for interpreting the Charter and applying it without anything to gain (hence the remedial powers).

Many pundits who oppose judicial authority have deemed the actions of the Court as somewhat of a hierarchal coup over Canadian law-making, however, as we will examine, the legislature often needs the judiciary to act as a “constitutional watchdog” in order to both advance and impose the law within Canada. Parliament may make laws that are inconsistent with the needs of society and the Court is simply there to ensure the protection of the people and the legitimacy of such laws. Nevertheless there are still those who feel as though the Court is simply

usurping the powers of the legislature. As Andrew Petter explains, “the politics of the *Charter* suggest that even a seemingly ‘liberalized’ attitude towards equality rights is unlikely to address the underlying causes of social inequality in Canada. At best, courts may lash out at the few remnants of government discrimination”.¹³ Petter’s argument outlines the contention faced between the courts and the varying critics of the *Charter*. His argument here is that the Court’s ability to modify the definition of equality, as per the *Charter*, still does not modify society’s view on certain issues, and although the *Charter* does protect homosexuals against discrimination legally, it does not prevent it socially. While he does have a relevant point considering the fact that the *Charter* does not apply to private relationships, one cannot help but question his reasoning. Extrapolating Petter’s reasoning, the courts cannot prevent discrimination, and thus, why make it illegal at all? This is simply an instance of the backwards thinking of those who feel contention towards the judiciary and take issue with its position as the referee of constitutional politics. In the case of equal rights, the Court may not have been able to protect every person discriminated against because of their sexuality, however, there is still a role for the federal government to create societal standards. Those who feel that this is the legislature’s job should ask themselves then why the legislature never took it upon itself to incorporate sexual orientation into the *Charter* through an act of Parliament. As well, in cases such as *Vriend v. Alberta*, why did it take a case going all the way to the Supreme Court for an amendment to be made on such an issue? As MacGuigan writes, “The judge’s legislative competence is narrower than that of the legislator. His/her role is to legislate between the gaps, to fill the open spaces in the law. Thus the rule of law is maintained”.¹⁴

¹³ Andrew Petter. *The Politics of the Charter: the illusive promise of constitutional rights*. (Toronto 2010) 40.

¹⁴ MacGuigan, *Sources of Judicial Decision Making*. 32.

While this essay has largely dealt with the Court's ability to interpret the *Charter*, we have not yet examined the actual event that sparked the sexual orientation and judicial interpretation debate, which was born out of the Vriend case. Although society had become increasingly accepting of homosexuals since the time of the *Charter's* inception, there had previously not been an instance where a homosexual person had successfully challenged a violation of their rights.¹⁵ In this instance, Delwin Vriend was fired from his position at a college in Alberta because of his sexual orientation. Vriend argued that this was a violation of his *Charter* rights, and under Section 15 it was illegal for the school to discriminate against him because of his sexual orientation. The case, which worked its way up to the Supreme Court was a fundamental one for Canadian law because, as previously mentioned, not only did the court agree with Vriend, it took it upon itself to rectify the error in Section 15 which did not include sexual orientation.¹⁶ As Mary Hurley has explained, "the purpose of section 15 is to prevent the violation of human dignity and freedom by the imposition of disadvantage, stereotyping or prejudice and to promote equal recognition at law of all persons as equally deserving".¹⁷ Therefore, Section 15 forces the courts to ensure that it itself is upheld and that individuals are treated equally as per the *Charter*. Upon reaching a decision in this case, Justice Iacobucci explained that "groups that have historically been the target of discrimination cannot be expected to wait patiently for the protection of their human dignity and equal rights while governments move toward reform one step at a time".¹⁸ This reasoning is congruent with the previous assessment that while the legislature may be in charge of enacting laws, it often refrains from making such important decisions, or can take an overwhelming amount of time before deciding

¹⁵ *Vriend v. Alberta*

¹⁶ *ibid*

¹⁷ Mary C. Hurley, *Charter Equality Rights: Interpretation of Section 15 in Supreme Court of Canada Decisions*. (2007).

¹⁸ *ibid*.

to make a decision, especially when concerning the *Charter*. Margot Young examines the case and the Supreme Court's position in advancing section 15, something many had been quite critical of prior to this case. She explains that "this conclusion [is] critical for the realization of the full substantive potential of section 15(1) itself".¹⁹ She goes on to explain that the Court established positive state obligations as a result of its decision (being that the government was forced to comply with its decision) and had it not had the reasoning it did, the legislative response to such an issue would have been quite minimal.²⁰ Therefore, it is important for the courts to step in and ensure that people, such as Mr. Vriend, are not taken advantage of, and that the *Charter* is not taken for granted. As a result, sexual orientation was not only acknowledged as equal rights issue, but it was now legally enforced, which led to some of the greatest social advancements in Canadian history. The argument that the Court's decision drifts away from framers' intent is false and the proof that the framers knew a situation such as Vriend's was inevitable was when they decided to leave the Section 15 open-ended and gave the courts the power to deal with the issue whenever it came up.

Another case in which the Supreme Court fundamentally advanced the rights of homosexuals with regards to the *Charter* was *M. v. H.* In this case, the Court explained that, once again, under section 15 of the *Charter*, individuals who were in same-sex common law relationships must be treated with the same equalities and benefits of those who are in heterosexual relationships.²¹ Similarly to the Vriend case, some may claim the Court's decision was an imposition on Canadian law. However, the court did not modify anything already written, and in fact upheld the current standards concerning marriage. In this case, the Court simply

¹⁹ Margot Young. *Change at the Margins: Eldridge v. British Columbia (A.G.) and Vriend v. Alberta* (1998), 249.

²⁰ *ibid*, 250.

²¹ *M. v. H.*

explained that the exclusion of same-sex partners from benefits implying their inability to form intimate, economically interdependent relationships, and offending their human dignity was a violation of section 15.²² Nowhere in this decision does it modify the definition of marriage, which would have been a far greater amendment to the laws of Canada at the time and perhaps could be claimed as an infringement of power on the part of the court. Martha Bailey explains that in fact, while certain benefits have been granted to cohabitation couple in Canada, most are reserved for married couples.²³ At the time of her writing (2004), same-sex marriage had not yet become universal within Canada, and she explained that certain decisions of the Supreme Court had advanced the protection of same-sex couples' rights; however the court refrained from modifying legislation to allow gay marriage, which was the responsibility of Parliament.²⁴ That amendment, in fact, did come through legislature in 2005, when Parliament realized that society had evolved and decided to invoke laws that represented these changes, something the courts had been doing for twenty-odd years, but as some say, better late than never. In this instance, Parliament took the initiative to react to a greater public demand of equal rights by tacitly allowing same sex marriage to become legal. This is evidence of the earlier argument that society inevitably modernizes and allows for the blurring of previously definitive lines with time. As such, the Supreme Court ensured that the change was constitutional and in the best interest of the Canadian people, thus following Parliament's lead and using its role as *Charter* interpreter accordingly.

The final issue to be argued is that when making *Charter* decisions involving sexual orientation, the Supreme Court has done so in accordance with the principles of the law and

²² Hurley, *Charter Equality Rights*.

²³ Bailey, Martha, *Regulation of Cohabitation and Marriage in Canada* (2004), 155.

²⁴ *ibid*

fundamental justice. As previously explained, in the case of *M. v H.*, the Court did rule that same-sex couples were bound to the same protections as heterosexual couples, however it did not give them the same rights as spouses, as the law clearly defines what benefits and privileges spouses can receive as opposed to common-law couples. Perhaps the most infamous case involving this scenario is that of *Egan v. Canada*, in which a same-sex common law couple was claiming that one member should receive the pension benefits of the other. The Court held that while the protection against discrimination and the benefits of the law apply universally to all Canadians, the definition of the term “spouse” did not recognize those who were not entered in a civil union of marriage.²⁵ The court drew a line between marriage and cohabitation, explaining that the latter does not justify the right to old-age security under Canadian law.

There have been both disagreements and praise on the outcome of this case from all sides of the spectrum. Daphne Gilbert explains Justice Claire L’Heureux-Dubé’s reasoning on this case, explaining that “her approach would de-emphasize the enumerated and analogous grounds in section 15, focusing instead on historic disadvantage, social context, and the effects of discriminatory practices”.²⁶ She notes that Justice L’Heureux-Dubé came up with her own set of guidelines for an appellant to follow when contesting an infringement of section 15: that they demonstrate a “legislative distinction”, that the distinction results in the denial of one of the equality rights on the basis that that person is part of identifiable group, and that the “distinction” is discriminatory by the definition of section 15.²⁷ As well, Diana Majury writes that, “It is not clear what the Supreme Court reads into its definition of equality and discrimination...

²⁵ *Egan v. Canada*, [1995] 2 S.C.R. 513

²⁶ Daphne Gilbert. *Unequaled: Justice Claire L’Heureux-Dubé’s Vision of Equality and Section 15 of the Charter*. (2003), 1-2.

²⁷ *ibid*, 6.

[However] certain cases suggest that the Court is defining discrimination in terms of negative impact or effects”²⁸ The point here is that while the Court has often seemed to neglect rights, it is evident that these justices are decisive and look for infallible reasoning when a case is presented. It is not as many make it seem, that the court is simply presented with a discrimination case and rules in favour of the infringed party. They look for concrete evidence, as well as apply the law to its full extent, and in many cases this has led to sexual orientation being identified as a possible discrimination factor, which is why it should be protected. Nevertheless, in the *Egan* case, the court remained frank that marriages differed from common-law relationships, and the benefits awarded to one group do not necessarily apply to another, which is a blatant legal standing, not an act of discrimination.

By upholding the definition of spouses regarding sexual orientation and government benefits, the Court demonstrated its unbiased approach, which was neither politically nor morally motivated. It remained frank, explaining that under the law spouses can only receive such benefits, and did not discriminate based on gender or sexual orientation. However, by acknowledging equal rights regardless of one’s sexual orientation, we can surmise that this was still somewhat of a social victory for same-sex individuals. As well, those who argue that the decision is flawed because same-sex marriage was not legalized at the time, see their arguments put to rest as this decision was one in a series which advanced same-sex couples’ rights and their voice within Canadian society. As such, one can argue that this inadvertently led to the 2005 legalization of gay marriage in Canada. However, with regards to framers’ intent, one must maintain the argument that the Court did not stray away from its powers and the official law

²⁸ Diana Majury, *Equality and Discrimination According to the Supreme Court of Canada*. (1991), 437-439.

under the framers, and as for the eventual legalization of same sex marriage, the decision was Parliament's, and not that of the Court, which leads one to argue that contention between the two should remain at a minimal level.

The political discussion of sexual orientation and equal rights has caused much controversy and consistently led to great debates, from within the judiciary, between the Court and Parliament, and among constitutional critics alike. The consistent belief that the Court has quashed framer's intent is inherently flawed because both political and societal evolution as well as *Charter* definition disproves it. The fact that section 15 has remained open-ended with its analogous grounds stipulation, as well as the remedial powers given to the court in the original *Charter* refutes the belief that the Court has acted outside of its powers. As well, the legislature's refusal to clearly define equality rights and its ability to gain from enacting, or refraining from enacting certain equality measures, proves that Parliament is perhaps more biased and politically motivated when it comes to dealing with taboo legal issues. Finally, the Court's ability to define the law clearly, the rights of individuals, its continued dedication to the law and the *Charter*, and its unbiased approach to decision-making proves that the judiciary is best suited to define and maintain the continued protection of both the *Charter* and Canadian society. Therefore, one cannot help but to reject both conclusions: that the Supreme Court is not flawed and that sexual orientation is an equal rights issue. For to adhere to such an analogy while neglecting the needs of an evolving society, is to contribute negatively to that very society and to go against the needs of its people.

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LE BILAN DU «FÉDÉRALISME D'OUVERTURE» DU GOUVERNEMENT DE STEPHEN HARPER FACE AUX REVENDICATIONS DU QUÉBEC

Gregory Godbout

Depuis la signature de l'Acte de l'Amérique du Nord britannique, qui marque la formation de la fédération canadienne en 1867, se sont alternées des périodes de centralisation du pouvoir entre les mains du palier fédéral et d'autres où les provinces arrivaient à faire quelques gains.¹ Les relations entre le gouvernement fédéral et les provinces, surtout celles avec le Québec, sont souvent tendues. Nous n'avons qu'à penser à la naissance du mouvement souverainiste québécois et à ses revendications. Pierre-Elliott Trudeau, premier ministre canadien de l'époque, s'opposait fermement au mouvement souverainiste québécois², lui qui était un fervent défenseur des droits individuels, dont la pensée est illustrée par des réformes comme la loi sur le multiculturalisme, la loi sur le bilinguisme et le rapatriement constitutionnel qui y incluait la Charte canadienne des droits et libertés³. Même si ces mesures avaient pour but l'unification nationale par la création d'une identité canadienne basée sur des valeurs communes, ces mesures ont «[...]laissé le pays plus divisé que jamais» selon Kenneth McRoberts, car cette vision du Canada basée sur l'égalité des individus et des provinces allait à l'encontre des revendications collectives des Québécois⁴.

La décennie entre la victoire du « non » lors du référendum sur la souveraineté en 1995

¹ R. Pelletier et M. Tremblay. *Le parlementarisme canadien* (Québec 2009), 59.

² D. Monière. *Pour comprendre le nationalisme au Québec et ailleurs* (Québec 2001), 117.

³ C. Couture et D. Chandonnet. *Vingt ans après Charlottetown : L'ordre libéral au Canada, Québec*, Les Presses de l'Université Laval, 2013, p. 25-46.

⁴ R. Pelletier et M. Tremblay. *Le parlementarisme canadien* (Québec 2009), 65.

au Québec et l'élection de Stephen Harper à la tête du gouvernement canadien peut être qualifiée d'ère de confrontation entre le gouvernement fédéral, dirigé par le Parti Libéral du Canada, et la province du Québec⁵. Dès 2004, Stephen Harper s'engage à sortir de cette ère s'il prend le pouvoir et prône un « fédéralisme d'ouverture ». Une fois au pouvoir en 2006, il a redéfini sa doctrine en disant qu'une telle pratique représenterait une opportunité de libérer le Québec de la polarisation au sein de sa population par la mise en œuvre d'actions concrètes telles que le respect des compétences provinciales et la limitation du pouvoir de dépenser⁶. Son discours faisait donc la promesse d'un renouvellement de la dynamique des relations intergouvernementales⁷.

Les relations intergouvernementales entre le Canada et le Québec sont souvent sous les feux de la rampe dans les médias. Le dossier constitutionnel est au cœur de cet enjeu. Il est important de rappeler que les différents gouvernements québécois qui se sont succédé depuis le rapatriement constitutionnel de 1982 ont tous refusé de signer la Constitution dans son état actuel. Certains fédéralistes québécois croient que le Québec pourrait y donner son accord moyennant des amendements majeurs, nous n'avons qu'à penser aux cinq conditions minimales que proposaient le Premier ministre du Québec Robert Bourassa pour que le Québec accepte de signer la Constitution canadienne lors des accords du Lac Meech⁸. Quant à eux, bien des souverainistes considèrent que la constitution actuelle est la preuve que les intérêts du Québec ne

⁵ R. Pelletier et M. Tremblay. *Le parlementarisme canadien* (Québec 2009), 73.

⁶ A. Harmes. *The Political Economy of Open Federalism* (2007), 420.

⁷ A. Noel. *Fédéralisme d'ouverture et pouvoir de dépenser au Canada* (2008), 1.

⁸ E. Montpetit. *Le fédéralisme d'ouverture : La recherche d'une légitimité canadienne au Québec* (Québec 2007), 29.

peuvent être protégés dans le cadre constitutionnel actuel et que cela justifie l'indépendance⁹. Il y a donc consensus entre les différents partis à l'Assemblée nationale, avec plusieurs distinctions bien sûr, que le fédéralisme canadien comme il a été institutionnalisé en 1982 ne concorde pas avec la vision que bien des Québécois se font du Canada¹⁰. Afin de bien saisir l'enjeu entourant notre article, il sera important de circonscrire le concept de fédération ainsi que son corollaire beaucoup plus spécifique qu'est le « fédéralisme d'ouverture » dans le contexte politique canadien.

Tout d'abord, le concept de fédération sera défini. Selon l'équipe de Perspective Monde de l'Université de Sherbrooke, une fédération est un pays où la constitution sépare les pouvoirs en au moins deux ordres politiques distincts¹¹. Cela suppose donc que les compétences législatives sont réparties entre le pallier fédéral et les pouvoirs régionaux (provinces, cantons, états, républiques)¹². Un État fédéral s'oppose à un État unitaire, où seul le pouvoir central peut légiférer. Dans une fédération, le pouvoir central ne détient donc pas la pleine souveraineté car elle est partagée, selon divers degrés, avec les pouvoirs régionaux¹³. Un élément important de ce type de d'organisation de l'État, est la non-subordination des subdivisions au gouvernement central. En effet, Ottawa ne peut dissoudre les assemblées législatives provinciales et la légitimité de celles-ci émane de la relation que ces provinces entretiennent avec leurs populations respectives.

⁹G. Laforest. *The 20th annual McDonald lecture in constitutional studies: What Canadian Federalism Means in Québec* (2010), 3.

¹⁰M. Bock-Côté. *De la reconnaissance du Québec à celle des Québécois : retour sur la reconnaissance de la nation par le gouvernement de Stephen Harper à l'automne 2006* (2007), 6.

¹¹Équipe Perspective Monde. *Définition de Fédération dans le glossaire* (2013).

¹²Ibid.

¹³R. Pelletier. *La dynamique fédérale au Canada dans «Le fédéralisme en Belgique et au Canada* (2009), 1.

Philip Resnick distingue deux types de fédérations : Les fédérations territoriales et les fédérations multinationales. Au sein des premières est proposé une vision commune de la nationalité alors qu'au sein des secondes, les diverses nations qui la composent ont droit à une certaine reconnaissance¹⁴. Selon lui, ces deux visions sont présentes au Canada, car la plupart des Québécois envisagent la fédération comme étant multinationale, tandis que la plupart des habitants des neuf autres provinces la considèrent surtout comme étant territoriale¹⁵. Cette division est clairement illustrée par les sondages qui démontrent que les résidents du Québec se définissent d'avantage comme Québécois que comme Canadiens et les résidents des autres provinces ont en général développé un sentiment d'appartenance beaucoup plus grand envers le Canada¹⁶. En reconnaissant des droits collectifs aux peuples autochtones aux articles 25 et 35 de la Charte, la constitution canadienne présente certains aspects d'une fédération multinationale¹⁷. Alain Noël complète en affirmant que le Canada est de fait une fédération multinationale, par les différentes nations qui la composent, autant autochtones, québécoises ou acadiennes, mais fonctionne bien souvent comme si elle était territoriale¹⁸.

Réjean Pelletier rappelle à quel point les suites du rapatriement constitutionnel de 1982, c'est-à-dire les tentatives de réformes constitutionnelles, ont marqué l'imaginaire collectif canadien et font en sorte que le désir de rouvrir le dossier constitutionnel est très faible parmi les décideurs politiques et la population.¹⁹ Il rappelle aussi l'incompréhension de la plupart des habitants du Canada face aux revendications historiques du Québec et d'un manque de volonté

¹⁴ P. Resnick. *Le Canada : une fédération territoriale ou multinationale* (2013), 21.

¹⁵ Ibid., 29.

¹⁶ Ibid., 34.

¹⁷ R. Pelletier et M. Tremblay. *Le parlementarisme canadien* (Québec 2009), 78.

¹⁸ A. Noël. *Fédéralisme d'ouverture et pouvoir de dépenser au Canada* (2008), 13.

¹⁹ R. Pelletier. *Le renouvellement de la fédération canadienne : Quand l'immobilisme tient lieu de politique* (2013), 55.

du côté canadien à faire des concessions²⁰. À titre d'exemple, le Québec avait comme revendications la reconnaissance du Québec comme société distincte, l'octroi d'un droit de veto au Québec pour toutes modifications à la constitution, le droit de retrait avec compensation pour tout programme fédéral représentant une ingérence dans les compétences provinciales, plus de pouvoirs en matière d'immigration ainsi que la garantie que le Québec puisse sélectionner trois des neuf juges à la Cour suprême. Selon Éric Montpetit, il y a aurait un espace dans l'ordre constitutionnel actuel qui permettrait de venir apaiser l'inconfort québécois face au fédéralisme canadien et qui se définit autour de ces points : La reconnaissance du caractère dualiste du Canada, la légitimation de l'utilisation de la clause dérogatoire, le respect des compétences provinciales, l'attribution du pouvoir à l'Assemblée nationale de nommer les juges à la Cour suprême du Canada, le règlement du déséquilibre fiscal ainsi que l'encadrement du pouvoir de dépenser²¹.

Quant à lui, Adam Harmes vient ajouter une autre dimension au fédéralisme d'ouverture qui, selon lui, s'insère à merveille dans l'idéologie néolibérale dont est adepte le Parti conservateur²². Il démontre qu'une telle décentralisation, en engendrant une réduction de la taille de l'État fédéral, engendrerait indirectement une semblable réduction au niveau provincial à cause de la compétition pour les taxes et les impôts²³.

Considérant qu'il y aurait un espace au sein de l'ordre constitutionnel canadien actuel permettant au gouvernement fédéral de calmer l'inconfort ressenti par une bonne partie de la population québécoise par rapport au fédéralisme canadien et cela sans procéder à une réforme

²⁰ Ibid., 51.

²¹ E. Montpetit. *Le fédéralisme d'ouverture* (Québec, 2007), 62-78.

²² A. Harmes. *The Political Economy of Open Federalism* (2007), 422.

²³ Ibid., 433.

constitutionnelle, il sera intéressant de se demander où se situe Stephen Harper aujourd'hui face à cet engagement électoral. À ce jour, peu d'études ont été faites permettant de porter un tel constat. En passant en revue les aspects saillants des relations intergouvernementales entre le Canada et le Québec depuis son arrivée au pouvoir en 2006, quel bilan peut-on faire du « fédéralisme d'ouverture » de Stephen Harper?

Sans porter de jugement trop hâtif, j'estime que le bilan de son ouverture face aux revendications du Québec est assez mitigé. Malgré l'apparence d'ouverture et les certes quelques avancées, «[...] il importe de préciser que les résultats demeurent encore assez limités»²⁴.

Le bilan traitera principalement de deux grands aspects, premièrement des mesures qui tendent vers la reconnaissance de la dualité des peuples fondateurs du Canada, c'est-à-dire s'approchant d'une vision multinationale du fédéralisme et se distanciant donc de l'idéal du «Canada one nation» constitutionalisé lors du rapatriement de 1982²⁵. La motion reconnaissant la nation québécoise ainsi que l'octroi d'un siège à l'Unesco pour le Québec seront traités.

Deuxièmement, il sera question du respect du partage des compétences. Plus spécifiquement, on se penchera sur le règlement du déséquilibre fiscal et l'utilisation du pouvoir de dépenser.

Tout d'abord, le gouvernement canadien de Stephen Harper a soumis à la Chambre des communes, en 2006, une motion reconnaissant les Québécois et les Québécoises comme formant une nation au sein d'un Canada uni²⁶. Ce faisant, il reconnaissait la distinction québécoise, mais sans l'enchâssement constitutionnel qu'aurait permis la réussite des Accords constitutionnels

²⁴ R. Pelletier et M. Tremblay. *Le parlementarisme canadien* (Québec 2009), 74.

²⁵ M. Bock-Côté. *De la reconnaissance du Québec* (2007), 10.

²⁶ R. Dutrisac et La Presse Canadienne. *Le Québec reconnu comme nation-Une motion sans conséquence, avoué Ottawa* (2006).

manqués de Meech et de Charlottetown²⁷.

Pour Philip Resnick, en reconnaissant les Québécois comme une nation et non le Québec la motion évitait de manière habile de reconnaître le caractère national du Québec et toute possibilité de lier l'identité nationale québécoise avec le pouvoir politique du Québec, ce qui est incompatible avec la vision mono-nationale du Canada, excluant bien-sûr la reconnaissance des droits collectifs des peuples autochtones et les différents traités signés avec ceux-ci²⁸. Comme le rappelle Mathieu Bock-Côté, cette reconnaissance n'a pas eu d'effets politiques, ses effets se limitant à une portée purement symbolique²⁹. Il l'interprète même comme étant une tentative de «[...]décrocher durablement le désir de reconnaissance identitaire et symbolique de la nation québécoise de ses conséquences politiques[...]»³⁰.» Vision quelque peu pessimiste du geste de Stephen Harper, à moins que l'on considère ce geste comme purement électoraliste, visant à agréger les votes du plus de Québécois possible alors qu'il ne formait qu'un gouvernement minoritaire. Mathieu Bock-Côté rappelle que les principes l'orientant ne sont clairement pas un désir de redéfinir l'identité canadienne sur sa matrice dualiste³¹.

C'est aussi en 2006, suite à l'élection d'un gouvernement conservateur mené par Stephen Harper, que le Québec s'est fait accorder une place au sein de la délégation canadienne à l'Organisation des Nations unies pour l'éducation, la science et la culture (UNESCO)³². Cependant, ce gain provincial n'a rien de si surprenant, car la doctrine Gérin-Lajoie, existant

²⁷ P. Resnick. *Le Canada* (2013), 34.

²⁸ P. Resnick. *Le Canada* (2013), 34-45.

²⁹ M. Bock-Côté. *De la reconnaissance du Québec* (2007), 6.

³⁰ Ibid., 16.

³¹ Ibid., 15.

³² Premier Ministre du Canada/Stephen Harper. *Le Premier ministre Harper et le premier ministre Charest signent un accord historique établissant un rôle formel pour le Québec à l'UNESCO* (Québec 2006).

depuis 1965, permet aux provinces d'agir à l'international dans leurs champs de compétence³³. Pour Réjean Pelletier, ce geste représente peu, car la délégation canadienne à l'UNESCO ne devant parler que d'une seule voix, le Québec est donc limité à une fonction de lobbyiste auprès des autres membres de la délégation canadienne ou des autres pays membres, d'où la qualification de strapontin³⁴. Ces propos sont à nuancer, car malgré les limites de la participation québécoise à l'UNESCO, celle-ci permet tout de même au Québec d'avoir des relations internationales directes avec des États souverains et des États fédérés au sein de cette organisation internationale³⁵.

Rappelons cependant qu'en cas de non consensus au sein de la délégation canadienne, le Québec peut demander des explications formelles de la part d'Ottawa; de plus, il a la liberté de poser des questions lors du suivi des décisions prises³⁶. Pour Kymlicka, la motion reconnaissant les Québécois comme une nation et l'attribution d'un siège à l'UNESCO est signe d'un rapprochement vers une forme de fédération multinationale³⁷.

Ensuite, comme je l'ai présenté lors de la conceptualisation du fédéralisme, ce type d'organisation des pouvoirs implique une séparation des compétences entre le palier fédéral et les provinces. Le bilan du gouvernement conservateur quant au respect des champs de compétences étudiera de façon détaillé le règlement du déséquilibre fiscal, l'utilisation du pouvoir de dépenser, car ce sont des spécificités de la politique canadienne qui permettent au gouvernement fédéral de s'ingérer dans les compétences provinciales et auxquelles Stephen

³³ E. Montpetit. *Le fédéralisme d'ouverture* (Québec, 2007), 109.

³⁴ R. Pelletier. *Le renouvellement de la fédération canadienne* (2013) 42.

³⁵ E. Montpetit. *Le fédéralisme d'ouverture* (Québec, 2007), 110.

³⁶ Y. Charbonneau. *Le Québec peut faire valoir sa voix à l'UNESCO* (2011).

³⁷ J-F. Caron et G. Laforest. *Canada and Multinational Federalism: From the Spirit of 1982 to Stephen Harper's Open Federalism* (2009), 45-46.

Harper avait promis de s'attaquer.

Depuis 2010, le gouvernement fédéral tente de créer une commission pancanadienne des valeurs mobilières, à laquelle six provinces s'opposent, dont le Québec³⁸. En s'entêtant à créer une telle commission, le gouvernement de Stephen Harper s'ingérerait directement dans une compétence provinciale, dont fait partie la régulation des valeurs immobilières³⁹.

Lors du budget de mars 2007, Stephen Harper a modifié la formule de péréquation et procédé à une hausse des transferts sociaux aux provinces pour ainsi remédier au problème du déséquilibre fiscal⁴⁰. Après avoir nettement amélioré la situation du Québec et des provinces en général, il est revenu sur sa décision un an plus tard, en raison de conjoncture économique, résultant en une perte de 50 millions de dollars pour le Québec en 2009-2010⁴¹. Le ministre québécois des Finances Raymond Bachand recevait encore moins de fonds issus de transferts fédéraux pour l'année 2010-2011⁴².

En décembre dernier, Jim Flaherty, ministre des Finances canadien, annonçait que les transferts aux provinces pour les soins de santé, qui augmentaient de 6% par année, seraient indexés au taux de croissance économique à partir de 2017⁴³. De plus, le transfert canadien en matière de santé (TCS) sera strictement distribué au prorata de la population, sans tenir compte des spécificités régionales⁴⁴. Pour le Parti conservateur, le déséquilibre fiscal est chose réglé

³⁸Radio-Canada et La Presse Canadienne. *Valeurs mobilières : une commission nationale inconstitutionnelle* (2011).

³⁹J. Poirier. *Le partage des compétences et les relations intergouvernementales : la situation au Canada* dans «*Le fédéralisme en Belgique et au Canada*» (2009), 112.

⁴⁰A. Noël. *Fédéralisme d'ouverture* (2008), 27.

⁴¹A. Castonguay. *Péréquation, Ottawa versera moins au Québec l'an prochain* (Québec 2008).

⁴²L. Godbout. *Les cinq années au pouvoir de Stephen Harper* (2011).

⁴³A. Noël. *Le fédéralisme symétrique* (2012), 104.

⁴⁴Ibid., 104.

depuis 2007⁴⁵. Le gouvernement du Québec et celui de bien d'autres provinces ne partagent cependant pas le même avis⁴⁶.

En 2011, Stephen Harper remettait une enveloppe de 2,2 milliards de dollars au gouvernement québécois de Jean Charest dû à l'harmonisation de la TPS et de la TVQ⁴⁷. Cela représentait, pour le gouvernement québécois de l'époque et le gouvernement canadien, une grande réussite du fédéralisme d'ouverture.

Finally, l'existence d'un déséquilibre fiscal entre le Fédéral et les provinces permet au gouvernement central de s'ingérer de manière indirecte dans des compétences provinciales, position que tiennent depuis longtemps les différents gouvernements du Québec⁴⁸.

La proposition du gouvernement fédéral s'est trouvé à être de limiter le pouvoir de dépenser dans les compétences provinciales, mais que dans les nouveaux programmes à frais partagés⁴⁹. Ce pouvoir n'étant pas reconnu officiellement par la constitution, un tel accord ferait reconnaître au gouvernement québécois l'existence de ce pouvoir qu'il conteste, entraînant l'enlisement des négociations⁵⁰.

En avril 2013, Alexandre Cloutier, ministre québécois délégué aux affaires intergouvernementales, affirmait que la volonté du gouvernement conservateur d'éliminer le

⁴⁵ La Presse Canadienne. *Paiements de péréquation - Le Québec n'a pas à se plaindre, disent les conservateurs* (2009).

⁴⁶ Portail Québec. *Le ministre Nicolas Marceau fait le point sur la rencontre des ministres des Finances des provinces et des territoires* (Toronto 2013).

⁴⁷ M. Ouellet. *Taxe de vente harmonisée: Harper donne enfin son chèque de 2,2 milliards \$: TVH: Harper donne 2,2 milliards \$ au Québec* (Montréal 2011).

⁴⁸ H. Lazard. *The Spending Power and the Harper Government* (2008), 129.

⁴⁹ M-A. Ménard. *Le pouvoir fédéral de dépenser* (2007).

⁵⁰ A. Noel. *Fédéralisme d'ouverture* (2008), 29.

pouvoir de dépenser ne s'était jamais concrétisée⁵¹.

Après avoir passé en revue les points saillants des relations intergouvernementales entre la province du Québec et le palier fédéral depuis l'arrivée au pouvoir de Stephen Harper, il est possible de conclure que «[...]les conservateurs ont respecté leurs promesses d'ouverture, mais sans répondre pleinement aux réclamations du Québec, surtout en matière de péréquation et d'encadrement du pouvoir fédéral de dépenser⁵².» De plus, la motion reconnaissant les québécois comme formant une nation au sein d'un Canada uni, ainsi que l'accord d'un siège pour le Québec au sein de la délégation canadienne à l'UNESCO, malgré l'inéquivoque démonstration d'ouverture, ne constitue que des gains symboliques pour le Québec⁵³. Le Parti conservateur, qui mettait le respect des compétences de juridiction provinciale au centre de leur promesse d'ouverture, l'a clairement bafouée avec la tentative de créer une commission des valeurs mobilières à l'échelle nationale.

Il serait intéressant de se demander si les choix politiques que les Québécois ont fait aux élections fédérales de 2008 et 2011 auraient «[...]contribué à sortir le Québec de l'écran de radar du gouvernement conservateur⁵⁴.» Il est aussi pertinent de rappeler qu'avant même l'adoption de la loi sur la clarté référendaire (C-20), élaborée par Stéphane Dion du Parti libéral du Canada, Stephen Harper avait rédigé, en 1996, un projet de loi délimitant le cadre dans lequel le Québec pourrait accéder à la souveraineté (C-341)⁵⁵. Ce projet de loi, mort peu après au feuillement, précédait de peu l'initiative libérale qui a mis sous tutelle canadienne le droit à

⁵¹ L. Gagné. *Le PQ compte défendre les intérêts du Québec* (2013).

⁵² R. Pelletier. *Le renouvellement de la fédération canadienne* (2013), 43.

⁵³ G. Boismenu. *Quand les références de la communication en politique fichent le camp* (2013), 73-74.

⁵⁴ E. Montpetit. *Le fédéralisme d'ouverture* (Québec, 2007), 146.

⁵⁵ C. Hénert. *Stephen Harper : l'ombre et la clarté* (2013).

l'autodétermination de la nation québécoise⁵⁶. Son parti est même allé récemment contester la loi québécoise qui n'allait pas dans le même sens que la loi C-20⁵⁷. Il serait donc difficile de conclure que Stephen Harper est parvenu à mettre fin à l'ère de confrontation entre le gouvernement canadien et le Québec.

⁵⁶ M. Bock-Côté. *De la reconnaissance du Québec* (2007), 15.

⁵⁷ Agence QMI. *Harper veut invalider la loi 99* (2013).

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Is the Notwithstanding Clause a Viable Option To Maintain Constitutional Supremacy?

Christian Holloway

Introduction

It has become apparent throughout the history of the *Canadian Charter of Rights and Freedoms* that section 33, or the Notwithstanding Clause, has been utilized very little in the parliamentary arena, yet has been the subject of an abundance of arguments, both in favour and opposed, in the academic spectrum. This is because section 33, to many theorists, is the mechanism that balances the Supreme Court of Canada and maintains constitutional supremacy in Canada. Through research and evaluation, it becomes evident that section 33 is not a viable option to maintain constitutional supremacy, and that judicial supremacy is already in effect. While there are many scholars who see the Supreme Court of Canada as the guardians of the Charter, and judicial supremacy as beneficial, it is a view that places too much faith in the hands of the unelected magistracy. Firstly, this paper will discuss the problems that face the Notwithstanding Clause. This section will demonstrate the problems that developed at its inception with the wording of the section, and how these problems have developed into the issues it faces today with regards to the ramifications that legislatures face if used. The following section will then evaluate the use of the Notwithstanding Clause in relation to the *Quebec Charter of the French Language* (which may also be referred to as *Bill 101*), as well as *Saskatchewan's Dispute Settlement Act*, and the circumstances surrounding both cases. Through examining the *Dispute Settlement Act* and *Bill 101*, it demonstrates that the negative implications normally associated with section 33 are not an issue of the Notwithstanding Clause itself, but are a result of external forces. This will provide the ground work for the final argument that the

Notwithstanding Clause is not doomed, but may find salvation in drastic measures. This final section will discuss methods on how to fix the Notwithstanding Clause in a manner that provides a viable and tangible application in society and is not solely a theoretical solution. This paper will conclude by summarizing the problems, the exceptions, and perhaps the saving of section 33.

What went wrong?

Section 33 of the *Canadian Charter of Rights and Freedoms* gives the ability to the legislature to declare an act *notwithstanding* a provision of the Charter included in section 2 (fundamental freedoms), sections 7-14 (legal rights), and section 15 (equality rights) for a renewable period of five years.¹ In other words, Section 33 gives the provincial and federal legislatures the ability to override a Supreme Court of Canada interpretation of legislation as contravening to our fundamental freedoms, and/or our legal and equality rights. While the inclusion of this tool was one of the main reasons the Charter was passed with consent from the provinces, it has faced a curse since its inclusion in the Charter. This is due to a number of reasons. Firstly, the way the clause was worded when it was entrenched into the charter led to tensions between the citizens and the government. The Trudeau government worded Section 33 in a way that whoever enacted it was seen as intentionally infringing the rights granted to Canadian citizens. The wording of the Notwithstanding Clause made it a clause to limit the rights of Canadians and is not in line with what the original framers (authors) of the Charter had intended. The original intention for the Notwithstanding Clause was in fact derived from “a belief of the Premiers in the inherent superiority of political judgment over judicial judgment in

¹ Canadian Charter of Rights and Freedoms. Part 1 of the Constitution Act, 1982, Schedule B to the Canada Act, 1982. U.K. 1982, c. 11.

accommodating competing interests, including interests that bear on the characterization of rights claims”.² It was also intended that the Notwithstanding Clause would only be used as a final method to correct the judiciary.³ This means that the original framers’ intent was not to have section 33 used as a method to constrain the rights of Canadian citizens, but it was a method to maintain supremacy in the hands of legislatures who possessed a stronger grasp on social issues. However, this is not the view taken by the citizens of Canada. The way in which the Notwithstanding Clause is written undermines its intention, and causes it to be seen as an anti-democratic mechanism. This is due to the way it is worded because it was written as a way to ‘suspend’ a right, and not as something beneficial to social policy or correcting a false judicial decision.⁴ Section 33 is faced with the problem now, that instead of its true intention being brought to light as a method to counter judicial supremacy, it has been permanently tarnished within the public consensus as a way for Parliament to suspend our rights. This has caused many legislatures to fear the political ramifications associated with Section 33, and has resulted in the Notwithstanding Clause seeing very little use in the history of Canadian politics.⁵ These political ramifications, that could face a legislature when enacting the Notwithstanding Clause, stem from the fact that legislatures are accountable to the people. If the public majority has the opinion that Section 33 is against their benefit and suspends their rights, a politician may be faced with future unemployment because of a loss in public support (and therefore the public vote) if it is used.

² John Whyte. *Sometimes Constitutions are Made in the Streets: the Future of the Charter’s Notwithstanding Clause* (2007), 82.

³ Christopher P. Manfredi. *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*. (Toronto 2000), 184.

⁴ John Whyte. *Sometimes Constitutions are Made in the Streets* (2007), 84.

⁵ Mark Tushnet. *Judicial Activism or Restraint in a Section 33 World* (2003), 96.

Critics would argue, however, that judicial supremacy has not occurred because the decisions made by the Supreme Court of Canada to deem a piece of legislation unconstitutional are the result of legislative action before it is even brought before the courts. This argument comes from the cabinet centered approach, and is of the belief that the cabinet is the reason the courts have this supremacy when it fails to ensure its legislation is consistent with the Charter and is constitutional.⁶ Giving power to the judiciary in this perspective is a willingness of the legislature. While this belief is accurate in saying that the Cabinet does have the first move, it is incorrect in saying that the cabinet does not ensure its rights are consistent with the Charter. What the Cabinet is not being consistent with is the judiciary's interpretation of the Charter, resulting in judiciary interpretations as the guidelines for legislation.⁷ The proper approach should be that "if the legislature is responsible and respectful of rights, the court should allow it to pursue its agenda, even when this judgment is different from the courts'."⁸ However, when it comes to the interpretation by the Supreme Court of the rights in question, the legislature will never override a piece of legislation that contravenes the decision by utilizing the Notwithstanding Clause because of the issues that are associated with it. This problem stems back to section 33 in that it is the reason as to why the true intentions of the legislatures are being questioned; regardless of whether their actions are justified or not.

The Notwithstanding Clause in Action

As previously stated, section 33 of the Charter has rarely been invoked in Canada, only actually being used twice in its history. While the reasons behind the scarcity of its use were

⁶ James B. Kelly, and Michael Murphy. *Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor.* (2005), 222.

⁷ Mark Tushnet. *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter-majoritarian Difficulty* (1995), 245.

⁸ Tsvi Kahana. *Constitutional Cosiness and Legislative Activism.* (Toronto 2005), 153.

discussed in the previous section, there have been a handful of attempted and abandoned uses of the Notwithstanding Clause, but only two clear, straightforward examples of actual invocation and the resulting effects of using section 33. The first is the case of *R. v. Ford* and its relation to *Bill 101*. The second is the use by the government of Saskatchewan in the *Dispute Settlements Act*. The case of *R. v. Ford* deals with Quebec's *Bill 101* (also known as the *Charter of the French Language*) and the sections relating to posting signs for businesses within Quebec. *Ford* brought the case before the Supreme Court of Canada asking them to decide if sections 58 (public signs, posters, and commercial advertising must be in French) and 69 (only the French version of a firm name may be used in Quebec) of the *Charter of the French Language* infringes the right to freedom of expression guaranteed in section 2(b) of the *Canadian Charter of Rights and Freedoms*, and similarly section 3 of the *Quebec Charter of Human Rights and Freedoms*, as well as the right not to be discriminated against based on language in section 10 of the *Quebec Charter of Human Rights and Freedoms*. The Supreme Court of Canada ruled in favor of *Ford* and deemed that section 58 and 69 infringed her rights. The immediate response to this decision by the National Assembly of Quebec was to invoke the invalidated sections *notwithstanding* the provisions in both the *Canadian Charter of Rights and Freedoms*, and the *Quebec Charter of Human Rights* (by invoking section 33) rendering it still in effect. While this was a victory for the Notwithstanding Clause it was short lived. After the five year renewable period of the Notwithstanding Clause, the Quebec government chose not to renew it. This, however, does not mean it was not successful in its use of the Notwithstanding Clause. Although Quebec chose not to re-invoke the Notwithstanding Clause, and instead amended its *Charter of the French Language*, this does not mean it could not have.⁹ This demonstrates that the Notwithstanding

⁹ James B. Kelly and Michael Murphy. *Shaping the Constitutional Dialogue on Federalism*, (2005), 236.

Clause was a viable option for the government of Quebec to protect the French language. The Quebec government's ability to use the Notwithstanding Clause is an example of the framers' intent behind section 33, and as such, allowed the government and people of Quebec to override a judicial nullification of something important to their policy as a distinct society.

The second case is the *Saskatchewan's Government Employee Union Dispute Settlement Act*. In this circumstance the Saskatchewan government implemented section 33 because they believed the *SGEU Dispute Settlement Act* infringed the workers right to the freedom of association as guaranteed under section 2(d) of the *Canadian Charter of Rights and Freedoms* by using the legislation to end a strike and return to work. Unlike the use of the Notwithstanding Clause in the example of the *Quebec Charter of the French Language*, the use in the *SGEU Dispute Settlement Act* is a moment that has stigmatized the Notwithstanding Clause. This is because the use of section 33 in this manner was a pre-emptive measure used by the government of Saskatchewan in fear of it being deemed unconstitutional and of no force and effect by the Supreme Court of Canada.¹⁰ This action by the Saskatchewan government diverges from the original framers' intent of using the Notwithstanding Clause as a last resort method to implement public policy that limits rights, but is beneficial in its circumstances. Instead Saskatchewan used the notwithstanding clause as a preemptive method to avoid the checks and balances by the Supreme Court of Canada, and to pass legislation that the government of Saskatchewan was aware was unconstitutional. It is this deviation from the original purpose of section 33, and the framers' original intent, that causes the public to have the negative view of the Notwithstanding Clause it possesses. It is also why legislatures are faced with opposition if they were to try and

¹⁰ Christopher P. Manfredi, *Judicial Power and the Charter* (Toronto 2000), 184.

invoke it today. This does not mean however, that the Notwithstanding Clause is forever condemned from use, but it does however need to be adjusted to have the connotations of being justifiable.

How to salvage section 33

While it may be seen that the Notwithstanding Clause is a feeble, unused mechanism that possesses a bleak future, there may in fact be hope for it. My argument is that the Notwithstanding Clause has died but the idea behind the framers' intent of section 33 is still very much an important aspect of our constitution. The issue that lies within this dilemma is a question of how to restore the Notwithstanding Clause to a tool that faces no ramifications or scrutiny when it is used. One possible method of salvation for section 33 of the *Canadian Charter* is the theory of mutual recognition/partnership presented by Tsvi Kahana. The idea of partnership means that the courts and the legislatures act in a respectful manner discussing their individual interpretations of the constitutionality of a piece of legislation to arrive in a medium agreement; the Notwithstanding Clause would therefore only be invoked if it were the intention to achieve constitutionality of legislation.¹¹ While the partnership theory does solve the problem of legitimizing the Notwithstanding Clause into an approach in line with the constitution, it arises a few problems. One problem is the principle of mutual recognition/partnership. If the courts and legislatures were to discuss their individual interpretations of the sections in question, and attempt to find a mutual ground where both parties can agree whether a piece of legislation is consistent with the *Charter*, it would result in the inability of anything to pass and no new legislation would form. This is because the judiciary and legislative actors would each present

¹¹ Tsvi Kahana. *Understanding the Notwithstanding Mechanism*. (Toronto 2002), 263.

their own interpretations, justifications, and reasons behind their views which would create a back and forth repetition between the two. The resulting effect would be a stalemate of mutual recognition that both parties have valid claims to their argument, and no interpretation would ever be agreed upon.

Another approach of how to fix the Notwithstanding Clause is that of a parliamentary Bill of Rights model, similar to one presented by Janet Hiebert. The parliamentary Bill of Rights model is stemmed from the idea that the protection of rights should occur within the government and not, however, solely reliant on the judiciary to determine the constitutionality of legislation.¹² This approach would eliminate the need for the Notwithstanding Clause because the structure of this argument is to have final authority within the government, the very purpose of the Notwithstanding Clause. This is similar to the cabinet centered approach discussed before in that the discretion of the constitutionality of rights rests within the legislature. It therefore suffers the same criticisms as well. The criticism being that since it is the Supreme Court that gives the second decision on the constitutionality of a piece of legislation, the legislatures are not going to attempt to be constitutionally consistent with the *Canadian Charter* itself, but will adjust the legislation to be in accordance with the interpretations that will be made by the Supreme Court of Canada; the resulting effect being policy distortion.¹³ The counter to the parliamentary Bill of Rights model that has developed says that “judicial review, rather than restrict democratic principles, protects the very conditions that are necessary for citizens to function equitably”.¹⁴ This perspective of the judiciary has already carried over into Parliament

¹² Janet L. Hiebert. *Parliamentary Bills of Rights: An Alternative Model?* (2006), 12.

¹³ Mark Tushnet. *Policy Distortion and Democratic Debilitation* (1995), 245.

¹⁴ Janet L. Hiebert. *Charter Conflicts: What Is Parliament's Role?* (Montreal 2002), 21.

and has created an environment where the legislatures put forth a piece of legislation without establishing its constitutionality before the fact, and leaves this power to the courts to inspect its legislation.¹⁵

While the approach of leaving validation to the Supreme Court, and the parliamentary Bill of Rights approach present two different positions, they both face a flaw that makes them unfit for Canadian society. The first position is that of eliminating the judiciary entirely, and having a Parliamentary Bill of Rights method, leaving complete interpretation powers to the legislatures. As we have seen from the *SGEU Dispute Settlements Act* this method would pose a risk because not all of the legislatures intentions are in the best interest of society, and therefore there requires to be a check and balance on the legislatures interpretation of the constitutionality of a piece of legislation. The second position is that of which is in effect presently in Canada, which is having supreme and final interpretation authority on whether legislation is consistent with the constitution in the domain of the Supreme Court of Canada. This method creates the problem of allowing unelected and unchecked actors to represent a democratic system. It also conflicts with the framers' intent that political judgment is superior to that of judicial judgment. The true issue with both these approaches is the absent Notwithstanding Clause. Section 33 is the tool that allows for a check on the legislatures to occur through the judiciary, but also allowing for a check to take place regarding the judiciary after the fact. Therefore with the exclusion of a Notwithstanding Clause, there is too much power in either one branch.

¹⁵ Janet L. Hiebert. *Parliamentary Bills of Rights*, 12.

There does exist one argument however that does present an extremely valid option for the future of the Notwithstanding Clause. This argument is presented by Christopher Manfredi. It is an argument that “just as constitutional amendments require extraordinary majorities to become law, legislative overrides of constitutional decisions should also require an extraordinary majority before becoming effective”.¹⁶ This view presents that, similar to the three-fifths vote to invoke a constitutional amendment, if a legislature would like to invoke a section 33 override to a piece of legislation, it would require more support from democratically elected actors; this would make it more likely to be consistent with correcting the judiciary instead of attempting to achieve political agendas. This argument would be achieved through amending the constitution to adjust the Notwithstanding Clause to encompass a new voting percentage required for use, but also an emphasis on that its use is to only be implemented for correcting the decisions of the Supreme Court of Canada.¹⁷ While Manfredi’s proposition is the best suited for the future survivability of the Notwithstanding Clause, there are some issues that are not addressed. While I believe his argument for a three-fifths vote should be enacted, his view of an emphasis on the way the Notwithstanding Clause should be invoked does not resolve the issue of pre-emptive uses of section 33 like what was witnessed with the *SGEU Dispute Settlements Act*. To fully resolve this problem, while amending section 33, the new Notwithstanding Clause should possess new codified guidelines specifically outlining that it may only be invoked after the constitutionality of legislation is reviewed by the judiciary. However, the simple amendment of the Notwithstanding Clause to these guidelines would also not resolve the problem of public opinion on section 33. This is why not only the Notwithstanding Clause’s methods should be amended but the wording itself in how it is implemented into the *Canadian Charter of Rights*

¹⁶ Christopher P. Manfredi. *Judicial Power and the Charter* (Toronto 2000), 192.

¹⁷ Ibid.

and Freedoms.¹⁸ This change would allow for Parliament to demonstrate to the public the true intention of the Notwithstanding Clause without being associated with the negatives attached to section 33 at the present time. While it essentially would have the same purpose and effect as the Notwithstanding Clause, by changing the wording in the section of the *Charter* it would allow for marketing the new section in a positive manner to the public, erasing the political ramifications feared when it is invoked in today's political arena.

Conclusion

The Notwithstanding Clause certainly has not been the most used section of the *Canadian Charter of Rights and Freedoms*, nor will this change in the near future. This develops a problem for the system of government in Canada because it has resulted in a shift into an era of judicial supremacy. The reason behind this shift is because the Notwithstanding Clause was intended as the bar protecting against judicial supremacy, and that since this method is no longer a viable option for such purposes, the Supreme Court of Canada has become supreme over the legislatures. This lack of activity has been the curse of section 33 since its inception. The way it has been worded in the *Canadian Charter* gives the impression that the Notwithstanding Clause's function is to allow legislatures to infringe the rights of Canadian citizens. The wording and the public impression of section 33 is contradictory to the intention of the framers' of the *Charter* when they included it. The original framers' intent for the Notwithstanding Clause was to provide a check and balance against the judiciary. However, the history of the use of the Notwithstanding Clause has created even more of a rift in its true purpose. On one hand the invocation of section 33 in the case of the *Quebec Charter of the French Language* demonstrated

¹⁸ Allan E. Blakeney. *The Notwithstanding Clause, the Charter, and Canada's Patriated Constitution: What I Thought We Were Doing* (2010), 1-9.

a justifiable use of the Notwithstanding Clause to protect a piece of legislation, after it was deemed unconstitutional by the Supreme Court of Canada. On the other hand is the use by the Saskatchewan government preemptively in the *SGEU Dispute Settlements Act*. This second usage is one of the reasons why the Notwithstanding Clause has the reputation it does for undermining democracy. These reasons are why section 33 needs to be fixed. While many scholars have attempted to solve this issue, as presented above in the arguments by Kahana and Hiebert, the only viable option rests in an adjusted form of Manfredi's argument. This adjusted argument would have the constitution be amended to change the wording of the Notwithstanding Clause to offset the public view of it, and have it revised into a clause that can only be applied reactively and is subject to a vote of three-fifths instead of a simple majority. This demonstrates that section 33 is an example of something that is not broken but needs to be fixed.

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The Expanded Role of the Judiciary: The Supreme Court and the Charter

Jeremy Cavan

The introduction of the *Charter of Rights and Freedoms* and the *Constitution Act, 1982* marked a decisive moment for Canadian federalism. In particular, it greatly expanded the role of the judiciary and the Supreme Court of Canada. The Charter created a legal framework of rights which changed the role of the courts in the Canadian political landscape. As a result, governments have been dissuaded from policy measures which might invoke legal action as a potential Supreme Court ruling is considered *stare decisis*¹⁷⁰ and could be potentially damaging to the confidence of the House of Commons and its popular support.

Expanding the role of the Supreme Court has raised the question: is it democratic for the Supreme Court to make decisions on behalf of parliament? Fears that the appointment of judges results in patronage and therefore ideologically driven decisions, are of little concern when the matter is closely inspected. Taking this into consideration, this paper argues that the Supreme Court is a valuable democratic tool in our federalist system, and that it is accountable and fair in practice regardless of its method of appointment. Having said this, there are methods which can improve upon the procurement of Judges which will be discussed later in this paper. In order to properly discuss the Supreme Court role in the Canadian federalist system, the measures of judicial independence for Supreme Court judges must be made clear, as must their general function within Canadian federalist structure post Charter. After which, this paper will show the positive role of the courts through case studies and how they affect our democratic institutions.

¹⁷⁰A doctrine or policy of following principles laid down in previous judicial decisions, otherwise known as precedent.

This will be followed by brief statistical analysis of the court's rulings before and after 1982 as well as suggestions made to address some of the major concerns voiced in regards to role of the Supreme Court.

In Canada, the Supreme Court rules on issues of jurisdiction, constitutionality and rights based claims. The importance of the court playing a neutral role in a federalist system is that it helps avoid jurisdictional and ideological conflicts between politicians and parties. The significance of non-interference and impartiality from government are paramount to a functioning judicial system. If the executive could interfere, it would negate the purpose of the court in general. The methods of ensuring judicial independence are similar to those of bureaucratic accountability in Canada prior to new public management; if either the government or the court acts outside their sphere then both are accountable to constitutional and public ramifications.

The basics of non-interference and impartiality as laid out by Andrew Heard are as follows: For judges, security of tenure, financial security and the administrative independence of the courts are the defenses available against government interference.¹⁷¹ As well, there are "constitutional conventions"¹⁷² which also follow a tradition of non-interference. These measures help to ensure independence; security of tenure ensures that a government cannot threaten to remove a judge due to an unfavorable decision; financial security helps to ensure leaders of the day cannot manipulate a judge's income as a reward or punishment and finally administrative independence distances court proceedings and dockets from political interference. On the other hand, the politicians have their own sets of rules and traditions which keep the judiciary at arm's

¹⁷¹ Heard, A. *Canadian Constitutional Conventions* (Toronto 1991), 118-120.

¹⁷² *Ibid*, 118.

length, they must maintain the confidence of the house as well as public favor, and are also bound by *stare decisis*. Furthermore, parliamentary conventions of deference to the court and a tradition of non-interference are also observed by those in office.

The relationship between judges and parliamentarians is in balance due to a situation where acting out results in punishment and accountability is maintained by externalities. Both parliamentarians and judges are under scrutiny; the courts are under the scrutiny of parliament and parliament is under the scrutiny of the opposition and the people. As well, both face the potential loss of employment. Politicians face re-election and judges face the tool of S.99(1) which suggests judges may only hold office under ‘good behavior’.¹⁷³ Removal of a judge, by no means a simple procedure, has never been invoked in Canada. The complexity of the process deters politicians from manipulating security of tenure and involves first referring the judge to a jury of peers known as the Judicial Council, a measure which ensures the government is not playing a role in the decision, then, if misconduct is found, the Canadian Judicial Council makes a recommendation of removal to the Justice Minister. The Justice Minister must then secure the approval of both the house and senate before the action can be completed.¹⁷⁴ The process serves as another measure of accountability; as the decision is made by all members of the house and senate, it maintains security of tenure for judges, but not without limitations.

The Supreme Court’s role in Canada has been described as Meta political, in that it helps manage the difficulties between people and politicians. However, the Supreme Court remains accountable to parliament, and through them, the people. James Kelly and Michael Murphy pointed out that “the Supreme Court's federalism jurisprudence supplements rather than subverts

¹⁷³ Canada, G. o. *Justice Laws Website* (2013).

¹⁷⁴ Canada, G. o. *Department of Justice* (2012).

the constitutional role of political actors.”¹⁷⁵ It is the role of the politicians to create the framework of the constitution, thereby creating the rules of the Supreme Court which the court must adhere to, which therefore makes the courts answerable to parliament. This demonstrates the democratic connection; the people vote for politicians who appoint Supreme Court justices, who oversee the Constitution and Charter, which is legislated by parliament, who are in turn answerable to the electorate. No further democratic process is necessary; the people vote for parliamentarians and they make the system work. If judges were elected it would create a whole new systemic incentive for partisanship. Judges would be competing for their position not on merit, but popular issues and ideology, as the complexities of their position are not easily summed up by slogans. The result of this would be similar to the US system; there would be no uniformity of law state to state, and personal vendettas against groups could be carried out by partisan judges. At a Supreme Court level, elected judges could have the effect of constitutional deadlock, and a poorly selected judge could intentionally slow politicians of different stripes so as to appease their voting constituency. The judges would then be answerable to their voters and not the law or the constitution, as it is the public’s vote that won them their position.

There are some who argue that the expanded role of the Judiciary has led to judicial supremacy.¹⁷⁶ They suggest that the choices of the court “are less a function of the Charters text than of the choices made by judges in the course of interpreting it.”¹⁷⁷ The concern raised by Morton and others regards an increase in governments and the public seeking out the Supreme Court to settle disputes. Morton also feels that this increased usage has invaded the public policy

¹⁷⁵ Murphy, J. B. *Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political* (2005), 218.

¹⁷⁶ F.L Morton, r. K. *The Charter Revolution and the Court Party*. (Peterborough 2000).

¹⁷⁷ Elliot, R. *The Charter Revolution and the Court Party: Sound Critical Analysis or Blinkered Political Polemic* (2001-2002).

arena and is therefore grounds for concern, if governments are utilizing the courts for decision making one not versed in the nature of their relationship would be right to fear the judiciary supplanting parliament, or operating to favor the provinces or federal government. It is important to note that while the courts interpret the Charter and precedent the parliamentarians still have the ability to enact law to more accurately instruct the judges. As will be discussed later in greater detail, the charter itself should be actively updated by parliament in order to maintain the balance of power and to properly instruct the judges so that precedent need not be made in absence of political guidance. Statistically speaking, the court's decisions post 1982 have favored no particular branch of government over the other and as was discussed earlier the government has yet to remove a judge from office. Furthermore, the increased activity of the court can only be explained by an equal thirst of participants in the courtroom. This suggests that the presence of the court has not only increased citizen participation, as will be discussed in the case studies, but also both levels of government. This increased role of the courts is due to an increased need for clarification and a civil pursuit of the law by all parties involved and not by a pursuit to increase caseload of the court by the court itself.

The Supreme Court does not actively pursue cases; cases are brought before the court. As James Kelly argued, "the court must interpret the constitution in a manner respectful of the contributions of other political institutions." This has included suspending decisions in the hopes of a legislative solution to an unconstitutional application. From 1982-2001, 9 cases were suspended in hopes of legislative remedy. If the court pursued cases, or sought to impose decisions outside of the Charter and constitution, this activity would more accurately describe the supremacy that Morton and Knopff refer to, as it would be a truly active judiciary. Instead, the

court has been respectful of the process of receiving cases, and adhered to the role given to them by parliament. If the court were to interject or subvert constitutional efforts of politicians, the court would be acting undemocratically, as it would upset the balance of accountability struck by the current arrangement. This is why “The Court explicitly encourages political actors to assume the lead in defining and implementing fundamental constitutional rights and freedoms”.¹⁷⁸ In order for the courts to properly carry out their responsibilities, parliamentarians must participate in their guidance. Having adequately outlined how the Court operates in the Canadian federalist system, case studies will be used to highlight the way in which the court has positively affected our democracy and federalism.

The Charter and increased role of the judiciary marked a democratization of Canadian federalism in some ways. Before the Charter, the public did not have the same access to legal power to pursue rights based discourse. The strengthening of the Supreme Court offered an avenue in which “[groups] can now pursue their policy agendas to the courts.”¹⁷⁹ This is not the only manner in which the Supreme Court has improved democracy. In the reference case *Figueroa v. Canada*, the Supreme Court “unanimously struck down the 50 candidate threshold for party registration under the *Canada Elections Act*.”¹⁸⁰ This ruling is significant, as it found that the S.3 must extend to all, including those who do not align with a party which meets the required 50 seat threshold. The ruling seeks to improve access to office for smaller, sometimes localized interest groups, especially in a rural area, where electoral districts may cover large territories. Size, or a lack thereof, does not dictate the validity of their issues, or their need for

¹⁷⁸ Murphy, J. B. *Shaping the Constitutional Dialogue* (2005), 218.

¹⁷⁹ Smithey, S. I. *Cooperation and Conflict; Group Activity in R v. Keegstra* (Montreal 2002), 189.

¹⁸⁰ MacIver, H. *The charter of rights and party politics: the impact of the Supreme Court ruling in Figueroa v. Canada (Attorney General)* (2010).

representation. The court focused on “the right of each citizen to play a meaningful role in the electoral process, rather than the election of a particular form of government.”¹⁸¹ By ruling in favor of *Figueroa*, the Supreme Court demonstrated its commitment to the constitution and the democratic process by removing barriers to entry in the political arena and ensuring that these rights are not arbitrary or partisan. If the government found this decision by the courts to be outside their purview or found that it was not in the public interest, they could have enacted legislation to correct it. The courts were only interpreting in the absence of political clarification which illuminates the position they have been given by parliament. There is also significance for judicial independence, the judges were free to strike down the law and received no ill will or interference from the government even though the *Canada Elections Act* was an act of parliament. Although this decision seeks to improve entry into the political arena, arguments have been made to the contrary.

Proponents of the 50 seat threshold argue that many fringe parties are not fit to govern due to their narrow scope of interest. The Court responded to this, stating that “The ability of a party to make a valuable contribution is not dependent upon its capacity to offer the electorate a genuine “government option””.¹⁸² The court therefore recognizes that politics are about contributions to the process, not just what the dominant political parties offer to be considered. This portrays the importance of a constitutional ‘umpire’ in the Canadian federalist system.¹⁸³ Having this ‘umpire’ aids the democratic process by giving the populace a pulpit to contest laws

¹⁸¹ *Figueroa v. Canada*, 28194 (2003).

¹⁸² *Ibid.*

¹⁸³ Heard, A. *Canadian Constitutional Conventions* (Toronto 1991), 121.

based on precedent and the Charter. This helps to keep politicians in check and helps to avoid legal oversights which are bound to happen in an ever-changing system.

In the reference case *Prov. Electoral boundaries (Sask.)*, the court examined the right to redraw electoral boundaries to reflect population disbursement more appropriately with regards to S.3.¹⁸⁴ The court upheld the provinces actions on the grounds that the province did not impinge the public's right to vote in redrawing electoral boundaries. This demonstrates the courts' even handed approach to issues of the constitution. Finding that "The purpose of the right to vote enshrined in s. 3 of the *Charter* is not equality of voting power *per se* but the right to 'effective representation'".¹⁸⁵ Because the court is bound to the constitution, and S.3 does not guarantee equality of voting power, the court upheld the right of democratically elected officials to draw boundaries where social/physical geography and population necessitate change. This is important because it distinguishes the limitations of S.3 of the Charter and ensured that the province was able to adapt to the changes it faced.

The Supreme Court is not affiliated with the provinces, and its members are chosen by Federal Cabinet. The court had no impetus to prefer the province in this decision. This reinforces their adherence to the 'black letter law' of the Charter. By abstaining from meddling where the constitution does not specify, the court acknowledges that it must defer to the legislatures in order to create such boundaries through constitutional amendment. It is important to note that the decision was not unanimous and concern was raised in regards to the redrawing of boundaries by Justices Lamer, C.J, L'Heureux-Dubé and Cory J.J, who felt that they should only be redrawn where they are "justified as contributing to the better government of the people as a whole, giving

¹⁸⁴ Reference re Prov. Electoral Boundaries (Sask.), 22345 (1991).

¹⁸⁵ Reference re Prov. Electoral Boundaries (Sask.), 22345 (1991).

due weight to regional issues involving demographics and geography.”¹⁸⁶ This shows a consideration for the right to vote and therefore a continuation of the commitment to the democratic process previously discussed in *Figueroa v. Canada*. The concern of misuse leaves room for future decisions to rule against unfair or illogical gerrymandering. The ruling upholds the previous assumptions of fair judgement, and exemplifies how the interpretation of S.3 was not biased towards or against any particular area of government.

In *Reference re Goods and Services tax*, the court ruled in favour of the federal government and its role to tax under S.91 (2). The ruling exemplifies the court’s understanding that the federal government has a constitutionally enshrined right to raise money “by any mode or system of taxation”¹⁸⁷, and does not require provincial consultation. In this case, a distinction was made between ‘black letter law’ and ‘legitimate expectations’. The court maintained that their job is not to be drawn into “a political controversy” or to “involve it in the legislative process”.¹⁸⁸ The court added that the provinces had “a ‘legitimate expectation’ that no change would be made in the agreement without [provincial] consent”¹⁸⁹, but that ‘legitimate expectations’ are not legally binding, and the court ruled based on the confines of its jurisdiction in federalism. If the court had ruled in favour of the provinces it would have been acting outside the jurisdiction of the court, and against the division of powers set out in S.91 and S.92.

The judgments of the court are often decided based on the ‘pith and substance’ or the jurisdiction as *intra vires* or *ultra vires*. Rulings, such as those on the *Canadian Environmental*

¹⁸⁶ *ibid*

¹⁸⁷ Canada, G. o. *Justice Laws Website* (2013).

¹⁸⁸ Saywell, J. T. *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism* (Toronto 2004), 277.

¹⁸⁹ *Ibid*.

Protection act (1985), found the federal government's right to criminal law allowed them to create laws which crossed into provincial jurisdiction. They could so, as long as it concurred with the constitutional right and in no way impeded the provinces right to "regulate and control the pollution of the environment either independently or to supplement Federal action."¹⁹⁰ The court was promoting shared governance, suggesting that both provinces and the federal government had roles to play in the environment, and that the two could function in their own spheres or seek to compliment on another provided they did not act *ultra vires*.

The increased role of the judiciary in Canadian politics since 1982 has had the effect of evening the playing field in the federalist arena. Between 1949 and 1982, the division of power cases fell consistently in favour of the federal government. Major blows were also dealt to the provinces in regards to economic and energy policy cases.¹⁹¹ This centralization shaped the views of many political scientists, that the courts were bias in favour of the federal government, for the obvious reasons of appointment and control of funds. Kelly argued that "Under the division of powers, the court determined which level of government has jurisdiction in specific policy areas".¹⁹² The effect of which, was to consistently rule in favour of the federal government. This is demonstrated by the statistical data, from 1949 to 1982 where "the Court invalidated 25 of 65 (38.5 percent) challenged provincial laws, but only 4 of 37 (10.8 percent) challenged federal laws".¹⁹³ The loss of a case for either a federal or provincial government was 'zero sum'; it involved the loss of power from one level to the other. After 1982, a defeat for the provinces did not increase the powers of the federal government. The empowerment of the court has removed the 'zero sum'

¹⁹⁰ Saywell, J. T. *The Lawmakers* (Toronto 2004), 286.

¹⁹¹ Kelly, J. B. *Guarding the Constitution* (Montreal, Kingston 2002), 80-81.

¹⁹² *Ibid*, 83.

¹⁹³ Smithey, S. I. *The Effects of the Canadian Supreme Court's Charter Interpretation on Regional and Intergovernmental Tensions in Canada* (1996), 86.

aspect of federalism and given the courts the ability to “rule that neither level of government may act in a manner that denies protected rights and freedoms, or conversely, that all governments may act in a certain manner.”¹⁹⁴ The result has been not greater centralization, but an evening out of court decisions.

During the first decade of the Charter, the rulings tilted slightly in favour of the provinces, as the court ruled in favour of the provincially challenged policy 72.3% of the time and the federally challenged policy 62.5% of the time.¹⁹⁵ Kelly argues that the “The empirical evidence demonstrates that the Supreme Court has acted in a balanced manner as federal statutes have been found to violate the protected rights and freedoms in 47% of cases”¹⁹⁶, and “Provincial statutes represent 50% of constitutionally invalid statutes”.¹⁹⁷ So, not only do the courts show evenhandedness in how often they side with either government, but also in how often the statutes are found constitutionally invalid.

The court’s even-handedness is statistically verified. Since 1982, the federal government has had a 67% rate of upheld decisions while the province has 61% of its cases upheld to date.¹⁹⁸ Shannon Smithey suggests that “The Charter has transformed [the] system by entrenching the protection of a long list of rights and liberties, and by giving courts power to grant appropriate remedies to enforce constitutional guarantees.”¹⁹⁹ Although the provinces have slightly less decisions in their favour, the small difference may be explained by the volume of cases and abilities

¹⁹⁴ Kelly, J. B. *Guarding the Constitution* (Montreal, Kingston 2002), 83.

¹⁹⁵ Smithey, S. I. *The Effects of the Canadian* (1996), 88.

¹⁹⁶ Kelly, J. B. *Guarding the Constitution* (Montreal, Kingston 2002), 83.

¹⁹⁷ *Ibid.*

¹⁹⁸ *Ibid.*

¹⁹⁹ Smithey, S. I. *The Effects of the Canadian* (1996), 84.

of the federal government. As it has substantially more experience than any one province it can more effectively deliver its case and consider rights implications before creating public policy. Statistic evidence of fairness does not suggest that improvements cannot be made.

Despite the benefits of the Charter and Supreme Court, there are inherent flaws in the system. Judges are chosen by cabinet, thus, justice selection is not as democratic as it could be. There is a simple solution to this; to make all of parliament vote on Supreme Court Justices in a manner similar to the procedure of the electing the speaker of the house.

Another problem that was not discussed in the research for this essay is the effect of an out of date Charter on Canadian federalism. If the Charter became outdated and unrepresentative of the people due to a lack of constitutional advocacy on behalf of parliament, the court would become the sole interpreter of the constitution and upset the balance struck. The absence of the legislature in the form of constitutional and rights advocacy would in effect make the entire process undemocratic. The vote of the people must be directly connected to constant revision of the Charter in order to maintain the democratic link between parliament and the Supreme Court. Without parliamentary guidance, the court would be forced to act unilaterally as the interpreter of the Charter, not as its guardian. The solution to this potential problem is to establish a long standing committee to review and offer amendments to the Charter in a systematic, so that the courts do not have to act unilaterally out of necessity due to the absence of constitutional direction.

To summarize, the courts democratic justification comes from a balance of accountability found in the relationship between the courts, parliament and the voting public. Each has the ability to hold the other accountable when any branch acts outside of their mandate. The measures of ‘good behavior’ for judges and *stare decisis* coupled with public scrutiny for politicians ensure that no party is in a position of privilege. This is a direct result of the introduction of the Charter in 1982 which has increased the role of the judiciary. The statistical data examined supports the court’s adherence to ‘black letter law’ and indicate an increase in access to the courts for both the governments and the populace. As a result of Supreme Court decisions the public now has increased access office, while increased activism of all parties has simultaneously decreased the elitist nature of politics. The court has proven to be a fair and even handed tool in the Canadian federation, as well as a benefit to democracy, the political process and federalism.

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