Rights jurisprudence and the Charter -
Evaluating the changing structure of Canadian federalism

By

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To my Family.

Fortes Soli, Fortiores Una.
Abstract. Rights jurisprudence in Canada dates back as far as Confederation in 1867. Between this date and 1982, the organizing principle of Confederation – federalism – has kept this jurisprudence solely within the supremacy of Parliament, subject to its confines and division of powers. After 1982, however, a new constitutional organizing principle was introduced, when Prime Minister Pierre Trudeau introduced the patriation initiative, touted as the “people’s package”. Individual rights and freedoms were now guaranteed by the Constitution. Citizens of Canada now had a direct link to the Constitution via the Charter and there were now two significantly different organizing principles within the constitutional order which created an unstable coexistence. This instability has led to a clash between judicially enforced Charter rights and federalism. The Charter has since had both a nationalizing and centralizing effect on Canadian federalism.

This thesis explores the relationship between rights and federalism in Canada from Confederation to present day by comparing the jurisprudence of pre and post Charter Canada. An analysis of Supreme Court’s (and its predecessor’s, the JCPC) decisions shows the profound effect the Charter has had on Canadian federalism. The result has been an undermining of federalism in Canada, with Parliamentary Supremacy replaced by Constitutional supremacy, and ultimately Judicial Supremacy. Moreover, rights discourse has largely replaced federalism discourse. Canadians have become very attached to their Charter, and are unwilling to allow any changes to the constitution that may affect their rights as political elites discovered the hard way after the collapse of the Meech and Charlottetown Accords. If federalism is to remain a relevant and viable organizing principle in the Constitution, then governments, especially at the provincial level, must find new and innovative ways to assert their importance within the federation.
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1. Introduction

On a cold and rainy April morning in 1982, amidst a good deal of controversy, celebration, and a significant degree of political conflict, the *Charter of Rights and Freedoms* was entrenched in the Canadian constitution. Since then, the *Charter* has transformed the Canadian political and legal landscape, fundamentally changing the role and responsibility of Canadian courts, and forever altering the relationship between individual Canadians and their constitution. Then Prime Minister Pierre Trudeau said that enshrining individual rights in the Constitution was an essential aspect of guaranteeing to all Canadians that their rights would be protected from government action. Moreover, with the Constitution patriated, Canada, with all the partners in the federation working together, would be able to change and improve upon the text of the Constitution as they saw fit and necessary. Canada witnessed the dawn of a new era of political discourse, one that, according to Trudeau, future generations of Canadians could look back on with pride.

The *Charter* is widely credited with transforming, in particular, the Supreme Court’s agenda, decisions, and workload. The *Constitution Act, 1982*, created in Canada a judicially enforced charter of rights entrenched in the Constitution, the supreme law of Canada. Former Chief Justice Antonio Lamer called the passing of the *Charter* “a revolution on the scale of the introduction of the metric system, the great medical discoveries of Louis Pasteur, and the invention of penicillin and the laser.” Moreover, with the Court’s traditional judicial role no longer confined to
arbitrating jurisdictional conflicts between two orders of government, judges have seen a fundamental change in their responsibilities. Both critics and supporters of the Charter have claimed that it has produced a number of important changes on the social and political landscape in Canada. In particular, there has been a shift from the traditional federalism framework of constitutional politics to a rights-based framework. Consequently, "the change has signalled an end to the historic reluctance of judges to enter in to a sphere previously considered explicitly political and as such, the exclusive prerogative of Parliament." The courts, and in particular the Supreme Court, have moved on to centre stage as political actors in creating and advancing social policy in Canada. They have passed judgment on the constitutionality of a tremendously broad range of political and social issues from abortion, to gay rights, to euthanasia.

Many observers often assume that the principal effect of the Charter is on the courts. What should not be overlooked is how a judicially reviewable charter of rights has affected federalism in Canada. Before 1982, federalism, and the division of legislative powers that derive from it, monopolized Canadian political and constitutional history. The Charter adds an interesting dynamic to Canadian constitutional dialogue, precisely because it proposes a new framework, a new paradigm of understanding, a new lens through which to examine Canadian constitutional jurisprudence. Similarly, the Charter has had a profound effect on the relationship between the Federal Government and the provinces, the relationship between the courts and Parliamentary supremacy, the ability of all levels of government to enact legislation, and more specifically, federalism in Canada. This
has resulted in calls for major reforms in the judicial system, namely the selection
process of the Supreme Court appointments, as well as a re-examination of the
current legislative division of powers by provincial elites whose governments believe
they have lost power as a result of the impact of the Charter.

The focus of this thesis is the relationship between the Charter and federalism. The Constitution Act, 1982, has within its text, "two competing visions of
the relation of the constitution to the peoples and governments of Canada," which
create an unstable coexistence that "impairs the effective working of the
constitution." Simply put, the Charter and the amending formula — also adopted in 1982 as part of the constitutional package — clash over the fundamental purpose of the
constitution. According to Alan Cairns, the amending formula "presupposes that
federalism is the most important constitutional organizing principle, that governments
are the major actors in federalism." Formal constitutional change falls within the
exclusive prerogative of governments and any change of the constitution that affects
their power within federalism is correctly a matter for those governments to address.

The Charter, however, presupposes that the citizen is as much a part of the
constitution and is of no less importance than government. While the amending
formula bestows sovereignty upon the federal and provincial governments by virtue
of their collective ability formally to amend the constitution, the Charter is the
'people's constitution' and based on the premise that their rights are paramount to
those of government. The conflicting relationship between federalism and the
Charter has resulted in a weakening of federalism in Canada. Since 1982, in the
courts, rights discourse largely has eclipsed federalism discourse. The Charter, in
effect, has redefined Canadian society as a single community of rights bearers with a pan-Canadian identity that makes only limited concessions to provincialism.\textsuperscript{11} “Succinctly, the \textit{Charter} states what the amending formula denies, that ‘federalism is not enough’ – that Canadians are more than a federal people.”\textsuperscript{12}

To better understand the argument put forward here, it is necessary to understand what federalism is, and more specifically what Canadian federalism is. K.C. Wheare offers the classic definition of federalism as “the method of dividing powers so that the general and regional governments are each within a sphere coordinate and independent.”\textsuperscript{13} A second definition of federalism is offered by A.V. Dicey who argues that a completely developed federal state has three leading characteristics. The first is a division of powers among different orders of government, each with limited and coordinate powers. The second characteristic is a supreme constitution that lays the foundation of the division of powers for each government. Finally, the third characteristic of a fully developed federal state is a court system with the authority to interpret the constitution.\textsuperscript{14} Although both of these definitions are overly simplistic in their description, they do define the principal foundation of a federal state in its rudimentary form.

Based on Wheare’s and Dicey’s definitions, Canada is not a true federal state by design. Wheare described Canada as a ‘quasi-federal state’. The original terms of the \textit{Constitution Act, 1867},\textsuperscript{15} were far from creating Canada as a true federal state by Wheare’s definition. There were a number of centralizing features in the 1867 Act that in many respects subordinated the provinces to the federal government.\textsuperscript{16} Nevertheless, since Confederation, there have been numerous judicial decisions,
largely by the Judicial Committee of the Privy Council (JCPC), that have interpreted certain constitutional provisions in such a manner as to restrict the ability of the federal government to interfere with the autonomy and independence of the provinces. In the early years after Confederation, the JCPC took a very narrow interpretation of the Federal government’s ability to enact laws for the ‘Peace Order and Good Government’ (POGG) of Canada, while at the same time, interpreting the provincial powers of ‘Property and Civil Rights’ under section 92(13) in the broadest possible sense. Similarly, the significant subordinating clauses of the original 1867 Act, such as the power of disallowance and reservation, have fallen into disuse. While still part of the formal constitution, convention dictates that they could not be used for the simple reason that, as Patrick Monahan argues, reserving or disallowing provincial legislation is “wholly inconsistent” with the principles of federalism. As Monahan states, “today there can be no doubt that both in law and in practice the provinces are independent of the federal government... It is clear, therefore, that Canada qualifies as a federal state.”

Alain-G Gagnon states that federalism means different things to different people. In one aspect, Gagnon describes federalism as a conflict-solving mechanism in that it provides a shield for minority groups that otherwise would be threatened. Similarly, it is also an “expression of democratic practices encouraging innovation in policy preferences and political choices at the territorial level.” Gagnon defines federalism as “a political device for establishing viable institutions and flexible relationships capable of facilitating interstate relations,” such as a division of powers between orders of government. Moreover, Gagnon states that the question of territory
is fundamental to any study of federalism. He argues that there is a distinction between American federalism and European federalism and that both systems exist in Canada. Thus, as Gagnon describes, “Canada, then, constitutes a unique laboratory for students in that varying political traditions compete with one another for political relevance and by extension, for political power.”

The two competing concepts of federalism are drawn out along traditional cleavages between Quebec on the one hand, and the “rest of Canada” on the other. To oversimplify, Quebec views Canada as a duality, the product of two founding peoples who entered into a compact as equals. Quebec is influenced greatly by European traditions of federalism that “encourage the expression of many different political streams in the body politic.” European federalism stresses the “value of community, is more likely to encourage collective choice, and tends to recognize the importance of provincial governments as the guardians of regional identities.” By contrast, there is a common conception and understanding throughout English Canada that Canada is a union of ten provinces equal in law, if not in size or economy. As such, there exists in English Canada a competing view of federalism that predominantly is influenced by the American model of federalism which stresses the one-nation concept, built on a liberalism “that emphasizes individual liberty, views the state as a means to protecting liberty, and typically looks to the national government for leadership.” The distinction between these two concepts of federalism in Canada is an important and necessary one because the entrenchment of the Charter in the constitution has a different meaning and a different symbolism for
Quebec than it does for English Canada. As a consequence, it has a different effect on federalism in Quebec than it does on the rest of Canada.

Canada is a different kind of federal state, very much unlike the American model of federalism, because it contains two distinct language communities that are more or less geographically independent of each other, and capable of forming two complete nations.\(^{26}\) The creation of a Canadian ‘nationalism’ was a guiding principle in which Trudeau found inspiration for a new constitutional order. Popular sovereignty and enshrining individual rights in the constitution were the foundations of building a single indivisible Canadian nation.\(^{27}\) The patriation of the constitution, however, in the words of Guy Laforest, “struck a fatal blow to the compromise of 1867, which was based on the refusal of homogeneity and on implicit acceptance of national duality.”\(^{28}\)

Peter Russell argues that in order to understand fully how the Charter influences politics in Canada it is necessary to recognize the three planes on which the Charter operates. The first plane is that of political culture, “where the Charter affects how Canadians think of themselves as citizens and their attitudes toward government.”\(^{29}\) At this level the Charter functions primarily as a symbol to Canadians. In the broad context of constitutional discourse, the Charter fundamentally changes who the constitution is for, and who it benefits. As Cairns explains, “the traditional cleavages of federalism that required the constitution to fashion harmonious coexistence between our federal and provincial selves now encompasses a diminishing proportion of who we are as a people.”\(^{30}\) Canadians are now part of the constitutional order that is the “supreme law of Canada.”\(^{31}\)
Consequently, the *Charter* has created new cleavages, or at least, reignited past cleavages. For individuals and minority interest groups alike, the constitution now speaks directly to them through the various sections of the *Charter* and provides to them a direct link to the constitution. As a result, in a very short period of time following the entrenchment of the *Charter*, these groups have all "developed enhanced constitutional self consciousness."\(^{32}\) They represent a new actor in the body politic referred to as "charter Canadians"\(^ {33}\) or the "Court Party."\(^ {34}\) To them, the old language of federalism is not central to the new constitutional discourse. The newly politicized social categories of sex, ethnicity, religion, and others, transcend federal and provincial spheres of jurisdiction and generate a new dialogue on citizen-state relations, denying ownership of the constitution to governments by reaffirming that the rights of the citizen are paramount to those of the government. While federalism continues to remain an important concept in understanding our origins, the language of rights that is embraced by the *Charter* represents a new organizing principle and a new constitutional discourse.

The second plane that Russell discusses is the application of the *Charter* by the courts. It is the judicial decisions through charter litigation that actually give meaning to the text of the *Charter*.\(^ {35}\) This has led to what some academic critics of the *Charter* have called "a regime of constitutional supremacy verging on judicial supremacy."\(^ {36}\) The Supreme Court is no longer only an umpire between the Federal Government and the provinces. Rather, it is a political actor involved in vital political, moral, and social debates. This has led further to the creation of an asymmetrical relationship between rights discourse and federalism discourse in the
courts because "in a competition between a Charter-sustained Canadian value and a provincial value, the latter will lose." While the effect of the Charter is the same on the Federal Government, the impact is much different. "Charter nullification of a federal executive or legislative act is an affirmation of Canadian values and thus strengthens a discourse that defines Canadians in other than provincial terms." Thus, a judicially enforced charter undermines federalism because it changes the cooperative relationship between the federal government and the provinces. It allows the courts through their decisions to encroach on the exclusive provincial spheres of jurisdiction, ultimately creating a hierarchical order by subordinating the provinces to a national standard. Consequently, the provinces have been mounting pressure on the Federal government for a re-examination, and possible reform, of the appointment process of judges to the Supreme Court of Canada.

The third plane that the Charter operates on, according to Russell, is the way the Charter permeates the very design process of public policy and legislation. From the early stages of drafting legislation, there is a great potential for Canadian values to influence provincial variations in policy and administrative behaviour. Lawyers in boardrooms, and politicians in committees, review and scrutinize every piece of legislation that is being drafted, or every new government policy or service being implemented, to ensure that it is 'Charter-proof'. Similar to a fiscal audit, the full spectrum of government activities becomes subject to a Charter audit. Ministries of Justice have moved to the forefront in governments as new central agencies in what James Kelly has described as bureaucratic activism, "a process whereby the development of policy within the administrative state has been
restructured to incorporate an extensive Charter review of policy proposals. Kelly argues that this is a new alternative form of activism in response to the growing judicial activism by the courts, to ensure that the political executive retains control over its policy agenda. Nevertheless, the implications for federalism on this plane are that federal and provincial elites begin to lose power. Policy options become further limited, and the ability of political elites to enact the legislation they want becomes hampered with the pervasive influence of the Charter.

The American Experience

The Canadian Charter is often seen as the culmination of American influence on Canadian politics, as it represents a stark departure from the traditions of the British Parliamentary system. It would be prudent at this time, therefore, to examine briefly the American experience in relation to Canada’s, as an entrenched bill of rights is widely seen as an American concept. On the surface, there are a number of striking similarities between Canada and the United States. Both countries are relatively wealthy, educated, and ethnically diverse; both were at one time British colonies. There are also a number of similarities between political institutions. Both countries have a bicameral legislature, are federally structured societies with two orders of government and have regular free elections to elect their leaders. Likewise, both countries have a supreme court and they both believe in democracy, due process, and the rule of law. Finally, the most important similarity for this study is that each country has its own entrenched charter or bill of rights. The United States in particular has over two centuries of experience, history, and jurisprudence with rights
and federalism. However, there are a number of key differences between these two countries that significantly change the way in which a charter of rights relates to federalism.

The first such distinction is cultural, specifically related to Quebec. The United States does not have a state within its federation that is remotely similar to Quebec vis-à-vis the rest of Canada. While there is a large segment of the American population that is Spanish speaking, they are not a majority in any state at present, so English is the only official language. Moreover, referring back to Alain Gagnon’s two distinctions of federalism in Canada, the political purposes of the provinces uniting federally are different from the American experience. The original purpose of federalism in Canada was to preserve, in particular, the distinct society of Quebec as one of two founding nations (European federalism), contrary to the United States that united federally for economic and physical security as one nation (American federalism).

The second major distinction is the structure of the judicial system. The Supreme Court is the highest and consequently, the most powerful court in Canada, sitting at the apex of the Canadian judicial system. As a general final court of appeal in Canada, it has the last word and final interpretation in all areas of Canadian law including provincial, federal, administrative, criminal, tax, and constitutional (including federalism and the division of powers, and the Charter of Rights and Freedoms). Moreover, its decisions are binding on all the courts below it, ensuring one national standard. In essence, the Canadian model is a unitary system in a hierarchical structure. This contrasts distinctly with the American model. The
national government in the United States has no control over the fifty state systems of courts. There is no hierarchical structure in the justice system between the Federal Supreme Court and the state supreme courts. In short, the judicial system is structured federally with each court system "sovereign" within its competent jurisdiction. The result is a duel court system with fifty-one court systems operating at an equal level with state courts enforcing state law and federal courts enforcing federal law. As such, state variations in local policy have significantly more protections against the centralizing effects of a bill of rights.\textsuperscript{45} However, there is one important similarity and that is with respect to constitutional matters wherein the United States Supreme Court has final say over the meaning and interpretation of the constitution and its decisions are binding on all courts in the US.

The third major difference is the selection process of Supreme Court justices. In Canada, justices are appointed by the Governor-General on advice from the Prime Minister. Currently, according to the \textit{Supreme Court Act}, the nine members of the Supreme Court of Canada, (the Chief Justice and eight puisne Justices), are appointed by the Governor in Council on the advice of the Prime Minister and the Minister of Justice who represent Cabinet. The appointee must either be a judge of a superior provincial court or be a barrister or advocate of at least ten years standing at the bar.\textsuperscript{46} The only other restriction is that three of the justices must be from Quebec and that by convention three justices come from Ontario, two from the Western Provinces, and one justice from the Atlantic Provinces. Everything else concerning the appointment process is left to the discretion of the appointing Cabinet.\textsuperscript{47} Similarly, the Prime Minister also appoints all the justices to the provincial courts of appeal and the
superior courts. As such, the Prime Minister can appoint judges who are sympathetic to the federal government with no real resistance by the provinces. Further, André Bzderg argues that federal high courts are best characterized as nationalist and centralist, "...largely the result of the strong institutional factors that link the federal high court to the political institutions of the central government, notably the process by which judges are appointed."\(^48\)

In the United States, Supreme Court justices are nominated by the President and ratified by the Senate. To be approved, the nominee must go before a Senate selection committee and answer questions put forth by members of the Senate, usually on hypothetical legal questions that either have come before the court in the past, or could come before the court in the future. The significance of this selection process is that the Senate is comprised of elected members who represent their states. As such, they have the potential to ensure that a future member of the Supreme Court will be sympathetic to state needs. Moreover, judges at the state level are elevated to their positions by a wide array of various appointment processes, so the President has no control over justices in the individual states.\(^49\)

**Thesis Outline**

This study is broken down into four parts. Chapter two will examine the evolutionary relationship between rights and federalism from Confederation until the entrenchment of the *Charter*. It often is argued that rights discourse in Canada does not begin until the passing of the *Charter of Rights and Freedoms* in 1982. The original framework of the *British North America Act, 1867*, excludes explicit
guarantees for individual rights, although some collective rights were entrenched in sections 93 and 133. The framers of the constitution opted for a constitution “similar in Principle to that of the United Kingdom” — a system founded on the principle of Parliamentary supremacy (albeit a federally structured constitution very much unlike that of the United Kingdom). Notwithstanding that, the concept of constitutionally protected rights and civil liberties in Canada was not a new feature in the political landscape that was imposed onto Canadian society out of a vacuum in 1982. On the contrary, there has been in Canada a long history of rights jurisprudence that has evolved over time.

From Confederation up to 1982, there existed a rights discourse within the framework of federalism and the Canadian constitution. The paramountcy of federalism was a dominant theme throughout the pre-Charter rights jurisprudence. Nevertheless, rights and civil liberties were protected by the courts despite the lack of any semblance of an entrenched bill of rights. This often was accomplished, albeit with some rather creative interpretations on more than one occasion, through the courts by using a division of powers analysis when interpreting rights cases. This time period, however, exhibited a mixed record of protecting rights and freedoms, clearly a result of limited institutional and constitutional rules that governed rights, a situation that would not be corrected until the passing of the Charter. By the 1960s, there was a growing rights consciousness developing in Canada; the growing new class of citizens who were of neither French nor British origin were becoming increasingly active and organized. In an attempt to weaken the centrifugal forces that were developing in the federation, and to impede the separatist threat that was
growing in Quebec, the Federal Government actively tried to harness the new rights consciousness. In 1968, the Federal Government proposed a number of fundamental constitutional changes, including a new amending formula, and a charter of rights, that would spawn a fourteen year constitutional war with the provinces that finally culminated in 1982 with the patriation of the constitution and ultimately, with a new constitutional discourse.

The third chapter will look at the promise of the Charter during the negotiating process, focusing on the various debates concerning the Charter and its potential/perceived impact on federalism, the division of powers, and the autonomy of the provinces. Likewise, this chapter will examine the timeline of events that led to the patriation of the constitution. The substance of the proposed charter of rights, as well as the process the Federal Government attempted to use to entrench the document, created both contentious and divisive issues for federalism. The Charter represented a fundamental change to the constitutional order. Federalism and Parliamentary supremacy had lasted for over a century as the two pillars of the constitution; the Charter undoubtedly would become a third. It was clear to those involved that even though the Charter alone did not alter directly the division of powers, it did show great potential to affect the legislative competence of the provinces, as well as to define a new and prominent role for the courts in Canadian politics. Supporters of the Charter argued that its impact would at best be minimal to provincial autonomy. Critics of the Charter were far more skeptical. They recognized the Charter not as an altruistic endeavour by the government to advance human rights and improve the human condition in Canada, but as a deliberate attempt
by Trudeau to counter the growing separatist movement in Quebec and undermine the rise of provincialism that was growing across the country.

This study will then proceed by examining how the *Charter* has affected federalism in Canada. More specifically, the next two chapters will look at the incongruity that lies within the constitution between a judicially enforced charter and federalism, the factors that have led to the shifting of constitutional discourse from a federalism discourse to a rights discourse, and the split between Quebec and the rest of Canada with respect to the success of the *Charter* at unifying the country. Influenced in part by the new-found power of the courts to strike down any law that is inconsistent with the rights guarantees of the *Charter*, and in part by the changing demography of the Canadian population, charter-politics and the language of rights have become a direct challenge to federalism and the language of government. As Cairns has observed, “The ethnicity of the new non-aboriginal, multicultural, and multiracial Canada largely concentrated in metropolitan centres cannot be ‘managed’ by federalism... Canadians are becoming a new people for whom the past of Wolfe and Montcalm is truly another country and for whom federalism has declined in instrumental value.”52 The percentage of the population that is of neither French nor English origin typically is hostile to dualist conceptions of the country.53 Moreover, the *Charter* allows Canadians to identify themselves directly within the constitutional order as rights-bearing individuals, equal to, and deserving of status and privilege previously enjoyed by governments.

Nevertheless, Canada still is comprised of two dominant and very distinct linguistic and cultural groups, the French in Quebec, and the English in the ‘Rest of
Canada'. Immigrants, or at least their children, tend over time to integrate with one or other of these groups, usually the English. Moreover, Quebec has distinguished itself from the rest of Canada not only by language, but by geographic area, government, legal system, and custom. Accordingly, the fourth chapter will examine the relationship between the Charter and Quebec specifically, and how a rights discourse has impacted federalism in Quebec. The province of Quebec always has envisioned its historical place in the federation as distinct from that of other provinces. The political purposes of federalism have a different meaning for Quebec and as such, it is assumed that the impact of the Charter would be different for Quebec than for the other provinces. Moreover, the sections of the Charter that cover minority language education rights, freedom of expression, and mobility rights present a far greater influence on Quebec’s language and cultural policy, an issue that is paramount to Quebec but largely inconsequential to the rest of Canada in general. (With the exception of New Brunswick, Canada’s only officially bilingual province.)

The fifth chapter will examine the broad implications of the Charter for Canadian federalism as a whole. The argument presented here proceeds in three phases. The first is that the Charter has had a significant centralizing impact on federalism, ultimately undermining the traditional division of powers framework in the Constitution Act, 1867, by interfering with the legislative competence of both orders of government. Second, the judicialization of politics that has occurred as a consequence of a judicially enforced charter of rights has transferred ultimate legislative authority to the courts and ushered in a new era of judicial supremacy at the expense of Parliamentary supremacy. And third, the addition of the Charter to
the constitution has created what Cairns has described as an 'unstable coexistence' that threatens to cripple the effective workings of the constitution. The Charter has created a third pillar in the constitutional order that generates a counter discourse to the traditional federalism discourse. This is evidenced first by the growing charter jurisprudence that slowly has been replacing provincial community values with national standards. Second, the failure of the Meech Lake and Charlottetown Accords has highlighted the clash between the old order of federalism and the new order of rights, demonstrating that the hegemony of the traditional discourse of the constitution has been successfully challenged and threatened with becoming obsolete as an organizing principle.

**Summary**

The Canadian constitution underwent a tremendous transformation in 1982, unparalleled by any other change since Confederation. Canadian political discourse has been transformed from the traditional federalism framework into a new arena of constitutional supremacy and rights discourse – by shifting the focus of Canadian constitutionalism from the powers of government to the rights of citizens. The Supreme Court has moved from being perceived as a neutral legal institution, to an active political actor. The entrenchment of the Charter has created an unstable coexistence within the constitutional framework and as the full impact of the charter jurisprudence begins to be realized and felt, the clash between federalism and judicially enforced rights likely will intensify. The consequences of the conflicting relationship between federalism and the Charter have resulted in a weakening of
federalism in Canada and will continue to undermine federalism the more rights-conscious Canadians connect to their constitution and their Charter.
Endnotes.


2 Ibid.


4 Ibid.


6 Ibid., pg. 64.

7 The Amending formula sets out the rules by which changes to the Constitution can be made. The procedures are set out in sections 35.1 and 38-49 (inclusive) of the *Constitution Act, 1982*. Prior to patriation, no formal amending formula existed within the text of the *British North America Act*. Any changes to the constitution could only be made by the British Parliament.

8 Cairns, pg. 7.

9 Ibid.

10 Ibid.

11 Ibid.

12 Ibid., pg. 8.


15 Prior to 1982 and the patriation of the constitution, the original constitution was called the *British North America Act, 1867*.

16 Monahan, pg. 103. The federal government was given the power to disallow any Act passed by a provincial legislature, the power to appoint the lieutenant governors of the provinces and be able to instruct the lieutenant governors to reserve royal assent of an Act so that it may be reviewed by Parliament, to appoint judges to the provincial superior courts, and “to make laws for the peace, order, and good government of Canada in relation to all matters not assigned exclusively to the legislatures of the provinces.” For a discussion of other centralizing features see P.W. Hogg, *Constitutional Law of Canada* 3rd ed. (Toronto; Carswell, 1992).

17 Monahan, pg. 233-238.

18 Ibid., pg. 103.

19 Ibid., pg. 104.

21 Ibid.

22 Ibid., pg. 24.

23 Ibid.

24 Ibid.

25 Ibid.


27 Guy LaForest, Trudeau and the End of a Canadian Dream (Montreal & Kingston; McGill-Queen's University Press, 1995), pg. 184.

28 Ibid., pg. 186.


30 Cairns, pg. 3.

31 Russell, pg. 345.

32 Cairns, pg. 4.

33 Ibid.


35 Russell, pg. 345.

36 Morton & Knopff, pg. 13.

37 Cairns, pg. 77.

38 Ibid.

39 The Conservative Government, elected in January of 2006, has begun reforming the appointment process of Supreme Court Justices. Stephen Harper, the new Prime Minister, established an ad hoc committee of Parlamentarians representing all Parties in the House of Commons with the mandate of questioning his Supreme Court nominee. The committee does not have a veto over the appointment, and the Prime Minister is not legally bound by any recommendations the committee may make. Details of this committee are discussed later on.

40 Russell, pg. 344.

41 Ibid., pg. 360.

43 Ibid., pg. 476.

44 Russell, pg. 333.


46 Jacob S. Ziegel, “Merit Selection and Democratization of Appointments to the Supreme Court of Canada” Choices 5 (June 1999), pg 6.

47 Ibid.


49 Jacob, et al, pg. 21.

50 Preamble of the Constitution Act, 1867.

51 Epp, pg. 159.

52 Cairns, pg. 112.

53 Ibid., pg. 111.

54 Epp, pg. 158.
2. Rights in Canada before the Charter

From Confederation to 1982, federalism and the division of legislative powers that derive from it monopolized Canadian political and constitutional history. A vast majority of important political debates over the last century - from the Great Depression to the building of the post-war welfare state, to the energy conflicts of the 1970s, and the constitutional wars of the 1980s and 1990s - have been fought in the arena of federal-provincial relations. A central issue, or theme, within these debates focussed around the role the federal institutions, and by extension the provincial governments, should play in solving the problems of the day.¹ Throughout this period, Canadian courts, and prior to 1949, the Judicial Committee of the Privy Council,² reviewed the exercise of lawmaking power of the governments by the concept of legal federalism. Legal federalism, in short, “concerns conflicts as to whether a challenged law falls within provincial or federal jurisdiction,”³ the implication being that invasion of federal jurisdiction by a province or vice versa was unconstitutional. Moreover, while the scope of judicial review under the British North America Act, 1867, primarily was limited to questions of legislative jurisdiction, the courts sometimes were successful in protecting rights through federalism review.

The original framework of the British North America Act, 1867⁴, excludes explicit guarantees for individual rights; the framers of the constitution opted for a constitution “similar in Principle to that of the United Kingdom⁵ – rooted in the
principles of Parliamentary Supremacy. However, the framers opted instead for a federally structured constitution that is very much unlike the United Kingdom. Apart from this very general reference, the basic principles of British Constitutionalism are not spelled out in the Constitution Act, 1867, but found in the common law and constitutional conventions that have evolved over time. Explicit guarantees and protections of rights in the 1867 Constitution were limited. The Crown was considered the guarantor and protector of rights in Canada. Prior to 1982, the supremacy of Parliament was paramount and the Parliamentarians themselves had virtually unlimited power to make law. The only constraints placed on the legislative ability of the national government were federalism and the division of powers. The role of the courts primarily was to decide cases by interpreting the law passed by governments or as defined by the common law,⁶ and to act as umpire between the two orders of government.

Nevertheless, while the Canadian Charter of Rights and Freedoms predominantly has occupied centre stage of the constitutional order and garnered much of the public attention since its entrenchment in 1982, it is not the beginning of rights protection in Canadian law. Prior to the Charter, the protection of fundamental rights and freedoms was left up to Parliament and the legislatures. So long as the federal government or the provinces acted within their respective spheres of jurisdiction, there was little that could be done to protect minorities or individuals from state encroachment or discriminatory legislation. The courts in Canada did manage in some cases to protect and advance civil liberties through the exercise of judicial review; but with very little in the way of written guarantees in the
constitution, these cases were more the exception than the rule.

It is important to understand what is encompassed in the term 'rights'. In a rudimentary understanding, the term refers to the inalienable liberties and fundamental freedoms that each individual has by virtue of being sovereign and rational. In lay terms, in a liberal democracy, they refer to the fundamental rights and freedoms (that is, freedom of expression, religion, association, assembly, the press) and basic legal rights (including fair trial, freedom from arbitrary arrest, presumption of innocence, freedom from cruel and unusual punishment), afforded to every individual, to protect the individual from arbitrary state action and encroachment. Similarly, rights can include equality (before and under the law), and equal protection and equal benefit of the law without discrimination based on race, colour, sex, age, religion, etc, primarily, those rights that presently are enshrined in various declarations and bills of rights, from the United States Bill of Rights in 1791, to the United Nations Universal Declaration of Human Rights in 1948, to the Canadian Charter of Rights and Freedoms in 1982.

The Canadian political and legal culture of the times, according to Charles Epp, was built around collective projects created in legislatures and Parliament, and implemented by governmental power. Moreover, Canadian society was relatively deferential toward authority, unwilling to challenge government authority in the courts. And until 1982, Canada's courts were relatively reluctant to create new liberties or rights against state authority. Nevertheless, there has been a long and evolving rights jurisprudence in Canada prior to the entrenchment of the Charter. As the Supreme Court has said, rights and freedoms in Canada did not spring from a
vacuum when the Charter was enacted. Many of the fundamental rights and freedoms that were enshrined in the text of the Charter existed as basic principles of law and political discourse.

As Peter Russell, Rainer Knopff, and Ted Morton point out, "the absence of a comprehensive charter of rights from the B.N.A. Act did not mean that no entrenched constitutional rights could be found in the B.N.A. Act." On the contrary, the BNA Act, 1867, did guarantee explicitly collective rights to denominational schools. Under section 93, minority religion education rights were secured for the Roman Catholic minority in Ontario and the Protestant minority in Quebec. Similarly, the use of either French or English in Parliament (and in the legislative assembly of Quebec), and in the courts of Canada and Quebec are guaranteed under section 133. Additionally, the Act also implicitly guarantees the right to a fair trial by maintaining that the judiciary remains independent under sections 99 and 100. Likewise, one can argue that the federal structure of Canada is a form of minority protection, especially where a minority group makes up a majority in their respective province, such as the French Canadians in Quebec. Moreover, section 92 (13) of the distribution of legislative powers, states each province has exclusive jurisdiction over "property and civil rights in the province." While the term 'civil rights' is vague in text, there is at least an acknowledgement within the constitution that civil rights in some capacity do exist. Finally, there has existed rights protection through common law and statutory interpretation. Most of the basic legal rights, such as habeas corpus, trial by jury, the presumption of innocence, derive from the common law tradition. They were 'judge made' rights that have existed in, and been a part of the
Canadian legal system long before they were entrenched in the Charter.  

Nevertheless, the protection of rights and freedoms in Canada prior to the 
Charter exhibited a mixed record of advancing civil liberties. With limited 
institutional and constitutional rules that governed rights and freedoms, the courts in 
Canada used many different and sometimes creative approaches to interpreting and 
defining those rights, from a division of powers analysis, to criminal law power, and 
finally to legal federalism and an implied bill of rights approach. In many respects, 
the judiciary was handicapped by the absence of an explicit statement on rights and 
freedoms in the BNA Act, 1867, and by the principles of federalism. In other words, 
the principles of federalism were paramount to rights and freedoms. Nonetheless, 
one important development emerges from the pre-Charter era, the practice of judicial 
review and an increasingly significant role for the courts in Canada’s political culture. 

This chapter will provide an historical overview of the most important court 
decisions of the Supreme Court of Canada, (and the Judicial Committee of the Privy 
Council), that relate to civil liberties and fundamental freedoms in Canada. It also 
will examine how rights in Canada have developed and how the courts have protected 
them. The history and evolution of rights jurisprudence in Canada happens in three 
distinct phases. The first two phases make up the pre-Charter era, from 
Confederation to the passage of the Bill of Rights in 1960, and from 1960 up until 
1982 with the passing of the Charter. The third phase is the Charter era, which will 
be discussed in a later chapter. Prior to the Charter, the protection of civil liberties in 
Canada was limited by the principle of Parliamentary sovereignty and federalism. It 
is not until the expanded powers of the court, and judicial review as a result of the
Charter, that we see the protection of rights and freedoms become paramount in constitutional discourses.

The earliest rights cases in Canada date back as far as the late 19th century and early 20th century. Some of these cases dealt with race relations between Asian (Chinese and Japanese) immigrants, (and British subjects of Asian descent), and the majority white population of western Canada. The courts adopted a division of powers analysis for protecting rights and freedoms, and in doing so, were able to carve out a sphere of protections for individuals. Civil liberties cases surfaced again in the 1930s. The JCPC decided the famous “persons” case in Edwards v. Attorney-General of Canada,18 establishing that women were persons and could be appointed to the Senate. Shortly thereafter, during the Great Depression in Alberta, conflicts grew between the then governing Social Credit party and its critics when government legislation interfered with press freedoms. What became known as the Alberta Press Case19 established an important line of jurisprudence known as the ‘implied bill of rights’. By 1949, appeals to the JCPC finally were abolished, and the Supreme Court of Canada became supreme both in practice and in name as the final court of appeal in Canada. At the same time, rights consciousness in Canada began to emerge in the wake of the atrocities of the Second World War and was inspired by the signing of the Universal Declaration of Human Rights (1948). The Supreme Court of Canada began to hear more and more cases that dealt with civil liberties. Some of those cases originated in the 1950s in Quebec between the Catholic majority and the Jehovah’s Witnesses. Once again, the Court adopted a new approach to protecting rights and freedoms whereby civil liberties would be protected by the common law constitution
as interpreted and applied by the judiciary. A commonality between all these early rights cases is that each of them dealt with a right or freedom that was included in the provisions of the Charter. As such, this chapter will look at these cases with respect to the rights issues they raised by examining the cases together that deal with a specific rights issue.

Judicial Review and the Legacy of the Judicial Committee of the Privy Council

Prior to the Constitution Act, 1982, the practice of judicial review with respect to civil rights in Canada often has been down-played as seemingly unimportant. This was largely because unlike the American Constitution, Canada's written constitution did not include an entrenched Bill of Rights. Nevertheless, the JCPC played a fundamental role in the development and evolution of judicial review, and in turn, the protection and advancement of rights and freedoms. The practice of judicial review began in Canada with the JCPC, "shaped by colonial relationships and the evolutionary character of the country's progress toward full political independence." In other words, judicial review is a product of the British colonial system.

An examination of the B.N.A. Act suggests that perhaps the Fathers of Confederation did not intend or anticipate the development of judicial review. Nowhere in the Act does it explicitly grant the courts the power of judicial review. Moreover, there is also no mention or creation of a national supreme court within the text of the constitution similar to that of the United States Supreme Court. All the constitution provides is that,

The Parliament of Canada may, notwithstanding anything in this
In other words, on the surface, it appears that the Fathers of Confederation did not envision a prominent role for the courts in resolving constitutional questions, or at best, paid no more than minimal attention to the possibility. Likewise, section 101 does not require absolutely the establishment of such a court, and more importantly, it does not bestow explicitly upon it the power of judicial review.24 Even during the debate on the Quebec Resolutions in the Parliament of Canada in 1865, Sir John A. Macdonald argued that “the distribution of legislative powers was such as to avoid the problem of conflict of jurisdiction and that in areas of concurrent jurisdiction the federal Parliament, because of the Governor in Council’s power to disallow provincial legislation, would prevail.”25 Nevertheless, it is not within the scope of this chapter to explore the debate concerning the intentions of the Fathers of Confederation to create, or not, a role for the courts and to establish the powers of judicial review. The point, however, is that regardless of the intentions of the framers of the constitution, the Judicial Committee of the Privy Council carved out a significant role in Canada for the courts as interpreter, umpire, and guardian of the Constitution with the power to strike down legislation, as well as to change the meaning of the constitution through micro-constitutional amendments.26 As such, while the majority of the cases heard by the JCPC dealt primarily with federalism and division of powers issues, it nevertheless made an important contribution to the advancement of rights and freedoms in Canada.

Two important cases came before the Court in the early years of
Confederation that would establish important precedents in deciding future cases. As previously mentioned, rights and freedoms in the early years after Confederation were protected, albeit in a limited capacity, through a division of powers analysis with the courts exercising the powers of judicial review. This was established by the JCPC’s decision in *Hodge v. R.* [1883] where the Court held that both Parliament and the provinces were each sovereign within their respective spheres of jurisdiction as numerated by sections 91 and 92 of the *B.N.A. Act.* As such, it was necessary for the workings of the constitutional order that the courts be able to strike down legislation that infringed on the division of powers. In the early years, judicial review was limited to containing each level of government within its assigned responsibilities. Civil liberties litigants often would contend that the offending legislation was *ultra vires,* or beyond the scope of jurisdiction of the enacting government. Thus, the division of powers analysis would be used in an indirect manner to advance rights and freedoms. Nevertheless, the strategy that was used to advance rights also can be used to infringe on rights. So long as Parliament or any legislature was operating within its constitutional jurisdiction, with no explicit guarantee for individual rights, the courts were limited in their ability to protect rights.

The second important decision was in *Edwards v. Attorney-General of Canada.* (the ‘Persons’ Case) The *Edwards* case was a landmark decision by the JCPC in that it proposed an entirely new approach to constitutional interpretation that has since become one of the core principles of constitutional law in Canada. Building on the precedents established in *Hodge,* the JCPC broadened the scope of the Court’s
power of judicial review. The Committee established what would be known as the "living tree approach." In its decision, Viscount Sankey, writing for the JCPC, stated that,

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada. Like all written constitutions it has been subject to development through usage and convention.

Their Lordships do not conceive it to be the duty of this Board -- it is certainly not their desire -- to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits, are mistresses in theirs.

The JCPC acknowledged that the constitution is not like an ordinary statute and should not be interpreted as such. Rather, it should be interpreted in a manner to ensure that it is reflective of society, adapting and changing to meet the needs of society as it changes. In this sense, the JCPC has established that the interpretation of the text of the Constitution can and should change without formally changing the text itself. Judicial review is not simply reviewing statutes and laws and policies of government, but is also a review of the constitution.

Fundamental Freedoms

The fundamental rights of expression and religion that are enshrined in the Charter today may not have been crystallized as specific rights under the BNA Act, 1867, but they did have force as basic principles that formed the foundation of the law in Canada. The Supreme Court of Canada, through its powers of federalism review, was able to attack certain laws that limited fundamental rights on the grounds that the
authority to enact the law fell outside the scope of competent jurisdiction of the sponsoring government. One of the most notable examples was the 1938 decision, *Reference Re Alberta Legislation.*

Since 1935, Alberta had been ruled by a Social Credit government, which in 1937, enacted a series of measures including the *Accurate News and Information Act,* to ensure that Social Credit policy was presented ‘accurately’ in the newspapers in accordance with government approval. In essence, the Act was designed to prevent negative criticism of the Provincial Government and Social Credit policy in the newspapers. The Federal Government asked the Supreme Court, by way of the reference mechanism, to examine the constitutional validity of the Act. While provincial governments normally have extensive authority to regulate businesses operating within the province, the Court found that the Social Credit measures struck at the very foundation of a parliamentary democracy.

The Court was unanimous in its decision. Then Chief Justice Duff, with Justices Cannon and Davis concurring, stated in his decision that, “The preamble of the statute [*BNA Act*], moreover, shows plainly enough that the constitution of the Dominion is to be similar in principle to that of the United Kingdom.” Duff goes on to say that the constitution “contemplates a parliament working under the influence of public opinion and public discussion.” More importantly, political institutions secure their competence and legitimacy from free discussion and criticism of public affairs and policy. Moreover, since the principle of free speech is not exclusively a provincial matter, it is necessarily vested in Parliament. As such, any attempt by a provincial legislature to abrogate the right of free speech would be *ultra vires.* In
short, "the right of every citizen to criticize government was a necessary and inherent element of Canada's constitution, and beyond the reach of a provincial legislature."\textsuperscript{38} Duff had attempted to expand rights protections in Canada by establishing in his decision that there existed within the preamble of the Constitution an 'implied' bill of rights. This view, however, was only supported by three of the justices. Cannon, who agreed with Duff in that the provincial legislature was \textit{ultra vires}, did so based on a more conventional interpretation of the division of powers. Cannon argued that the press bill was an attempt by the province to revive the crime of seditious libel and therefore, was an encroachment of the Federal Government's exclusive power over criminal law.

Fifteen years later, the Supreme Court was faced with a number of civil liberties cases from the province of Quebec. In all, there were seven cases that were decided, ranging from various issues of freedom of religion,\textsuperscript{39} to police conduct,\textsuperscript{40} to the executive powers of the premier.\textsuperscript{41} Moreover, in all seven cases, the civil liberty litigants were victorious in their cause. It seemed to be a beginning of a growing rights consciousness in Canada, at least within the Supreme Court. Russell, Knopff, and Morton point out that the significance of the Court's emerging rights jurisprudence in the 1950s is that "despite the absence of either a constitutional or statutory Bill of Rights the Canadian legal system provided considerable protection for the communicative freedoms of unpopular minorities at least from attacks by oppressive provincial governments."\textsuperscript{42} Nevertheless, despite the initial victories of the litigants, the Supreme Court rulings in Quebec in the 1950s would not provide an absolute protection of rights and freedoms in Canada. The Court in its decisions
often was divided and indecisive as to the scope of protections toward rights within the existing constitutional framework.

In *Saumur v. Quebec*, the appellant challenged the validity of a local by-law that prohibited the distribution of pamphlets in the streets without the permission of the chief of police. Saumur, a Jehovah Witness, argued that the by-law was unconstitutional because it interfered with freedom of worship and freedom of the press as guaranteed by the preamble of the *B.N.A. Act*, following Duff's decision in the *Alberta Press Case*, and by other statutes including the *Freedom of Worship Act, 1852* (which was re-enacted by the government of Quebec in 1941). Both the trial judge and a majority of the Appeal Court upheld the by-law, but the Supreme Court in a 5-4 decision overturned the decision and held that "the by-law did not extend so as to prohibit the appellant as a member of Jehovah's Witnesses from distributing in the streets [their pamphlets]." Moreover, the Court also held that police officers must refrain from interfering with Jehovah's Witnesses distributing pamphlets. While Saumur won his case on the immediate issue, the Court itself was very divided in its reasoning and as a result, the decision in *Saumur* was inconclusive as to the position freedom of worship and freedom of the press would take in the context of the constitution.

Justices Rand and Kellock argued for the majority that the by-law was *ultra vires*, since freedom of worship and freedom of the press are neither civil rights or matters of a local nature in the province. Justice Estey, concurring, also argued that freedom of worship and the press fall under the federal powers of "Peace, Order, and Good Government." Justice Locke, also for the majority, argued that freedom of
worship and the press are rights granted to all Canadians by the statute of 1852 and implicit in the preamble of the Constitution. Moreover, Locke also argued that the intent of the by-law was an exercise of criminal law power and thus, the responsibility of the federal government under section 91(27). Justice Kerwin, however, sided with Saumur for an altogether different reason. In his decision, he asserted that freedom of the press and religion were the responsibility of the province, and therefore, the by-law was *intra vires*. However, the by-law conflicted with the Freedom of Worship Act, and therefore, does not apply. Then Chief Justice Rinfret, and Justices Taschereau, Cartwright and Fauteux, dissenting, argued that the pith and substance of the by-law was to regulate the usage of streets, and was a matter of local and private nature in the Province, and thus, the by-law was *intra vires*. In short, there were three contrasting views as to the relationship between civil liberties and the division of powers and not one view was supported by the majority of the Court. The only definitive conclusion that could be drawn from this case was that the protection of rights and freedoms in Canada was limited without an entrenched bill of rights.

Four years after the Saumur decision, the Supreme Court gave its decision in *Switzman v. Elbling and the Attorney General of Quebec*. The Court was asked to decide on the constitutional validity of the Act Respecting Communistic Propoganda, 1937, the Padlock Law. The purpose of the Act was to prohibit the propagation of communist ideology in the province. The Attorney-General of Quebec intervened in the case to defend the Act, and again, as in Saumur, both the trial judge and the Quebec Court of Queen’s Bench (Appeal Side) found the Act to be constitutional.
The Supreme Court of Canada, in an 8-1 decision, found the Padlock Law to be *ultra vires*, and therefore, unconstitutional. Once again, similar to *Saumur*, the appellant, Switzman, won his case on the immediate issue, but the Court in its decision provided no conclusive foundations as to the relationship of rights jurisprudence in the Canadian Constitution. Then Chief Justice Kerwin, and Justices Locke, Cartwright, Fauteux, and Nolan argued for the majority that the intent of the statute was an exercise of criminal law which falls under the responsibility of the federal government under section 91(27). Likewise, Justices Rand, Kellock, and Abbott, concurring with the majority on the result, reaffirmed the implied bill of rights theory established by Chief Justice Duff in the *Alberta Press Case*, and argued that “the subject-matter of the statute... ...constitutes an unjustifiable interference with the freedom of speech and expression essential under the democratic form of government established in Canada.”\(^\text{47}\) Only Justice Taschereau dissented and believed that the intent of the legislation was not criminal law, but rather about property, and therefore, provincial jurisdiction.\(^\text{48}\) Once again, as was the case in *Saumur*, the Court was divided as to how to protect rights and freedoms within the existing framework of the constitution.

Peter Russell, Rainer Knopff, and Ted Morton contended that the failure of the Court to establish majority support for an implied bill of rights was “an important contributing factor in the movement to establish a formal Bill of Rights in Canada.”\(^\text{49}\) The case for an entrenched Bill of Rights in Canada would be advanced further as a result of the circumstances that surrounded the case of *Roncarelli v. Duplessis*, 1959. Although civil liberties groups would receive yet another victory from the Supreme
Court at the expense of the Quebec Appeals Court, there are several important issues that stand out from this case, and "the principles at stake concern every Canadian."50

The Supreme Court of Canada was asked whether there existed any absolute, legal limitations on the exercise of "the absolute discretion of an administrative official."51 The plaintiff, Frank Roncarelli, was a member of the Witnesses of Jehovah and the owner of a restaurant in Montreal. Roncarelli filed a lawsuit against the Premier of Quebec, Maurice Duplessis, for damages when, on December 4, 1946, the Premier ordered the Quebec Liquor Commission to cancel his liquor license because Roncarelli continually provided bail52 for other Jehovah Witnesses who were targeted and persecuted by Duplessis' Government Policy.53 It would take thirteen years before the case reached the Supreme Court; nevertheless, on January 27, 1959, the Court in a 6-3 decision upheld Roncarelli's appeal. The importance of this case, however, in the words of Frank R. Scott, was that it "provid[ed] an important affirmation of the Rule of Law in Canadian jurisprudence."54 Moreover, it emphasized the demand for further protections of rights and freedoms in Canada, and it increased the awareness for judicial review of administrative action.

It is important to note, however, that the protection of rights in the pre Charter era was very limited. The protection of rights through federalism review, while significant in certain instances, necessarily was limited and subordinate to parliamentary supremacy. While the courts may have been willing to protect rights and freedoms, there was little that could be done if governments decided that individual rights needed to be curtailed for the benefit of the public interest.
The Constitution Act and Racial Discrimination

During the pre-Charter era, the courts were faced with a number of significant limitations on their ability to protect minorities from discrimination. A series of cases came before the Supreme Court and the JCPC that dealt with challenges to overtly racist legislation, and in many of the cases, the challenges would prove to be unsuccessful. In *Russell v. R.* (1882), the Court established what would be known as the 'pith and substance' doctrine in determining division of powers cases. The issue facing the Privy Council was the *Canada Temperance Act*, a federal statute that permitted local areas to prohibit the sale of "intoxicating liquor." At issue was whether or not the Act in question was constitutionally invalid because it dealt with property and civil rights, a matter reserved to the provinces under section 92(13) of the *B.N.A. Act*. The fact that alcohol or liquor could be held as property did not prevent the Privy Council from upholding the federal legislation because it dealt with "an evil which is assumed to exist throughout the Dominion." According to Sir Montague Smith, Parliament could enact laws that indirectly affect property and civil rights as long as it did so for a good reason. Moreover, in assessing the validity of any legislation it is necessary to determine the true nature of the legislation by considering the true intent of the legislation in question. Thus, according to Montague Smith, the *Canada Temperance Act* was valid because the true object of the Act was the preservation of public health and safety and within the federal jurisdiction of peace, order and good government.

Under this doctrine, the court would determine the 'pith and substance' - or intent - of a law by establishing its central or fundamental feature. If an act is in pith
and substance in relation to the jurisdictional responsibility of the sponsoring government, whether it be federal or provincial, then the law may have incidental effects on other jurisdictional responsibilities that are *ultra vires* of the sponsoring government without thereby being rendered unconstitutional.\(^{60}\) Thus, the ‘pith and substance’ doctrine focuses primarily on the intent of the legislation, and not the effect, in determining constitutional validity. The problem of this approach for civil liberty protection in Canada is that overtly racist or discriminatory legislation survived judicial review so long as the pith and substance of the legislation fell within jurisdiction of the responsible level of government. As will be seen from the early years of confederation, the ‘pith and substance’ doctrine resulted in interesting and sometimes contradictory interpretations of the constitution.

The case *Union Colliery Co. v. Bryden, 1899*, involved a challenge to the British Columbia *Coal Mine Regulation Act, 1890*. Under this act, Chinese immigrants in B.C. were prohibited from seeking employment in the mining industry. The Union Colliery Company sought to have the legislation struck down not because the legislation was discriminatory toward the Chinese, but rather, because the legislation represented an infringement on business practices. The mining companies were able to pay Chinese workers far less in wages for more dangerous work in the mines. This cheap labour allowed for greater competition between mining companies, but more important, the lower wages allowed for greater profits for the companies.\(^{61}\) The mining company argued that the legislation was unconstitutional because it interfered with the federal government’s responsibility for “Naturalization and Aliens.”\(^{62}\)
Nevertheless, Chinese labourers won, and were able to continue employment with the mining companies. At the heart of the *Coal Mine Regulation Act* was a conflict between the provincial responsibility of “property and civil rights” under section 92(10), and the federal responsibility of “naturalization and aliens” under section 91(25). The JCPC ruled in its decision that the pith and substance of the legislation was to regulate the activities of Chinese immigrants and therefore, was *ultra vires* the competency of the provincial legislature to pass the act. Lord Watson, in the *Bryden* decision, had maintained that the mining regulations had “no application except to Chinamen who are aliens or naturalized subjects.” For civil liberty litigants, the *Bryden* decision was a mixed victory for civil libertarians. On the one hand, the Court had protected the rights of the Chinese immigrants to work and earn a living in British Columbia. As a consequence, however, Chinese workers still were considered second class citizens in that the mining companies could continue to pay them less for more dangerous work.

The victory won by civil liberty litigants would be short-lived, however. As easily as it can be to use the division of powers to protect rights and freedoms, it is similarly just as easy to infringe on the rights of people. This is highlighted in the case *Cunningham v. Tomey Homma, 1903*. At issue was a restriction in the City of Vancouver’s voter registry list that prevented Japanese individuals regardless of their legal status in Canada (whether they were immigrants, naturalized British subjects, or born British subjects of Japanese descent), from participating in elections. Once again, the JCPC approached the case as a division of powers issue between the federal responsibility of “naturalization and aliens” and the provincial responsibility
to enact electoral laws for local matters in the province. The court ruled that the pith and substance of the offending provincial legislation was to regulate the voters’ list within the province and not to regulate the naturalization of immigrants, thereby upholding the provincial regulations. The Court held that, “The Elections Act did not deal either with naturalization or with aliens, since a child born in Canada of Japanese parents, although a British subject would be equally excluded.” The Elections Act was aimed at all Japanese, irrespective of birth place, and as such, did not in pith and substance attempt to regulate the naturalization of aliens. (As opposed to the Coal Mine Regulation Act which specifically targeted Chinese Immigrants.) While there is little doubt as to the discriminatory intent of the Act, there was nothing the Court could have done.

The protection of rights and freedoms by the courts in Canada would take another step back in 1914 with the Quong Wing v. The King case. In March of 1912, the government of Saskatchewan passed An Act to Prevent the Employment of Female Labour in Certain Capacities. Threatening a fine of up to $100 or two months in jail, the Act specified that,

No person shall employ in any capacity any white woman or girl or permit any white woman or girl to reside or lodge in or to work in or, save as a bona fide customer in a public apartment thereof only to frequent any restaurant, laundry, or other place of business or amusement owned, kept or managed by any Japanese, Chinaman or other Oriental person.

Quong Wing, a Chinese restaurant owner in Moose Jaw, Saskatchewan subsequently was fined $5 under the act for employing white women. His appeal eventually made its way to the Supreme Court of Canada in 1914 and gave the Court “its first opportunity to examine legislation with an overtly racial intent.” Once again, a
conflict arose between the provincial power of property and civil rights and the federal power of naturalization and aliens. The Court, in a 4-1 decision led by then Chief Justice Sir Charles Fitzpatrick, argued that the "pith and substance" of the *Female Labour Act* must be understood as being in the best interests of white women. The intent of the legislation was to protect white women and not to restrict the hiring practices of Chinese businessmen. The Act did not prevent Chinese businessmen from engaging in business, as the employment or patronage of white women was not a necessary condition for operating a business.\(^67\) As a result, the *Female Labour Act* was declared constitutionally valid by the Supreme Court of Canada.\(^68\)

After the *Quong Wing* decision, it unofficially was established that equality was not considered an issue of national importance and therefore, as long as the provincial legislation did not interfere with federal authority, there was no need for the Dominion government to disallow the Act, and no way for the courts to strike the law down. Likewise, a law based upon racial discrimination that applies to all members of a given race whether they are foreign born or Canadian born, as was the case with the *Female Labour Act*, was more acceptable than a law construed to apply only to aliens and naturalized subjects as the case was with the *Coal Mine Regulations Act*.\(^69\)

Just a few months after the *Quong Wing* decision, the federal government enacted the *War Measures Act* in response to the First World War that was erupting in Europe. The Act was designed to give sweeping emergency powers to the federal government for the "security, defence, peace, order and well-being of Canada" in a time of "war, invasion, or insurrection, real or apprehended."\(^70\) Specifically
mentioned powers included scope to censor or detain without trial, and to do anything else that the government saw fit to proclaim by Order in Council. During the First World War, thousands of Ukrainians in Canada, who had originated from the Austro-Hungarian empire, were rounded up and shipped off to labour camps as enemy aliens.

During the Second World War, after the bombing of Pearl Harbour, thousands of Japanese Canadians, many of whom were British subjects, were rounded up and sent off to internment camps while their property was confiscated. At the end of the war, those who were incarcerated had the option to relocate ‘east of the Rockies’ without compensation or alternatively, to accept assisted repatriation to Japan. It is arguable, however, that having an entrenched bill of rights would have made little if any difference at all as similar events also transpired in the United States during the War even though they had a bill of rights. Moreover, in 1944 in Korematsu v. United States the United States Supreme Court upheld the constitutionality of the internment when it held, in short, that “Pressing public necessity may sometimes justify the existence of such restrictions... ...which curtail the civil rights of a single racial group.”

For civil liberties litigants, there was little that could have been done. The Supreme Court already had established in two previous decisions, largely unrelated to rights issues, that the War Measures Act was intra vires of the federal government and therefore, constitutionally valid. Thus, when the Co-operative Committee on Japanese Canadians challenged certain orders in council made under the authority of the War Measures Act that authorized the deportation of Japanese nationals back to Japan, the Court could do nothing except uphold the order. The Court stated in its
decision that “because each of the Orders in Council are, by force of the War
Measures Act, the equivalent of a statute, they have the force of law, and, to all
intents and purposes, while they stand, they are exactly on the same footing as an Act
of Parliament...76 ...that such legislation was, expressly and impliedly, adopted
because it was deemed necessary or advisable for the security, defense, peace, order
and welfare of Canada by reason of the existence of war.”77

The Canadian Bill of Rights

The failure of the courts to protect adequately individuals and groups
from racial and other forms of discrimination, combined with a growing
consciousness of the horrors of war, the Holocaust, and the treatment of Japanese
Canadians created “a climate in which it was increasingly felt that human rights
values deserved enhanced recognition and protection.”78 During a radio address in
1948, John Diefenbaker observed,

The time has come to assure that this government shall be shorn of its arrogant
disregard of the rights of the people. It does not rule by Divine right as did the Stuart
Kings... A Bill of Rights for Canada is the only way in which to stop the march on
the part of the government towards arbitrary power, and to curb the arrogance of
men.

Some say that it is unnecessary and our written constitutional rights protect us. They
have not in the past. They can not unless you and I have a right to the protection of
law in the courts of the land. There are others who claim that the Parliament of
Canada cannot pass laws to preserve the constitutional freedom of Canadians. If that
be true, then Canadian citizenship is a provincial variable. There will be nine kinds
of Canadians in Canada whose freedoms will be based on the home address of each
of us. If that contention be true, Canadian unity is a meaningless term.79

During his career as a trial lawyer, Diefenbaker had fought often against the power
and privileges of the Crown, struggling in court for the rights of the accused.
According to biographers, he was a champion of individual rights and freedoms; it
was "the most authentic source of his populism." He had complained about the use of Duplessis' *Padlock Law* throughout the 1940s, and accordingly, advocated a bill of rights for Canadians. In 1957, John Diefenbaker was elected prime minister of Canada. Shortly thereafter, he tried to persuade the provinces to amend the *B.N.A. Act* to include an entrenched bill of rights. The provinces refused to support the amendment, however, and as a result, Diefenbaker opted instead to try and protect rights and freedoms through a federal statute. In 1960, Diefenbaker's Conservative government passed the *Canadian Bill of Rights* and entered Canada into a new era of rights jurisprudence.

Despite the principles expressed in the *Bill of Rights*, its effectiveness as a mechanism for protecting and advancing rights was hampered by several factors. First, the Bill only applied to federal laws, leaving provincial laws unaffected. Second, the Bill's recognition "that in Canada there have existed and shall continue to exist" fundamental freedoms discouraged judicial activism in the interpretation and protection of rights and freedoms. Finally, and the most important limitation of the Bill, was that it lacked constitutional status which in effect would weaken any legitimate claim that the Bill had the authority to invalidate other federal legislation that followed. As such, the courts interpreted the Bill very narrowly and signaled to civil liberty litigants that the *Bill of Rights* was not an effective tool for challenging federal statutes. As a result, the number of cases that actually would make it to the Supreme Court, and the success rates of those cases, were small. Moreover, only once, in *The Queen v. Drybones*, 1970, did the Supreme Court actually invalidate a federal statute on the grounds that it conflicted with provisions in the *Bill of Rights*. 
In 1963, the first real test of the Supreme Court’s treatment of the *Bill of Rights* occurred. In the case *Robertson and Rosetanni v. The Queen*, the Court was asked to decide if the *Lord’s Day Act*, 1952, conflicted with the freedom of religion provisions guaranteed by the *Bill of Rights*. The Appellants were convicted on a charge of opening their bowling alley on a Sunday contrary to the *Lord’s Day Act*. Robertson and Rosetanni argued that the *Bill of Rights*, in effect, had repealed section four of the *Lord’s Day Act*. The Court, in a 4-1 decision, dismissed Robertson and Rosetanni’s appeal citing that,

> The Canadian *Bill of Rights* was not concerned with ‘human rights and fundamental freedoms’ in any abstract sense, but rather with such ‘rights and freedoms’ as they existed in Canada immediately before the statute was enacted.87

Likewise, the Court argued that such legislation has never been considered historically as an interference with the kind of freedom of religion that is guaranteed in the *Bill of Rights*. Moreover, the Court argued that the effect of the legislation should be examined, as opposed to the purpose, and whether or not the consequence of the legislation has in effect abrogated or interfered with religious freedom.

Likewise, the majority of the Court also found that the *Bill of Rights* had no impact on laws that were already in existence at the time the *Bill* was enacted. The Court found that this was “no doubt a business inconvenience, but it was neither an abrogation nor an infringement of religious freedom.” Only Justice Cartwright dissented, arguing that the purpose and effect of the Act was to compel the observance of Sunday as a religious holy day by all inhabitants of Canada, and therefore, was an infringement of religious freedom.89

While many civil liberty supporters in Canada may have been disillusioned
with the *Bill of Rights* after the *Robertson and Rosetanni* decision, they would find new hope in the *Bill* in the Court's next major important decision, *The Queen v. Drybones*, 1970. At issue in *Drybones* was whether or not section 94 (b) of the *Indian Act*, 1952, is rendered inoperative by the terms of the *Canadian Bill of Rights*. Section 94 of the *Indian Act* made it an offence for any Indian to be intoxicated off the reserve.\(^{90}\) *Drybones* argued that this infringed upon the equality provisions of the *Bill of Rights* because non-Indians were allowed to be intoxicated off a reserve. Consequently, Indians were not afforded the same equality under the law, a provision guaranteed by the *Bill of Rights*. The Supreme Court, in a 6-3 decision, upheld the Northwest Territories Court of Appeal decision to acquit *Drybones* of being intoxicated while off the reserve, and declared the offending provisions of the *Indian Act* invalid. More importantly, however, the Court was unanimous on the view that equality before the law meant that the law should not treat one racial group more or less harshly than another. Nevertheless, the Supreme Court would not follow the path it laid down in *Drybones* for very long.

Two cases emerged in the 1970s that indicated a departure from the precedent set in *Drybones*. In 1974, the Supreme Court once again was called upon to examine another section of the *Indian Act* in *Attorney-General of Canada v. Lavell and Bédard*.\(^{91}\) The case involved two Indian women who argued that section 12(1)(b) of the *Act* infringed on their right to equality before the law as guaranteed to them by the *Bill of Rights*. This particular section of the *Act* stipulated that an Indian woman who marries a non-Indian would lose her Indian status including the right to hold property and live on an Indian reserve. On the contrary, an Indian man who married a non-
Indian woman retained his status and the right to live on the reserve. As such, Lavell and Bédard argued that section 12(1)(b) constituted discrimination by reason of sex. The Supreme Court argued, in a 5-4 decision, that

the phrase "equality before the law" is not effective to invoke the egalitarian concept exemplified by the 14th Amendment to the United States Constitution. Rather, it is to be read in its context as a part of the "rule of law" and means equality in the administration or application of the law by the law enforcement authorities, and no in-equality in the administration and enforcement of the law; as between Indian men and women, flows as a necessary result of the application of s. 12(1)(b) of the Indian Act.92

In other words, the Court defined equality before the law not as a substantive requirement of the law itself, but a requirement of the way in which laws are administered. The Indian Act may well have discriminated against women, but as long as it was applied equally to all who were affected, then there was no violation of equality.

The precedent set in Lavell and Bédard would be reaffirmed in the Court’s decision in the case of Bliss v. Attorney-General of Canada, 1979. The Appellant, Stella Bliss, argued that Section 46 of the Unemployment Insurance Act, 1971, conflicted with equality provisions guaranteed under the Bill of Rights and constituted discrimination on the grounds of sex. At issue was a provision of the Act that denied regular benefits to women who interrupted their employment because of pregnancy. The Supreme Court, unanimous in its decision, held that the Appellant’s appeal should be dismissed. Justice Ritchie, writing for the Court, argued that “Any inequality between the sexes in this area is not created by legislation but by nature.”93

Furthermore, the Court reaffirmed its position in Lavell, that as long as the law was applied equally to all that were affected, then there was no violation.
Conclusions

It is sometimes argued that rights discourse in Canada does not begin until the passage of the Charter. However, this is clearly not the case. Rights jurisprudence has been evolving in Canada since the early days of Confederation. The pre-Charter era, however, has exhibited a mixed record of rights protection in the courts. This was a result of both institutional and constitutional limitations that would not be corrected until the entrenchment of the Charter. The original B.N.A. Act lacked any real explicit and meaningful guarantees for the protection of individual rights. The courts were unwilling to expand constitutional rights at the expense of parliamentary supremacy and federalism and moreover, largely were unable to in many cases. Federalism and the division of powers that derive from it were paramount to any other legal or constitutional jurisprudence.
Endnotes.

1. Yves De Montigny, "The Impact (Real or Apprehended) of the Canadian Charter of Rights and Freedoms on the Legislative Authority of Quebec" in, Charting the Consequences David Schneiderman and Kate Sutherland, eds. (Toronto: University of Toronto Press, 1997), pg. 3.

2. Herein referred to as the JCPC.


4. Herein referred to as the BNA Act

5. Preamble of the Constitution Act, 1867.


8. Ibid.


11. Section 93 of the British North America Act, 1867 reads: 93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provisions:

   (1.) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

12. However, there was no judicial remedy if Section 93 was violated. Any remedy to a violation would require intervention by the Federal Government.

13. Section 133 reads: 133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec. The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

14. Sections 99 and 100 read: 99. The Judges of the Superior Courts shall hold office during good Behaviour, but shall be removable by the Governor General on Address of the Senate and House of Commons. 100. The Salaries, Allowances, and Pensions of the Judges of the Superior, District, and County Courts (except the Courts of Probate in Nova Scotia and New Brunswick), and of the Admiralty Courts in Cases where the Judges thereof are for the Time being paid by Salary, shall be fixed and provided by the Parliament of Canada.
15 Constitution Act, 1867 part VI, Section 92, Subsection 13.

16 Sharpe and Swinton, pg. 5.

17 Ibid, pg. 5-6.


25. Smith, pg. 118.

26 Christopher P. Manfredi, Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism 2nd Ed. (Canada: Oxford University Press, 2001). Micro constitutional amendment refers to the informal changing of the meaning of the text of the constitution through judicial interpretation. See for example the JCPC’s interpretation of the Peace Order and Good Governance Power in Local Prohibition Reference [1896] A.C. 348; Reference Re Board of Commerce Act, 1919 (Canada) [1922] 1 A.C. 191; and Toronto Electric Commissioners v. Snider [1925] A.C. 396, where the Court took a very narrow interpretation of the federal POGG power while broadening the scope of the provincial powers over property and civil rights.


32. Justices Kerwin, Crocket, and Hudson all concluded that the three bills were ultra vires, however, for different reasons presented by Duff CJ.

33. The preamble of the British North America Act reads: Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom:

34. Chief Justice Lyman Duff, Reference RE Alberta Statutes [1938] 2 S.C.R. 100
35. Ibid.

36. Ibid.

37. Ibid.

38 Sharpe and Swinton, pg. 8.


42. Russell, Knopff, and Morton, pg. 299.


44. Ibid.

45. Ibid. pg. 299,300,301.

46. Russell, Knopff, and Morton, pg. 301, 300.


48. Ibid.

49. Russell, Knopff, and Morton, pg. 318


52. As of November 12, 1946, Roncarelli had provided bail in approximately 380 cases alone.

53. The majority of Witnesses arrested were charged for distributing printed material including two periodicals known as “The Watch Tower” and “Awake.” Altogether, almost one thousand Witnesses were arrested under by-laws requiring a license for distributing goods. See, Bickenbach, pg. 182.

54. Scott, pg. 193.

55 Monahan, pg. 208.

56. Ibid., pg. 207.

57. Ibid.

58. Ibid., pg. 208.
59. Ibid.

60. Ibid.


63. Walker, pg. 103.

64. Cunningham v. Tomey Homma [1903] A.C. 151

65. Walker, pg. 51, 52. In August of 1912, an amendment was made to the act retracting the words “Japanese” and “or other Oriental person,” and a new clause admitted that stated, “The said Act shall be construed as though the said words struck out by subsection (1) hereof had never been contained therein.”

66. Ibid., pg. 53.

67. Ibid., pg. 103.

68. Quong Wing’s application for appeal to the Judicial Committee of the Privy Council was rejected.

69. Walker, pg. 105.

70 The War Measures Act, 1914 Section 3 (1).

71 J.L. Finlay and D.N. Sprague, eds. The Structure of Canadian History 5th ed. (Scarborough: Prentice Hall, 1997). Pg. 412-413.

72 Korematsu v. United States, 323 U.S. 214 (1944)

73 Ibid.


76 Ibid., at para 45.

77 Ibid., at para 54.

78 Sharpe and Swinton, pg. 13.


80. Bliss, pg. 194.
81. Monahan, pg. 25.


83. Manfredi, pg. 16.


85. Monahan, pg. 25.


90. Section 94 of the *Indian Act* reads as follows:

94. An Indian who

(a) has intoxicants in his possession,

(b) is intoxicated, or

(c) makes or manufactures intoxicants off a reserve, is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment.


3. The Charter Debates

This chapter will examine the key events and policy decisions of the Federal Government that led to the passing of the Canada Act. Likewise, the chapter will examine the positions, with respect to how the process, as well as the substance, of the patriation proposal, would affect federalism in Canada, of the provincial governments and opposition parties that sat before the special joint committee of the Senate and the House of Commons.

Constitutional reform in Canada was not a new phenomenon by any means. Jean Chrétien, the then federal Minister of Justice, speaking in the House of Commons in the opening speech of the debate on the constitution on October 6, 1980 stated, “for over half a century federal and provincial governments have agreed on the desirability of bringing home Canada’s constitution... ...and yet despite numerous attempts and many federal-provincial conferences, governments have been unable to agree on means to achieve these objectives.”

Since Confederation there had been numerous federal-provincial attempts to patriate the constitution that had all failed. Demands for a renewal of the constitution often would arise in times of national crisis or a difficulty in federal-provincial relations. The crisis that would lead to the culmination of debate on the constitution and the realization of the Constitution Act, 1982, was Quebec’s Quiet Revolution in the 1960s.

In February of 1968, a Federal-Provincial First Ministers’ Conference was held in Ottawa that would lay the beginning foundation of the Charter of Rights and Freedoms and the federal government’s policy for the future of federalism in Canada. A paper entitled A
Canadian Charter of Human Rights was presented at the conference by Pierre Trudeau, who at the time was Minister of Justice in Lester B. Pearson’s government. In it, Trudeau outlined the fundamental importance of entrenching human rights within the constitutional framework. Those matters which affect an individual’s dignity after the primary needs of shelter, nourishment, and security have been met, were known as ‘natural’ rights: “Rights to which all men were entitled because they are endowed with a moral and rational nature.” To deny those rights would be an affront to natural law. Citing the works of Cicero, St. Thomas Aquinas, and John Locke, Trudeau emphasized that rights are eternal for all people of all times and superior to any man-made laws. Moreover, because of Canada’s federal structure and the constitutional division of powers, the need to entrench rights within the constitution as the supreme law is that much more important because the rights of the individual transcend the jurisdiction of governments. He stated, “Authority to legislate with respect to some of the rights regarded as fundamental lies with the provinces, authority to legislate with respect to others of these rights lies with Parliament.” In essence, the rights of the individual are above federalism. Nevertheless, according to Trudeau, the entrenchment of rights is not a transfer of power from one level of government to another, rather it is a restriction of the authority and power of all governments.

At the same time, Prime Minister Pearson presented the document Federalism for the Future: A Statement of Policy by the Government of Canada. It stated first, that the government of Canada was ready fully and completely to begin the process of reviewing all facets of the constitution, and second, that the number one priority for the federal government was the entrenchment of a bill of rights. Moreover, Pearson stated that by recognizing the
rights of the individual and placing the entrenchment of a charter as the first priority for any constitutional amendment, the government proclaims its belief that the rights of the people must precede the rights of governments. Once again, however, Pearson reiterated the government position that an entrenched bill of rights would not affect the current distribution of powers, nor affect the provincial jurisdiction over property and civil rights; rather, it would restrict the power of all governments equally. According to the policy statement presented by the Prime Minister, the Government of Canada believed that only under a federal system could the country achieve its goals. Furthermore, the Government rejected both centralization and fragmentation of the current federal system, and accepted that federalism must be a balance. The government’s commitment to an entrenched charter of rights and its commitment to preserving federalism would set the tone of the negotiating process for the next twelve years, during which time federal and provincial governments began a wide-ranging review of the Constitution which had gone through various iterations by 1980. Although numerous and diverse issues were discussed, patriation with a Canadian amending formula was always a central issue. Ultimately, however, the success of the federal government in reconciling these two priorities, reconciling entrenched rights on the one hand, and federalism on the other, would prove to be a difficult and daunting task.

Throughout the 1970s, renewed calls for patriation of the constitution dominated much of the political agenda. Numerous first ministers’ conferences, federal-provincial conferences, constitutional conferences, as well as a number of special joint committees were established and held across the country in an attempt to reach a consensus between the provinces and the Federal Government on how to patriate the constitution. It would prove to
be a frustrating decade, and tensions between governments were at their highest level. About the only thing that was agreed upon by the provinces and the Federal Government was that they disagreed. The task of patriating the constitution seemed to be an impossible one. By September 1980, a number of key events occurred that increased the urgency to patriate the constitution, ultimately prompting Trudeau to terminate the latest round of negotiations by announcing that agreement was impossible and that his government would proceed to take unilateral action to bring home the constitution with an amending formula and a charter of rights and freedoms. In 1976, the Parti Québécois (PQ), led by René Lévesque, became the government in Quebec, and promised to hold a referendum on sovereignty association; in the following year, the PQ passed Bill 101 restricting attendance at English-language schools. In May of 1980, Lévesque made good on his promise and held a province wide referendum on sovereignty-association. Just prior to the referendum, Trudeau had promised that if the PQ was defeated in the referendum, constitutional changes would follow with his government committed to a 'renewed federalism'. The PQ and the 'oui' side were defeated soundly with almost 60 per cent of Quebec voters rejecting sovereignty association. Believing the PQ to have been weakened by the defeat, and with the momentum of Quebeckers choosing federalism, it had become clear to Trudeau that he now had the best opportunity to make the constitutional changes he desired.

The patriation of the constitution involved a number of key issues. It included adding an amending formula, entrenching a charter of rights and freedoms, and enshrining in the constitution a principle of equalization and a commitment of government to the reduction of economic disparities. While the provinces and the Federal government were able to agree
easily on the principles of equalization, the effort to formulate an amending formula and a charter of rights provoked numerous debates and disputes, as it had done since these subjects first had appeared on the agenda decades earlier.

Trudeau, seizing the opportunity to capitalize on the separatists' defeat, attempted to renew the constitutional debate. In June of that same year, the Government of Canada tabled in the House of Commons "Priorities for a New Canadian Constitution," and intensive federal-provincial negotiations soon followed over the summer months. By September of 1980, the Federal Government and the provinces were no closer to reaching an agreement on the constitution. In fact, the provinces were more polarized on the issues than they ever had been since 1968. On September 12, 1980, during the eighth Federal-Provincial First Ministers' Conference since 1968, talks broke down prompting Prime Minister Trudeau to terminate the conference and announce that his government would continue unilaterally to entrench a charter of rights and freedoms and patriate the constitution. It was a bold step by Trudeau, one that signalled a departure from the government's previous commitment to federalism and consent of the provinces. While patriation itself may not affect the federal-provincial relationship, there was a clear understanding that the proposed Charter of Rights and the amending formula could have, or potentially could have, a substantial effect on the legislative competence of the provincial legislatures. Moreover, Trudeau's willingness to amend the constitution without the consent of the provinces would have a profound effect on the principles of federalism as a whole. The message being conveyed was that the powers, rights, and privileges granted to the provinces by the Constitution were subservient to those of the federal Parliament. Essentially what Trudeau was attempting to do through his
unilateral action was to ask the British Parliament to make substantial changes to the Canadian constitution first before bringing the constitution home. Trudeau had argued passionately of the need for Canada to have full control over its own constitution, and the need to sever the last imperial tie to the British Parliament but not before taking advantage of it one last time.

On October 6, 1980, Trudeau tabled, in the House of Commons a "proposed resolution for a joint address to Her Majesty the Queen respecting the Constitution of Canada." Jean Chrétien, Minister of Justice, moved that a special joint committee of the Senate and the House of Commons be appointed to consider and report on the proposed resolution, and that afternoon, the House of Commons began its first and historic debate on Trudeau's constitutional package. In his speech to the House, Chrétien spoke at length of the importance of the Charter. He restated the government's long-standing position that the proposals of the Federal Government, including an entrenched charter of rights, would not affect the division of powers in Canada. He said, "There is no transfer of powers from the provinces to the federal government. All that has been done is to prohibit both levels of government from interfering with fundamental rights of Canadians." Notwithstanding that, Chretien also argued that the provinces need to recognize Canada as a country with "one citizenship and not ten provincial citizenships," that rights must come before federalism. He underlined this notion later in his speech when he stated that if the provinces were left to protect individual rights then "there would be no such thing as rights and freedoms common to all Canadians."

The New Democratic Party leader, Ed Broadbent, boldly and openly supported
Trudeau's initiative and constitutional package. In his address to the House of Commons, he stated that "it is indeed time to act, and act now, on the Constitution of Canada." Broadbent supported the inclusion of the charter citing examples in Canadian history of rights being violated, such as the Padlock Law in Quebec, the Alberta Press Bill, or the internment of Japanese Canadians, claiming that all could have been prevented if we had had an entrenched statement on rights. Moreover, the entrenchment of rights in the constitution would not upset the principle of federalism in Canada in general, and specifically with respect to minority language rights, it would preserve the duality of Canada.

Opposition to Trudeau's proposal came from the official opposition in Parliament, the Progressive Conservatives, backed by the eight provinces that would later be known as "the gang of eight." Joe Clark, Leader of the Opposition, stated in his speech to the House that while constitutionally protected rights themselves do not undermine federalism, the process by which they are being entrenched does. Clark argued that Canada came about as a result of a partnership between governments, and practice has ensured that any amendments that affect both levels of government must be approved by both levels of government, that there should be two parties to a constitutional decision, not just one. Trudeau's plan unilaterally to entrench a charter and patriate the constitution without a consensus of the provinces would upset the principles of federalism. The taking of action - in this case the current process by which the charter would be entrenched - becomes more important than the substance of the amendment. In this respect, for Clark, an entrenched charter of rights posed a great threat to federalism in Canada.

In October of 1980, a special joint committee of the Senate and of the House of
Commons was established to review the government's proposed constitutional package. For the next two months, the committee heard testimony and studied written briefs from a multitude of various interest groups, organizations, political parties, governments, experts, and individuals in Canada, all with their concerns or accolades for the proposed constitutional package. Provincial governments, as well as provincial political parties in particular, voiced many concerns over the entrenchment of the Charter and its effects on provincial autonomy and Canadian federalism. Similarly, a number of experts in the field of Canadian politics and constitutional law sat before the committee to give their opinions on the proposal.

The first provincial government to appear before the committee was Prince Edward Island. J. Angus MacLean, Premier of PEI, stated before the committee that any amendments to the constitution should be dealt with through the political process, including a federal-provincial consensus representing all eleven legislatures and not unilaterally as the federal government was proposing. MacLean argued that the action of the Federal Government was an attempt to impose its own view of federalism on an unwilling nation, the consequence of which is a fundamentally altered federal-provincial relationship. Additionally, Canada was an independent nation and as such, any changes to the constitution should be made by the Canadian government and not the British Parliament. Secondly, MacLean argued that while the government of PEI was in favour of protecting the rights of people, they were opposed to the way in which rights would be protected under Trudeau's proposal. They believed that an entrenched Charter would weaken parliamentary democracy by transferring "the definition of our basic social values from our legislatures to the Supreme
Entrenching broadly phrased rights into the constitution runs the risk of changing the character of both governments and courts which could lead to the "destruction of the very fabric of Canadian federalism."^30

John Buchanan, the Premier of Nova Scotia, testified before the committee that in 1867, there was an understanding that Canada was to be a federal state, a compact between governments, and that the proposal by Trudeau, including the Charter, would infringe on existing provincial constitutional powers, upsetting the original understanding of Confederation. Moreover, any action or proposal which infringed on the powers of a province, without the consent of the province, that is to say unilateral in nature, fundamentally would destroy the division of powers agreement of the BNA Act, 1867.31 Buchanan stated that every citizen belongs to two communities, "the province and what we have historically identified as the dominion."32 Moreover, the two communities should be clearly distinguished with clearly defined areas of autonomy. Similarly, in the original understanding of the BNA Act, 1867, neither community would assume "a unilateral right to alter the terms of the agreement and to invade the autonomy of the other."33 Buchanan argued that the unilateral action by Trudeau to patriate the constitution and entrench a charter of rights was an infringement on provincial autonomy and an affront to the federal system. While he conceded that it might indeed be necessary to change the constitution, it could be achieved only properly through mutual agreement of all the participants in the federation.

New Brunswick was the third government to appear before the committee and the first to endorse and support the proposal, arguing that there was no conflict between having entrenched rights and federalism.34 Richard Hatfield, then Premier of New Brunswick,
argued before the committee that the most important priority was to patriate the constitution. In Hatfield’s opinion, the proposed resolution did not disturb the balance between the federal government and the governments of the provinces. The Fathers of Confederation entrusted the powers to deal with matters closest to the people to the provinces, and the powers to deal with national issues to the federal government.\(^{35}\) For Hatfield, the proposed constitutional package continued, for the most part, to protect the division of powers, and to respect provincial autonomy. The only area in the constitutional order that is disturbed by the proposed resolution is the provincial right over education in the province of Quebec. New Brunswick was not alone in its support of Trudeau’s initiative, however. The government of Ontario led by William Davis was a proponent of patriation including an entrenched charter of rights and the amending formula, although Ontario never officially sat before the Committee.

The fourth and last provincial government to address the committee was Saskatchewan with then Premier Allan Blakeney drawing on similar arguments as other critics of Trudeau’s proposal. Blakeney argued that on principle he was opposed to the constitutional entrenchment of a charter of rights because it would change the legislative power of both Parliament and the provincial legislatures, and should require the unanimous consent of all the governments involved. For Blakeney, the unilateral actions by the Federal Government to patriate the constitution and entrench a charter of rights violated the principles of federalism.\(^{36}\)

Aside from provincial governments sitting before the committee, a few of the provincial opposition political parties also elected to give testimony, primarily from
provinces whose governing parties chose not to sit before the Committee. The Union Nationale, led by interim leader Michel Le Moignan, presented before the committee the federal framework which Quebec traditionally favoured, as well as his party’s views of the proposed constitutional changes. Le Moignan argued that the new constitution must be designed and adopted in Canada, by Canadians, with the approval and consent of the provinces, and clearly must recognize the equal status of the two orders of government. Moreover, the new constitution must recognize the dual nature of Canada and affirm that Quebec is “the heart of one of these two founding nations.”

Similarly, Le Moignan further argued that the entrenchment of a charter of rights was an infringement of exclusive provincial jurisdiction that altered the current division of powers and the sovereignty of the provinces. For Le Moignan, the only manner in which a charter could be entrenched legitimately, without interfering with provincial autonomy, was with the consent of the provinces.

Similarly, two opposition parties from Alberta appeared before the committee to address their concerns and recommendations for the new constitution. The Alberta New Democratic Party leader Grant Notley, along with Ms. M. McCreary, Co-Chair of the Alberta NDP Constitution Committee, and Dr. Garth Stevenson, Member of the Alberta NDP and constitutional expert, supported the entrenchment of a charter of rights. In his presentation, Notley argued that in any constitutional review, “one has to recognize the need for strong provinces, but also a strong federal government.” For federalism in Canada, there must be a balance between the two orders of government within the constitutional order. With respect to the entrenchment of the Charter, Stevenson stated, “We do not view this as a
question of centralization or one which divides the interests of the East from the West, but really as a measure which would strengthen the individual against the state, and by state we mean both levels of government. Moreover, while there was an agreement that the Charter no doubt would affect the powers and authorities of each order of government, there was also a consensus that the constitutional balance of power would continue to be maintained without a significant shift in power from one government to the other.

The Alberta Social Credit Party, however, was far more sceptical, at least about the process for adopting an entrenched charter of rights in the constitution, if not about the substance. Echoing the concerns of many other critics of Trudeau’s proposal, Rod Sykes, the Leader of the Alberta Social Credit, was concerned greatly by the unilateral action to amend the constitution prior to patriation. The amendments to the constitution, including a charter of rights, had not been agreed to by the provinces, and were such as to alter or potentially alter the division of powers and the relations between the Federal government and the provinces. Moreover, the constitution, once patriated, would be a new constitution, imposed on the provinces against their will.

The Committee also heard testimony from a number of constitutional experts who spoke on their own behalf, including Gil Remillard of Laval University, and Peter Russell from the University of Toronto, who spoke at length about the nature of Canadian federalism and the impact of both the patriation process and the substance of the proposed Charter of Rights. According to Russell, entrenching rights in a constitution is as serious an undertaking as any nation can embark on because it transfers power away from the governing authority and places limitations on the supremacy of the government to encroach on the
personal liberties of the people. In short, it is a change in the social contract between the people in a state and its sovereign. Moreover, the judiciary becomes entrusted with the task of interpreting the terms of the contract.\textsuperscript{42} Additionally, Russell argued that the sovereign powers of the provinces to enact legislation within their exclusive spheres of jurisdiction as outlined by the original Constitution, would be altered by both the substance and the process of the Charter: by substance, in that it infringes on their rights to govern over purely provincial matters, as well as transferring ultimate supremacy away from the legislatures and Parliament to the Supreme Court as the final interpreter and guardian of the Constitution; by process, in that, as many other critics and those opposed to unilateral action have opined, these fundamental changes to the constitution were being done without the consent of provinces.\textsuperscript{43}

Similarly, Remillard, who subsequently would be a minister in the government of Robert Bourassa, argued before the Committee that the proposed resolution challenged the very basic principles of federalism because it sought to alter the terms of the union without the consent of one party. Remillard expressed the traditional Quebec belief that the \textit{British North America Act, 1867}, is a pact, a compromise, and a legal structure,\textsuperscript{44} and therefore can not be changed without the consent of all the parties involved. Beyond that, federalism is also a way of seeing things at both the provincial level as well as the national level. Federalism in Canada exists because of the vast geography, the different regions and cultures, and the two dominant language groups. As such, Remillard further argued that in order for a charter of rights to be entrenched in the constitution, the federal government must have a consensus from the provinces because it affects the autonomy of the provincial governments
within their respective spheres of jurisdiction.

In January 1981, the special committee on the constitution had completed its work, and on February 15, 1981, it tabled its final report, ultimately approving Trudeau’s proposal. In the debate that followed in the House of Commons, Trudeau defended his position to patriate the constitution unilaterally and entrench a charter of rights. He stated that the will of the Canadian people demands that it be done, and the rights of the Canadian people are beyond the scope of federalism. Trudeau argued that not only was unanimity among the provinces impossible, so too was even a majority agreement. Trudeau further argued that contrary to the position of the opposition, the Charter is neither against federalism nor does it deny the spirit of federalism. Moreover, Trudeau reaffirmed the government position that the Charter does not transfer powers from the provinces to the central government, but rather, if anything at all, it transfers power from the government to the people.

On April 16, 1981, premiers from the provinces representing the “gang of eight” (Quebec, Alberta, Manitoba, Prince Edward Island, Newfoundland, British Columbia, Saskatchewan, and Nova Scotia), signed a new Canadian patriation plan including an amending formula. In the accord, the signing provinces agreed to patriate the constitution as quickly as possible, adopt a new amending formula, (known as the Vancouver consensus), and enter into constitutional negotiations based on the new amending formula. This accord re-emphasized the gang of eight’s position that the Charter and all other amendments in Trudeau’s proposal should be negotiated after patriation with consent of the provinces. The accord was conditional upon the Government of Canada withdrawing the proposed joint address on the constitution. Nevertheless, the premiers’ attempt to forestall Trudeau’s plan
with this new accord was ineffective. Debate continued in the House of Commons and the Senate on the proposal and Trudeau moved closer to unilateral patriation and a charter of rights.

The provinces, however, would win an important victory against Trudeau. Three provinces had submitted references to their courts regarding the constitutionality of Trudeau's proposals. In September, 1981, the Supreme Court of Canada, on appeal from the Manitoba, Quebec, and Newfoundland Courts of Appeal, rendered its verdict in a landmark case, *Reference re Amendment of the Constitution of Canada. (Nos. 1, 2, and 3) (1981).* In its decision, the Court held that unilateral action to patriate the constitution by the Government of Canada was legal and therefore constitutional under the current framework of the *British North America Act, 1867*. Nevertheless, the Court also held that there existed a constitutional convention that required "some" provincial consent to constitutional amendments that affect federal-provincial relationships. Accordingly, the unilateral action by Trudeau was deemed unconstitutional. As a result, Trudeau backed away from unilateral patriation and agreed to meet the premiers.

At the subsequent Federal-Provincial First Ministers Conference on the morning of November 5, 1981, the provinces, with the exception of Quebec, and the Federal Government reached an agreement. In the agreement, Ottawa and "a substantial number of provincial governments" agreed to patriate the constitution, adopt the April Accord or "Vancouver" Amending Formula with a few modifications, and entrench the full Charter of Rights and Freedoms that was currently before Parliament with a few modifications, one of which included the addition of the "notwithstanding" clause. That afternoon, Trudeau
announced in the House of Commons that “we have by consensus constitutionalized an endeavour begun in this House more than a year ago to bring Canada’s Constitution to Canada, to have in it an amending formula and to have in it a charter of rights...” Many of the concerns raised by the provinces, that the process and the substance of an entrenched charter fundamentally would alter the foundations of federalism in Canada, had been addressed. The provinces were able to negotiate with Ottawa on the various provisions of the Charter. The provinces’ main fears that the Charter would become a centralizing force through judicial interpretations by the Supreme Court of Canada apparently were offset by the inclusion of the ‘notwithstanding’ clause whereby provinces could override certain sections of the Charter.

Fourteen years, numerous conferences and committees, and countless hours of negotiations later, the Government of Canada and all but one of the provinces finally had reached an agreement on the constitution. In early December, the proposed resolution respecting the Constitution of Canada was adopted by Parliament. It was transmitted by the Governor General to the United Kingdom and on the 22nd of December, 1981, was presented in the House of Commons of the United Kingdom. By March 29, 1982, it finally was given Royal Assent by Queen Elizabeth II and proclaimed in force on April 17, 1982. Canada ultimately had established full control over its constitution with a new amending formula and an entrenched Charter of Rights and Freedoms. A new era in Canadian politics began, shifting from the politics of federalism to the politics of rights and freedoms.
Endnotes.


5. Ibid., pg 242. Details of Quebec’s Quiet Revolution are discussed further in chapter 3.


8. Ibid., pg. 53.


10. Ibid., pg. 66.

11. Ibid., pg. 64-65.

12. Stevenson, Unfulfilled Union, pg. 249.

13. The Charter of the French Language


16. Stevenson, Unfulfilled Union, pg. 249.


20. Ibid., pg 3282.

21. Ibid., pg 3285.

23. Ibid., pg. 3297-3298.

24. Stevenson, *Unfulfilled Union*, pg. 252. The “Gang of Eight” consisted of the provinces of British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, Nova Scotia, Prince Edward Island, and Newfoundland. It was an alliance between the provinces to challenge Trudeau and the patriation initiative. Ontario and New Brunswick were willing to support the proposal.


26. Ibid., pg 3289-3296.


28. J. Angus MacLean, , Premier, Government of Prince Edward Island *Constitution of Canada - Special Joint Committee* November 27, 1980, issue 14 pg. 73.

29. Ibid., pg 81.

30. Ibid., pg 81-83.


32. Ibid.

33. Ibid.


35. Ibid., pg. 48.


38. Ibid., pg. 34.


42. Peter Russell, Professor, University of Toronto, *Constitution of Canada - Special Joint Committee*, January 8, 1981, issue 34, pg. 131.
43 Russell, pg. 132.

44 Gil Remillard, Professor, Laval University, Constitution of Canada - Special Joint Committee January 9, 1981, Issue 35, pg. 5.


46. Ibid., pg. 8515.


49. Ibid.


51. The full changes to the Charter of Rights and Freedoms outlined in the First Minister’s Agreement on the Constitution, November 5, 1981, include;
(a) with respect to mobility rights the province has the right to undertake affirmative action programs for socially and economically disadvantaged individuals as long as the province’s employment rate was below the national average.
(b) the “notwithstanding” clause would only cover sections dealing with fundamental freedoms, legal rights, and equality rights, and would require re-enactment not less frequently than once every five years.
(c) the provisions of Section 23 in respect of minority language education rights would apply to all provinces.

52. Trudeau, Commons Debates November 5, 1981, pg 12536.

53. Stevenson, Unfulfilled Union, pg. 257.

54. Events Following the Adoption of the Resolution by the House of Commons and the Senate, Chronology to April 17, 1982 in Bayefsky, pg. 940.
4. The Charter and Quebec

The Canadian Charter of Rights and Freedoms has been a part of the Constitution for almost twenty-five years. In that time, the effect of the Charter on the two institutional foundations of the Canadian state, Parliamentary supremacy and federalism,\(^1\) has been debated greatly by politicians, academics, and the intellectual elites. Parliamentary supremacy subsequently has been qualified with constitutional supremacy by the courts; likewise, provincial governments no longer can lay claim to being sovereign within their respective fields of jurisdiction under the terms of the Constitution Act, 1867, and were confronted with the challenge of reconciling public policy with new national standards set by the Charter and again, by the courts.\(^2\) Consequently, one of the most important questions that has been raised over the years pertains to the success of the Charter in achieving the goals aspired to by its framers. Has it improved federalism and unified the country, or has the Charter failed? This is not an easy question to answer, particularly in the general sense, given the dualistic nature of Canadian federalism and the status of Quebec in the federation vis a vis the other nine provinces. Quebec always has been a unique participant in Canadian federalism and likewise, it is assumed that the impact of the Charter on Quebec would be far different than on any other particular province. Moreover, given Trudeau’s desire to entrench civil liberties, in particular language rights, and to combat the growing separatist movement in Quebec, the Charter would have a different significance for Quebec than for
the rest of Canada.

As such, in order to answer this question accurately or effectively, it is necessary to address this question in two ways. The first is to look at the broad implications of the Charter for federalism and whether the Charter has failed to stem the tide of Quebec nationalism while fostering a new Canadian identity. The second way is to look at Quebec separately, because of its distinctive place in Canadian federalism and the specific issue of language rights as they relate to Quebec. While language rights do relate to the other provinces, they have a different importance for Quebec precisely because the linguistic minority in Quebec is the majority everywhere else in North America. Thus, the majority needs protection from the minority language as well as vice-versa. The central theme of this chapter will explore the effect of the Charter on Quebec with respect to federalism, and the success of Trudeau in unifying Canada as one nation, thus attempting to answer the question, has the Canadian Charter of Rights and Freedoms failed Quebec? The following chapter will explore the question from the broader perspective, has the Charter failed the rest of Canada (ROC) and undermined federalism in Canada?

Has the Charter failed Quebec? The simple answer is yes. Although still legally bound by its provisions, Quebec never officially signed on to the Charter despite the fact that the patriation initiative was, in part, a move by the Federal Government following the 1980 referendum to appease or at least subdue the Quebec government which was looking for a renewed relationship within the federation. During the referendum campaign in a speech in Montreal, Trudeau had promised constitutional change and committed himself and his
government to “renewed federalism” if the “Non” side was victorious. The changes that were made were not what Quebec nationalists had envisioned or hoped for. Quebec was disillusioned with the Charter, the new amending formulae and the promise of a better relationship and status within the constitution. Moreover, two further attempts by the Mulroney government to bring Quebec back into the ‘constitutional family’ also failed. For Quebec, the failure of the Charter is a much more complex answer rooted in the intrinsic nature of federalism and the historical understanding that Quebec’s place in Canada is as one of two founding nations.

Organization

In summary, this chapter advances the argument that the Charter has failed Quebec, furthering the division between the Province and the rest of Canada, and undermined the principles of federalism as they stand in the Constitution Act, 1867. Instead of ameliorating the tensions between Quebec and Canada, as Trudeau had hoped, the Charter has intensified them. This chapter will be divided into four parts. The first part will look at Quebec’s place in the federation and the position that it is not just another province but rather one of two founding nations committed to the preservation of dualism and a constitutional framework that reflects and maintains it. The second part of the chapter will examine the issue of language and its importance to the identity and character of Quebec. It would be difficult to understand just how the Charter in general, and the language provisions in particular, affect Quebec without understanding the significance of language and its place in the identity of
that province. The third part of the chapter then will examine how the *Charter* has affected Quebec and the future implications. The final part of this chapter will discuss the Supreme Court decision *Ford v. Quebec (Attorney General) (1988)*, and how it directly challenged the legislative competence of the government of Quebec to legislate effectively in a provincial sphere of jurisdiction. By the end of this chapter, we will be able to witness just how rights discourse impacts federalism in Canada in relation to the province of Quebec, and we definitively can conclude that the *Charter* has both undermined federalism and failed Quebec.

**Quebec’s Place in Canadian Federalism**

Quebec’s Francophone population, or at least its clerical and political elites, was the first to reject the American Revolution in 1776 because they considered more or less explicitly that their identity and their culture would be better protected within the British Empire. At the very least, *The Quebec Act (1774)* seemed to promise more protection than the Americans likely were to offer. When Canada was created in 1867, the motivation to do so was the desire to counter the forces of American integration. Despite Sir John A. MacDonald’s wishes that Canada become a unitary state similar to the United Kingdom, he had to bow to strong pressure from the colonies, especially Quebec, to form a federation, but one that would be markedly different from the American experience. From the time of Confederation in 1867 to the present day, Canada’s federal system has “borne the lion’s share of the burden of bringing together a linguistically and regionally diverse citizen body within
the confines of a single nation-state." The original constitutional structure under the Constitution Act 1867 enabled political and economic union at the time, and among other things, was able to accommodate the unique needs of Quebec. "Federalism ensured that the French-speaking majority in that province would have the powers necessary for cultural preservation," notably, education, the civil law in the form of the civil code, and property and civil rights. The French Canadians living in Quebec became faithful to the principles of federalism as it allowed them to maintain a distinct society within Canada and likewise, the case can be made that Quebec has been the most prominent defender of both federalism and the British parliamentary system.

"Quebec is a complex and interesting society." It has played a dynamic role in the evolution of Canadian federalism and the relationship between "Canada's cultural duality and its federal institutions." Moreover, there has been much debate among Canadians about whether Quebec is a province of Canada like the others, or whether it is a distinct society that should be treated differently. Whatever the outcome of the debate, there is little question that from a sociological perspective Quebec is very much a distinct society in relation to its North American counterparts. The uniqueness of Quebec in relation to the other provinces is not just a matter of language, but of culture, and culture to the Québécois intimately is linked to identity. From a political standpoint, Quebec is distinct as well, if for no other reasons than its view or comprehension of its place in federalism is as one of two founding nations of Canada, and its understanding that Confederation was the result of a compact entered into by the provinces and the United Kingdom. Implicit in this
understanding is that no change in the current division of powers, or in the relationship between the provinces and the federal government, should be allowed to take place without the unanimous consent of the provinces, or at least Quebec. Likewise, implied in this understanding was that “only the provincial government represented Quebec’s interests.”

Michael Ignatieff, a renowned writer and historian, as well as an elected member of Parliament and leadership contender for the Liberal Party, has written,

Federalism ... is just a particular way of sharing political power among different peoples within a state ... Those who believe in federalism hold that different peoples do not need states of their own in order to enjoy self-determination. Peoples ... may agree to share a single state, while retaining substantial degrees of self government over matters essential to their identity as peoples.

The essential claim by the province of Quebec is that it constitutes a ‘different people’ and thus, wants to share political power, coordinated but not subordinated, to fulfill its mission to become, in the words of its former premier Jean Lesage, “the political expression of French Canada.” This has become especially true since the 1960s and the ‘Quiet Revolution.’ The Quiet Revolution refers to the period between 1960 and 1966, when a series of legislative changes gave new powers to the provincial government which in turn inspired many social changes in Quebec society. While the details of the changes can be read elsewhere, the importance of this time period is that Quebec society entered into a new era. During this period, “much of Quebec’s Francophone population had come to equate the promotion of their collective identity with the empowerment of the provincial state. The Québécois, as they now began to call themselves, felt that in the state and its agencies they at last had the
collective tools with which to build their future society." As Garth Stevenson writes, as a consequence, the established belief that the current terms and division of powers of the Constitution Act, 1867 were sufficient for Quebec was quickly dismissed. “Instead Quebec politicians, officials, and academics increasingly argued that the Quebec ‘nation’ required new powers and ‘special status’ to develop its potential.”

**Language in Quebec Society**

Language plays a central role in social relations and as such, it emerges as a key factor in the way social relations, and ultimately societies, are constructed. Language has played a fundamental role in the development of Quebec society especially since the 1960s with the culmination of the rise of Francophones as the dominant group in the economy of the province, and the emergence of “a new generation of dynamic and proud French Canadians, making a living out of using their French language.” The French language would become intrinsic to the identity of the Québécois. Quebec is the only province in Canada where they could live and work in French.

There was a growing concern during the 1960s in Quebec about the future of the French language. There was a trend among new immigrants to the province to adopt English and send their children to English schools. In addition, Quebec society also witnessed an abrupt decline in the birth rate among the Francophone population. Moreover, English was still the dominant language in the marketplace and in business. Language had become such an important aspect of identity to the province and among the Québécois who began to see
themselves "as a majority in the province and not as a minority in Canada" that in the 1970s, a number of statutes were passed by the various Quebec governments further to promote and protect the language.

In 1974, Robert Bourassa's Liberal government passed Bill 22, the Official Language Act, making the French language the official language of the province. In 1976, the first separatist government in Quebec, the Parti Québécois led by René Lévesque, was elected. The following year the Lévesque government deemed the Official Language Act inadequate and replaced it with the Quebec Charter of the French Language, informally known as Bill 101. The new statute brought in sweeping new language policies that affected every facet of life in Quebec from government and the courts, to education, the work place, and public signs and corporate advertising. The preamble of the Charter of the French Language states, "the French language ... is the instrument by which that people has articulated its identity." Even the Supreme Court of Canada in Ford v. Quebec (which will be discussed in greater detail further on) acknowledged that "Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is a means by which a people may express its cultural identity." Language separates Quebec from the other provinces and the recognition of this separation is paramount when examining how the Charter has failed Quebec. Language has such an intrinsic significance toward identity that naturally the language rights provisions of the Charter would affect Quebec differently than the rest of Canada, and the broader effects of the Charter on federalism in general also would have a different effect on Quebec's understanding and place in the federal system.
Language rights in Canada are unusual in that they are ‘positive’ rights. They are different from most other rights such as ‘negative’ rights, which constrain governments from acting or encroaching upon a person’s individual liberties but do not require any positive action on behalf of the government. Positive rights, on the other hand, entitle an individual to certain action by the government, such as funding for schools, or the extension of social benefits.\(^{32}\) With the Charter of Rights and Freedoms came new protection for language rights that would become a key component of the proposed constitutional amendments in 1982. The federal government at the time, led by Trudeau, saw the Charter as a whole, and language rights in particular, as a way to strengthen national unity.\(^{33}\) Prior to the Charter, language had a precarious place in the constitution. “Language” was not mentioned explicitly as a subject of either federal or provincial jurisdiction under sections 91 and 92 of the Constitution Act, 1867. Section 133 guaranteed official bilingualism at the federal level and in Quebec, at least, in the legislature and the courts. Nevertheless, the provisions of Canadian federalism made some aspects of regulation of language a de facto provincial matter. Education, social and health services, for example, are provincial areas of jurisdiction where language is an important part of the delivery of the services.\(^{34}\)

Trudeau had dedicated his career to the struggle against Quebec nationalism and separatism. From a constitutional point of view, he argued that “the Quebec legislature has no authority to speak on behalf of ‘French Canada’.”\(^{35}\) As such, he always presented himself as a champion of federalism; however, to him, a federal system meant equality among the provinces; Quebec was like the others and therefore, deserved the same powers as the rest of
the provinces. The adoption of a constitutional bill of rights would establish the unity of Canada by creating one citizenship. The power of both Parliament and the legislatures would be restrained in favour of the Canadian citizen, and further, he envisioned a greater role for the courts as the final interpreters and protectors of rights for Canadians.

His main objective when he started to push for a constitutionalized charter of rights was to grant minority language rights, and he believed that the protection of these rights was so important that it could not be left up to the provinces. Trudeau argued that language rights are of special importance to Canada because of the fact that Canada was founded by two distinct language groups; “Language is the basic instrument for preserving and developing the cultural integrity of a people.” The manner in which to preserve those rights is through a broad and extensive guarantee within the constitution. Moreover, Trudeau also believed that achieving language parity within federal institutions was a better means to preserving federalism in Canada as opposed to granting special powers or status to Quebec.

The Charter’s minority language rights provisions, as well as other guaranteed rights and freedoms, as the “supreme law of Canada,” would enable the courts to be brought into the political sphere as actors, encroaching on provincial jurisdiction over language, education, property and civil rights.

How the Charter has Affected Quebec and Future Implications

A constitutionalized bill of rights is a concept borrowed from the political culture of the United States. Ironically, however, although the Charter is only a little more than twenty
years old, it often is said that it is now a major part of the Canadian identity, at least, as Lysiane Gagnon qualifies, "as far as English Canadian intellectuals are concerned." Nevertheless, with the introduction of the Charter it can be argued that the Charter has led to the 'Americanization' of the political culture in Canada, and the Canadian constitution has shifted fundamentally from being a constitution "similar in principle to that of the United Kingdom" to one that embodies individual rights to 'life, liberty, and security of the person'. As Louis Balthazar argues, the French Canadians, who traditionally have been defenders of federalism and the British Parliamentary system, may break from the Canadian federation precisely because the entrenchment of the Charter "[has] made the federation alien from its original intent and more similar to the American concept of national union," a concept that from the beginning, has been rejected by the French Canadians.

As a consequence, the Charter has been received with mixed feelings and raises an interesting question: why has Quebec not signed on to the Charter? Understanding now the importance of language to the people of Quebec, and how that province views itself and its place in the federal system, we can see that there are two principal reasons to understanding Quebec's reluctance to signing the Charter. The first reason is the manner in which the Charter came about. Trudeau's move to patriate the constitution unilaterally gave way to a power struggle between the provinces, and in particular, Quebec and the federal government. In the end, the constitution was patriated with an entrenched Charter of Rights and Freedoms with the support of the other nine provinces. Quebec was excluded from the final agreement and thus did not sign the accord. For this reason, the Charter could not be seen
as a breakthrough or as a “progressivist initiative.” Nor was it the ‘renewed federalism’ that was promised them. On the contrary, it was viewed as part of a package that “had been brutally imposed on Quebec without its consent by English Canada.” Moreover, it signalled an end to the compact theory of federalism and the belief that no amendment could be made to the constitution without the unanimous consent of the provinces, and in particular, of Quebec.

Furthermore, for Quebec, it indicated an abandonment and a betrayal by the other provinces. In addition, this was another incident in the growing antagonism between two schools of thought with respect to the Charter and federalism that plagued the two decades prior and during the patriation negotiations. The first, embodied by Trudeau, asserted that French Canadians “given individual rights, equal chances, and a decent degree of protection for their language should be able to affirm themselves throughout the country.” The second school of thought which was endorsed by virtually all provincial politicians in Quebec, focussed on the collective rights of the Québécois “to develop the institutions and increase the powers of the province that was their only true homeland - the only place where they formed a majority.” This leads us to the second principal reason why Quebec is reserved in its acceptance of the Charter.

The Charter endeavours to establish and cultivate a pan-Canadian juridical identity across the federal system. In the words of Alan Cairns, “the Charter generates a roving normative Canadianism, oblivious to provincial boundaries... a homogenising Charter-derived-rights-bearing Canadianism.” In essence, it creates a country in which there exists
one pan-Canadian identity, one citizenship, not ten provincial identities and ten provincial
citizenships.\textsuperscript{51} The end results of such does two things. First, it fundamentally alters the
two nations theory of Canadian federalism and second, parliamentary supremacy is replaced
with constitutional supremacy and \textit{Charter} imperialism. As discussed earlier, there is also
the real implication that the minority language education rights under the \textit{Charter} will
threaten the jurisdictional sovereignty of the provinces' rights over education. Moreover, the
\textit{Charter} also encroaches on property and civil rights, one of the enumerated classes of
provincial jurisdiction which originally was designed to protect Quebec’s legal system, under
section 92 of the \textit{Constitution Act, 1867}.\textsuperscript{52} As James Tully argues, in the specific case of
Quebec, the \textit{Charter} “violates the jurisdictional autonomy of Quebec’s civil law and civilian
tradition guaranteed in the \textit{Quebec Act} of 1774.”\textsuperscript{53} The retention and preservation of
Quebec’s civil code was a defining feature and fundamental distinction between Quebec and
the rest of Canada, which lives by the common law system inherited from England. Under
the \textit{Charter}, there will be one national standard with respect to civil law in the provinces
which undoubtedly will result in significant changes in the Quebec civil code as the evolving
\textit{Charter} jurisprudence will lead to an accelerated blurring of the distinction between the
English common law and the French \textit{Civil Code}.

Property and civil rights, and education are two of the largest areas of exclusive
provincial responsibility under the division of powers. They are provincial responsibilities
precisely because of the belief and the understanding at the time of Confederation that
Quebec has its own culture and identity and the provinces would be the best suited to
preserve and protect local cultural identities. While there is no actual transfer of power or authority from the provinces to the federal government by the Charter, there is a transfer of power from all governments to the court system and ultimately, to the Supreme Court of Canada - another federal institution that is appointed by the federal government. Under programs such as the Court Challenges Program, the federal government can do indirectly what it could not do directly, that is, to use Charter litigation to challenge provincial authority in provincial areas of jurisdiction.

The loss that Quebec has felt under the Charter is two-fold. First, along with the loss of its place in the federal system and the demise of the compact theory, it also has lost its special status at the Premiers’ Conference. In the past, Quebec’s size and distinct character gave it an understanding that it had a veto over any constitutional change, by convention if not legally, thus giving it a political advantage. However, shortly after the constitution was patriated, the Supreme Court in Reference Re: Amendment to the Canadian Constitution dismissed the claim that Quebec had any veto, conventional or constitutional. Moreover, the defeat of the Meech Lake and Charlottetown Accords indicated that the Charter had transformed the way Canadians think about federalism with the result that satisfying Quebec’s desire for autonomy and status was apparently a lower priority than before.

Prior to 1982, the Constitution easily could be described as the ‘government’s’ constitution. However, with the entrenchment of the Charter it became the ‘peoples’’ constitution, and future change to their constitution would not happen without their participation. This is evidenced by the defeat of the Meech Lake Accord that witnessed
heavy resistance by citizen groups who opposed both the substance of the Accord and the closed process that produced it.\textsuperscript{58} “For the first time in Canadian history, a constitutional accord that had the support of all eleven first ministers did not become law.”\textsuperscript{59} This signalled the end to the historical monopoly on the constitutional amending process that the first ministers traditionally had enjoyed.

Peter Russell, assessing the defeat of Meech Lake, declared, “Charter rights had replaced provincial rights as the fundamental constitutional rights.”\textsuperscript{60} The nationalists in Quebec were far more explicit in what the loss of Meech meant for them: “The failure of the Meech Lake Accord marks a real turning point in the history of Quebec and Canada. It demonstrates that the dualist dream which Quebec intellectuals and politicians passed on from generation to generation is virtually impossible.”\textsuperscript{61} Likewise, the 1992 \textit{Charlottetown Accord} would follow in the same footsteps as Meech. Despite the attempt by the premiers to seek public legitimation of the agreement through a national referendum, the Accord again was rejected, also in Quebec. As a consequence, the traditional politics of elite accommodation, and the use of the first ministers conference for conducting constitutional politics were no longer sufficient to appease the population. The constitutional politics in Canada prior to 1982 were about the dominance of governments. The \textit{Charter} changed all that. Federalism lost out to the ‘people,’ to rights, and to pan-Canadian citizenship.

Quebec’s second loss comes in the form of legislative loss at the hands of the courts, in particular, the invalidation of statutes through judicial review. What makes this kind of loss significant is that when a provincial government has a piece of legislation invalidated by
a court, all the provincial governments indirectly lose the legislative authority to deal with
the particular issue in their own way. This is a consequence of the structure of the judicial
system in Canada. While the political system is structured federally, the justice system in
Canada is unitary, meaning there is one court system that is hierarchical in structure with the
Supreme Court of Canada at the apex. As such, all decisions by the Supreme Court are
binding on all lower courts and all governments in Canada. While the national government
is as bound as the provinces by the decisions of the Supreme Court, any loss under the
Charter to the authority of the federal government to legislate in a particular area is a loss to
another national institution. In this regard, there is still a national standard being set.

The Quebec legislation that was invalidated by the Supreme Court was substantial in
nature. Unlike the federal statutes that were invalidated, which mostly dealt with old
criminal code provisions and police procedures, Quebec lost entire sections of one of its most
valuable and important pieces of legislation, Bill 101, the Charter of the French Language.
This infuriated Quebec nationalists and intensified the divide between Quebec and the rest of
Canada. The premier of Quebec in response invoked section 33, the ‘notwithstanding
clause’, to override the Supreme Court decision, but at great political cost. English
Canadians outside of Quebec and Anglophones in Quebec did not see the implementation of
section 33 as an act to save its legislation from invalidation through judicial review, nor as a
strike against an agreement to which it refused to give assent, but rather, they saw it as a
deliberate attack on the English minority that lived in the province. Relations between
Quebec and the rest of Canada hit a new all-time low, and the tensions in the federal system
rose to new heights. Likewise, under the *Charter*, the federal government found new ways to challenge various provinces, and in particular Quebec's minority language policies through the use of the Court Challenges Program that would provide infrastructure and funding to minority language groups. These groups backed by federal funding, would use the courts to compel changes in provincial language policies. From this perspective, the *Charter*, in the words of F.L. Morton, "represents an institutional loss of policy autonomy for the provinces and a corollary empowerment of social interests favoured by the federal government." The perception in the media was that these court challenges were launched by persecuted minorities struggling to obtain their rights against a hostile government, rather than the heavy-handed attempts by Ottawa to intrude in provincial jurisdiction. Alliance Quebec, a federally funded Anglophone rights group in Quebec, was able to challenge successfully three major sections of *Bill 101* in the courts.

In short, The *Charter* has turned minority interests into minority rights, transferred authority over language policy out of provincial legislatures and into federally appointed courts and shifted provincial matters involving provincial areas of jurisdiction to a national forum. The result is a *de facto* strengthening of the authority of the federal government at the expense of the authority of the provincial governments. "Victory in a courtroom rights battle carries the implication of permanence. The victor's policy is constitutionally entrenched, and the whole point of entrenchment is to guarantee a permanence not possible in legislative politics." In the end, under the *Charter*, the federal government has been able to use the courts successfully to engage in micro-constitutional amendment through judicial
review, thus slowly changing the traditional principles of federalism and the division of powers, an alteration that becomes highlighted by the Ford decision. Moreover, the federal government will be able to continue this approach to constitutional change as part of its plan under the Charter to create and establish a pan-Canadian identity of one citizenship and ten equal provinces.

**Ford v. Quebec and Broader Political Implications**

At issue in the Ford case was whether certain provisions of the Charter of the French Language that required public signs and commercial advertising be in French only were a violation of the freedom of expression provisions of the Charter of Rights and Freedoms and the Quebec Charter of Human Rights and Freedoms, and of the guarantee against discrimination based on language of the Quebec Charter. The Quebec Superior Court held that Bill 101 violated the provisions of the Quebec Charter and was of “no force or effect.” The Quebec Court of Appeal agreed with the Superior Court and also held that Bill 101 infringed on the freedoms of expression provisions of the Canadian Charter. The Supreme Court of Canada unanimously agreed with the two Quebec courts.70

The Ford decision was a controversial decision by the Supreme Court of Canada, but not necessarily because of what the court said in its decision, but by the medium in which Ford was decided and the implicit broader political implications that resulted. By this, it is meant that it was not so much what was said but who said it, namely, a national supreme court, appointed by the federal government, using a document that was forced upon Quebec
by the federal government, telling Quebec that their Charter of the French Language, the crown jewel of the Quebec government’s language policy, was unconstitutional.

It is important to understand in the context of this decision the justifications for the language policy in the first place, aside from the fact that ‘language’ is a fundamental aspect of identity and culture. Essentially, there are two arguments that can be made. The first is the collective rights argument, the right of the French speaking majority to its cultural survival. The second argument hinges on liberal democratic principles, that in order to foster social cohesion and equal participation, there is a need for a common public language.\textsuperscript{71} The Attorney-General for Quebec argued before the Court that there is a distinction between the medium and the message, that Bill 101 did not regulate the content of speech, only the language in which it is conveyed; therefore, there was no violation. The government of Quebec was fostering only the need for a common language. The Supreme Court had disagreed, however. They stated in their decision that “language is not merely a carrier of content ... Language itself is content.”\textsuperscript{72} Nevertheless, the Court did agree that the legislative objective of Bill 101 was important and legitimate; however, it did not constitute a “reasonable limit” as “demonstrably justified in a free and democratic society.”\textsuperscript{73}

While the full details of the decision can be read elsewhere, the important issue is that the actual substance of the decision was not overtly controversial from a legal perspective. The impugned sections of Bill 101 were found to be in violation of not just the Canadian Charter but also of the Quebec Charter, passed by a Quebec government. The controversy comes from the broader political implications as a result. As discussed earlier, one of the
fears of the Charter that was voiced by Quebec, as well as seven other provinces, was over the transfer of power from the governments to the courts. From the provincial perspective, it was a well-founded concern, highlighted by the implications of the Ford decision. This essentially comes down to the crux of the argument that the Charter undermines federalism and as a consequence, has failed Quebec. The broader political context of the case, by going to the courts to resolve disputes, has the effect of disabling and derailing the political debate. It does this because it sends an implicit message to the people of Quebec that “the issue you have been debating is not one you are entitled to debate, and thus decide for yourselves. In important respects, the issue has already been decided by the Charter.”

Clearly, this was the case in Quebec after the Ford decision was rendered. The people of Quebec had just been told that when it comes to ‘language,’ an issue of fundamental importance to the Francophones of Quebec, and an issue that has long been established as falling under the legislative jurisdiction of the province, they are no longer capable of control because of the Canadian Charter of Rights and Freedoms.

Conclusions

The original Confederation bargain in 1867 that was shaped by dualism and the compact theory was altered fundamentally in 1982 with the introduction of the Charter. Since then, it is argued that the judicialization of politics and the emergence of strong and growing rights jurisprudence has weakened government power in Canada and undermined the basic principles of federalism. The ultimate result is the failure of the Charter to unify
the country. Rather than addressing and accommodating the needs and concerns of Quebec, the federal government led by Pierre Elliot Trudeau pushed ahead with his plans to patriate the constitution and entrench a charter of rights. The result is a fundamental shift in Canada from parliamentary supremacy to constitutional supremacy. Moreover, the Charter has in a relatively short time become so popular with English speaking Canadians that efforts, described by Peter Russell as ‘mega constitutional politics’ to reinstate the kind of federalism that would be suitable to Quebec have all been in vain. The federalism under the Charter equally has failed Quebec, evidenced by the failure of Meech and Charlottetown to restructure the constitution, and by the re-invigoration of Quebec separatism that in the 1995 referendum in Quebec saw the sovereignists fall short of a victory by a mere 60,000 votes.

That is not to say, however, that the federation has and will remain status quo. The constitution, as Peter Russell describes, can be understood as an organic system. Although Quebec lost in the ‘mega-constitutional’ rounds, it had gained much of what it asked for by administrative change through intergovernmental agreements. Following the 1995 referendum, then Prime Minister Chrétien introduced a package of semi-constitutional proposals to honour the promises of reform he had made at Verdun during the referendum campaign. Since that time, the two orders of government have entered into other agreements that in practice alter the division of powers while avoiding formal constitutional change.
Endnotes.


2. Ibid.


4 Pierre Elliot Trudeau, Speech at the Paul Sauve Arena, Montreal, Quebec, May 14, 1980

5. The first attempt was in 1987 with the Meech Lake Accord and the second attempt came in 1992 with the Charlottetown Accord.


9. Ibid., pg. 3.


12. Stevenson, Unfulfilled Union, pg. 94.

13. Ibid.


15. Ibid.


18. Ibid. pg. 101.


20. Ibid., pg. 48-49.


24. Balthazar, pg. 47.


31. Ibid. 716.

32. Sharpe & Swinton, pg. 208.


34. Maureen Covell, “Minority Language Policy in Canada and Europe: Does Federalism Make a Difference?” in Bakvis & Skogstad, pg. 244.


36. Balthazar, pg. 51.

37. Trudeau, Federalism and the French Canadians, pg. 54-57.

38. L. Gagnon, “The Charter and Quebec” pg. 46.


40. Ibid., pg. xxv.

41. The Constitution Act 1867, PART VII, section 52 (1) reads, The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
The significance of this section is that it constitutionalizes judicial review and authorizes the courts to strike down any legislation enacted by Parliament or the provincial legislatures that are inconsistent with the provisions of the Charter that also are interpreted by the courts.

42. L. Gagnon, “The Charter and Quebec” pg. 45.

43. Preamble to the Constitution Act, 1867, which reads; “Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom ...”

44. Balthazar, pg. 45.

45. L. Gagnon, “The Charter and Quebec” pg. 46.

46. Ibid., pg. 46.

47. Ibid.

48. Ibid. (Emphasis added.)

49. Ibid., pg. 47.


51. Jean Chrétien, Commons Debates October 6, 1980, pg 3282.

52. Stevenson, Unfulfilled Union, pg. 29.


The Quebec Act, 1774, reinstated the French civil code as the civil law for the colony. It also expressly recognized the right of individuals to freedom of religion, guaranteed the Roman Catholic Church its ‘accustomed Dues and Rights,’ and provided for a special oath for Roman Catholics so they could accept seats on the Legislative Council.

54. Further to the point, section 94 of the Constitution Act, 1867, allows for the Parliament of Canada to make “Provision for the Uniformity of all or any of the Laws relative to Property and Civil Rights in Ontario, Nova Scotia, and New Brunswick.” However, Quebec was exempted from this provision of the Act.

55 The Court Challenges Program was launched in 1978 by the Trudeau government. It was designed to let language groups increase pressure on provincial governments to provide more bilingual services. It was a federal program that provided funding to minority groups to pursue their causes through the court system where they could challenge the constitutionality of provincial policies and laws under the Constitution Act, 1867, and later under the Charter. The program later was expanded to include all “equality seeking groups.”

56. Morton, pg 181.

58. Morton, pg 184.

59. Ibid.


62. By contrast, the United States has fifty-one judicial systems compared to our one. Their judicial system is structured federally meaning each state has its own court system and supreme court; as well, the national government also has its own court system and supreme court. Neither the supreme court of a state or the supreme court of the national government is subordinate nor binding on the other. The only exception is with matters that pertain to the United States Constitution and Bill of Rights. In this instance, the US Supreme Court has the ultimate authority.


64. Christopher P. Manfredi, Judicial Power and the Charter - Canada and the Paradox of Liberal Constitutionalism 2nd ed. (Canada: Oxford University Press, 2001), pg. 181-188.


66. Ibid., pg 181.


68. Ibid., pg. 160.

69. Micro constitutional amendments refer to the informal process that changes the meaning of the constitution through judicial decisions. See Manfredi.

70. Ford v. Quebec (Attorney General) [1988] 2 S.C.R. 712-732. What is significant about Ford is that the Quebec Superior and Appeal’s Courts both found that the Government of Quebec was in violation of its own laws.


73. Section 1 of the Canadian Charter of Rights and Freedoms.


75. Ibid.

76 For a detailed discussion on Mega Constitutional Politics, see Peter Russell, Constitutional Odyssey: Can Canadians Become a Sovereign People? 3rd ed. (Toronto; University of Toronto Press, 2004).
77. Bakvis & Skogstad, pg. 3.

78. Peter Russell, *Constitutional Odyssey – Can Canadians Become a Sovereign People?* 3rd ed. (Toronto; University of Toronto Press, 2004), pg. 237-238. Included in Chrétien’s package was a resolution by the House of Commons recognizing Quebec as a distinct society, a restoration of Quebec’s constitutional veto with the passing of the *Constitutional Amendments Act, 1996*, and changes to the federal unemployment insurance program to give the provinces greater control over labour market development.
Federalism is the most visible and distinctive element in Canadian political life. Canadian political discourse has been shaped and constructed by the relationships and conflicts between the federal and provincial governments. The entrenchment of the *Canadian Charter of Rights and Freedoms* often has been heralded as the most fundamental constitutional change in Canadian political history. Since its inception into Canadian law in 1982, it has, above anything else, generated numerous discussions and debates as to its present and future role within Canadian political discourse. The *Charter* has its advocates and enthusiasts who see the *Charter* as a crowning glory in the advancement of liberalism, human rights, and a strong central Canadian state. Likewise, there are the sceptics and denouncers who see the *Charter* as a false hope of rights and equality, hidden behind an altruistic façade, and an infringement upon the sovereign rights of the Provinces. And there are those who criticize the *Charter* on the grounds that it gives excessive powers to judges at the expense of elected representatives. Over the past two decades, a number of important debates have emerged among the “chattering classes of charterland.” The first issue is whether or not a rights framework is appropriate for advancing social equality in Canada. The second issue, inextricably linked to the first, is whether appointed judges, rather than elected legislators, should
make social policy. Similarly, a third important issue arises with respect to the effect of the Charter on federalism in Canada; namely, can a rights discourse be reconciled with federalism.

This chapter will explore the relationship between the Charter and the principles of federalism in Canada. The argument presented here is that the Canadian Charter of Rights and Freedoms has had a significant centralizing effect on Canadian federalism. Moreover, the judicialization of politics that has occurred as a consequence of the entrenchment of rights in the constitution ultimately undermines the traditional division of powers framework outlined in the Constitution Act, 1867. While on the surface there may not appear to be much evidence to support the claim, the first twenty years of Charter jurisprudence would indicate that the Charter has been a strong centralizing force within Canadian politics, encroaching on the sovereignty of the provinces, and undermining the principles of federalism. The previous chapter explored this issue looking specifically at Quebec. Quebec always has been a distinctive participant in Canadian federalism and likewise, it is assumed that the impact of the Charter on Quebec would be far different than on any other particular province. Moreover, the entrenchment of rights in the constitution, especially language rights and freedom of expression, would have a greater effect on Quebec's language policy, an issue that is paramount to Quebec but not quite so to the rest of Canada in general. This chapter will look at the Charter and federalism in Canada and the issues that are of common importance to all the provinces, namely, the encroachment on the exclusive provincial spheres of jurisdiction, the
centralization of power, and the ultimate undermining of the principal foundations of federalism.

It is important to define first, how the Charter is centralizing, and second, what is meant by the judicialization of politics. The Charter has been characterized by various critics and academics as a centralizing force in Canada because it leads to a transfer of power from provincial governments to the Supreme Court of Canada, a federally appointed institution, thus concentrating ultimate authority at the national level. Similarly, the Charter is seen as having a nationalizing influence because it places constraints on the extent to which a province can promote community values. In this sense, the Charter fosters and promotes pan-Canadian identities against provincial identities. More important, these rights, entrenched in the Constitution, ultimately would be interpreted and upheld by the Supreme Court of Canada, a federal institution whose decisions are binding on all Canadian courts, federally and provincially. The implication of this is that when the Supreme Court of Canada strikes down a provincial statute, all provinces indirectly lose the legislative authority to deal with that particular issue. However, if the Federal Government has a statute struck down, they too are impeded in their legislative authority, but they lose that power to another central institution that has the power to impose a single national standard. Accordingly, it can be argued that the impact of judicial review of federal statutes is minimized in comparison to provincial statutes.

Consequently, since the adoption of the Charter of Rights and Freedoms into Canadian politics and law, the 115-year tradition of parliamentary supremacy and legal
federalism has been abandoned and replaced by "a regime of constitutional supremacy verging on judicial supremacy." The Charter has become a catalyst for a new era of judicial activism and the emergence of the judicialization of politics in Canada. On rights issues, the judiciary has, for better or worse, become a pro-active player, drawn into the political realm of social policy making; the Court has been transformed into a decidedly public law court, and Canadians have gone from "passive spectators to assertive rights-bearers." This, as will be shown, has had a far greater impact on provincial authority than it has had on the authority of the Federal Government. This is primarily because provinces are more apt to enact policies and legislation that deal with social welfare state policies and regional diversities and particularities that diverge from a national standard, and thus, are more likely to infringe on a protected freedom.

The judicialization of politics refers to the expansion of judicial power at the expense of democratic power. There is a shift in authority from Parliament and the legislatures to the courts, and consequently, there is a shift in the role of the judiciary from being a neutral legal actor to being a political actor with its own political agenda. With respect to the constitution, the Court has moved beyond its role as umpire between the Federal Government and the provinces over the division of powers. Its members are involved in vital political debates, deciding on the constitutionality of deep moral, political, and social issues such as abortion, gay rights, the limits of free speech, language policy, education, and the rights of a province to secede from the union. As a result, the Supreme Court is charged with an even greater responsibility through its increased powers of judicial review that affect all aspects of politics
in Canada.

The argument here will proceed in three stages. The first part will examine the judicialization of politics in Canada and the rise in judicial power since the introduction of the Charter. While the courts in Canada always have played a fundamental role in the political and constitutional evolution of Canada, prior to 1982 the role of the Supreme Court of Canada, (and its predecessor, the JCPC), has been primarily to resolve jurisdictional disputes between the Federal Government and the provinces as the ‘umpire of federalism’. It is the entrenchment of the Charter as the ‘supreme law of Canada’ that transforms the Supreme Court from its traditional umpire role to that of a political actor in Canadian politics. This will demonstrate two points. First, it will show how the empowerment of the Court has led to an encroachment on the jurisdiction of provincial authority far greater than on that of the federal authority, and second, how the transfer of Canadians from subjects of Parliament to rights-bearing citizens has led to a fundamental shift in the role of government for the citizen body. The second area will examine some of the significant Supreme Court decisions and how they erode provincial authority over major policy areas such as education and social policy, two very important areas that prior to 1982, were exclusive areas of jurisdiction of the provinces. In particular, this area will focus on minority language education rights and gay rights. Similarly, this section specifically will examine the federal and provincial statutes nullified by the Charter. Finally, the third area will evaluate the arguments put forth that “the Supreme Court of Canada’s Charter jurisprudence has not had the detrimental effects on Canadian federalism that the critics [of the Charter] contended.”
Ultimately, we will be able to conclude that there is a clash between rights and federalism, and that the *Canadian Charter of Rights and Freedoms* undermines the traditional principles of federalism outlined in the *Constitution Act, 1867*.

**The Judicialization of Politics**

The enactment of the *Charter of Rights and Freedoms*, in 1982, brought about a fundamental change in rights jurisprudence in Canada and “provided the necessary institutional framework for an extensive judicialization of politics.” To use Torbjorn Vallinder’s words, it was a heavy dose of “judicialization from without,” i.e., by judges. It easily can be argued that the constitutionalization of rights in the form of a bill of rights, or a charter, has been a desirable and necessary step in the evolution of Canadian constitutional politics. Ran Hirschl, however, argues that, “judicial empowerment is in many cases the consequence of a conscious strategy undertaken by threatened political and economic elites seeking to preserve their hegemony.” Political elites deliberately initiate and support a constitutionalization of rights in order to transfer power to supreme courts where their policy preferences more likely will be upheld due in part to factors such as the court’s record of adjudication and the ideological preferences of the justices. The Federal Government throughout the 1960s and 1970s was being challenged by the provinces on many fronts. The provinces were experiencing their greatest periods of economic growth and decentralization. This was especially the case in Quebec during the Quiet Revolution. The separatist movement was gaining momentum and more and more Quebeckers were looking to Quebec
City, and not Ottawa, as their nation’s capital. Trudeau’s strategy to counter the rise of provincialism in general and the Quebec separatists in particular was to constitutionally entrench a charter of rights, thereby transferring ultimate authority to the courts and preserving the hegemony of the Federal Government through the Supreme Court.

Hirschl’s theory or explanation complements the arguments put forth by many Charter critics, especially by the left-wing critics who characterize the Charter as “a most dangerous form of capitalist class rule.” (Or conversely, by right-wing critics who have characterized the Charter as “a powerful weapon in the hands of self-seeking ‘special interest groups.’”) Moreover, it is an argument that resonates with the provinces who see Trudeau’s Charter as a tool to combat the thriving increase of Quebec nationalism and the growing rise of province building, and finally, as a means for the federal government to meddle in exclusive provincial matters where they previously could not.

Hirschl’s arguments also give rise to a third significant critique of the Charter, that the judicialization of politics has led to a sharp departure from the democratic rule of law. The Charter is mostly a collection of “vague incantations of lofty but entirely abstract ideals, incapable of either restraining or guiding judges in their application to everyday life.” The judges, who are largely unaccountable for their decisions, are given the power to solve the questions that are not addressed by the legislatures and also to nullify laws that elected legislatures have made. This has led to the courts becoming what Robert Martin describes as “the most dangerous branch.” The judges of the Supreme Court actively have been involved in setting the social agenda, amending legislation, and amending the constitution.
As Martin describes, "They have not hesitated to address and purport to resolve highly contentious and divisive issues, such as abortion, assisted suicide, the legitimacy of homosexuality, and the Quebec secession. Using a technique which it invented, and to which it gave the name 'reading in,' the Court has been prepared to amend legislation. The Court has even gone to the point of altering the text of the constitution."\(^\text{17}\)

Federalism is essentially about the shared power between two orders of government. Each order of government is sovereign within its sphere of jurisdiction, and up until 1982, each order of government had supreme authority to legislate on any matter that was *intra vires*. According to Christopher Manfredi, the judicialization of politics leads to a shift from Parliamentary Supremacy to Constitutional Supremacy, and finally to a 'jurocracy,' or judicial supremacy. The courts become in charge, elected governments become subordinated, the 'people' are no longer their own rulers, and power is no longer shared but monopolized by the courts.\(^\text{18}\) As discussed in the introductory chapter, this has created an incongruity within the text of the constitution that manifests itself when attempting to reconcile individual rights and federalism. The courts have impeded the legislative competence of both the Federal government and the provinces.

That is not to say that protecting citizens from the whims of government action is bad. However, the implications for federalism are such that the courts encroach on provincial autonomy and monopolize power because under the *Charter*, they now have a policy veto that carries over into virtually any field of provincial jurisdiction. Through the courts, local social and moral policy issues are transferred from the provincial arena to the
national one.\textsuperscript{19} As previously mentioned, the Federal Government is not immune to the
effects of the Charter either. The recent controversy over the same sex marriage issue is an
excellent example of national social policy being dictated by the courts to the elected
representatives of Parliament. That issue notwithstanding, there is a fine distinction that can
be made between the impact of the Charter on the provinces, and the impact on the Federal
government. As Samuel LaSelva observed,

\begin{quote}
The Charter’s constriction of provincialism is magnified by its subtle and
pervasive Canadianism. It is commonly recognized that a Canadian value
is affirmed whenever the Charter is used to strike down a provincial law or
executive order. But a Canadian value… is also affirmed whenever the
Charter is used to nullify a federal law or executive order. As a result, the
Charter generates a continuous affirmation of Canadian values.\textsuperscript{20}
\end{quote}

The policy agenda of the Federal government is ostensibly a national agenda by
nature, so while Parliament’s absolute authority to legislate may be impeded by charter
limitations, at the end of the day a national standard is still established. The provinces, on
the other hand, may still retain the right to legislate within their exclusive sphere of
jurisdiction, but they must do so while respecting national standards as defined by the judges.
The consequence is a loss of exclusive power to the Supreme Court, and a loss of provincial
identity to the national identity.

The supremacy of the courts, their authority, and the power of judicial review, comes
from the Constitution itself. Under section 52 of the Constitution, (which states “The
Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with
the provisions of the Constitution is, to the extent of the inconsistency, of no force or
effect,”\textsuperscript{21}) the courts have the power to strike down any legislation that pertains to any matter
that they interpret to be inconsistent with the *Charter* and other parts of the *Constitution*. It is the courts that ultimately interpret the constitution and define the meaning of the words and the text. This has led to the portrayal of the Supreme Court not as an umpire in a game, but as a player in the constitutional process. This notion was quickly endorsed by the Supreme Court very early on in the *Charter* era. In *Hunter v. Southam Inc.*, the Court stated,

> The task of expounding a constitution is crucially different from that of construing a statute. A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill or a Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.

Likewise, there have been ten other decisions since *Hunter* where the Court explicitly has stated that it was the guardian of the constitution. Additionally, in the *Judges Salaries Reference* decision, the Court furthered this sentiment by stating that the constitution was a castle and the Court is the "[protector] of the Constitution and the fundamental values embodied in it" including the rule of law, fundamental justice, equality, and preservation of the democratic process. Furthermore, in *Vriend v. Alberta*, the Court stated that its members are the "trustees" of the constitution and charged with the responsibility of its interpretation. The significance of this is that, in effect, the Supreme Court has through its decisions created a hierarchical order within the constitution with themselves at the top and
the elected governments subordinate. Moreover, the Court signified that it was prepared to take a liberal and activist approach to interpreting the meaning of the Charter. Thus, the provinces are only sovereign within their spheres of jurisdiction so long as their policy initiatives are consistent with the national standard set by the Supreme Court.

The second effect is the transformation in the citizen body. Trudeau's plan was to create a Canada with one citizenship, where Canadians can all celebrate together what they have in common. He wanted Canadians to identify themselves not by their province, but as Canadians with equal rights. The effect of this was to de-legitimize the authority of the provincial governments to enact social policy against pan-Canadian national standards. If Canadians could identify with one another as equal members of society with equal rights, then any attempt by a provincial government to upset that equality would be met with resistance, both in the form of public pressure and/or litigation in the courts. This is evidenced by the defeat of the Charlottetown Accord in the first national referendum on the Constitution in October, 1992. While the reasons for the defeat of the Accord are complex, one of the most frequent arguments made against the Accord was that the provisions relevant to the Charter's application to Quebec and First Nation's governments threatened to undermine Charter rights and freedoms. As such, the defeat of the accord was hailed “as a victory for people’s rights.”

Likewise, for the 20th anniversary of the Charter, in March of 2002, Ipsos-Reid conducted a national survey on attitudes toward the Charter. They asked Canadians three questions. The first question was, “Do you feel that your rights and freedoms are better protected because the Charter of Rights and Freedoms became law in
Of those polled, 74% of Canadians felt that their rights are better protected because of the Charter, with a high of 84% in the Atlantic region, 75% in Quebec, 73% in Ontario, 77% in the prairies, a low of 68% in Alberta, and finally 72% in British Columbia. The second question asked, “When you think of the Charter of Rights and Freedoms, do you associate it MOST with protecting: The equality of women and minorities?; The rights of Criminals or accused criminals?; The rights of aboriginals?; The rights of gays and lesbians?; The rights of all Canadians?; The rights of other groups or individuals?; Don’t Know?” Of those polled, 72% of the respondents thought that the Charter most protects the rights of all Canadians with again, a high of 86% in the Atlantic region, 72% in Quebec, 70% in Ontario, 75% in the prairies, a low of 63% in Alberta, and 75% in B.C. Finally, the third question asked, “Do you feel more comfortable with: Judges protecting your rights through interpreting the Charter?; Politicians in Parliament and the provincial legislatures protecting your rights?; Don’t Know?” Seventy per cent of Canadians felt more comfortable entrusting the protection of their rights and freedoms to judges than to politicians: 74% in the Atlantic provinces, 73% in Quebec, 67% in Ontario, 77% in the prairie region, a low of 62% in Alberta, and a high of 76% in B.C. (See Appendix A)

The significance of this is that the judicialization of politics that arguably began in 1982 with the entrenchment of rights and freedoms in the constitution has led to a rights consciousness in Canadian society. Canadians have gone from passive observers to rights bearing citizens, increasingly mobilizing against governments in the courts, seeking changes in the laws and in the way we are governed. This in turn has had significant implications for
federalism in two ways. First, the federal government has been able to use the courts to circumvent the division of powers framework and thus to interfere in policy areas that are assigned exclusively to the provinces. Second, individuals and minority groups have been able to use the courts to engage in micro-constitutional amendments, informally changing the meaning of the constitution against the will of the provinces. Both of these arguments are supported by the Supreme Court’s jurisprudence in relation to minority language education rights as well as gay rights.

**Minority Language Education**

The Charter was sold as the “people’s package.” Trudeau’s primary goal was to strengthen citizens’ allegiances to the Canadian state and to strengthen the influence and paramountcy of the Supreme Court. The corollary effect was to strengthen the de facto authority of the federal government by reducing the authority of all the provincial governments. “Behind the rhetoric of the Charter as the ‘peoples package’ was a deliberate strategy to overrule various provinces’ restrictive and unfriendly treatment of official language minority groups.” As F.L. Morton states, this is accomplished because “the Charter transformed these minority interests into minority rights, thereby transferring ultimate policy responsibility to the Supreme Court.” Entrenched rights alone are not enough to accomplish this goal, however. Thus, to supplement the entrenchment of rights a new federal program was created, the Court Challenges Program, that provided litigation funding to minority language groups. The Federal government would provide the funding
for these groups to challenge provincial legislation in the courts, and thus be able to sidestep the division of powers and indirectly challenge the provinces’ exclusive authority over education. For the Federal Government, this was a highly successful strategy.\(^{35}\)

Federally funded minority language groups won a number of very important legal challenges in the courts in *Protestant School Boards,\(^{36}\)* in *Mahé v. Alberta,\(^{37}\)* and in *Solski v. Quebec.\(^{38}\)* In Quebec, minority language groups were successful in winning court challenges not only against the sign laws in *Ford,\(^{39}\)* but also in the minority language education provisions of the French Language Charter in *Protestant School Boards.* At issue was whether the provisions of the *Charter of the French Language* regarding English instruction were inconsistent with the minority language educational rights guaranteed by section 23 of the Canadian *Charter.\(^{40}\)* The Court concluded that the relevant provisions of the French language Charter were inconsistent with the *Canadian Charter* and as a consequence, were declared of “no force or effect to the extent of the inconsistency.”\(^{41}\) Furthermore, the Court stated that the offending legislation could not be characterized as a “reasonable limitation” on rights under section 1.\(^{42}\)

At the same time, federally funded Francophone minority language groups outside Quebec were able to challenge successfully provincial minority language educational provisions. After *Protestant School Boards, Mahé v. Alberta* was the next major section 23 case to come before the Supreme Court. In *Mahé,* the Supreme Court examined the degree to which minority language groups could demand management and control of their education system.\(^{43}\) In its decision, the Court took a broad interpretation of section 23. The Court
stated that education in one’s language provides an important way to preserve and promote the minority’s language and culture. Referring back to Ford, the court reaffirmed that “Language is not merely a means or medium of expression; it colours the content and meaning of expression. It is, as the preamble of the Charter of the French Language itself indicates, a means by which a people may express its cultural identity.” The Mahé decision created a new set of national standards for the delivery of minority language education that “minority language groups have been able to enforce through litigation (or its threat) in the other eight English speaking provinces.”

Solski was another major challenge to Quebec’s Charter of the French Language. At issue was section 73(2) of the Quebec Charter that limited the category of persons eligible to receive minority language education. Only children who had completed a “major part” of their instruction in English were eligible. The Supreme Court, in its decision, held that the “major part” requirement must involve “a qualitative rather than a strict quantitative assessment of the child’s educational experience.” Further, the Court stated that “The qualitative assessment will determine if a significant part, though not necessarily the majority, of the child’s instruction, considered cumulatively, was in the minority language.” As such, the Court concluded, “A reading down of s. 73(2) — by qualitatively defining the “major part” requirement set out in that section as meaning a “significant part” — permits Quebec to meet its legislative objectives” without excluding eligible persons from minority language schools.

The significance of this decision was twofold, in that first, section 73(2) was declared
constitutional only after the Court "properly interpreted" it, and two, through its interpretation, the Court broadened the class of people eligible for minority language education. Moreover, the policy implications for the Quebec government, as a consequence, are potentially enormous primarily because, by the Court's words,

To purposefully assess the requirement for participation in s. 23(2), therefore, all the circumstances of the child must be considered including the time spent in each program, at what stage of education the choice of language of instruction was made, what programs are or were available, and whether learning disabilities or other difficulties exist. The relevance of each factor will vary with the facts of each case and other factors may also arise depending on the circumstances of the particular child and his or her educational experience.  

As a result, each application for minority language education instruction must be decided on a case by case basis with all the personal circumstances of the particular child necessarily being considered.

While all three of these cases were a victory for bilingualism and dualism in Canada, they were victories that came at the expense of the provinces because the provinces could no longer trounce minority language groups, and because they had lost significant policy control over education at the hands of the Supreme Court. In the end, the Charter has allowed the federal government to achieve indirectly what it could not have achieved directly.

The Politics of Gay Rights and Federalism

The gay rights movement in Canada really began to take shape in the early 1970s, before the Charter, with the rise of rights advocacy groups: the Coalition for Gay Rights in Ontario (CGRO), the Association pour les droits des gais du Quebec (ADGQ), the Gay Alliance Toward Equality (GATE Vancouver), and one pan-Canadian group, the National
Gay Rights Coalition (NGRC). The main goal of these groups was to measure the severe depths of formal equality in an attempt to break the cycle of discrimination that homosexuals faced. The strategy of these organizations was to use deliberately the courts as part of a concerted political strategy to raise social awareness. This was accomplished by focussing on three particular test cases that challenged the provisions of various provincial human rights codes and advocated the inclusion of ‘sexual orientation’ as an enumerated ground for protection from discrimination. Although they lost in the courts, they did achieve a great victory in society by drawing attention to the legislation and attitudes that discriminate against homosexuals in Canadian society. “What matters for the success of a social movement is not legal victory or defeat, but the actual assertion of rights claims and the political mobilizing that occurs around such claims.” The significance of this, or the importance of this, is that the gay and lesbian organizations were able to appeal to a collective consciousness in society by effectively making a rights claim as a group that is deserving of a right - analogous to other minority groups’ rights claims in society. After the entrenchment of the Charter, gays and lesbians began to win a few very significant challenges. It was clear that the Supreme Court was ready and willing to take a very liberal interpretation of the Charter.

When the final draft of the Charter was proposed, ‘sexual orientation’ was not included as an enumerated ground under the Charter’s equality section. Nevertheless, the Supreme Court in Andrews v. Law Society of British Columbia established that the enumerated grounds outlined in section 15 did not form an exhaustive list. Claims could be
made on other grounds of discrimination provided they were analogous to those already listed. Following Andrews, the question regarding ‘sexual orientation’ as an analogous ground for discrimination came to the Court, and quickly became a non-issue. It was clear to the Court in Egan v. Canada,\(^56\) that sexual orientation “falls within the ambit of s. 15 protection as being analogous to the enumerated grounds.”\(^57\) As such, the Supreme Court “read in” sexual orientation to be included as one of the enumerated grounds of protection offered by the equality provisions of section 15 of the Charter. Although Egan was a loss for the gay rights movement in that the Court upheld the constitutionality of the Old Age Security Act, it was a huge victory for the movement because it was able to entrench their rights claim into the constitution.

When the Supreme Court delivered its judgement in Vriend v. Alberta,\(^58\) it unanimously held that the exclusion of gays and lesbians from the Alberta human rights code was a “particularly cruel form of discrimination,”\(^59\) whereby the only appropriate remedy was to ‘read-in’ sexual orientation to the infringing act. Justice Frank Iacobucci defended the Court’s activist role “as the product of a deliberate choice of our provincial and federal legislatures.”\(^60\) According to Iacobucci, the role of the Court is to “serve as the ‘trustee’ of the Charter, and to scrutinize the work of the legislature and the executive not in the name of the courts, but in the interests of the new social contract that was democratically chosen.”\(^61\) Vriend was a controversial decision in that sexual orientation explicitly was excluded from the Alberta Individual Rights Protection Act as well as the original draft of the Charter. The Court did not simply strike down the statute as being unconstitutional, but rather rewrote the
statute to include “sexual orientation” as one of the enumerated grounds for protection. James Kelly states, “The implications of Vriend for Canadian federalism and provincial autonomy are profound, as this decision illustrates both the tension between rights and federalism and the question of local preferences over local affairs.”

The most significant victory of the gay rights movement came in 1999 when the Supreme Court came down with its verdict in M. v. H. At issue was the definition of ‘spouse’ in Ontario’s Family Law Act, which included common law heterosexual relationships but excluded same sex relationships. The Court held that the Family Law Act was unconstitutional but suspended its decision for six months to give the province time to change the legislation. The result was that the Court’s decision potentially affects more laws, both federal and provincial, in Canada, than all of its previous Charter rulings combined - fifty-eight federal statutes and hundreds of provincial statutes. M. v. H. laid the foundation for one of the most significant social changes to be imposed on the provinces and Canadian society as a whole. In June of 2003, the Ontario Court of Appeal in Halpern et al. v. Attorney-General of Canada et al., citing the precedents established by the M. v. H. decision, held that the traditional definition of marriage was unconstitutional thereby legalizing gay marriage in Ontario. The two years that followed witnessed seven other provinces and one territory follow suit until finally in July of 2005, the federal government passed the controversial Bill-C38 The Civil Marriage Act, legalizing gay marriage in all of Canada.
Examining the Empirical Evidence

An empirical review of the Supreme Court’s Charter jurisprudence reveals that the ‘nation building’ intentions of Trudeau’s charter indeed have reduced federal diversity in Canada, given a considerable amount of credibility to the centralization thesis, and furthered the assumption that federalism and rights are incompatible. This study examined all of the Charter cases before the Supreme Court between 1982 and 2005 that directly challenged a federal or a provincial statute. Additionally, cases that resulted with the Court taking any positive action, meaning the Court either struck the legislation down as unconstitutional or ‘read in’ to the statute and changed the law so it would coincide with the Charter, were considered to be a “Charter win.” Likewise a “Charter loss” refers to the cases where the Court finds the impugned legislation to be constitutional, or if unconstitutional, a justifiable reasonable limit.

What the study found was that since 1982, there have been one hundred and thirty-one federal statutes, and seventy-one provincial statutes challenged as an infringement of the Charter. The results of these challenges have led to thirty-six Charter wins (see Table 1) in relation to federal statutes, and twenty-three provincial (see Table 2). The Fundamental Freedoms (Sections 2), the Equality Rights (section 15), and the Minority Language Education Rights (Section 23) of the Charter have had the greatest impact on limiting provincial autonomy. Sections 2 and 15 combined accounted for sixty percent of the Charter wins against the provinces and section 23 of the Charter accounted for sixteen percent of the Charter wins. Against federal legislation, sections 2 and 15 were used as
well with twenty-eight percent of the Charter wins. The most successful results on federal legislation, however, have involved the legal rights provisions of the Charter, equally sections 7 and 11. Those two sections accounted for half of all the Charter wins against federal statutes, specifically the Criminal Code of Canada.

The numbers seem to indicate that in fact, the provincial governments have been the hardest hit by the Charter. They have had to face fewer total challenges compared to the Federal Government, but they have been dealt more losses. The Federal Government has not been immune from the effects of the Charter; however, in terms of having major policy initiatives invalidated, it has fared much better than the provinces. Of all the federal cases, over two-thirds (sixty-nine per cent) of the challenges involved provisions of the Criminal Code. Moreover, the majority of federal cases (fifty-six percent) that have resulted in a charter win belonged to the criminal law domain; most of those statutes essentially were procedural in nature and the majority of them were struck down by the legal rights provisions of the Charter. Of all the federal statutes overturned, only eight could be argued to have had a substantial impact.69

Nevertheless, the implications for federalism when the national government loses a case in the courts are far less significant. The centralizing effect is still very prevalent because despite the loss, there is still a national standard established that is binding on all governments. This is true in the Morgentaler case in particular, where even after the federal provisions regulating abortion in the Criminal Code were struck down, the Court also struck down provincial legislation that would have led to diversity in the
administration of federal policy that pertained to abortion, citing that differences in provincial standards over abortion “impose a threat to fundamental justice.” On the other hand, while the Singh decision resulted in a major policy loss for Federal Immigration law, its impact was negligible on the provincial front. The end result in both cases was the Supreme Court replacing one national policy with another.

That is not to say that the Court is completely against, or has completely disregarded the diverse nature of federalism within Canadian politics. On the contrary, in three separate equality challenges the Court has rejected claims that province based differences constituted an infringement of equality rights. As Janet Heibert states,

\[
\text{The Court elaborated on the tension between federalism and the Charter and indicated it would be reticent to interpret the Charter in a manner that is not cognizant of the diversities authorized by federalism.}
\]

In other words, the Courts have recognized the principles of federalism and regional differences in the application of federal law can be a legitimate means of promoting and advancing the values of a federal system. The provinces are different from one another, and therefore, what works in one province does not necessarily work in another. The importance of this in relation to federalism is an implicit recognition that while cultural identities - language, ethnic origin, nationality, religion etc. - are protected under section 15 of the Charter, ‘province’ is not.

Provincially, of the twenty-three Charter wins, fifteen could be classified as a major policy defeat for the provincial governments either because they resulted in an additional financial obligation for the government, or forced the government to change its social
policies to reflect a new national standard set by the courts. Six of the fifteen cases involved either language rights or minority language education rights and three of the cases resulted in major changes to provincial labour codes. The effect of the Charter on provincial autonomy, however, goes far beyond language policy in Ford, minority language education in Protestant School Boards and Mahé, and gay rights in Vriend. The nullification of provincial statutes has, in effect, established national standards in several provincial areas of jurisdiction, including standards in appeal procedures in Thibault v. Corp. Professionelle Médecins du Quebec. Likewise, in Edmonton Journal v. Alberta, the Court struck down the restriction of the publication of certain information obtained in matrimonial proceedings and at pre-trial stages of civil actions. Further, in Andrews, the Court declared that the citizenship requirements under the B.C. Barristers and Solicitors Act, 1979, contravened section 15(1) of the Charter and were therefore of no force or effect. In Black v. Law Society of Alberta, it invalidated sections of the Law Society rules prohibiting its members from entering into partnership with non-resident lawyers and from being members of dual or multiple firms as an infringement of mobility rights. Additionally, the Court set national standards in terms of the administration of justice after the The Judges' Reference in which it stated that provincial governments could not freeze or decrease the salaries of judges as part of an overall economic measure to reduce expenditures. Eldridge v. British Columbia (a.g.) resulted in the British Columbia Government having to provide sign language interpreters in the hospitals and in Miron v. Trudel, the Court held that the Ontario Insurance Act violated section 15 of the Charter for not including common law partners of
the opposite sex under the definition of ‘spouse’. The Court remedied the infringement by including marital status as analogous to other enumerated classes of subjects to be protected from discrimination, and read in the definition of ‘spouse’ to include a common law partner.

That is not to say that it is all doom and gloom for the provinces, that the Court is completely against, or has completely disregarded the diverse nature of federalism within Canadian government. On the contrary, the Supreme Court has demonstrated in a number of decisions that it is sympathetic to federalism concerns. The first instance comes in R. v. Edwards Books where a majority of the Court held that “when attempting to reconcile the legislation with protected rights, there is no constitutional obligation on a province to adopt the same legislative arrangement used elsewhere.” La Forest, in the decision, stated, “The simple fact is that what may work effectively in one province (or in a part of it) may simply not work in another without unduly interfering with the legislative scheme.” Likewise, in three separate equality challenges,

The Court elaborated on the tension between federalism and the Charter and indicated it would be reticent to interpret the Charter in a manner that is not cognizant of the diversities authorized by federalism.

The difference, however, is that in all of these three cases they dealt with the procedural application of certain provisions of the Criminal Code. Arguably, there is a fundamental difference between procedural matters of the Criminal Code and provincial education or language policies. The latter would have far greater influence over the linguistic and cultural development of a society than the former.
Evaluating the Critics of the Centralization Thesis

There is a substantial body of literature focusing on the effect of the Charter in Canada. The debate has ranged from those who have seen it as a centralizing force, undermining the principle of federalism that was the foundation of Canada's constitutional order, to those who interpret this centralization thesis as nothing more than symbolic. This section will attempt to examine and evaluate some of the principal arguments against the centralization thesis.

What evidence do the critics of the centralization thesis offer to counter the argument that the Charter has undermined Canadian federalism? Many critics turn to provisions built right into the Charter, namely Section 1, the 'limitation clause', and section 33, the 'notwithstanding' clause. Janet Hiebert argues that section 1 has two effects. First it expands the scope and depth of the Charter. Second, it helps reconcile protected rights with federalism because it allows the law to consider federal diversity. However, distinguishing between allowable state action and the protected rights of society is not a simple task. The courts are continually challenged by complex questions dealing with the reasonable limits clause of the Charter. Courts must decide what legislative objectives are worthy of limiting protected rights, as well as just how much latitude should be given to governments to implement and administer social policies. Thus, while the burden of "demonstrably justifying" a reasonable limit falls on the shoulders of the governments (thereby countering the sense of centralization), the final interpretation of the meaning and scope of section 1 is still the responsibility of the Court. Therefore, section 1 does not offer a concrete protection
against the nationalizing and centralizing effects of the Charter. Indeed, in substantial provincial policy cases, such as Ford, Protestant School Boards, and Vriend, to name a few, the section 1 argument was rejected by the Court.

Others, such as James Kelly, Peter Hogg, and Allison Bushell, have stated that the ‘notwithstanding clause,’ or the legislative override, provides a counter to the centralizing effect of the Charter because it allows Parliament or a provincial legislature the express right to declare that a piece of legislation operates “notwithstanding” the Charter. According to James Kelly, “The notwithstanding clause (s.33) allows legislatures to override certain unfavourable judicial decisions and can advance federal diversity because it allows elected officials to assert the reasonableness of legislation found to violate pan-Canadian rights and freedoms.”

Section 33 was put into the Charter primarily to do just this – to protect the provinces from the Charter. However, it has become nothing more than a “paper tiger.” The provision was an important compromise reached at the time of entrenchment to meet the provincial concerns about the enhanced power of the courts through judicial review but, it has been used only scarcely at times in its history and primarily in the early years of its existence. The use of the notwithstanding clause has become overall, politically ‘incorrect,’ at least outside of Quebec. Even after the fierce opposition to the Vriend decision, Alberta Premier Ralph Klein backed down from using the legislative override. Similarly, during the last federal general election, former Prime Minister Martin campaigned on a promise to remove the federal government’s ability to ever use the notwithstanding clause.

The final major argument against the centralization thesis is what Morton calls “the
body count" approach. By simply looking at the numbers, there have been more federal statutes nullified by the Supreme Court than provincial statutes. Moreover, while there has been a nullification of a federal statute in almost every year since the entrenchment of the Charter, the same can not be said for provincial statutes where the time interval between nullifications has at some points been upwards of three years. However, this approach to viewing the effect of the Charter is limited because it assumes that all statutes that are nullified are equal. As Morton asks, "How many procedural nullifications of the federal Criminal Code does it take to equal the nullification of Quebec's language education policy?" Similarly, focusing only on judicial output misses the pre-emptive impact of the Charter. Charter politics extend well beyond the courtroom where just the threat of litigation can dissuade governments from adopting certain policies. Governments with limited and inflexible budgets such as the smaller 'have not' provinces or local municipalities are much more vulnerable to threats of Charter litigation. Likewise, a second important area of pre-emptive Charter impact occurs within governments during the pre-legislative stage of the policy process. Extensive Charter review of policy proposals has been incorporated in the development process of public policy to ensure that the risk of judicial nullification on Charter grounds of proposed statutes is minimized. It is at this pre-Cabinet stage that Morton argues the Charter's effects on provincial power have been most pronounced.
Conclusion

The passing of the Charter arguably has been the single most important event for the Supreme Court. Since then, the core tensions between Ottawa and the provinces, between the English and the French, and between individual rights and federalism have been exacerbated. Provincial autonomy has been reduced as a result of the Charter by imposing national standards in provincial spheres of jurisdiction. There has been a paradigmatic shift in Canadian political discourse from Parliamentary Supremacy to Constitutional Supremacy to Judicial Supremacy. While both orders of government have been affected, the provinces have been the greatest losers. They can no longer claim to be sovereign within their exclusive jurisdiction. Policy options over local matters have been supplanted by national standards. The traditional understanding of federalism, and the purposes therein, have been undermined by the centralizing effects of the Charter. As we can conclude by the evidence, there exists an explicit tension between a rights discourse and federalism. Nevertheless, it is difficult to predict accurately or even speculate as to how far the Charter will undermine the authority of the provinces. The Charter is still quite young and only a small Charter jurisprudence exists. Moreover, the courts have been broad and liberal in their interpretation of the Charter, thus allowing for flexibility in future Charter cases. On the evidence that is available, one easily could speculate, above all else, that the Charter certainly has been a powerful centralizing tool with clear implications toward federalism. It has transformed Canadian political discourse out of the traditional federal framework and into a new arena of
constitutional supremacy - by shifting the focus of Canadian constitutionalism from the powers of governments to the rights of citizens, turning “a government’s constitution to a citizen’s constitution.”97
APPENDIX A
Reproduced in part from original study conducted by the Ipsos-Reid Corporation, March 2002 on the 20th Anniversary of the Charter

Do you feel that your rights and freedoms are better protected because the Charter of Rights and Freedoms became law in 1982?

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<td>72%</td>
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<td>12%</td>
<td>15%</td>
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When you think of the Charter of Rights and Freedoms, do you associate it MOST with protecting:

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APPENDIX A Continued

Do you feel more comfortable with:

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4. Yves De Montigny, “The Impact (Real or Apprehended) of the Canadian Charter of Rights and Freedoms on the Legislative Authority of Quebec” in, Charting the Consequences David Schneiderman and Kate Sutherland, eds. (Toronto: University of Toronto Press, 1997), pg. 3.


6. Hiebert, pg. 126.


10. Ibid., Pg. 91.

11 Ibid., Pg. 103


13. Ibid., Pg. 200.


15 Ibid., pg. 43.


21. Section 52 (1) of the *Constitution Act, 1982*, Schedule B.


34 See discussion about the Court Challenges Program in Chapter Three.


38 Solski (Tutor of) v. Quebec (Attorney-General) [2005] 1 S.C.R. 201.


40 Minority Language Educational Rights

Section 23(1) Citizens of Canada
(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or
(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province,

have the right to have their children receive primary and secondary school instruction in that language in that province.


42 Ibid. 67-68. Section 1 of the Canadian Charter states; The Canadian Charter of Rights and freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.


44. Ibid. 362.


47 Ibid.

48 Ibid.

49 Ibid.


51. These three cases were Damien v. Ontario Racing Commission, GATE Vancouver v. Vancouver Sun,

52. Smith, Pg. 296.

53. Ibid., Pg. 292.

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

(2) - Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.


57. Ibid, pg. 514.


59. Manfredi, Judicial Power and the Charter, pg. 3.


61. Ibid, 135.


67. Excluded from this study were cases that challenged the actions of Police or Government Officials, or issues involving the administration of justice.

68. Positive action refers to the Court declaring the impugned legislation unconstitutional and either striking down or ‘reading in’ the statute.


70. Hiebert, pg. 137.

71. R. v. Turpin, R. v. S.(S.), and Haig v. Canada

72. Hiebert, pg. 134.

73. A.G. (Que) v. Quebec Protestant School Boards; Ford v. Quebec; Devine v. Quebec (A.G.); Mahe v. Alberta; Reference RE Public Schools Act (Manitoba); Solski (Tutor of) v. Quebec (a.g.)

74. UFCW Local 1518 v. Kmart Canada Ltd.; Dunmore v. Ontario (a.g.); Nova Scotia (Workers Compensation Board) v. Martin; Nova Scotia (WCB) v. Laseur


83. Hiebert, pg. 133.


86. Hiebert, pg. 133, 137.

87. Ibid., pg. 137.

88. Kelly, pg. 324.

89. For a further discussion on Section 33, see Howard Leeson, “Section 33, The Notwithstanding Clause: A Paper Tiger?” in Paul Howe & Peter H. Russell, Judicial Power and Canadian Democracy (Montreal &
91. It was first used by Quebec to shield all of its applicable laws from Charter scrutiny shortly after the Charter came into effect. It was largely done in protest over the patriation of the constitution without the consent of Quebec. The second time it was used was by Saskatchewan to protect back to work legislation during a provincial labour dispute. The Supreme Court eventually upheld the legislation as constitutional. The third significant time was used by Quebec after the Ford decision.

92. Morton, pg 176.

93. Ibid.

94. Ibid, pg 177.

95 Ibid.

96 Ibid.

97. Russell, pg. 34.
6. Conclusion

The *Charter of Rights* has become an integral and fundamental characteristic of the modern Canadian state. Canadian political discourse has been transformed from the traditional federalism framework to one that now includes a rights discourse. A new constitutional order has been established by shifting the focus of Canadian constitutionalism from the supremacy of governments to the rights of citizens. The entrenchment of rights and freedoms has assigned a vital new role and responsibility for the Canadian courts while marking a significant break with the past. No longer are Parliament and the legislatures supreme, and no longer is federalism the defining element of the constitutional order. The *Charter* has transformed the Canadian political and legal landscape; it has had a significant impact on the legislative agendas of governments and it has changed forever the relationship between governments and the courts, Parliament and the legislatures, and between individual Canadians and their constitution.

This thesis has examined how a judicially reviewable charter of rights has affected federalism in Canada, and the impact it has had on the division of powers. It has argued that the entrenchment of the *Charter* in 1982 has had a profound effect on federalism in a quantifiable manner. There now exists a clash between federalism and judicially enforced rights that has created an unstable coexistence within the constitutional order. The original *British North America Act, 1867*, was a government's constitution. It established the principle of Parliamentary
supremacy and outlined the roles and responsibilities of each order of government through the division of powers. Each order of government was sovereign within its respected sphere of jurisdiction. The amending formula, added in 1982 as part of the constitutional package, reinforced the notion that federalism is the most important constitutional organizing principle by presupposing that governments are the major actors in federalism. Only governments have the exclusive prerogative of formally amending the constitution.¹

The Charter, however, is the 'people's constitution'. It reflects the opinion that the citizen is as much a part of the constitution as government, and as the supreme law of Canada, the rights of citizens become paramount to those of government. It usurps Parliamentary supremacy with constitutional supremacy. The Charter has redefined Canadian society as a single community of rights bearers with a pan-Canadian identity. Moreover, it has challenged significantly the preeminence of federalism in the constitutional order. The consequence of this clash has resulted in a considerable weakening of federalism in Canada.

In addition, this thesis has examined a number of important issues that are consequently a result of the clash between rights and federalism. Under the Charter, both Parliament and the legislatures have suffered a loss of legislative autonomy. This has impacted their freedom to enact the legislation or policy options they may prefer. More significantly, the centralizing impact of the Charter has furthered the power loss for the provinces primarily because it usurps exclusive provincial policy agendas and subjects them to national standards. Charter politics and the language of rights have become a direct challenge to federalism and the
language of government. The traditional constitutional federalism discourse has been challenged by a rights discourse and is supported by the new-found power of the courts to strike down any law that is inconsistent with the rights guarantees of the Charter.

The first chapter examined the relationship between rights and federalism and the manner in which that relationship evolved between Confederation and 1982. Prior to the Charter, the role of the courts was concerned primarily with the concept of legal federalism, that is, whether a challenged law fell within the scope of federal or provincial jurisdiction. It was in this capacity that the courts in Canada were able to advance rights issues in Canada. As was demonstrated, however, the courts were free to protect rights in Canada only insofar as federalism and certain sections of the Constitution Act allowed. Some collective rights in the Constitution did exist, specifically sections 93 and 133, and therefore, could be protected by the courts in the event of a legislative infringement.²

Similarly, if one order of government stepped beyond their legislative authority as enumerated by the division of powers, the courts had the ability of judicial review to strike the impugned legislation down, but as long as the provincial legislatures did not interfere with federal authority, and vice versa, there was no way for the courts to strike the law down. The courts already had established in Hodge v. R.³ that each order of government is sovereign within its sphere of jurisdiction, and therefore, under the principles of Parliamentary supremacy, any law that was deemed intra vires, regardless of whether the
legislation was discriminatory or a violation of what would be by today’s standards considered a protected freedom, was constitutional.

The second chapter examined the promise of the Charter and the potential impact it would have on federalism and the division of powers. The 115 years between Confederation and the entrenchment of the Charter had exhibited a mixed record of rights protection in Canada. The original constitution lacked any real explicit and meaningful individual right guarantees and the courts were unwilling, and in most cases, unable, to expand constitutional rights. The Crown was considered the guarantor and protector of rights in Canada. Parliament’s authority, with the exception of the division of powers, was supreme to all other government institutions, and federalism was the most fundamental organizing principle of the constitutional order, and paramount over any other legal or constitutional jurisprudence.

As the first chapter demonstrated, the traditional legal and constitutional bases for safeguarding rights were insufficient. There was an emerging rights consciousness growing in Canadian society as well as a greater push for decentralization by the provinces. Quebec nationalism was on the rise, fuelled by the Quiet Revolution, and throughout the country, provincial governments were engaged in unprecedented province-building endeavours. Trudeau had a vision to deal with the Quebec nationalists and reel the other provinces back into line. To accomplish it, however, required nothing less than a formal charter of rights entrenched in the constitution. During the 15 years between 1967 and 1982, Canadian politics was dominated largely by Trudeau’s national unity strategy. His
vision included a country with one national identity and one citizenship, not ten provincial citizenships. The key to accomplishing this task was to change the citizens' allegiances to Canada and the Federal government and away from the provinces. If all Canadians shared the same rights and freedoms regardless of the province in which they resided, then it would foster a pan-Canadian identity.

After the defeat of the PQ in the 1980 referendum, Trudeau had what he believed to be the perfect opportunity to patriate the constitution and entrench a charter of rights. The substance of the proposed charter, as well as the unilateral action to entrench a charter, created, however, a contentious and divisive issue for federalism. Simply put, the Charter represented a fundamental change to the constitutional order. Parliamentary supremacy and federalism had lasted for 115 years as the two pillars of the constitution. The Charter threatened to challenge them both. Even though the Charter alone did not alter directly the division of powers, or transfer any power from one order of government to the other, it did demonstrate an impending threat to the legislative competence of the provinces, as well as define a new and prominent role for the courts in Canadian politics. The rights of the individual are above federalism and above the supremacy of Parliament. The potential impact of the Charter on federalism embodied a drastic departure from the traditional understanding of Canadian constitutional discourse.

This thesis then proceeded to examine how the Charter has affected federalism in Canada. The third chapter began by examining the relationship between the Charter and Quebec, and how a judicially enforced charter of rights has impacted federalism in Quebec. The political purposes of federalism have a
different meaning for Quebec, and as a consequence, the impact of the Charter had been significantly different. Confederation was viewed in Quebec as a compact between two linguistic nations, the French and the English, and federalism was the mechanism by which they were united to preserve their cultural distinctiveness. For Quebec, the Charter represents a challenge to every understanding of what federalism is in Canada.

The hostility toward the Charter is not because Quebec opposes protecting human rights in general. The Québécois long have been supporters of individual rights. They had drafted their own Charter of Human Rights before the Canadian Charter came about. However, the Canadian Charter was imposed on Quebec by the Federal Government and the other nine provinces without its consent. Quebec was the only province not to support Trudeau's patriation package even after it was modified in an effort to satisfy provincial concerns. Symbolically, the Charter represents an end to the dualist vision of Canada held by Quebec and the belief that any change to the constitution would have to have the support of Quebec. For the first time since Confederation, the Constitution underwent a major fundamental transformation without Quebec's support. Quebec's claims of a constitutional veto were shattered. So too was its understanding of its place in Canadian federalism—legally and constitutionally, it was a province just like the others.

Similarly, the Charter poses a threat to the collective identity of the province as the homeland of the French Canadians and "the political expression of French Canada." Entire sections of the Charter of the French Language have been struck down for violating various sections of the Canadian Charter, as witnessed in
the Ford and Protestant School Board cases. While section 33, the notwithstanding clause, has shielded Quebec from certain provisions of the Charter, the language rights in the Canadian Charter are not included among the provisions of the Charter affected by the clause. Likewise, the Quebec civil code, a defining feature and fundamental distinction between Quebec and the rest of Canada, is similarly under threat as national standards in civil law are established as a result of the evolving Charter jurisprudence. Federalism was concerned with the preservation of the cultural differences of the colonies and it is this which allowed Quebec to maintain a distinct society within Canada. What makes Quebec unique is that the linguistic majority of the province is a minority everywhere else. Culturally, they are a province unlike the others. The Charter has made the federation alien from its original intent and it is precisely for this reason that Trudeau’s national unity strategy and his Charter of Rights and Freedoms have failed Quebec.

Finally, the fifth chapter examined the broader implications of the Charter for Canadian federalism as a whole. As was demonstrated, the Charter has been a centralizing force, not because it has granted additional powers to the Federal Government, but because the Charter favours national standards over local provincial policies. Added to that, is the emergence of the judicialization of politics that ultimately has undermined the traditional division of powers framework. Since the Charter, the courts have been far more eager to interfere with the legislative competence of the provinces by engaging in judicial activism and micro constitutional amendments when rendering their verdicts, as was witnessed especially in Andrews, Vriend, and M. v. H. The courts simply have not been taking
a minimalist approach to deciding issues, nor are they confining themselves to matters of law. On the contrary, they have been weighing in on significant moral and social policy issues such as abortion, gay rights, and euthanasia. As Robert Martin states, "The Supreme Court of Canada has been reluctant to accept that there can be any questions which are, by their nature, beyond its jurisdiction."6

The Federal Government is just as susceptible to the interference of its legislative responsibilities by the courts, but the impact is not as severe for three primary reasons. First, the Supreme Court is a federal institution, appointed by the Federal Government, and therefore, any legislative loss that Parliament might face is a loss to another federal institution. Second, and intricately connected to the first, when a provincial government loses its ability to legislate on a particular matter, every province also loses that ability to legislate. Finally, the provinces are more apt to enact policies that deal with regional diversities or social policy issues of a civil or private nature that diverge from national standards, or cause people to be treated differently from province to province, and therefore, are more likely to infringe on a protected freedom. This was seen especially in the fields of education policy,7 labour relations,8 health care administration,9 family law,10 civil rights,11 and in Quebec, in particular, with language policy.12

What sort of conclusions can be drawn from all of this? First, prior to the entrenchment of the Charter, Parliamentary supremacy and federalism were the two fundamental pillars of the constitutional order in Canada. The addition of the Charter has added a third pillar that both generates a counter discourse to the traditional federalism discourse, and challenges directly the feasibility of federalism
as an organizing principle. The traditional understanding of federalism, and the purposes therein, have been undermined by the centralizing effects of having a judicially enforced charter of rights. There has been a definitive shift in Canadian constitutionalism from Parliamentary Supremacy to Constitutional Supremacy to Judicial Supremacy.

The second conclusion that can be drawn is that the provinces certainly have been the largest losers in the courts having lost the most autonomy and policy control when compared to the Federal Government. Moreover, the larger provinces have lost more than the smaller ones. Alberta and Quebec, two of the most vocal and critical provinces of the centralizing effects of the Charter, also have been the hardest hit. They have each lost six major decisions, combining for over half of all the successful charter challenges of provincial statutes at the Supreme Court. British Columbia was next with five defeats, followed by Ontario with four. (Table 2) It becomes evermore clear that there exists an explicit conflict between a rights discourse and federalism, and more to the point, that the provinces have suffered far greater loses under the Charter than the federal government.

In response, the provinces recently have taken action in an attempt to counteract the centralizing effect of the Charter. In what easily could be described as a mere formalization of the decades old Premiers' conferences, the Premiers of the provinces and territories recently created the Council of the Federation. Comprised of the ten provincial and three territorial governments, the Council boasts itself as a new institution "for a new era in collaborative intergovernmental relations." The Council, in the words of the preamble of the Founding
Agreement, is part of a plan by the Premiers of the provincial and territorial governments "to play a leadership role in revitalizing the Canadian federation and building a more constructive and co-operative federal system."\textsuperscript{14}

The preamble of the Founding Agreement further recognized that federalism is based on shared principles including respect for the \textit{Constitution} and the division of powers, and under the \textit{Constitution}, Canada's two orders of government are of equal status and sovereign within their own areas of jurisdiction. Furthermore, it is the objective of the Council to exercise leadership on national issues as they pertain to the interests of the provinces and territories, and to advance inter-governmental relations based on the recognition of the diversity within the federation. As provincial matters are being fought out on the national stage in the Supreme Court, the provinces are no longer willing to stay quiet on national issues as they pertain to provincial issues. Federalism is neither hierarchical nor unitary. Since 1982, the provinces have been subservient to the courts, and diverse provincial social policy has been rejected in favour of one singular unitary national policy.

The 2004 work plan of the Council called for a strengthening of the Federation through the appointment of a special committee of ministers to develop new ways in which current important Prime Ministerial appointments might be selected to serve in key national institutions such as the Supreme Court.\textsuperscript{15} With the emergence of the Supreme Court as a major political actor and the centralizing effect of the \textit{Charter} on federalism in Canada, who is appointed to the Court takes on a significant importance. In the context of the clash between a rights discourse and federalism within the constitutional order, it becomes clear from the provincial
perspective why the Supreme Court appointment process needs changing. The provinces have lost a disproportionate number of significant policy cases at the hands of the *Charter* at the Supreme Court level, and the provinces currently have zero input into the selection process of Supreme Court justices.

Up until just recently, as Robert Ivan Martin states, "the prime minister has an untrammelled discretion in deciding who to appoint. There is no formal consultation process, nor is the prime minister ever required to justify a particular appointment." However, with the recent election of the Conservative Party led by Stephen Harper in January of 2006, the appointment process of judicial nominees has undergone an historic change. Marshall Rothstein, Harper's first Supreme Court nominee, became the first ever appointee to sit before an ad hoc all party committee of MPs to be interviewed and questioned regarding his opinions and beliefs on various political and moral issues. The committee itself did not have any authority to veto the nominee, nor is the committee in its current form a legal or permanent fixture of the judicial nomination process. However, it is a significant departure from the traditional method of appointing judges to the high court. While no future prime ministers are bound legally to continue on with Harper's precedent under the current constitutional framework, it certainly would be difficult to revert back to the old 'closed door' way of appointing supreme court justices.

The Council of the Provinces is an attempt by the provinces to regain some control over their policy agenda. While certainly the creation of the council is not a direct consequence of the *Charter*, there is, however, a correlation. It is a challenge to the vision of Canada that has been promoted by Trudeau of 'one nation' and one
national interest in a federal system that “pits thirteen ‘junior’ governments against one ‘senior’ government responsible for ensuring that the national interest prevails over the parochialism of the provinces and territories.”17 The Premiers of the provinces and territories want a greater voice in the federation, especially when much of their voice has been muted by the Supreme Court. While most provinces may be relatively small in resources and stature, collectively they have strength in numbers and under the new Council, they are backed by a formalized agreement and supported by their own secretariat to assist in the organization and implementation of its agenda.

This thesis also raises other interesting questions as to the future of constitutional politics in Canada. In particular, questions arise about how federalism may evolve in the future and whether or not federalism is even logically compatible with a charter of rights that imposes national standards on public policy. Federalism in the classic sense is premised on what Hamish Telford describes as the “compartmentalization of politics.”18 Contemporary political issues no longer can be separated into ‘water tight compartments’. Many of the issues that arise out of Charter-based challenges cross over into multiple spheres of jurisdiction that affect every order of government. A charter challenge of a provision of a provincial law that is intra vires of the province can boil over into a national debate and force the hand of every government to act unwillingly, as in M. v. H. or Vriend.

Canadians have become deeply attached to the Charter. A recent survey has shown that over ninety percent of Canadians view the Charter as important to the national identity.19 The Charter, however, has become more than just a symbol of
national pride and identity. Going back to the Ipsos Reid poll discussed in chapter five, seventy percent of Canadians felt more comfortable entrusting the protection of their rights and freedoms to judges rather than Parliament or the provincial legislatures, and since 1982, Canadians have used the Charter frequently in defence of their rights and freedoms. The defeat of the Meech Lake Accord in particular and the Charlottetown Accord to a somewhat lesser extent are cases in point of how quickly the Charter has become entrenched in the minds of Canadians.

As Cairns states, “the public reactions to Meech Lake go beyond federalism and reveal fundamental disagreements over the very nature and purpose of the constitution.”20 The Charter brought new groups into the constitutional order and enhanced the pre-existing constitutional status of Aboriginals. It was the ‘people’s constitution’ that bypassed governments and spoke directly to Canadians by defining them as bearers of rights and accorded them specific constitutional recognitions. The Charter reduced the relative status of governments in relation to the constitution and strengthened the status of citizens. It encouraged citizens to think of themselves as constitutional actors.21 The reaction by citizens groups toward the Meech Lake Accord was as much a challenge to the process as it was to the substance of the proposed reforms. No longer were citizens groups willing to sit idly by while the eleven first ministers sat behind closed doors, a privilege they had enjoyed since Confederation, and together came up with a constitutional reform package, especially one that compromised the rights of Canadians.

A quick look to our southern neighbour can teach us a few lessons about their experience with a bill of rights and federalism. The United States government
has shown that a bill of rights and federalism are compatible with some degrees of success. It has for the most part been successful in balancing state interests with the rights of the citizen. But, without getting into great detail, there are some key differences and observations that can be made to help explain the success of the American experience. For starters, as discussed in the introductory chapter, the difference in structure of the American judicial system arguably plays a key role. Second, the selection process of supreme court justices in the United States can be considered as a contributing factor. In particular, the states, via the US Senate, have a voice in the selection process of potential justices through the confirmation hearings. Finally, and likely the most significant difference, is the function of the upper house of Congress, the United States Senate.

In Canada, there is no effective and functional forum for provincial representation at the national level of government. From the beginnings of Confederation, the Senate in Canada always has been a body of prime ministerial patronage, a reward to the party faithful. The Senate was not and is not able to function as a "house of provinces." Consequently, there are no institutions that allow for regional and provincial concerns to be settled at the national level. Even with the new Council of the Federation, there is no binding legal or constitutional obligation for the federal government to listen. This contrasts greatly with the style of the American Senate that represents all fifty states by way of democratically elected Senators. Thus, state interests can be addressed effectively from the centre ensuring a legitimate check on federal primacy.
Of course, these are not the only explanations, and nor are they proven facts. The reasons for the successes of the American experience are far more complex and intricate than what simply is stated here. However, they do offer a credible explanation and provide a beginning into understanding why there has been tension between an entrenched charter of rights and federalism in Canada. They also may suggest a possible prediction of how federalism and government in Canada likely is to evolve.

The consequences of the conflicting relationship between federalism and the Charter have resulted in the weakening of federalism in Canada. Likewise, the more rights conscious Canadians connect to their constitution and their Charter, the further federalism will be undermined. The judicialization of politics by nature is adversarial and conflict driven. There is always a winner and a loser, where the rights of the individual usually are won at the expense of the state or other citizen's / organized interests. Similarly, as the full impact of Charter jurisprudence begins to be realized and felt, the clash between federalism and judicially enforced rights will intensify, furthering the unstable coexistence within the constitutional order. In just a short period of time, Canadian political discourse has been transformed from the traditional federalism framework into a new era of rights discourse and a growing rights consciousness. As the centralizing impact of the Charter grows, and the provinces continue to lose control over their policy agenda, the conflicts between the two orders of government likely will intensify, and the demands for more powers by the provinces similarly will build up in an attempt to breathe new relevance into federalism.
Endnotes.

1 In the text of the *British North America, 1867*, there are more than two hundred references to government, and zero references to citizens.

2 Section 93 protected denominational schools and section 133 protected the use of French or English in Parliament and the legislature of the Province of Quebec, as well as in court proceedings in Canada and Quebec.

3 *Hodge v. R.* [1883]

4 The *Quebec Charter of Human Rights* was passed on June 27, 1975 by Robert Bourassa’s Liberal government.


7 *A.G. (Que)* v. *Quebec Protestant School Boards* [1984] 2 S.C.R. 66

8 *UFCW Local 1518 v. Kmart Canada Ltd.* and *Dunmore v. Ontario* (a.g.) [1999] 2 S.C.R. 1083


14 *Council of the Federation Founding Agreement* (December 5, 2003)


16 Martin, pg. 96.

17 André Burelle, “The Council of the Federation: From a Defensive to a Partnership Approach” *Constructive and Co-operative Federalism? A Series of Commentaries on the Council of the Federation* (Published by the Institute of Intergovernmental Relations, Queens University, 2003.)

18 Hamish Telford, “Expanding the Partnership: The Proposed Council of the Federation and the Challenge of Glocalization” *Constructive and Co-operative Federalism? A Series of Commentaries on the Council of the Federation* (Published by the Institute of Intergovernmental Relations, Queens University, 2003.)
19 The exact question asked by Environics is “How important are each of the following to the Canadian Identity: Bilingualism, Multiculturalism, the Charter of Rights?” In 2003, the most recent year in which the question was asked, 75% stated the Charter was “very important” while 18% stated it was “somewhat important.” (Source: Environics Research Group, internet accessed December 15, 2005)
http://www.acs-aec.ca/Polls/Poll38.pdf


21 Ibid.

22 Bob Rae, “Some Personal Reflections on the Council of the Federation” Constructive and Co-operative Federalism? A Series of Commentaries on the Council of the Federation (Published by the Institute of Intergovernmental Relations, Queens University, 2003.)