

Retrospective

Saskatchewan, the Patriation of the Constitution and the Enactment of the *Charter*: Looking Back and Looking Forward

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The patriation of the Constitution and the enactment of the Charter was a watershed event in the protection of human rights in Canada. The new constitutional provisions have had a tremendous impact in many areas, such as equality, criminal procedural protections and aboriginal rights. Against that context, this paper argues that the Charter has deep roots in Saskatchewan: the Saskatchewan Bill of Rights enacted by the Douglas government and the Canadian Bill of Rights enacted by the Diefenbaker government laid the groundwork for an entrenched charter of rights. The Saskatchewan influence continued during the Patriation Debate, when Saskatchewan played a major role, both politically and in the courts, which the paper reviews in some detail. The paper then discusses post-Charter developments, characterising the Charter as the trigger for one of the most extensive law reform projects in Canadian history, by both the legislatures and the courts. The paper also reviews the impact which the Charter has had internationally: in the view of some commentators, the Charter has led the way for other countries interested in entrenching fundamental rights, particularly within the Commonwealth. The innovative approaches taken by the Supreme Court of Canada in interpreting the Charter have also led to that court supplanting the United States Supreme Court as the human rights leader for courts in other countries. The paper closes with retrospective comments on the impact of the Charter from two

¹ Senior Crown Counsel, Constitutional Law Branch, Saskatchewan Ministry of Justice. This paper originated as a Continuing Professional Development Presentation organized by the Law Society of Saskatchewan in Regina, April 30th, 2012, and Saskatoon, May 1st, 2012, for members of the Law Society with 25 years or more at the bar. As always, I thank my wife, Sharon H Pratchler, QC, for her encouragement and support. Roy Romanow, QC, and John Whyte, QC, gave generously in responding to my requests for interviews. My colleagues in the Saskatchewan Ministry of Justice offered excellent suggestions and comments on this topic, particularly Graeme Mitchell, QC, Gerald Tegart, QC, Madeleine Robertson, QC and Mitch McAdam, QC. Beth Bilson, QC and Manny Sonnenschein, QC gave helpful comments following my presentation in Saskatoon. Magistrate WFB Vodrey of the Cleveland Municipal Court gave helpful comments on an early draft of this paper and the research staff at the Diefenbaker Centre were always helpful. Professor DeLloyd Guth of Robson Hall, University of Manitoba, provided invaluable editorial advice. The opinions in this paper remain my own, and do not necessarily represent positions of the Saskatchewan Ministry of Justice. All flaws remain my own.

Saskatchewanians who were heavily involved in the Patriation Debate: Roy Romanow and John Whyte.

Le rapatriement de la Constitution et l'adoption de la Charte ont été des évènements décisifs dans l'histoire de la protection des droits de la personne au Canada. Les nouvelles dispositions constitutionnelles ont eu une énorme incidence sur de nombreux domaines comme le droit à l'égalité, les protections procédurales dans les affaires pénales et les droits des autochtones. Dans ce contexte, le présent article soutient que la Charte possède des racines profondes en Saskatchewan : la Charte des droits de la Saskatchewan adoptée par le gouvernement Douglas et la Déclaration canadienne des droits adoptée par le gouvernement Diefenbaker ont préparé le terrain pour une charte des droits et libertés inscrite dans la Constitution canadienne. L'article examine en profondeur l'influence de la Saskatchewan qui s'est poursuivie pendant le débat sur le rapatriement, lors duquel la Saskatchewan a joué un rôle capital au plan politique et juridique. Il examine ensuite la période qui a suivi l'inscription de la Charte dans la Constitution, décrivant celle-ci comme le déclencheur d'un des plus vastes projets de réforme du droit dans l'histoire canadienne, tant par les législatures que par les tribunaux. Il examine également l'impact de la Charte au plan international. Selon certains observateurs, la Charte a ouvert la voie à l'inscription constitutionnelle de droits et de libertés fondamentaux dans d'autres pays, notamment les pays du Commonwealth. En empruntant des approches novatrices à l'interprétation de la Charte, la Cour suprême du Canada a supplanté la Cour suprême des États-Unis comme chef de file en matière de droits de la personne au niveau international. Enfin, l'article se conclut par les commentaires rétrospectifs sur l'impact de la Charte formulés par deux Saskatchewanais profondément engagés dans le débat sur son rapatriement, Roy Romanow et John Whyte.

I. Introduction

All Canadians can celebrate the recent opening of the Canadian Museum of Human Rights in Winnipeg. The Museum demonstrates Canada's commitment to providing fair treatment and equality to everyone in Canadian society. The opening of the Museum also provides an excellent opportunity to look back on the Patriation Debate of the late '70s and early '80s, which culminated in the entrenchment of human rights in our Constitution. During this period, Canadians debated some of the most fundamental questions about our political and constitutional structure: How could patriation of the Constitution be achieved, consistent with the basic principles of federalism and democracy? How should future amendments to the Constitution be made, balancing the needs of federalism, the protection of minority views, and democratic principles? Should Canada have an entrenched charter of rights? How should Aboriginal rights be protected by the Constitution? The debate took place in Parliament, in the courts and amongst ordinary Canadians, asking basic and fundamental questions about the type of Canada we wanted.

As we know, patriation of the Constitution was accomplished in 1982, along with the enactment of the *Canadian Charter of Rights and Freedoms*.² Aboriginal and Treaty rights also received constitutional protection for the first time in the *Constitution Act, 1982*.³ The *Charter* changed our constitutional structure, placing human rights front and centre. These changes can be seen as part of the natural progression in Canada's long tradition of protecting human rights, particularly after World War II when Canada, along with other nations, realized the need for greater legal protections for fundamental human rights.

In this article, I will review political and legal events which led to that constitutional milestone, with particular emphasis on contributions which Manitoba's sister province, Saskatchewan, had on the enactment of the *Charter*. I will then discuss some of the trends in the early years of the *Charter*, as lawyers and judges worked to fulfill its promise and legislators responded by weaving its basic principles into statute law. Then, I will discuss the *Charter's* international impact - increasingly, the *Charter* has become the model for constitutional protection of human rights in other nations, particularly within the Commonwealth. I close by considering comments from two key Saskatchewan actors in the Patriation Debate: Roy Romanow, QC, the Attorney General for Saskatchewan who helped craft the "Kitchen Accord" which led to patriation, and John D. Whyte, QC, the Director of the

² *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, reprinted in RSC 1985, Appendix II, No 44 [*Charter*].

³ *Constitution Act, 1982*, s 35, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, reprinted in RSC 1985, Appendix II, No 44 [*Constitution Act, 1982*].

Constitutional Law Branch of the Department of the Attorney General (as it was then called) during the Patriation Debate.

Thirty years on, it may actually be difficult to appreciate how much of a difference the *Charter* and *Constitution Act, 1982* have made in Canada, in part because they have been so successful. The *Charter* has entrenched human rights in our national psyche, the impact of which can be illustrated by four vignettes, starting with two news items from 2012, the year of the *Charter's* 30th anniversary.

First, in Alberta, where even before the 2012 election writ dropped, we knew that the next Premier of Alberta would be a woman because both main political parties were led by women.⁴ Now, that could have been foreseen in 1982 as a theoretical possibility. The fight for women's political equality has been going on for a long time, particularly in Alberta, home to the Famous Five who sparked the *Persons Case*.⁵ Manitoba also led the fight, being the first Canadian jurisdiction to recognize a woman's right to vote in 1916.⁶ But progress towards women's equality, and equality generally, dramatically accelerated with the enactment of the *Charter*, with its general guarantee of equality in section 15, and its specific guarantee of gender equality in section 28. Both sections were the product of hard-fought lobbying efforts by women's groups in the run-up to patriation.⁷

Also in 2012, Mark Tewksbury, a respected former Olympian and gold medalist at the 1992 Barcelona Games, was named *Chef de mission* of the Canadian Olympic Team for the 2012 London Games. Given his history in sport, this should not come as a surprise; however, Mark Tewksbury is an openly gay man.⁸ In 1982, who would have had the imagination to predict that that could happen? Again, it was not simply because of the *Charter*, as there were gay and lesbian advocacy organizations before the *Charter*, but the *Charter's* equality provision has had a huge impact on gay and lesbian rights.

Third, with regards to Aboriginal law, the Supreme Court of Canada has recognized a duty on governments to consult First Nations and Aboriginal groups about land and resource use affecting their Treaty and Aboriginal rights.⁹

⁴ In the 2012 Alberta general election, Premier Alison Redford led the Progressive Conservative Party to re-election. Danielle Smith, the leader of the Wildrose Alliance Party, was returned as Leader of the Official Opposition: "Albertans elect Tory majority government", *CBC News* (23 April 2012), online: <www.cbc.ca/news/albertans-elect-tory-majority-government-1.1133869>. In fact, the Alberta election was the second time both of the major party leaders in a provincial election were women. In the 1993 general election in Prince Edward Island, Premier Catherine Callbeck faced off against Patricia Mella: "Callbeck's quiet campaign gives Liberals PEI landslide", *The Globe and Mail* (30 March 1993) A5.

⁵ *Edwards v Canada* (AG), [1929] UKPC 86, [1930] AC 124.

⁶ *An Act to amend The Manitoba Election Act*, SM 1916, c 36.

⁷ See Doris Anderson, "Canadian Women and the *Charter of Rights*" (2005) 19:1 NJCL 369.

⁸ Chris Nelson, "Face of a nation; Twenty years after Barcelona and more than a decade after coming out, Mark Tewksbury will wave the Maple Leaf as chef de mission at the London Games", *Regina Leader-Post* (21 April 2012) G1.

⁹ See *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511, which found that

This duty to consult applies to all levels of government. It has also begun to get the attention of private businesses when they propose land and resource developments, specifically if they will eventually require governmental approvals. Implementation of the duty to consult, perhaps more than any other legal development in recent years, has had a major impact on the economic strength of First Nations and Aboriginal groups, providing them ongoing opportunities for input into matters of crucial interest to their people.¹⁰

Finally, a personal reminiscence hints at the major influence of the *Charter* on the criminal law: when I attended the Saskatchewan Bar Course in 1989, one session was a panel discussion on criminal law and procedure, with several Crown prosecutors and defence lawyers participating. The topic of Crown disclosure came up. Mark Brayford, a leading criminal defence lawyer in Saskatoon, emphatically stated that the *Charter* gave his clients the right to full Crown disclosure, and that right could only be satisfied when he had a complete copy of the Crown's file sitting on his desk. Some of the Crowns were skeptical and dismissive of this idea. Of course, two years later in *R v Stinchcombe*, that's exactly what the Supreme Court of Canada said.¹¹ Disclosure changed from being a discretionary power in the hands of the Crown¹² to a legally enforceable right of the accused. That was one of the most fundamental changes to criminal procedure in our history, strengthening the right of an accused person to know the case they had to meet, and ultimately ensuring a fair trial.

These examples illustrate the two most significant aspects of the *Charter*. First, on a grand scale, it changed the way we think about public issues and the relationships between individuals and governments. Things that seemed unimaginable 30 years ago are now the norm. When making policy, governments now must take *Charter* values into account, since the people expect their governments to follow those principles. The *Charter* is very much a statement of high-level political theory, one that the Canadian people have embraced.

a duty of consultation flowed from the constitutional protection for aboriginal and treaty rights set out in the *Constitution Act, 1982*, *supra* note 4, s 35. Section 35 of the *Constitution Act, 1982* entrenched protection of Aboriginal and Treaty Rights in our Constitution. While this provision technically resides outside of the *Charter* itself, it can be argued that it is similar in principle to *Charter* provisions, as it guarantees the rights of Aboriginal individuals and groups against the government in a way which can be enforced in the courts.

¹⁰ Government of Canada, "Aboriginal Peoples' Participation in Canada's Resource" (22 March 2014), *Canada's Economic Action Plan*, online: <actionplan.gc.ca/en/backgrounder/r2d-dr2/aboriginal-peoples-participation-canadas-resource>.

¹¹ *R v Stinchcombe*, [1991] 3 SCR 326, [1992] 1 WWR 97 [*Stinchcombe*].

¹² During my articles with a private firm, I once participated in obtaining disclosure from the Crown in a murder case, pre-*Stinchcombe*. Defence counsel were required to attend at the Crown office. The Crown prosecutor read the witness statements to defence counsel, who took notes. Defence counsel were not allowed to look at the witness statements, and certainly were not allowed copies, even though the accused faced a mandatory life sentence.

The *Charter* and *Constitution Act, 1982* have also had an effect at the individual level, notably for an accused in criminal matters, but also for litigants in family law matters, in labour law issues, and in Aboriginal and Treaty cases. They are legal documents, implemented by the courts in countless disputes across the country over the past 30 years. For every Supreme Court of Canada decision, there are thousands of smaller local cases that rarely get media attention but are of crucial importance to the participants. It is there that patriation has its great impact on individual lives, and where we, as lawyers, play our role, whether for the individual, for advocacy groups, or for the government. On a daily basis, we work out the meaning and details of the *Charter*, implementing its promise and ideals.

II. Saskatchewan's Contribution

A. Pre-Charter Developments

The *Charter* has strong roots in Saskatchewan. Premier Tommy Douglas and Prime Minister John Diefenbaker helped trigger the national debate on the entrenchment of fundamental rights and freedoms before the *Charter* was even a gleam in Pierre Trudeau's eyes. Douglas and Diefenbaker had both taken steps to guarantee the rights of individuals by enacting statutory Bills of Rights. In 1947, Premier Douglas introduced *The Saskatchewan Bill of Rights Act*,¹³ the first bill of rights in the Commonwealth since the original English *Bill of Rights* of 1688.¹⁴ The *Saskatchewan Bill of Rights* remains in force today as part of *The Saskatchewan Human Rights Code*.¹⁵ At the federal level, in 1960, Prime Minister Diefenbaker brought in the *Canadian Bill of Rights*, which also remains in force.¹⁶ Both Bills of Rights were influential in subsequent debates

¹³ *The Saskatchewan Bill of Rights Act, 1947*, SS 1947, c 35 [*Saskatchewan Bill of Rights*]. Douglas' commitment to a bill of rights grew in part from his concerns about the use of armed force by police in Manitoba and Saskatchewan to put down labour protests in the aftermath of World War I and during the turbulent years of the Depression. He had also witnessed the Nuremberg Rally of 1936, which further strengthened his determination to protect civil rights. When the 1945 Dominion-Provincial Conference rejected Douglas' call to add a bill of rights to the *British North America Act, 1867* (now *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5), he decided to implement it at the provincial level. The *Saskatchewan Bill of Rights* was drafted by Morris Shumiatcher and introduced in the Legislative Assembly by Attorney General Jack Corman (Stuart Houston & Bill Waiser, *Tommy's team: the people behind the Douglas years* (Markham: Fifth House, 2010) at 172-73). Interestingly, when Attorney General Corman spoke on the *Saskatchewan Bill of Rights* in the Legislative Assembly, he cited approvingly two proposals for a bill of rights at the federal level, one by a Co-operative Commonwealth Federation (CCF) Member of Parliament, and the second by John Diefenbaker: Saskatchewan, Legislative Assembly, *Hansard*, 10th Leg, 4th Sess (19 March 1947) at 987 (Hon JW Corman).

¹⁴ *Bill of Rights, 1688* (Eng), 1 Will & Mar (2d Sess), c 2.

¹⁵ *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, Part I ("Bill of Rights") [Code].

¹⁶ *Canadian Bill of Rights*, SC 1960, c 44; reprinted in RSC 1985, Appendix III [*Canadian Bill of Rights*]. Diefenbaker championed a bill of rights throughout his career, preparing a first draft in Wakaw,

leading to the enactment of the *Charter*.¹⁷

It would be hard to find two such different individuals as Douglas and Diefenbaker, with completely opposite political views; but on this issue they agreed: individuals have rights that governments must respect, and those rights should be enshrined in law. Saskatchewan has thus had a long, bipartisan tradition of support for the rights of individuals and their relationship with government, pre-dating the enactment of the *Charter* by many years.¹⁸

B. The Patriation Debate

With that history in mind, it is not surprising that Saskatchewan played a major role in the patriation of the Constitution, both in the political discussions and the legal manoeuvring. When the Patriation Debate heated up, Saskatchewan had a very strong team. As usual, Saskatchewan punched above its weight and made crucial contributions to the great debates on how to bring the Constitution home.

There was Premier Alan Blakeney, a Rhodes scholar and perhaps the only premier who was Prime Minister Trudeau's intellectual equal.¹⁹ Blakeney

Saskatchewan in the early 1920s, and bringing forward a motion in the Commons in support of a bill of rights every year from 1946 onwards. He stated that he had two general goals in pushing for a bill of rights. First, he wanted a guarantee of equality to ensure that all citizens of Canada were equal members of Canadian society, not just those of British and French heritage (John G Diefenbaker, *One Canada: The Memoirs of the Right Honourable John G. Diefenbaker, The Crusading Years, 1895 to 1956*, vol 1 (Toronto: MacMillan of Canada, 1975) at 253). Second, as an experienced lawyer, he understood the need for legal restrictions on governmental action, particularly for the accused as part of a fair justice system. He also understood the value of constitutional guarantees for members of minorities, and also appreciated that all Canadians benefitted from legal recognition of fundamental freedoms, such as freedom of expression and religion (John G Diefenbaker, *One Canada: The Memoirs of the Right Honourable John G. Diefenbaker, The Years of Achievement, 1956 to 1962*, vol 2 (Toronto: MacMillan of Canada, 1976) at 251–55 [Diefenbaker, *Years of Achievement*]). Overall, he believed that a bill of rights would change the way governments think about fundamental issues: "it would make Parliament freedom-conscious" (*ibid* at 32, quoting his own speech made in the House of Commons from 24 March 1952).

¹⁷ There are some significant differences between these two Bills and the *Charter*. For instance, the *Saskatchewan Bill of Rights* (*supra* note 13, ss 15, 17) applies to governments and also to private parties, unlike the *Canadian Bill of Rights* and the *Charter*, which only apply to the federal government and to the federal and provincial governments, respectively (*Canadian Bill of Rights*, *supra* note 16, s 5; *Charter*, *supra* note 2, s 32). The *Saskatchewan Bill of Rights* was thus also a forerunner for human rights laws. The *Canadian Bill of Rights* includes protection for property (*supra* note 16, s 1(a)), which is absent from both the *Saskatchewan Bill of Rights* and the *Charter*. The protection of property gives the *Canadian Bill of Rights* ongoing relevance in relation to the federal government. See e.g. *Authorson v Canada* (AG), 2003 SCC 39, [2003] 2 SCR 40, involving a challenge to federal administration of certain veterans' pensions, where the plaintiff relied, albeit unsuccessfully, on the property rights in the *Canadian Bill of Rights*.

¹⁸ In addition to the influence of these two politicians, there was also a strong academic contribution from Saskatchewan in relation to the *Canadian Bill of Rights*. The lead draftsman on the *Canadian Bill of Rights* in the federal Department of Justice was Elmer A Driedger, QC, from Saskatchewan, later the federal Deputy Minister of Justice: Elmer A Driedger, "The Meaning and Effect of the Canadian Bill of Rights: A Draftsman's Viewpoint" (1977) 9:2 Ottawa L Rev 303. Walter S Tarnopolsky, a graduate and then faculty member of the College of Law at the University of Saskatchewan (later on the Ontario Court of Appeal), wrote a textbook which became the leading authority on the *Canadian Bill of Rights*: Walter Surma Tarnopolsky, *The Canadian Bill of Rights*, 2nd revised ed (Toronto: McClelland and Stewart, 1975).

¹⁹ Stephen Clarkson & Christina McCall, *Trudeau and Our Times: Volume 1 – The Magnificent Obsession*

was also to play a key political role in the communications amongst the First Ministers during the heat of the Patriation Debate, being able to speak frankly with Premier Davis of Ontario, who had the ear of the Prime Minister, and also with Premier Lougheed of Alberta, who was extremely influential with some of the other premiers.²⁰ There was also Roy Romanow, QC, Attorney General and Minister of Intergovernmental Affairs, later Premier of Saskatchewan. He took the lead on the file within the government, being bright and energetic, committed to the development of the Constitution, and with the ability to maintain good relations with his opposite numbers in other governments.²¹ He was supported by an excellent team within the Department of the Attorney General:

- Richard Gosse, QC, the Deputy Attorney General and academic from Queen's University and the University of British Columbia, who co-ordinated the overall approach to the patriation issue;
- Ken Lysyk, QC, a former Deputy Attorney General of Saskatchewan and the Dean of Law at the University of British Columbia, who was retained to argue the province's case before the Supreme Court of Canada,²² later appointed to the Supreme Court of British Columbia;²³
- John Whyte, the Director of the Constitutional Branch of the Department of the Attorney General, later Dean of Law at Queen's University and then Deputy Minister of Justice of Saskatchewan;
- Jim MacPherson, later Dean of Osgoode Hall, now on the Ontario Court of Appeal;
- Bryan Schwartz, counsel in the Constitutional Law Branch and now Professor of Law at Robson Hall, University of Manitoba;
- Patrick McDonald, who did much of the early preparatory work leading up to the negotiations in the late 1970s;
- Darryl Bogdasavich of the Civil Law Branch; and
- George Peacock, a brilliant constitutional lawyer who participated in the entire drafting process of the text of the *Charter* throughout the federal-provincial consultations over many years, and who had a decisive influence on the ultimate text of the *Charter*.

There were also considerable contributions from three officials in the Department of Intergovernmental Affairs: Deputy Minister Howard Leeson;

(Toronto: McClelland and Stewart, 1990) at 372; Howard Leeson, *The Patriation Minutes* (Edmonton: Centre for Constitutional Studies, Faculty of Law, University of Alberta, 2011) at 95-96; Robert Sheppard & Michael Valpy, *The National Deal: The Fight for a Canadian Constitution* (Scarborough: Fleet, 1982) at 131.

²⁰ Sheppard & Valpy, *supra* note 19 at 8.

²¹ Leeson, *supra* note 19 at 96.

²² *Re Resolution to amend the Constitution*, [1981] 1 SCR 753, 11 Man R (2d) 1 [*Patriation Reference* cited to SCR].

²³ Hon Roy Romanow, "Nation Building and the Canadian Constitution: The Impact of Ken Lysyk as an Advocate on the *Patriation Reference* and Other Important Cases" (2005) 38:2 UBC L Rev 493 at 500-01; John D Whyte, "Appreciating Ken Lysyk" (2005) 38:2 UBC L Rev 583 at 584-85; Hon Barry L Strayer, "Ken Lysyk and the *Patriation Reference*" (2005) 38:2 UBC L Rev 423 at 424-25.

Bob Weese, Director of Constitutional Relations; and Lionel Bonneville, Intergovernmental Affairs Officer.²⁴ Overall, the Saskatchewan government team stood out.²⁵ Nor was Saskatchewan's contribution to the Patriation Debate limited to lawyers and officials with the government. Several other Saskatchewan lawyers made significant contributions.²⁶

Recall that Pierre Trudeau did not initially have strong support for his plan to patriate the Constitution and enact the *Charter*, especially once he proposed unilateral patriation by the federal government. Joe Clark, the Leader of the Official Opposition, was sympathetic to the substance of the patriation proposal, but opposed the suggestion of unilateral federal action.²⁷ However, Ed Broadbent, the leader of the third party in the Commons, the New Democratic Party (NDP), initially gave his support to Trudeau's proposal for unilateral action.²⁸ On the provincial side, only two provinces, Ontario and New Brunswick, supported the federal proposal whole-heartedly. Seven other provinces opposed it. Saskatchewan charted a more nuanced course, originally neither joining the federal government nor the provinces which opposed Trudeau's plan for patriation. Saskatchewan only joined the "Gang of Eight" after several unsuccessful rounds of negotiations.²⁹

After the breakdown in negotiations, the focus shifted to the debate in the courts. Québec, Manitoba and Newfoundland each referred the federal

²⁴ E-mail from John Whyte (5 May 2015).

²⁵ Sheppard & Valpy, *supra* note 19 at 192: "Blakeney's pan-Canadianism and Romanow's media star status were irksome to some in the eight's entourage; since the Regina bureaucracy was one of the best in the country, Blakeney and his staff generally came to meetings with their homework done and a batch of new proposals up their sleeves (the latter was a particular irritant to Quebec)."

²⁶ Barry Strayer, QC, a former faculty member with the Saskatchewan College of Law and later on the Federal Court of Appeal, was the lead Assistant Deputy Minister within the federal Department of Justice on the *Charter* and was one of the counsel for the federal government in *Patriation Reference*, *supra* note 22 at 761. Doug Schmeiser, QC, former Dean of the College, was an advisor to the Government of Manitoba and one of the counsel for Manitoba in the *Patriation Reference*. Ken Norman, Chief Commissioner of the Saskatchewan Human Rights Commission, and Louise Simard, Deputy Chief Commissioner, appeared before the Joint Committee of the House of Commons and the Senate to speak in favour of the *Charter* and outlined their experience in advancing equality rights, particularly with respect to affirmative action under s 47 of the *Code*, *supra* note 15, a precursor to s 15(2) of the *Charter* (Canada, "Minutes and Proceedings and Evidence of the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada," 5 December 1980, 20:5-20:27). Norman and Simard also included written submissions about the "override" clause in s 44 of the *Code*, *supra* note 15, which became a forerunner for s 33 of the *Charter*. Norman Zlotkin, a faculty member of the College and former research director of the Native Law Centre, was an advisor to the Assembly of First Nations and the Nishnawbe-Aski Nation. Delia Opekokew, then practising law in Ontario and Saskatchewan, was an advisor to the Assembly of First Nations and the Federation of Saskatchewan Indian Nations. Yvonne Peters, a graduate of the College and now Chairperson of the Manitoba Human Rights Board of Commissioners, was an advisor and activist with various disabilities advocacy groups which successfully advocated for the inclusion of disability in s 15 of the *Charter* ("Making a Difference: Yvonne Peters", *CBA National* (January 2014), online: <www.nationalmagazine.ca/Articles/January-February-2014-Issue/Making-a-Difference-Yvonne-Peters.aspx>).

²⁷ Clarkson & McCall, *supra* note 19 at 336-40.

²⁸ Pierre Elliott Trudeau, *Memoirs* (Toronto: McClelland and Stewart, 1993) at 310.

²⁹ Roy Romanow, John Whyte & Howard Leeson, *Canada... Notwithstanding* (Agincourt, Ont: Carswell/Methuen, 1984) at 116-29.

proposals to their Courts of Appeal for rulings. Those courts split on the issue. The Québec and Manitoba Courts of Appeal held that the federal government could proceed unilaterally to patriate the Constitution – provincial consent was not required for the federal request to the British Parliament for constitutional amendments.³⁰ The Newfoundland Court of Appeal held the opposite, ruling that there was a constitutional convention requiring provincial consent.³¹ Those three cases then were appealed to the Supreme Court of Canada in the *Patriation Reference*, one of the most important cases that the Supreme Court has ever heard.

The issues before the Court boiled down to two separate questions: did the federal government have the legal authority to unilaterally ask the British Parliament to amend Canada's Constitution? And if so, were there any constitutional conventions which restricted the federal government's use of that power?³² The debate over the constitutional convention was perhaps the most intractable. The federal government and its supporters, Ontario and New Brunswick, argued that the Court should not even address the issue of a constitutional convention, since the existence of a convention was essentially a political question, not a legal one. Alternatively, they argued that there was no constitutional convention requiring the federal government to obtain agreement from the provinces before requesting constitutional amendments from the British Parliament.³³ Seven of the dissenting provinces argued the opposite: there was a constitutional convention that required unanimous provincial consent for amendments proposed by the federal government.³⁴ Such dug-in, polar-opposite positions could only be disheartening for the future of the country.

Saskatchewan again took a more nuanced position, opposing the federal proposal for unilateral amendment, but on a different basis than the other dissenting provinces. Like them, Saskatchewan argued that there was a constitutional convention requiring provincial consent to major constitutional amendments. Unlike the other provinces, however, Saskatchewan argued that the convention did not require unanimous consent, but rather a "sufficient measure of provincial agreement."³⁵

³⁰ *Reference Re Amendment of the Constitution of Canada* (1981), 117 DLR (3d) 1, 7 Man R (2d) 269 (CA); *Reference Re Amendment to the Constitution of Canada (No 3)*, 120 DLR (3d) 385, [1981] CA 80 (Qc CA).

³¹ *Reference Re Amendment of the Constitution of Canada (No 2)* (1981), 118 DLR (3d) 1, 29 Nfld & PEIR 503 (Nfld CA) [Nfld Reference cited to DLR].

³² Each of the provincial references asked the questions in different ways, but the Supreme Court of Canada dealt with them as two questions, one relating to constitutional law and one relating to constitutional convention. Manitoba asked three questions (*Patriation Reference*, *supra* note 22 at 762); Newfoundland asked four questions (*ibid* at 762–63); Québec asked two questions, with each question containing two sub-questions (*ibid* at 763).

³³ *Ibid* at 886.

³⁴ *Ibid*.

³⁵ *Patriation Reference*, *supra* note 22 (Factum of the Attorney General of Saskatchewan, Intervenant at para 35–37) [Factum].

This approach was not simply a political compromise, but one grounded in the principles of federalism and a review of the history of constitutional amendments. Saskatchewan argued that it was not consistent with federalism that the federal government should be able to make fundamental changes to the Constitution of Canada unilaterally; such a power could theoretically extend to abolishing provinces entirely.³⁶ On the other hand, Saskatchewan argued that the principles of federalism did not call for unanimous provincial consent.³⁷ That approach could lead to constitutional gridlock, in which a single province could block proposed amendments, no matter how much support the amendments had in the rest of the country. A balanced federation did not require unanimous consent on all issues. Thus, Saskatchewan argued that a measure of provincial consent was required, but not unanimity.

Ian Binnie, later a member of the Supreme Court himself, was present in the Court on the day that Saskatchewan argued, and has since praised the province's approach, commenting on how significant the Saskatchewan position was for the Court. In his view, Saskatchewan created a practical solution for the Court, which laid a considerable burden on the federal government to work with the provinces, without creating a permanent constitutional freeze.³⁸ In a speech years later, Justice Binnie described the tension in the courtroom lessening noticeably, as Saskatchewan's counsel, Ken Lysyk, made his submission while avoiding the constitutional hardball arguments of the other counsel. The justices' eyes lit up, as they saw a way through what had looked like an intractable political and legal impasse.³⁹

When the Court gave its decision, it ruled 7-2 on the first question: the federal Parliament had the legal authority to request constitutional amendments from the British government.⁴⁰ That was a win for the federal government. However, on the second question, the Court ruled 6-3 that a constitutional convention existed.⁴¹ The majority stated:

Counsel for Saskatchewan agreed that the question be answered in the affirmative but on a different basis. He submitted that the convention does exist and requires a measure of provincial agreement. Counsel for Saskatchewan further submitted that the Resolution before the Court has not received a sufficient measure of provincial consent.

³⁶ *Ibid* at paras 28-29, citing *Nfld Reference*, *supra* note 31 at 25 (the *Factum* quoted an unreported version of the *Nfld Reference* judgment).

³⁷ *Factum*, *supra* note 35 at paras 30-34.

³⁸ J W Ian Binnie, "In Praise of Oral Advocacy" (2003) 21 *Adv J* 3 at 9, reprinted in David Stockwood & David E Spiro, eds, *Ethos, Pathos, and Logos: The Best of The Advocates' Society Journal, 1982-2004* (Toronto: Irwin Law, 2005) 17.

³⁹ Personal recollection of a speech given by Ian Binnie J to the Canadian Bar Association, Saskatchewan Branch (4 February 2005).

⁴⁰ *Patriation Reference*, *supra* note 22 at 807, 840-41, Laskin CJC, Dickson, Beetz, Estey, McIntyre, Chouinard & Lamer JJ; Martland & Ritchie JJ, dissenting.

⁴¹ *Ibid* at 886, 872, Martland, Ritchie, Dickson, Beetz, Chouinard & Lamer JJ; Laskin CJC, Estey & McIntyre JJ, dissenting.

*We wish to indicate at the outset that we find ourselves in agreement with the submissions made on this issue by counsel for Saskatchewan.*⁴²

Few pleasures are sweeter for any lawyer than to have their position adopted completely by a court. When that court is the Supreme Court of Canada, and the issue is one of fundamental importance to the nation, we can only imagine the satisfaction that this statement brought to the Saskatchewan team.

C. The Kitchen Accord

The *Patriation Reference* was hardly the last word. Faced with the Court's Delphic decision, the federal and provincial governments went back to the bargaining table. In theory, the federal government could have pushed ahead with its plan of unilateral federal action, but the decision's ruling on the issue of convention had significantly weakened the federal government's position in the political realm. Ed Broadbent, leader of the NDP, had been a supporter of the federal position, but after the decision he urged the Prime Minister to convene another constitutional conference.⁴³ It was also unclear what impact the decision would have on the British Parliament.⁴⁴ In his memoirs, Prime Minister Trudeau indicated that he briefly considered proceeding unilaterally, but concluded that as a political matter, he had to try once more to get provincial support. He was concerned about how such a move would be perceived in Britain following the Supreme Court decision, and furthermore, that his two provincial supporters, Premiers Davis and Hatfield, might now oppose unilateral action.⁴⁵

In November 1981, the First Ministers met in Ottawa. At first, prospects for an agreement seemed grim.⁴⁶ I recall watching the national news after the first day of negotiations, with Lloyd Robertson stating to the effect that "Canada's leaders acted today in a very un-Canadian fashion. They failed to compromise."

As we now know, the First Ministers eventually reached a near-unanimous agreement on patriation, through a series of offers, counter-offers, and behind-the-scenes discussions. It began when Premier Davis of Ontario privately advised the Prime Minister that he was prepared to give up a veto for Ontario.⁴⁷ This concession was crucial, since earlier in the year, the

⁴² *Ibid* at 886 [emphasis added].

⁴³ Romanow, Whyte & Leeson, *supra* note 29 at 188–89.

⁴⁴ *Ibid* at 188.

⁴⁵ Trudeau, *supra* note 28 at 316.

⁴⁶ Romanow, Whyte & Leeson, *supra* note 29 at 193–97; Clarkson & McCall, *supra* note 19 at 359; Graham Fraser, PQ: *René Lévesque & the Parti Québécois in Power* (Toronto: Macmillan of Canada, 1984) at 292; Leeson, *supra* note 19 at 98.

⁴⁷ Fraser, *supra* note 46 at 293.

dissident premiers had proposed an amending formula that did not include a veto for any province.⁴⁸ By giving up a veto for Ontario, Davis was making the premiers' proposal more viable.

Then, on the third day of the Conference, Premier Blakeney presented a new proposal, for an amending formula which simply required the consent of seven provinces, with no veto for any province and no right for a dissenting province to opt-out of a constitutional amendment affecting provincial powers.⁴⁹ Although the Saskatchewan proposal did not gain support from the Conference, it was a significant step towards breaking the deadlock. Premier Lévesque and the Québec delegation were particularly disturbed by the Saskatchewan proposal, both by its content and because it showed a possibility for movement.⁵⁰ Blakeney, as well as Premier Bennett of British Columbia, were both signalling they could make concessions, weakening the solidarity of the Gang of Eight.⁵¹

Then came perhaps the key point of the Conference. In a rapid-fire exchange in French, Prime Minister Trudeau challenged Premier Lévesque to put the *Charter* to a national referendum, a proposal which Lévesque accepted on the spot.⁵² That finally broke the solidarity of the eight provinces opposing the federal proposals.⁵³ The Gang of Eight had had an understanding that there would be no major change in their positions unless all agreed.⁵⁴ The prospect of a referendum had been floated in the past, but the Anglophone premiers in the Gang of Eight were firmly opposed to the idea.⁵⁵ Premier Lévesque's acceptance of the Prime Minister's gambit broke the solidarity of the opposing provinces, and consequently the logjam. Trudeau triumphantly

⁴⁸ "Premiers' Conference, Ottawa, Ontario, April 16, 1981" in Anne F Bayefsky, ed, *Canada's Constitution Act, 1982 and Amendments: A Documentary History*, vol II (Toronto: McGraw-Hill Ryerson, 1989) 804 at 804, 808 ["Premiers' Conference"].

⁴⁹ Romanow, Whyte & Leeson, *supra* note 29 at 201–04.

⁵⁰ Fraser, *supra* note 46 at 294–95. One official in the Québec delegation put it bluntly to the press: "Blakeney nous a chié entre les mains!" ("Blakeney has screwed us!") (*ibid* at 294).

⁵¹ Clarkson & McCall, *supra* note 19 at 375.

⁵² *Ibid* at 376–79; Fraser, *supra* note 46 at 295, noting that only Premier Blakeney immediately saw beyond the political dynamic of the conference and understood the constitutional implications of Trudeau's referendum proposal, commenting to his officials that "[Trudeau]'s trying to conventionalize the charter" (*ibid*). Trudeau was hoping that the democratic value of a referendum could meet the Supreme Court's ruling that a substantial degree of provincial consent was needed for constitutional amendments. Popular approval of the patriation package could potentially be a substitute for the conventional requirement for consent from the provincial governments.

⁵³ Trudeau subsequently indicated that he had gone into the conference knowing that to succeed, he would have to find a way to break the premiers' solidarity: Trudeau, *supra* note 28 at 317.

⁵⁴ Romanow, Whyte & Leeson, *supra* note 29 at 193; Clarkson & McCall, *supra* note 19 at 379: "By embracing – without prior consultation – a proposal the anglophone premiers were sure to loathe, Lévesque had broken the cardinal Gang of Eight rule that his own adviser Claude Morin [Québec's Minister of Intergovernmental Affairs] had insisted on: that the dissidents should never change position without advance consultation."

⁵⁵ Romanow, Whyte & Leeson, *supra* note 29 at 205; Clarkson & McCall, *supra* note 19 at 378–80; Fraser, *supra* note 46 at 295.

announced to the Conference, and then to the media, that there was now a “Quebec-Ottawa alliance.”⁵⁶ Without responding in detail to questions from the media, he simply stated, “The cat is among the pigeons.”⁵⁷

Over the next 24 hours, a deal was hammered out. The most commonly accepted version of events is that the federal Minister of Justice, Jean Chrétien, met with Roy Romanow and Roy McMurtry, the Attorney General of Ontario, in a kitchen at the Ottawa Conference Centre in the late afternoon. The three of them reached the outline of an agreement, modelled on the amending formula proposed by the dissident premiers at their conference in April 1981, but with three notable changes: the removal of financial compensation for a province which opted out of an amendment affecting provincial powers; the inclusion of the notwithstanding clause in the *Charter*; and the terms for the minority education clause.⁵⁸

The three Attorneys General then reported back to their First Ministers. Trudeau convened a meeting of his closest advisors. His initial reaction was to reject the agreement, known today as the Kitchen Accord. He loathed the notwithstanding clause and was upset that the proposed amending formula did not include any mechanism for the people to participate directly in constitutional amendments.⁵⁹ But as he was discussing the accord with his advisors, the phone rang. It was Premier Davis, his staunch ally. Davis told Trudeau that he and Premier Hatfield both thought that the outline of the deal had promise, and they could both accept it. If Trudeau now rejected compromise, he would be going to London alone, without even the support of Ontario and New Brunswick.⁶⁰ Chastened, Trudeau instructed Chrétien to work out the deal, on the condition that Chrétien get the support of seven provinces representing 50% of the national population.⁶¹ Chrétien went to work. Throughout the night and early morning, intensive discussions were

⁵⁶ Romanow, Whyte & Leeson, *supra* note 29 at 205; Trudeau, *supra* note 28 at 318–20; Clarkson & McCall, *supra* note 19 at 378–79. Trudeau’s words to the Conference, aimed at the other premiers, were “This is a triumph. There is suddenly a Quebec-Ottawa alliance. You are all surprised, gentlemen. Too bad for you.” (Trudeau, *supra* note 28 at 319). By contrast, Lévesque in his memoirs indicated that it was the terms that the federal government proposed for the referendum option, later in the day, which broke the solidarity: René Lévesque, *Memoirs*, translated by Philip Stratford (Toronto: McClelland and Stewart, 1986) at 331.

⁵⁷ Fraser, *supra* note 46 at 296; Clarkson & McCall, *supra* note 19 at 379.

⁵⁸ Romanow, Whyte & Leeson, *supra* note 29 at 207–09; Trudeau, *supra* note 28 at 321; Clarkson & McCall, *supra* note 19 at 380–81. For a differing account of how the deal was put together, which instead emphasizes the role of Newfoundland in reaching the accord, see Brian Peckford, *Some Day the Sun Will Shine and Have Not Will Be No More* (St John’s: Flanker Press, 2012) at 251–81. For a contemporary news account of the deal-making, including an interview by Mike Duffy with the jubilant Chrétien, McMurtry and Romanow in the kitchen the day after, see CBC Digital Archives, “Canada’s Constitution: The Kitchen Accord” (5 November 1982), online: <www.cbc.ca/player/Digital+Archives/Politics/The+Constitution/ID/1818451861> at 00h:16m:35s [CBC Digital Archives].

⁵⁹ Trudeau, *supra* note 28 at 321–22.

⁶⁰ *Ibid* at 323–24; Clarkson & McCall, *supra* note 19 at 382–83.

⁶¹ Trudeau, *supra* note 28 at 324–25.

held between the various delegations, with the exception of Québec.⁶² Again, the Saskatchewan delegation played a key role. One of the major meetings on the draft was held in Blakeney's suite and included officials from four of the provinces.⁶³ Blakeney continued to be an essential link in the chain of communications between the other premiers, and gradually they reached a consensus.⁶⁴ At seven in the morning, Chrétien telephoned Trudeau with the news that they had a deal with all provinces except Québec.⁶⁵

When the eight dissident premiers met for breakfast in the morning, the proposal was on the table at each place setting. Premier Lévesque was outraged, both by being excluded from the overnight discussions and by the content of the proposal.⁶⁶ At the Premiers' Conference in April 1981, he had been the first Québec premier to ever agree to a possible patriation plan without a constitutional veto for Québec. However, he had done so on the condition that a province could opt-out from a constitutional amendment which affected provincial powers and would receive financial compensation from the federal government in relation to the opt-out.⁶⁷ The new proposal would deprive Québec of both a veto and financial compensation should

⁶² There is some indication that the Québec delegation, which was staying on the Québec side of the Ottawa River, was aware that negotiations were underway, but chose not to participate: Clarkson & McCall, *supra* note 19 at 384, n 29, citing a confidential source within the Québec delegation. Trudeau later speculated to the same effect, on the basis that the separatist Lévesque would never have accepted a patriation package:

I don't know whether he and his delegation were celebrating, just sleeping on it, or regretting that they had broken the solidarity. But they obviously were not prowling the corridors or working the phones, looking to negotiate a compromise as the others were; they decided they would rather sit it out than be part of a compromise. Lévesque wasn't trying to improve the constitution - he was a separatist.

Trudeau, *supra* note 28 at 326. Lévesque denied this in his memoirs, writing that before going back to the Hotel de la Chaudière on the Quebec side of the river, Claude Morin and I took the precaution, as a formality, of giving our telephone number to two or three of the others who, as usual, were staying in Ottawa. "If anything new comes up, don't forget to call us." "No problem," they replied, but they had trouble looking us in the eye.

Lévesque, *supra* note 56 at 331. Interestingly, Lévesque uses rather similar language as Trudeau to describe the quiet negotiations going on in the hotels: "We have been reproached since for staying in Hull that night. Did they expect us to snoop around the corridors of the Château Laurier, listening at keyholes perhaps?" (*Ibid.*)

⁶³ Romanow, Whyte & Leeson, *supra* note 29 at 208–09.

⁶⁴ *Ibid* at 204–05, 207–08; Leeson, *supra* note 19 at 97; Sheppard & Valpy, *supra* note 19 at 8.

⁶⁵ Trudeau, *supra* note 28 at 325.

⁶⁶ Fraser, *supra* note 46 at 296–97; Romanow, Whyte & Leeson, *supra* note 29 at 209–10.

⁶⁷ "Premiers' Conference", *supra* note 48 at 804, 808; Clarkson & McCall, *supra* note 19 at 374–75; Fraser, *supra* note 46 at 282–83. Lévesque explained in his *Memoirs* that in his view, an opt-out with compensation was a more useful tool for Québec than a veto:

But Quebec would be deprived of its right of veto. I should perhaps admit that this old obsession has never turned me on. A veto can be an obstacle to development as much as an instrument of defence. ... On the other hand, the right to opt out, which we had learned to use in the sixties - the best example being the creation of the Caisse de dépôt - is in my view a much superior weapon, at one and the same time more flexible and more dynamic. "You wish to take this or that path we are not ready to follow? Very well, my friends, go ahead. But without us." From stage to stage, I repeat, *we could create something very like a country in that fashion.*

Lévesque *supra* note 56 at 325–26 [footnotes omitted] [emphasis added].

Québec opt-out of a constitutional amendment affecting provincial powers.⁶⁸ Most significantly, the provision for minority language education would override the provisions of Bill 101, reducing Québec's control over education in the province. Between elimination of the veto, denial of compensation for opting-out and restrictions on Bill 101, the proposal was a major defeat for Lévesque and his vision for Québec. Far from strengthening Québec's constitutional powers, as had been the goal of all Québec premiers for decades (including Lévesque himself), the proposed accord instead weakened Québec's powers.⁶⁹

When the Conference formally reconvened on November 5th, 1981, all of the First Ministers except Lévesque accepted the proposal which had been worked out overnight. There was one significant addition: Prime Minister Trudeau insisted on the addition of a five year "sunset clause" on any law using the notwithstanding clause.⁷⁰ The Conference concluded with the Accord being approved by the federal government⁷¹ and all provinces except Québec.⁷²

Two points stood out: after over half a century of discussions, there was substantial agreement on a patriation package. And, it was done without Québec's consent. These two points still echo.

⁶⁸ "Federal-Provincial First Ministers' Conference, Ottawa, Ontario, November 5, 1981" in Bayefsky, *supra* note 48, 904 at 904 ["First Ministers' Conference"], which provided that the amending formula would be based on the Premiers' agreement from April 1981, "with the deletion of Section 3 which provides for fiscal compensation to a province which opts out of a constitutional amendment." Note that subsequently, in an effort to obtain Québec's agreement to the patriation package, the federal government and the other nine provinces agreed to a limited right to compensation for a province which opted out of constitutional amendments relating to "education or other cultural matters," which is now set out in the *Constitution Act, 1982*, *supra* note 3, s 40; see Letter from Prime Minister Trudeau to Premier Lévesque (1 December 1981) in James Ross Hurley, *Amending Canada's Constitution: History, Processes, Problems and Prospects* (Ottawa: Canada Communications Group, 1996) 245 at 247.

⁶⁹ Fraser, *supra* note 46 at 297-300.

⁷⁰ Romanow, Whyte & Leeson, *supra* note 29 at 211; Clarkson & McCall, *supra* note 19 at 385; "First Ministers' Conference", *supra* note 68 at 904-05. Jean Chrétien wrote that ten years later, Trudeau accused him of weakening the *Charter* by giving in to the Premiers on the notwithstanding clause: "'You gave them that,' [Trudeau] said. 'Sorry, Pierre,' I countered. 'I recommended it. You gave it.'" Jean Chrétien, *My Years as Prime Minister* (Toronto: Alfred A Knopf Canada, 2007) at 392 [emphasis in original].

⁷¹ Trudeau, *supra* note 28 at 325-26; Clarkson & McCall, *supra* note 19 at 384-85. The Prime Minister's closing words for the conference were: "We all have what is called in French, '*l'esprit d'escalier*,' badly translated, 'afterthought.' I think I won't open the meeting for any afterthoughts, because we better grab the signatures, this paper, and run, before anybody changes his mind. *La séance est ajournée.*" CBC Digital Archives, *supra* note 58 at 00h:11m:55s.

⁷² By contrast, Premier Lévesque's concluding speech sounded a clear note of outrage coupled with a grim warning: "I must say that I sincerely regret that Quebec now finds itself today in a position which has become one of the fundamental traditions of the Canadian federal régime: Quebec finds itself alone. It will be up to the Quebec people, and to them alone, to draw their own conclusions. ... The straitjacket which the federal régime represents is being tightened again for us. There is absolutely no question of accepting that; we will never capitulate, and we will use all the means that remain to prevent it." Fraser, *supra* note 46 at 299.

III. April 18th, 1982: The Day After

So, on April 17th, 1982, on a wet and windy day in Ottawa, Her Majesty signed the Proclamation bringing the Constitution home and the *Charter* into effect. And then, to quote Kipling, “The tumult and the shouting dies, The Captains and the Kings depart.”⁷³ In this case, the Queen and the First Ministers and the Attorneys General all left, no doubt to a nice luncheon, with champagne and toasts and jubilation that years of hard-fought political battles had come to an end.

And the next day, April 18th, 1982, in courtrooms across the country, lawyers and judges looked at each other with puzzled looks, and asked “What on earth do we do now?” That was the great challenge: how to put meat on the dry bones of the *Charter*? How could the lofty words on paper be turned into real rights for individuals, with corresponding obligations on governments?

Across Canada, lawyers and judges rose to the challenge to make the *Charter* a reality. In his retirement speech, Chief Justice Bayda of Saskatchewan commented that the decade from 1982 to 1992 was the busiest time in his long tenure on the bench, as judges grappled with the innovative arguments and issues brought forward by counsel.⁷⁴ Judges and lawyers were making it up as they went along, so to speak, as they all sought to answer the question: what did the words of the *Charter* mean?

To start with, the great uncertainty was how the Supreme Court of Canada would respond to the *Charter*. Would the Court treat it in the same way as the *Canadian Bill of Rights*, to which the Court had never given much weight? Or would they take the *Charter* more seriously?

We quickly learned that the latter was the case. All of the earlier cases where the Court had said that they could not use the *Canadian Bill of Rights* to overturn statutes because the *Bill of Rights* was simply a statute itself, and not a constitutionally entrenched document,⁷⁵ had actually foreshadowed how the Court would treat the *Charter*. By entrenching rights in the Constitution, the elected governments had clearly signalled that they wanted the courts to be able to overturn statutes that infringed on protected rights, and the Supreme

⁷³ Rudyard Kipling, “Recessional” in *The Works of Rudyard Kipling: One Volume Edition* (September 2000), Project Gutenberg, online: <www.gutenberg.org/files/2334/2334-h/2334-h.htm>.

⁷⁴ Personal recollection of a speech given by ED Bayda CJS (9 September 2006) on the occasion of his retirement from Saskatchewan’s Court of Appeal.

⁷⁵ From the enactment of the *Canadian Bill of Rights* in 1960 until the enactment of the *Charter*, there was only one case where the Supreme Court held that a federal law was inoperative due to a conflict with the *Canadian Bill of Rights*: *R v Drybones*, [1970] SCR 282, 9 DLR (3d) 473. In several other cases, the Court held that the *Canadian Bill of Rights* could not be used to strike down a statute duly passed by the federal Parliament under legislative authority granted to it by the Constitution: *R v Currie*, [1972] SCR 889 at 899, 26 DLR (3d) 603, Laskin J (as he then was); *Lavell v Canada (AG)*, [1974] SCR 1349 at 1358, 1361–62, 38 DLR (3d) 481, Ritchie J; *R v Burnshine*, [1975] 1 SCR 693 at 705–06, 44 DLR (3d) 584, Martland J. For a review of the Court’s approach to the *Canadian Bill of Rights*, see Peter W Hogg, *Constitutional Law of Canada*, 5th ed, supplemented (Toronto: Carswell, 2007), s 35.5.

Court took the lead in that role. This change in mind-set was summarized by Chief Justice Brian Dickson: “Thus, in Canada, legislative supremacy is subordinate to Constitutional supremacy”⁷⁶

The first major case that reflected this change, in my opinion, was *R v Big M Drug Mart Ltd*, where the Court struck down the federal *Lord’s Day Act* as a breach of freedom of religion.⁷⁷ The Court declined to follow its own earlier decision which had upheld the *Lord’s Day Act* in light of a similar freedom of religion challenge under the *Canadian Bill of Rights*.⁷⁸

In another case that same year, *R v Therens*,⁷⁹ the Supreme Court expressly acknowledged that it did not find its own earlier decisions adjudicated under the *Canadian Bill of Rights* to be determinative of issues under the *Charter*, given its constitutional nature. In *Therens*, the Court held that a motorist, who was compelled to give a breath sample under the *Criminal Code* 1970,⁸⁰ was detained within the meaning of section 10(b) of the *Charter*, and therefore had the right to counsel. The Court declined to follow its earlier decision in *Chromiak v The Queen*, which had held that a motorist in that situation was not detained within the meaning of the same phrase used in section 2(c) of the *Canadian Bill of Rights*, and therefore did not have a right to consult counsel before giving a breath sample.⁸¹ Speaking for the majority on this point, Justice Le Dain stated:

In considering the relationship of a decision under the Canadian Bill of Rights to an issue arising under the Charter, a court cannot, in my respectful opinion, avoid bearing in mind an evident fact of Canadian judicial history, which must be squarely and frankly faced: that on the whole, with some notable exceptions, *the courts have felt some uncertainty or ambivalence in the application of the Canadian Bill of Rights because it did not reflect a clear constitutional mandate to make judicial decisions having the effect of limiting or qualifying the traditional sovereignty of Parliament*.⁸²

The decision in *Reference Re BC Motor Vehicle Act* quickly followed, in which the Court held that the *Charter’s* guarantee of the “principles of fundamental justice” in section 7 was not limited to procedural rights, such as the rules of natural justice.⁸³ Justice Lamer (as he then was) wrote the decision for the

⁷⁶ Rt Hon CJ RGB Dickson, “Keynote Address” in Frank E McArdle, ed, *The Cambridge Lectures, 1985: Selected Papers Based upon Lectures Delivered at the Conference of the Canadian Institute for Advanced Legal Studies, 1985, held at Cambridge University, England* (Montréal: Les Éditions Yvon Blais, 1987) 1 at 4.

⁷⁷ *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, 18 DLR (4th) 321 [*Big M Drug* cited to SCR]; *Lord’s Day Act*, RSC 1970, c L-13.

⁷⁸ *R v Robertson*, [1963] SCR 651, 41 DLR (2d) 485; *Big M Drug*, *supra* note 77 at 342–44.

⁷⁹ *R v Therens*, [1985] 1 SCR 613, 18 DLR (4th) 655 [*Therens* cited to SCR]. *Therens* was on appeal from the Saskatchewan Court of Appeal.

⁸⁰ *Criminal Code*, RSC 1970, c C-34 [*Criminal Code* 1970].

⁸¹ *R v Chromiak*, [1980] 1 SCR 471, 102 DLR (3d) 368.

⁸² *Therens*, *supra* note 79 at 638–39, Le Dain J, dissenting in result but speaking for the Court on this point [emphasis added].

⁸³ *Reference Re BC Motor Vehicle Act*, [1985] 2 SCR 486 at 511–13, 24 DLR (4th) 536 [*Re BC Motor Vehicle*].

majority. He declined to follow the restrictive interpretation which the Court had given to the phrase “principles of fundamental justice” in an earlier case under the *Canadian Bill of Rights*.⁸⁴ In reaching this conclusion, Justice Lamer emphasised that the constitutional status of the *Charter* gave judicial review its legitimacy, unlike under the *Canadian Bill of Rights*:

It ought not to be forgotten that the historic decision to entrench the *Charter* in our Constitution was taken not by the courts but by the elected representatives of the people of Canada. It was those representatives who extended the scope of constitutional adjudication and entrusted the courts with this new and onerous responsibility. Adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy.⁸⁵

Any doubts about the way the Supreme Court of Canada would treat the *Charter* were settled, in my opinion, in the case of *R v Morgentaler* (1988).⁸⁶ The Court again declined to follow one of its own earlier decisions under the *Canadian Bill of Rights* and waded squarely into one of the most contentious matters of public policy, abortion. In doing so, the Court confirmed that the principles of fundamental justice under section 7 had an expansive application.⁸⁷

I was in the courtroom the day *Morgentaler* 1988 was handed down. Back then, all decisions of the Court were announced in open court, rather than by deposit with the Registrar, as is the current practice.⁸⁸ It was tense. Two of the biggest Mounties I have ever seen were very visibly on guard. Supporters and opponents of Dr. Morgentaler filled the courtroom, along with the press. Then Dr. Morgentaler himself arrived, accompanied by his counsel, Morris Manning, QC. Everyone knew that whatever happened, we were about to hear a major pronouncement on the *Charter*.

The tension continued to mount after the Court came in. The Court’s custom was to begin with decisions on motions and leave applications, leaving decisions on appeals to the end. So Dr. Morgentaler and his counsel, and Crown counsel, and the supporters, and the opponents, and the media had to sit through a lengthy set of announcements by the Court disposing of motions and leave applications that had nothing to do with the *Morgentaler* 1988 issue. The tension continued to build, as everyone fidgeted through the long list of procedural

⁸⁴ *R v Duke*, [1972] SCR 917 at 923, 28 DLR (3d) 129, Fauteux CJ, citing *Canadian Bill of Rights*, *supra* note 16, s 2(e).

⁸⁵ *Re BC Motor Vehicle Act*, *supra* note 83 at 497.

⁸⁶ *R v Morgentaler*, [1988] 1 SCR 30, 44 DLR (4th) 385 [*Morgentaler* 1988].

⁸⁷ In *R v Morgentaler* (1975), [1976] 1 SCR 616 at 658, 53 DLR (3d) 161, the Court unanimously ruled from the Bench that there was no basis to challenge the abortion provisions of the *Criminal Code* 1970 under the *Canadian Bill of Rights*. In *Morgentaler* 1988, *supra* note 86, the Court held, by a 5-2 majority, that the abortion provisions of the *Criminal Code* 1970 infringed women’s rights to security of the person under section 7 of the *Charter*.

⁸⁸ *Supreme Court Act*, RSC 1970, c S-19, s 26. This was repealed and replaced by SC 1987, c 42, s 26(1), authorizing judgment to be given either by deposit with the registrar, or in open court.

motions. Finally, Chief Justice Dickson came to the two appeals being decided that day. He first read the decision in *R v Simpson*, having to do with a charge to a jury in a criminal case.⁸⁹ It was an important case, no doubt, and significant for the accused, but a visible distraction to those in the courtroom who were anxiously awaiting the decision they had all come to hear.

The Chief Justice paused. Everyone was on the edge of their seats. Then he announced, "In the case of *Henry Morgentaler and others v Her Majesty the Queen*." Mr. Manning and Crown counsel stood. The Courtroom was silent.

Then four simple words: "The appeal is allowed."

Throughout the courtroom, there were gasps of anxiety and sighs of relief. The Chief Justice then read the detailed answers to the seven constitutional questions which had been set. At one point, Dr. Morgentaler himself went up to Mr. Manning and whispered to him, who gestured for Dr. Morgentaler to return to his seat. The press reports the next day indicated that Dr. Morgentaler was nervous and confused by the long list of questions, and that he needed to confirm that he truly had won his case.⁹⁰

The Court then adjourned for fifteen minutes prior to the next appeal. There was a tremendous rush for the doors, as reporters raced out to shout the news, and the supporters and opponents all rushed to be interviewed, to enthusiastically praise or roundly condemn the Court, respectively. A few of us watched from the top of the staircase in the Great Hall. Someone commented that it was like a rock had been thrown into a pond, and now all the ripples spread. The courtroom was calm again, waiting for the next case.

From that point on, it was clear that the Supreme Court had abandoned the *Canadian Bill of Rights* mindset. Governments had taken seriously the Court's reluctance to act on the *Canadian Bill of Rights* and thus enacted a constitutionally entrenched *Charter*. The Court in turn took seriously its new responsibilities, which the elected branches of government had conferred upon it. A few months later, I was at a conference where the Chief Justice was speaking. He was followed by a Member of Parliament, who commented that, if there was any doubt at all about the significance of the *Charter*, the *Morgentaler* 1988 decision had made it clear to Parliament.

The impact of the *Charter* was also felt in lower courts. In the years immediately after the *Charter* came into force, it was said that defence counsel in criminal matters could argue that the police had infringed their client's rights by being rude, and judges would say, "Well, we'll have to set it down for argument." An exaggeration, perhaps, but it captures the sense of uncertainty and innovation of that period.

That uncertainty and innovation was demonstrated in one child protection

⁸⁹ *R v Simpson*, [1988] 1 SCR 3, 46 DLR (4th) 466.

⁹⁰ Kirk Makin, "Abortion law scrapped; women get free choice", *The Globe and Mail* (29 January 1988) A1 at A10.

matter in civil chambers in the Saskatchewan Court of Queen's Bench in the summer of 1983. The lawyer for the parent opposed the application by Social Services, in part by challenging ten different sections of *The Family Services Act*.⁹¹ He argued that the *Act* violated an extensive list of *Charter* rights of the parent and the children:

- their freedom of association, contrary to section 2(d);
- the principles of fundamental justice, contrary to section 7;
- the right not to be arbitrarily detained, contrary to section 9;
- the right to counsel, contrary to section 10;
- the right to a trial within a reasonable time, contrary to section 11;
- the right to be free from cruel and unusual treatment or punishment, contrary to section 12; and,
- the right to equality under section 15.⁹²

Ultimately, the Queen's Bench dismissed all of the challenges.⁹³ In retrospect, we can look at that case and say that the arguments were not strong; but who knew in 1983? Counsel and courts were feeling their way. Counsel had an obligation to bring forward new and innovative arguments, and courts had a corresponding obligation to take them seriously. As the jurisprudence gradually built, it became clearer which arguments were non-starters; but it was very much an evolutionary process.

IV. Arcs of Development in *Charter* Jurisprudence

As a practising constitutional lawyer for the past 25 years, I have observed several arcs of development in the *Charter* jurisprudence.

The first arc was in the area of criminal law. It was expected that the initial challenges were going to be under the provisions of the *Charter* dealing with legal rights in the criminal process for several reasons. First, the criminal law is one of the busiest areas of the courts, providing a large amount of the case load. Second, Canada has a strong and dedicated criminal defence bar, who are professionally obliged to raise every argument they can for their clients. There was no doubt that they would grab the *Charter* and run with it. Third, the most immediately accessible provisions of the *Charter*, from section 7 to section 14, all concern legal rights in the courts, primarily from a criminal law perspective. These legal rights in turn have strong roots in basic principles of the common

⁹¹ *The Family Services Act*, RSS 1978, c F-7.

⁹² *Shingoose v Saskatchewan (Minister of Social Services)* (1983), 26 Sask R 235 at paras 2, 4, 149 DLR (3d) 400 (QB) [*Shingoose*]. The reported decision does not make reference to s 15, although the parent initially advanced a s 15 argument (*Shingoose v Saskatchewan (Minister of Social Services)* (20 April 1983), Regina, Sask QBM No 417 (notice of motion and appeal) at 3). Counsel for the parent graciously abandoned the s 15 argument after the chambers judge pointed out during oral argument that s 15 would not come into force until April 17th, 1985, two years after the date of argument. *Charter*, *supra* note 2, s 32(2).

⁹³ *Shingoose*, *supra* note 92 at paras 6, 11, 13, 16, 18–20, 22.

law; there was a good understanding from the outset about concepts such as the right to counsel, fair trials, protection from unreasonable searches and seizures, the presumption of innocence and the right to a jury. The difference was that those rights were now entrenched and backed with a strong remedial provision, section 24, which authorized courts to correct governmental action which was not consistent with the *Charter*. And for the first decade, the focus of *Charter* developments was largely in criminal law.

Then other sections began to come into play. In 1989, the Supreme Court gave its first decision under the equality provision, section 15, in *Andrews v Law Society of British Columbia*.⁹⁴ The first minority language education case under section 23, *Mahe v Alberta*, followed the next year.⁹⁵ Also in 1990, the Court delivered its decision in *R v Sparrow*, the first Aboriginal law case under section 35 of the *Constitution Act, 1982*.⁹⁶ In a speech in 1992, Chief Justice Lamer commented on this pattern. He predicted that once the general outline of the legal rights sections had been established, the courts would begin to see more cases dealing with equality rights, freedom of expression and freedom of religion.⁹⁷

As counsel in the Saskatchewan Constitutional Law Branch, these arcs of development have been reflected in my own practice. When I started, the bulk of the work I did was in relation to the criminal law and the legal rights provisions of the *Charter*. However, that aspect of my practice has dropped off. The Supreme Court of Canada's pronouncements on the meaning of the legal rights provisions have largely been incorporated into the normal principles of criminal procedure. Issues such as pre-trial delay, exclusion of evidence, and disclosure are now routine, and Crowns rarely call for us on these issues.

Instead, just as Chief Justice Lamer predicted, much of our work is now on the civil side. The recent litigation with respect to *The Public Service Essential Services Act* of Saskatchewan is one of the most obvious illustrations.⁹⁸ Labour law and the *Charter* is one example of an area where the Supreme Court's jurisprudence has been in a state of flux. I would describe it as "on-again, off-again, on-again." An early decision of the Saskatchewan Court of Appeal gave a broad application to the *Charter's* guarantee of freedom of association, ruling that it included a right to strike.⁹⁹ The Supreme Court of Canada overturned that Saskatchewan decision as part of its *Labour Trilogy* of 1987, which gave a

⁹⁴ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.

⁹⁵ *Mahe v Alberta*, [1990] 1 SCR 342, 68 DLR (4th) 69.

⁹⁶ *R v Sparrow*, [1990] 1 SCR 1075, 70 DLR (4th) 385.

⁹⁷ CJ Antonio Lamer, "The Canadian Charter of Rights and Freedoms: Challenges and Prospects" (1992) 7:4 Can Speeches 27 at 33 (Thane Campbell Lecture in Law, Charlottetown, Prince Edward Island, 10 March 1992).

⁹⁸ *Saskatchewan Federation of Labour v Saskatchewan*, 2015 SCC 4, 380 DLR (4th) 577, rev'g 2013 SKCA 43, 361 DLR (4th) 132, aff'g 2012 SKQB 62, 390 Sask R 196. Ultimately, the SCC struck down *The Public Service Essential Services Act*, SS 2008, c P-42.2, under the *Charter*, *supra* note 2, s 2(d).

⁹⁹ *RVDSU, Locals 544, 496, 635, 955 v Saskatchewan*, 19 DLR (4th) 609, 39 Sask R 193 (CA).

narrow interpretation to freedom of association, as not including the right to strike.¹⁰⁰ Then the Court began gradually expanding its approach to freedom of association, leading to the *British Columbia Health Services* case in 2007, which appeared to overrule the *Labour Trilogy* to some extent.¹⁰¹ Four years later, the Court gave its decision in *Ontario (Attorney General) v Fraser*, which appeared to pull back again.¹⁰² Most recently, in January 2015, the Court overruled the *Labour Trilogy* in *Saskatchewan Federation of Labour v Saskatchewan*, holding that the right to strike is protected by freedom of association. The Court struck down the Saskatchewan *Public Service Essential Services Act*, while upholding significant amendments to *The Trade Union Act*.

Over the past 30 years, the Court has thus tried a number of approaches to the *Charter's* guarantee of freedom of association and its impact on labour law. It is not clear if the *Saskatchewan Federation of Labour* case is the final word on the issue, or simply one more way station for the Court in this area.

V. Looking Back / Looking Forward

So, looking back, how to summarize? There are obvious developments mentioned in the Introduction, including the major effect which the *Charter* has had on relationships between individuals and governments, and the developments of the rights of individuals in 30 years of court cases under the *Charter*. However, there is another way to think about the impact of the *Charter*: it has triggered the biggest law reform project in Canadian legal history. Parliament and the Legislatures have woven the principles of the *Charter* into ordinary statute law, partly in response to decisions of the courts. The *Charter* is not simply a matter for judicial decisions. Its principles now suffuse our statute law.

This process started immediately with the enactment of the *Charter*. Across Canada, the federal, provincial and territorial governments began massive reviews of their statutes, trying to catch in advance as many provisions as possible which had been made unconstitutional in light of the *Charter*.¹⁰³ Every jurisdiction but one enacted legislation to amend provisions which would likely be contrary to the *Charter*.¹⁰⁴ Many changes, such as repeal of *The*

¹⁰⁰ *RWDSU v Saskatchewan*, [1987] 1 SCR 460, 38 DLR (4th) 277; *Reference re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313, 38 DLR (4th) 161; *PSAC v Canada*, [1987] 1 SCR 424, 38 DLR (4th) 249.

¹⁰¹ *Health Services and Support – Facilities Subsector Bargaining Assn v British Columbia*, 2007 SCC 27, [2007] 2 SCR 391 at para 38.

¹⁰² *Fraser v Ontario (AG)*, 2011 SCC 20, [2011] 2 SCR 3.

¹⁰³ See e.g. Hon J Gary Lane, *Compliance of Saskatchewan Laws with the Canadian Charter of Rights and Freedoms: A Discussion Paper* (Regina: Saskatchewan Department of Justice, 1984).

¹⁰⁴ The Saskatchewan Legislature enacted *The Canadian Charter of Rights and Freedoms Consequential Amendment Act*, SS 1984-85-86, c 38, which amended or repealed over forty Acts of the Saskatchewan Legislature. Similarly, Parliament enacted the *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, RSC 1985, c 31 (1st Supp), which made extensive amendments to the federal statutes. See also *Charter*

Seduction Act of Saskatchewan, were long overdue.¹⁰⁵ Of course, the exception to this review process was Québec, which went the opposite direction and used the notwithstanding clause in section 33 to insulate all of its laws from much of the *Charter*.¹⁰⁶

Law reform has also been driven by legislative reactions to decisions of the courts, particularly from the Supreme Court of Canada. Peter Hogg and Allison Bushell have christened this trend the “*Charter* dialogue.” They argue that the legislative and judicial branches of government both have a stake in the interpretation and application of the *Charter*, and that, through the branches’ responses to each other, this dialogue “culminates in a democratic decision”.¹⁰⁷ However, others have argued that the *Charter* has had the adverse effect of reducing the involvement of elected officials in true law reform, with governments ceding that role to the courts.¹⁰⁸

This law reform trend has been obvious in criminal law. Decisions of the Supreme Court of Canada have resulted in numerous federal amendments to the *Criminal Code* 1985.¹⁰⁹ However, consistent with this dialogue thesis,

Omnibus Act, SA 1985, c 15; *Charter of Rights Amendments Act*, SBC 1985, c 68; *The Charter Compliance Statute Amendment Act*, SM 1985–86, c 50; *An Act Respecting Compliance of the Laws of the Province with the Canadian Charter of Rights and Freedoms*, 1985, SNB 1985, c 41; *An Act Respecting Compliance of the Laws of the Province with the Canadian Charter of Rights and Freedoms*, 1985(2), SNB 1985, c 42; *The Charter of Rights Amendment Act*, 1985, SN 1985, c 11; *Statute Law (Canadian Charter of Rights and Freedoms) Amendment Act*, SNWT 1985 (3d Sess), c 10; *Statute Law Amendment Act*, 1985, SNS 1985, c 7; *Equality Rights Statute Law Amendment Act*, 1986, SO 1986, c 64; *Charter of Rights (Consequential Amendments) Act*, SPEI 1987, c 6; *Canadian Charter of Rights and Freedoms Consequential Amendments Act*, 1985, SY 1985, c 9.

¹⁰⁵ The common law action for seduction was still available in Saskatchewan in 1982, allowing the father of an unmarried woman who became pregnant to sue the “seducer,” not for child support for his daughter and her child, but for the financial expense suffered by the father, for the loss of his daughter’s services around the home during her pregnancy. *The Seduction Act*, RSC 1978, c S-43 had modified the common law action to some extent. The internal review by the Department of Justice identified the concept of such an action as “offensive to section 15 of the *Charter*” and recommended that the act be repealed: Lane, *supra* note 103 at 25. *The Seduction Act* was repealed by *The Children’s Law Act*, SS 1990-91, c C-8.1, s 61 [*Children’s Law Act*], which also abolished the common law action.

¹⁰⁶ Québec enacted an omnibus bill which added a “notwithstanding clause” to every Act of the Québec Legislature in force as of 17 April, 1982, in protest against patriation of the Constitution over Québec’s objections: *An Act respecting the Constitution Act, 1982*, SQ 1982, c 21, s 52. In 1989, the Supreme Court ruled that the omnibus bill was a valid exercise of the override under section 33: *Ford v Quebec (AG)*, [1988] 2 SCR 712, 69 DLR (4th) 550.

¹⁰⁷ Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35:1 Osgoode Hall LJ 75.

¹⁰⁸ For a brief outline of the literature on “dialogue” between judicial and legislative branches of government, see Hogg, *Constitutional Law of Canada*, *supra* note 75 at s 36.5, n 50.

¹⁰⁹ *Criminal Code*, RSC 1985, c C-46 [*Criminal Code* 1985]. See e.g. *R v Swain*, [1991] 1 SCR 933, 5 CR (4th) 253, where the Court struck down parts of the criminal law relating to the defence of insanity. That decision led to a complete overhaul of the law in this area, adding the new defence of “not criminally responsible by reason of a mental disorder” (*Criminal Code* 1985, *supra* note 109, Part XX.1 (“Mental Disorder”), as enacted by SC 1991, c 43, s 4). In *R v Daviault*, [1994] 3 SCR 63, 118 DLR (4th) 469, the Court held that self-induced drunkenness could be a defence for general intent offences such as sexual assault. That decision resulted in the speedy passage of s 33.1 of the *Criminal Code* 1985 (as enacted by SC 1995, c 32, s 1), placing limits on the defence of self-induced drunkenness. The Court’s decision in *R v O’Connor*, [1995] 4 SCR 411, 130 DLR (4th) 235 [*O’Connor*], dealing with disclosure of third party therapeutic records, led to enactment of provisions regulating access to such records (*Criminal Code* 1985, *supra* note 109, ss 278.1–278.91, as

Parliament's response to many of the Court's decisions has not always been a blanket acceptance of the position taken by the Court, but has instead resulted in new provisions which respect the constitutional rulings of the Court while implementing Parliament's intended policy. In turn, the Supreme Court has in some cases upheld new legislation passed by Parliament in response to the Court's earlier rulings, even though the new legislation did not always follow the Supreme Court's approach to the issues in question in the previous cases.¹¹⁰

The *Charter* has also had major influences in other areas of law, notably family law. For instance, in Saskatchewan, there were once two provincial statutes dealing with the rights of children: *The Infants Act*,¹¹¹ for children born within the bonds of holy matrimony, and *The Children of Unmarried Parents Act*,¹¹² for those children of "lesser" status. That invidious distinction did not last long, once section 15 of the *Charter* came into force. The court decisions knocking down parts of the *Children of Unmarried Parents Act*¹¹³ helped spur a general reconsideration of the law governing children.¹¹⁴

Similarly, cases challenging the different rights of married couples compared to common law couples have triggered general reforms to the law

enacted by SC 1997, c 30, s 1). In *R v Feeney*, [1997] 2 SCR 13, 146 DLR (4th) 609, the Court held that an arrest warrant was needed to arrest an individual in a dwelling house, a legislative gap which Parliament promptly filled (*Criminal Code* 1985, *supra* note 109, ss 529.1-529.4, enacted by SC 1997, c 39, s 2).

¹¹⁰ See e.g. *R v Mills*, [1999] 3 SCR 668, 180 DLR (4th) 1, where the Court upheld ss 278.1-278.91 of the *Criminal Code* 1985, which Parliament had enacted in response to *O'Connor*, *supra* note 109. In *Canada (AG) v JTI-Macdonald Corp*, 2007 SCC 30, [2007] 2 SCR 61 [*JTI-Macdonald*], the Court upheld the *Tobacco Act*, SC 1997, c 13. Parliament had enacted that Act in response to the Court's decision in *RJR-MacDonald Inc v Canada (AG)*, [1995] 3 SCR 199, 127 DLR (4th) 1, which struck down the previous federal legislation, the *Tobacco Products Control Act*, SC 1988, c 20, on the basis that it infringed freedom of expression under s 2(b) of the *Charter*, and could not be justified under s 1. For a discussion of the Court's decision in *JTI-Macdonald*, see Thomson Irvine, "Changing Course or Trimming Sails? The Supreme Court Reconsiders" in Adam M Dodek & David A Wright, eds, *Public Law at the McLachlin Court: The First Decade* (Toronto: Irwin Law, 2011) 9 at 12-15.

¹¹¹ *The Infants Act*, RSS 1978, c I-9 [*Infants Act*].

¹¹² *The Children of Unmarried Parents Act*, RSS 1978, c C-8 [*Children of Unmarried Parents Act*].

¹¹³ *Friesen v Gregory* (1986), 55 Sask R 245, 1986 CanLII 3053 (QB), finding that s 3 of the *Children of Unmarried Parents Act*, *supra* note 112 discriminated against men by only allowing women to apply for support, breaching s 15; infringement upheld under s 1 of the *Charter*; *G(TL) v L (D)* (1988), 50 DLR (4th) 758, 66 Sask R 211 (CA), striking down s 34 which required corroboration of evidence of single woman as to paternity; *W(DS) v H(R)* (1988), 55 DLR (4th) 720, 71 Sask R 66 (CA), striking down s 9 (one year limitation period for filiation application); *P(CE) v V(G)* (1988), 101 DLR (4th) 726, 108 Sask R 183 (QB), striking down s 36 of the Act which prohibited a support application if the father was not in default of existing payments; *Christante v Schmitz* (1990), 83 Sask R 60, [1990] 4 WWR 744 (QB), ruling that the mother of an illegitimate child could apply for maintenance under the *Infants Act*, *supra* note 111, which provided better procedural rights than did the *Children of Unmarried Parents Act*, *supra* note 112; *G(RR) v P(DE)* (1991), 95 Sask R 224, 28 ACWS (3d) 472 (QB), refusing to apply the limitation period in the Act on filiation proceedings in the case of a child born before the *Charter* came into force.

¹¹⁴ In 1990, the Saskatchewan Legislature repealed the *Infants Act*, *supra* note 111, and the *Children of Unmarried Parents Act*, *supra* note 112, replacing them with the *Children's Law Act*, *supra* note 105, and the *Family Maintenance Act*, SS 1990-91, c F-6.1, which removed all distinctions based on the marital status of the parents. For a general review of this issue, see Susan B Boyd, "The Impact of the *Charter of Rights and Freedoms* on Canadian Family Law" (2000) 17:1 Can J Fam L 293.

governing couples, whether married or unmarried.¹¹⁵ Saskatchewan has gone the farthest down that route of any province, giving unmarried couples the same rights as married couples in all aspects of provincial law.¹¹⁶

Cases dealing with sexual orientation, under both human rights statutes and the *Charter*, have had a remarkable impact on the law and on social attitudes. The cases dealing with same-sex marriage, which ultimately led to the federal *Civil Marriage Act*, are the best known illustration of those changes.¹¹⁷ Other, less well-known changes relating to pension equality,¹¹⁸ family law matters,¹¹⁹ and other issues have led to same-sex couples being treated in exactly the same way under Saskatchewan law as opposite-sex couples, regardless of marital status. Again, Saskatchewan has been a leader in this regard, with the 2001 amendments placing same-sex couples in a position of complete equality with opposite-sex couples four years before the federal *Civil Marriage Act* was enacted.¹²⁰ *The Civil Marriage Act* legalized same-sex marriage federally; but the 2001 Saskatchewan legislation had already established equality for same-sex couples in all legal matters under provincial jurisdiction.¹²¹

VI. The *Charter* Internationally

In considering the impact of the *Charter*, one other area is important to

¹¹⁵ See e.g. *Watch v Watch* (1999), 182 Sask R 237, 67 CRR (2d) 311 (QB), which held that the exclusion of common law couples from *The Matrimonial Property Act*, 1997, SS 1997, c M-6.11 infringed s 15 of the *Charter*; *Ferguson v Armbrust*, 2001 SKCA 122, 213 Sask R 108 (CA), which held that the exclusion of common law spouses from inheritance rights under *The Intestate Succession Act*, 1996, SS 1996, c I-13.1 was discriminatory.

¹¹⁶ See *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001*, SS 2001, c 50 [*Domestic Relations Amendment*]; *The Miscellaneous Statutes (Domestic Relations) Amendment Act, 2001 (No 2)*, SS 2001, c 51 [*Domestic Relations Amendment 2*]. These two Acts amended all provincial laws which related to the rights of married couples, placing unmarried couples on a position of equality with married couples.

¹¹⁷ See e.g. *Halpern v Canada (AG)*, 65 OR (3d) 161, 225 DLR (4th) 529 (CA); *Barbeau v British Columbia*, 2003 BCCA 406, 15 BCLR (4th) 226 (CA); *Catholic Civil Rights League v Hendricks*, [2004] RJQ 851, 238 DLR (4th) 577 (CA); *Dunbar v Yukon*, 2004 YKSC 54, 122 CRR (2d) 149; *Vogel v Canada (AG)* (2004), [2005] 5 WWR 154, [2005] WDFL 630 (Man QB); *Boutilier v Nova Scotia (AG)*, [2004] NSJ No 357 (QL) (SC); *NW v Canada (AG)*, 2004 SKQB 434, 246 DLR (4th) 345; *Pottle v Canada (AG)*, [2004] NJ No 470 (QL) (SC(TD)); *Harrison v Canada (AG)*, 2005 NBQB 232, 290 NBR (2d) 70; *Reference Re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698.

¹¹⁸ See e.g. *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609 [*Egan*], recognizing sexual orientation as a protected personal characteristic under s 15 of the *Charter*, but upholding the exclusion of same-sex couples from the *Old Age Security Act*, RSC 1985, c O9, by a narrow 4-1-4 decision, a result subsequently altered by legislative amendment (*Modernization of Benefits and Obligations Act*, SC 2000, c 12, s 192). Compare *Egan* to the later decision in *Canada (AG) v Hislop*, 2007 SCC 10, [2007] 1 SCR 429, striking down portions of amendments to the *Canada Pension Plan*, RSC 1985, c C-8, which unduly restricted rights of same-sex couples to claim survivor benefits.

¹¹⁹ See e.g. *M v H*, [1999] 2 SCR 3, 171 DLR (4th) 577, which held that the exclusion of same-sex couples from the support provisions of *Ontario's Family Law Act*, RSO 1990, c F.3 was discriminatory.

¹²⁰ *Civil Marriage Act*, SC 2005, c 33.

¹²¹ The crucial points in the *Domestic Relations Amendment*, *supra* note 116 and the *Domestic Relations Amendment 2*, *supra* note 116 were to make the definition of “spouse” gender-neutral in all provincial laws, and to make the laws apply equally to common law couples and married couples. These amendments placed same-sex couples living common law on a position of full equality with opposite-sex couples, whether married or common law.

consider, namely its influence in other countries. Increasingly, the *Charter* is the model which other nations look to when implementing constitutional rights. Canada and the *Charter* appear to have supplanted the United States and the American *Bill of Rights* as the model for the protection of constitutional rights.

For instance, drafters of the *New Zealand Bill of Rights Act 1990* borrowed directly from the Canadian precedent and wording. Section 1 of the *Charter* has its counterpart in section 5 of the New Zealand Bill, which provides that the rights guaranteed therein are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹²² In cases involving constitutional rights, the courts in New Zealand now cite the courts of Canada more than the courts of any other country.¹²³ South Africa provides another example: when South Africans were developing their post-apartheid Constitution, they borrowed heavily from the *Charter*. The South African courts now frequently cite decisions of the Supreme Court of Canada.¹²⁴

A decade ago, Aharon Barak, then President of the Supreme Court of Israel, wrote an article in the *Harvard Law Review* which touched on this issue. Justice Barak commented, with regret, that in his opinion, the Supreme Court of the United States was “losing the central role it once had among courts in modern democracies.”¹²⁵ By contrast, in Barak’s view, “the Supreme Court of Canada is particularly noteworthy for its frequent and fruitful use of comparative law”, with the result that “Canadian law serves as a source of inspiration for many countries around the world.”¹²⁶

More recently, in January 2012, Justice Ruth Bader Ginsburg of the United States Supreme Court was interviewed on Egyptian television, discussing how Egypt and Tunisia should move forward to implement the promise of the 2011 Arab Spring. She responded, “*I would not look to the US Constitution, if I were drafting a constitution in the year 2012.*”¹²⁷ Instead, she suggested Egypt consider Canada’s *Charter* as a model, as well as South Africa’s Constitution and the *European Convention on Human Rights*.¹²⁸

Think of that: instead of pointing to the United States *Bill of Rights*, an Associate Justice of the United States Supreme Court pointed instead to other

¹²² *New Zealand Bill of Rights Act 1990* (NZ), 1990, No 109, s 5.

¹²³ James Allan, Grant Huscroft & Nessa Lynch, “The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?” (2007) 11:3 *Otago L Rev* 433 at 437, 455.

¹²⁴ Hon Claire L’Heureux-Dubé, “The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court” (1998) 34:1 *Tulsa LJ* 15 at 24.

¹²⁵ Aharon Barak, “A Judge on Judging: The Role of a Supreme Court in a Democracy” (2002) 116 *Harv L Rev* 19 at 27.

¹²⁶ *Ibid* at 114.

¹²⁷ “US Supreme Court Justice Ruth Bader Ginsburg to Egyptians: Look to the Constitutions of South Africa or Canada, Not to the US Constitution”, *The Middle East Media Research Institute* (30 January 2012, Clip No. 3295) online: MEMRI < www.memritv.org/clip_transcript/en/3295.htm > [emphasis added]

¹²⁸ *Ibid*.

countries' constitutions as better models for developing democracies.

These trends have been confirmed by an empirical study by two American academics, Professors Law and Versteeg, which illustrates that the *Charter*, not the American *Bill of Rights*, is increasingly the model followed by countries which are developing new and democratic constitutions.¹²⁹ They have found that the trend is particularly marked in other Commonwealth countries which share the British tradition of unwritten constitutional protections: "No sooner did Canada break away from the rest of the common law pack, however, than the pack followed its lead."¹³⁰ They refer to Canada as a potential "constitutional superpower", supplanting "the United States as a leading global exporter of constitutional law".¹³¹

VII. Retrospective Comments from Roy Romanow and John Whyte

Two individuals in Saskatchewan who played major roles in the Patriation Debate and the development of the *Charter* were kind enough to have provided their perspectives on the *Charter's* development: Roy Romanow, the Attorney General for Saskatchewan at the time,¹³² and John Whyte, the Director of the Constitutional Law Branch from 1979 to 1982.¹³³ I asked both of them their thoughts on the *Charter*, where it has been and where it is going. I am indebted to both for sharing their time and opinions.

Mr. Romanow began with a reminder that it was not just the *Charter* that happened on April 17th, 1982. Equally or perhaps of even more importance, was patriation of the Constitution, and he remains concerned that that not be forgotten. Patriation was an act of nation-building, completing the work begun by the Fathers of Confederation in 1867 and elaborated by subsequent major constitutional developments, such as the *Balfour Declaration* of 1926¹³⁴ and the *Statute of Westminster, 1931*.¹³⁵ Patriation was a major achievement in itself, before one even begins to consider the actual content of the *Charter* and

¹²⁹ David S Law & Mila Versteeg, "The Declining Influence of the United States Constitution" (2012) 87:3 NYUL Rev 762. See also Adam Liptak, "'We the People' Loses Appeal with People Around the World", *The New York Times* (6 February 2012), online: <www.nytimes.com/2012/02/07/us/we-the-people-loses-appeal-with-people-around-the-world.html> .

¹³⁰ Law & Versteeg, *supra* note 129 at 818.

¹³¹ *Ibid* at 809-11.

¹³² Interview of Roy Romanow, QC (26 April 2012) [Romanow Interview].

¹³³ E-mail from John Whyte, QC (13 April 2012). See also John D Whyte, "Canadian Charter of Rights and Freedoms at 30", *Toronto Star* (16 April 2012) online: <www.thestar.com/opinion/editorialopinion/2012/04/16/canadian_charter_of_rights_and_freedoms_at_30.html> .

¹³⁴ *Report of the Imperial Conference, 1926*, Canadian Sessional Papers, 1926-27, No 10, at 15; reproduced in Robert MacGregor Dawson, *Constitutional Issues in Canada 1900-1931* (London: Oxford University Press, 1933) at 91-92.

¹³⁵ *Statute of Westminster, 1931* (UK), 22 & 23 Geo V, c 4; reprinted in RSC 1985, App II, No 27.

the rest of the patriation package.

The importance of Mr. Romanow's comment on this point was brought home by an article in the *Toronto Star*, which revealed that recently released British Cabinet documents from 1982 show that the Thatcher government in the United Kingdom was not initially convinced that it should enact any patriation package proposed by the Government of Canada, in light of provincial opposition. One proposal considered by the British government was not to enact anything; another option was simply to enact the amending formula, but not the *Charter*.¹³⁶ The mere possibility that a foreign government could decide whether our Constitution should have been amended at all, and to what extent, shows how important the act of patriation was. For better or worse, as of April 17th, 1982, we Canadians are the masters of our fate.

Mr. Romanow also commented that the two sections he had thought would have the most influence, in terms of changes, were the equality provision (section 15 of the *Charter*), and the guarantee of Aboriginal and Treaty rights (section 35 of the *Constitution Act, 1982*). He was not surprised that that has, in fact, been the case. In his view, rights are an ongoing evolutionary debate in the public sphere. That debate will be influenced by changing societal views, as illustrated by the same-sex marriage cases and the re-examination of Canada's prostitution laws.¹³⁷ The *Charter* has resulted in a greater emphasis on process and individual rights, which was anticipated, but he is surprised at the extent of the favourable effects.

When asked if there have been developments which he did not anticipate, he replied that the biggest was the extent of the development of Aboriginal rights under section 35. He said that there was a general understanding in 1982 that Aboriginal rights would be an important area, but he did not anticipate so much development there. He has also been surprised that the notwithstanding clause in section 33 has not been used more frequently. Another unexpected development was a political one: the attempts in the Meech Lake and Charlottetown processes to develop the patriation package further. Overall, however, he thinks that the *Charter* has developed in the way he thought it would, creating fundamental constitutional guarantees and a

¹³⁶ Jim Bronskill, "Thatcher Cabinet looked at rejecting Canadian Charter of Rights Plan", *The Toronto Star* (16 April 2012), online: <www.thestar.com/news/canada/2012/04/16/thatcher_cabinet_looked_at_rejecting_canadian_charter_of_rights_plan.html>. For a detailed analysis of the manoeuvrings of the federal government and the provinces in London during the Patriation Debate, see Frédéric Bastien, *La bataille de Londres : dessous, secrets et coulisses du rapatriement constitutionnel* (Montréal: Boréal, 2013); Romanow, Whyte & Leeson, *supra* note 29, ch 5 at 134ff.

¹³⁷ The Romanow Interview was on 26 April 2012, exactly one month after the Ontario Court of Appeal gave its decision in *Canada (AG) v Bedford*, 2012 ONCA 186, 109 OR (3d) 1, largely upholding the solicitation provisions. Note that the dissent in that decision was written by MacPherson JA, formerly part of the patriation team of the Constitutional Law Branch of Saskatchewan. MacPherson JA would have found that the communication provision violated s 7 of the *Charter*. Since then, the Supreme Court of Canada has unanimously held the provisions to be unconstitutional, reaching the same conclusion as MacPherson JA on the communication provision: *Canada (AG) v Bedford*, 2013 SCC 72, [2013] 3 SCR 1101.

balance between individuals and state empowerment.

Mr. Romanow's biggest concern remains that section 7 will be given a much broader scope in the future than was intended, leading courts to overrule policy decisions of elected governments. He stated that section 7 caught the greatest attention and debate within governments at the time. In his view, section 7 should be left to procedural matters, not substantive policy matters, and should not be used to challenge the democratic process and political debates.

Even so, when I asked Mr. Romanow if he would change anything, he said, "No." The *Charter* was the result of a very complex project, the product of political principles and political compromise. In assessing the *Charter* and the patriation package, one must keep in mind the context of the larger political issues at that time, which help explain how some of the *Charter's* sections came to be. He thinks it a miracle that the political actors kept it together. Everyone had things that they would have done differently if acting alone, but everyone had to accept the end result. There was no major doubt about the accomplishment. He is satisfied, with no regrets overall.¹³⁸

John Whyte's comments differ in that his biggest disappointment with the *Charter* is that he thinks the courts have failed to develop coherent doctrine, particularly in the principles of fundamental justice in section 7 and equality rights in section 15. In his view, the Supreme Court of Canada has been inconsistent in approaching these issues, lurching from one analytic mode to another, from restrictive views to more expansive readings.

On a related issue, he is not satisfied with the way section 1 has developed. In his view, its primary purpose was to guarantee rights, but it has become a way for majoritarian principles to limit rights. Again, he thinks that the Court has not done a good job in developing a coherent doctrinal approach to section 1. He believes that the *Oakes* test is rigorous in theory, but has been developed in too subjective a manner, leading to a lack of clarity. If he had the chance for a "do-over", this is one area he would look at, to find another way to process contextually required limits on rights. In his view, the internal limitations in sections 7 and 15 have been fruitful, reducing the relevance of section 1 with respect to those provisions.

In spite of his concerns about inconsistent doctrinal analysis of sections 7 and 15, Mr. Whyte indicated that he was happy with the overall development of those sections, which he characterised as having "expansive and unruly lives of their own," resistant to attempts to tame them. He is pleased that the potential reach of sections 7 and 15, although sometimes curtailed, at other times seems to avoid limitations and to give rise to general, coherent ideas of fundamental justice and equal protection. Interestingly, in contrast to

¹³⁸ Romanow Interview, *supra* note 132.

Mr. Romanow, he thinks that, if anything, the courts have not used section 7 broadly enough. He is particularly concerned that courts have not properly developed the scope of section 7 of the *Charter*. More generally, what he most likes is that the *Charter* has changed our “constitutional sensibility,” leading to much greater discussions of the overall structure of our Constitution, sometimes termed the “unwritten” principles, but which are really attempts to draw general statements of principle from the various detailed provisions of the Constitution.¹³⁹ He sees this development as a clear sign of national political maturity.

VIII. Closing

Lawyers who have practiced in the past 30 years are the luckiest in Canadian history, largely because of the *Charter*. In terms of a professional challenge, we were there at the creation and have been on the frontlines for the past 30 years, implementing the promise of the *Charter*. No other generation has had a similar constitutional opportunity thrust on them, not even the lawyers of 1867. The *Charter's* range of impact has crossed all boundaries in law, and our job in implementing it, as legislative drafters and as counsel before the courts, has made us chief engineers of Canadian constitutional development and law reform, entrenching human rights into our national psyche.

¹³⁹ Note the similarity between Mr. Whyte's analysis and John Diefenbaker's statement in 1952 that an entrenched Bill of Rights “would make Parliament freedom-conscious.” Diefenbaker, *Years of Achievement*, *supra* note 16 at 32.