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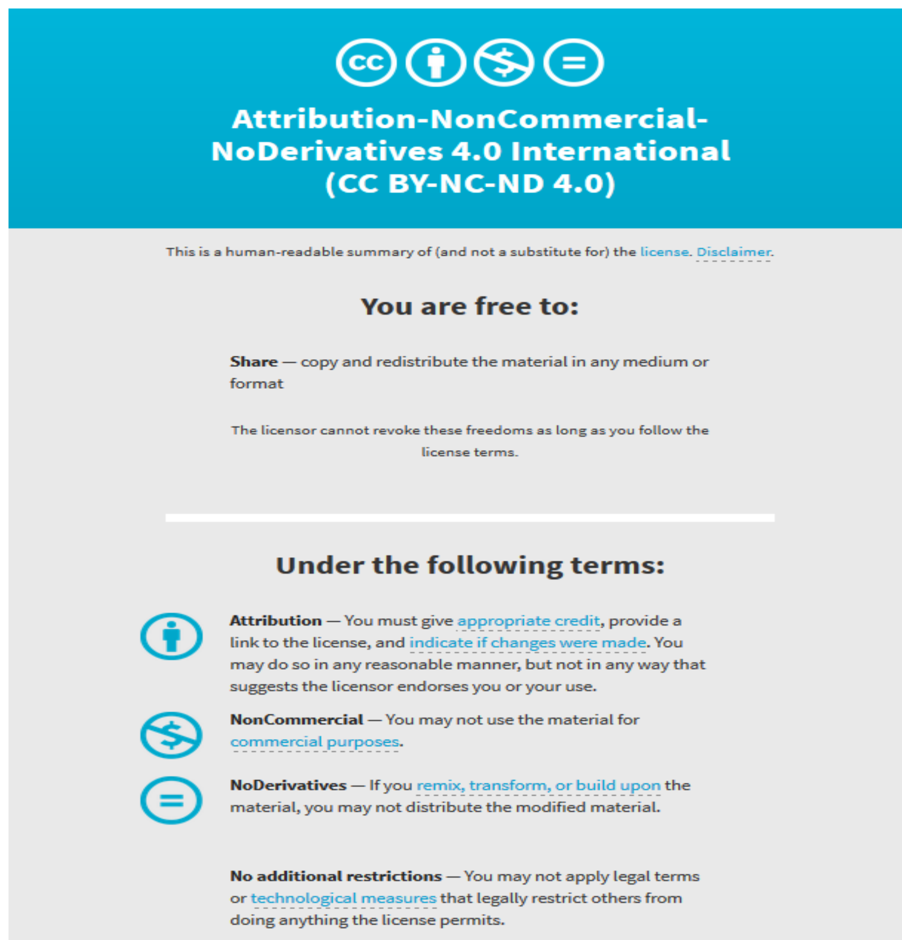

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Building National Identity through the Constitution: The Canadian *Charter* Experience

Lorne Neudorf[1]

> Writers and poets have always searched for the Canadian identity … But what is Canada itself? With the charter in place, we can now say that Canada is a society where all people are equal and where they share some fundamental values based upon freedom. The search for this Canadian identity … has led me to insist on the charter.
>
> — Pierre Elliot Trudeau, *Memoirs*

This book brings together leading scholars to consider a series of important questions on the relationship between constitutions and national identity. In their chapters, contributors discuss the possibility of future amendments to the Australian Constitution, what those amendments might look like and the effect they could have in shaping national identity. This is a creative, forward-looking conversation that grapples with fundamental questions of how Australia sees itself and what it aspires to become, both at home and in the world. This chapter adds a comparative dimension to this discussion by looking at the experience of the *Canadian Charter of Rights and Freedoms* (the '*Charter*').[2] It seeks to aid the deliberation by providing an example

1 The author thanks Olga Pandos for her research assistance. The standard disclaimer applies.
2 *Canada Act 1982* (UK) c 11, sch B pt I.

of a country that embarked on a journey to build national identity through a radical change to its Constitution. With the perspective gained from nearly 40 years since the *Charter* came into force, there are valuable lessons to be learnt from its successes, failures and unexpected outcomes.[3] This chapter will also consider whether the *Charter* has succeeded in achieving its nation-building goals and transforming Canada into the just society envisioned by its framers.

There is little doubt that the *Charter* has become strongly connected to Canadian national identity. It is recognised by Canadians as the most important symbol of their country, ranking above the flag, the national anthem and ice hockey.[4] The *Charter*'s perceived importance is hardly surprising in light of the seismic legal and political changes that it unleashed. The *Charter* reshaped the institutional balance of powers and produced many (sometimes divisive) changes to Canadian law, a process that continues to the present. It also sparked a paradigm shift in terms of thinking about law: at least half the content of the constitutional law courses taught at Canadian law schools focus on the *Charter*, while *Charter* issues make up about 50 per cent of the Supreme Court of Canada's case load.[5] Speaking from experience, it is challenging for Canadian law students to imagine that a legal issue might *not* involve the *Charter*! After almost four decades, politicians, jurists and academics continue to debate the role and meaning of the *Charter* and its rights and freedoms.

The Canadian *Charter* provides a useful comparator in considering potential changes to the Australian Constitution given a number of similarities between the two countries. Australia and Canada share a heritage of English common law, the Westminster parliamentary system, a partly written and partly unwritten constitution, and federalism. Both countries have been influenced by English and American legal traditions. Both have similar demographic profiles and advanced resource-based economies. And both countries face persistent challenges on the long road to reconciliation with

3 While the *Charter* came into force in 1982, the commencement of s 15, its equality guarantee, was delayed until 1985.

4 'Canadian Identity, 2013', *Statistics Canada* (Web Page) <www150.statcan.gc.ca/n1/pub/89-652-x/89-652-x2015005-eng.htm>. But for a competing perspective see Nik Nanos, 'Charter Values Don't Equal Canadian Values: Strong Support for Same-Sex and Property Rights' (February 2007) *Policy Options* 50, 55: 'Canadians generally support the Charter, but don't see it as essential to their Canadian values or identity' at 55.

5 Because of the *Charter*'s strong legal rights protections, many *Charter* cases arise in the context of criminal proceedings: see 'Decisions and Resources', *Supreme Court of Canada* (Web Page) <scc-csc.lexum.com/scc-csc/en/nav.do>.

their First Nations peoples. Despite these similarities, there are also some key differences between Australia and Canada. The *Charter* experience must therefore be appropriately contextualised. Accordingly, this chapter does not argue in favour of Australia adopting the *Charter* model of rights or any particular *Charter* provision.[6] Through a *Charter* case study, it instead seeks to provide a better understanding of the *process* that is involved in using constitutional change to build national identity, highlight some of the potential outcomes of that process and offer an evidence-based jumping off point for discussions about Australia's constitutional future. It also makes two interrelated claims. First, constitutions *can* contribute to building a new sense of national identity over time. Second, the way in which constitutions ultimately shape national identity *cannot* be entirely controlled or even accurately predicted from the outset.

I. Trudeau's constitutional vision: A just society

Ever since the pivotal English victory over the French on the Plains of Abraham in 1759, the question of Quebec's position in British North America, and later Canada, has loomed large in politics and law. The strained relationship between Anglophone and Francophone communities, the 'two solitudes', has presented an ongoing challenge to the development of a Canadian identity. Pierre Elliott Trudeau, a charismatic Quebec lawyer and professor, faced a severe crisis that threatened to break up the country after becoming prime minister in 1968.[7] Starting in the early 1960s, the Front de libération du Québec, a separatist paramilitary group, had carried out hundreds of attacks and bombings, mainly in the English-speaking suburbs of Montreal and at federal offices. The violence culminated with the October 1970 kidnapping of a British diplomat and the killing of the Quebec deputy premier. The wisdom of Trudeau's use of martial law, which suspended the civil liberties of millions of Canadians to give police greater powers

6 Although some scholars have held up the *Charter* as an innovative constitutional model that can serve as a template for others: see, eg, Lorraine Weinrib, 'Canada's Constitutional Revolution: From Legislative to Constitutional State' (1999) 33(1) *Israel Law Review* 13, doi.org/10.1017/S0021223700015880.

7 Pierre Trudeau served as Canada's prime minister from 1968 to 1979 and again from 1980 to 1984.

to stamp out the separatist violence, continues to be debated by scholars.[8] The October Crisis played a role in the formation of the Parti Québécois to advance Quebec sovereignty peacefully through the political process. In 1976, the Parti Québécois won a majority government in Quebec, and, in 1980, it held a referendum asking Quebecers whether they would support secession from Canada. The proposal was rejected by 59.6 per cent of voters.

During the referendum campaign, Trudeau became the chief spokesman for the 'no' side, promising that he would patriate the Canadian Constitution from the United Kingdom and enact a bill of rights if sovereignty was defeated.[9] Several prime ministers had previously attempted to bring home the Constitution but failed because of intractable federalism disputes with the provinces. Trudeau was not dissuaded. He saw the potential of constitutional patriation to move Canada beyond a society that was still largely a relic of British colonial history and that remained divided along English/French and European/Aboriginal lines:

> The Canadian nation is composed of citizens who belong to minorities of many kinds: linguistic, ethnic, racial, religious, regional and so on … Canadian history has consisted of a difficult advance toward a national unity that is still fragile and is often threatened by intolerance—the intolerance of the English speaking majority toward francophones, the intolerance of whites toward the indigenous populations and non-white immigrants, intolerance toward political and religious dissidents such as Communists and Jehovah's Witnesses.[10]

In Trudeau's view, a new constitutional arrangement could help build a more unified, modern and progressive country. According to Jean Chrétien, Trudeau's Minister of Justice and a key player in the design of the *Charter*, '[it] was time for people to take a stand'.[11] Bringing home the Constitution was intended to make Canadians masters of their own destiny and help develop

8 See, eg, William Tetley, *October Crisis 1970: An Insider's View* (McGill-Queen's University Press, 2007); Dominique Clément, 'The October Crisis of 1970: Human Rights Abuses under the *War Measures Act*' (2016) 42(2) *Journal of Canadian Studies* 160, doi.org/10.3138/jcs.42.2.160.

9 Pierre Trudeau made the promise during the referendum campaign: Jean Chrétien, 'Bringing the Constitution Home' in Thomas S Axworthy and Pierre Elliott Trudeau (eds), *Towards a Just Society: The Trudeau Years* (Viking Penguin, 1990) 282, 290. Trudeau had previously attempted but failed to patriate the Constitution with the Victoria Charter. Earlier prime ministers had made attempts since 1927, but could not obtain agreement from the provinces for a domestic constitutional amendment process, at 282–6.

10 Pierre Elliott Trudeau, 'The Values of a Just Society' in Thomas S Axworthy and Pierre Elliott Trudeau (eds), *Towards a Just Society: The Trudeau Years* (Viking Penguin, 1990) 357, 365–6 ('Just Society').

11 Chrétien (n 9) 285.

a new sense of national pride. It would also present an opportunity to move past historical divisions by writing down the shared values of Canadians.[12] Trudeau identified these values as including democracy, equality, diversity, mutual respect for difference and the multicultural heritage of Canadians.[13]

The first chapter of Canada's Constitution—the *British North America Act, 1867*[14]—had already been written. It was a foundational but sterile document establishing the mechanics of State institutions and allocating powers classed by subject matter to the federal and provincial legislatures. Trudeau referred to it as a deficient and 'inadequate' Constitution, holding 'little educative value … [and] little that inspires patriotism'.[15] By contrast, the *Charter* was designed to be both inspirational and aspirational by guaranteeing fundamental rights to Canadians in the pursuit of a more egalitarian society.[16] The *Charter* would reflect 'the very nature of Canada',[17] and would 'lead to a new national spirit among Canadians to work for the creation of a richer life together'.[18]

Although Parliament enacted the *Canadian Bill of Rights*[19] in 1960 (which remains in force), the legislation was limited in its transformative effect. Its guarantees were construed narrowly by the courts and no individual remedies were available. Instead, the statute directed courts to interpret and apply federal laws in a manner that would be consistent with the enumerated rights.[20] Trudeau's vision for the *Charter* went far beyond this model. As part of the Constitution, the *Charter* would be enforceable by the courts as Canada's supreme law over inconsistent federal or provincial law. Its constitutional entrenchment would also guarantee a lasting legacy,

12 Pierre Elliott Trudeau, *Memoirs* (McClelland & Stewart, 1993) 322, 366 ('*Memoirs*').

13 See generally, Pierre Elliott Trudeau, *A Time for Action: Toward the Renewal of the Canadian Federation* (Government of Canada, 1978) ('*A Time for Action*').

14 *British North America Act, 1867* (UK), c 3 (30 & 31 Vict), renamed the *Constitution Act, 1867* by the Schedule to the *Constitution Act, 1982* (n 2).

15 Trudeau, *A Time for Action* (n 13) 8.

16 The *Charter* includes some rights that apply exclusively to Canadians, such as voting and mobility rights, along with others that apply to everyone such as the protection against unreasonable search or seizure. At the *Charter*'s proclamation ceremony on 17 April 1982, Pierre Trudeau stated that the *Charter* 'defines the kind of country in which we wish to live': Pierre Elliott Trudeau, 'Remarks at the Proclamation Ceremony', *Library and Archives Canada* (Web Page, 17 April 1982) <www.canadahistory.com/sections/documents/leaders/Pierre_Trudeau/Patriation.html>.

17 Chrétien (n 9) 285.

18 Trudeau, *A Time for Action* (n 13) 13.

19 *Canadian Bill of Rights*, SC 1960, c 44.

20 Ibid s 2.

as it would become difficult to change under a series of new amendment formulae. In short, the *Charter* was designed to set in motion a legal, political and social transformation for the decades ahead.[21]

Underlying the *Charter* was Trudeau's vision of a just society. According to Trudeau, a just society was one that was based on individual freedom, in which each person enjoyed an equality of opportunity.[22] In order to provide and protect this freedom, individuals would hold 'basic rights that cannot be taken away by any government'.[23] The *Charter*'s purpose was therefore to 'strengthen Canadian unity through the pursuit of … freedom and equality'.[24] Trudeau's political philosophy had formed decades earlier in Montreal when he helped found *Cité Libre*, a magazine that published young intellectuals critical of Quebec politics.[25] Trudeau and the editors promoted federalism and liberal values through the magazine. By focusing on these values, the *Charter* was intended to unite Canadians and reverse a trend towards regionalism. Commenting on the state of the nation before the *Charter*, Trudeau wrote that:

> Canada, along with Switzerland, was already one of the two most decentralized countries on earth with respect to jurisdictions and public finances. However, the two countries being very different in size, Canada needed stronger bonds to hold the parts together. Furthermore, although the Swiss comprised four distinct nationalities, they had developed a common sense of belonging over many centuries and would speak without hesitation of the 'Swiss nation'. Canada, in contrast, had grown territorially as late as 1949, and its writers and politicians were still seeking a national identity. Edward Blake and Heni Bourassa, two of Canada's most brilliant parliamentarians, had both—forty years apart—deplored the absence of a pan-Canadian national feeling. Seventy years later, the provincial premiers would reject a draft preamble to the constitution because they considered the terms 'Canadian people' and 'Canadian nation' unacceptable![26]

21 See, eg, Michael Ignatieff, *The Rights Revolution* (Anasi Press, 2007).

22 Trudeau, 'Just Society' (n 10) 357–8. For a further description of the just society see Pierre Elliott Trudeau, *The Essential Trudeau* (McClelland & Stewart, 1998) 16–20.

23 Trudeau, *Memoirs* (n 12) 322.

24 Trudeau, 'Just Society' (n 10) 368.

25 Ibid 357.

26 Ibid 376.

Constitutional patriation would be harnessed by Trudeau in an attempt to pull the country together and build a new sense of national identity. The *Charter* would set out 'a system of values such as liberty, equality, and the rights of association that Canadians from coast to coast could share'.[27] It would seek to achieve a common standard of living, wealth redistribution, English and French as the official languages for federal services, equality and the protection of minorities and opportunity for all persons to prosper anywhere in the country.[28]

II. Transforming vision into legal text

It is rarely a straightforward matter to translate a constitutional vision into formal legal text. After encountering provincial opposition to constitutional change that would enlarge the role of the federal government, Trudeau bifurcated his vision to focus on a 'people's package' of patriation and the *Charter*.[29] A 'politician's package' to revisit federalism and the balance of power between the federal and provincial governments would have to wait.[30] The drafting of the *Charter* was assisted by an all-party joint committee, which heard from a broad range of individuals and groups over a period of three months.[31] In receiving submissions from more than 900 individuals and nearly 300 groups, and broadcasting its hearings on television, the committee generated substantial interest in the *Charter* and imbued its work with a sense of legitimacy.[32] It has been suggested that the entire project might have failed without this public support.[33] The committee made several changes to the proposed *Charter* text, including adding new protections for women and disabled persons. In light of a surprise 1981 Supreme Court of Canada ruling,[34] which recognised a constitutional

27 Trudeau, *Memoirs* (n 12) 322.

28 Adapted from Chrétien (n 9) 285.

29 Trudeau, *Memoirs* (n 12) 309.

30 Ibid.

31 For an overview of the proceedings, see Peter W Hogg and Annika Wang, 'The Special Joint Committee on the Constitution of Canada, 1980–81' (2017) 81 *Supreme Court Law Review* (2d) 3; Adam Dodek (ed), *The Charter Debates: The Special Joint Committee on the Constitution, 1980–81, and the Making of the Canadian Charter of Rights and Freedoms* (University of Toronto Press, 2018), doi.org/10.3138/9781442623934.

32 Hogg and Wang (n 31) 7.

33 Ibid 23, citing Deputy Minister of Justice Roger Tassé. Pierre Trudeau wrote that through the committee process, '[a] national constituency had been created in favour of the charter': Trudeau, *Memoirs* (n 12) 322.

34 *Reference Re Resolution to amend the Constitution* [1981] 1 SCR 753.

convention obliging the federal government to obtain a substantial degree of consent from the provinces for constitutional change, Trudeau met with provincial leaders, which resulted in further changes to the *Charter*.[35] The major change was the insertion of s 33, the 'notwithstanding clause', which permitted a legislature to exempt its laws from certain *Charter* rights for a period of up to five years, renewable indefinitely.[36] This 'kitchen accord' compromise, negotiated between Chrétien and two premiers, brought all of the provinces—except Quebec's formidable René Lévesque—on board. The final text of the *Charter* was then sent to the United Kingdom by a joint address of the Parliament of Canada to the Queen. While it was debated in Westminster,[37] the *Charter* was duly enacted without amendment as Schedule B of the *Canada Act 1982*,[38] which also terminated the United Kingdom's power to make further changes to the Canadian Constitution. In its place, Part V of the *Constitution Act, 1982* included new amendment formulae, which established procedural and political hurdles for making future constitutional changes, all of which would now take place in Canada.[39]

The Quebec government immediately rejected the *Constitution Act, 1982* and the *Charter*, denouncing the revised constitutional settlement as illegitimate given its lack of consent. For several years after the *Constitution Act, 1982* came into force, Quebec's legislature invoked s 33 to proclaim that all of its laws operated notwithstanding the *Charter*.[40] While Quebec's political rejection of the Constitution itself had no legal effect on its

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35 The case was brought by several provincial governments on the basis of Pierre Trudeau's announcement that he would be willing to proceed with constitutional amendment unilaterally. While the majority of the Supreme Court of Canada held that there existed a convention of substantial provincial support for constitutional change, it was not legally enforceable: ibid 774–5.

36 While Pierre Trudeau opposed the notwithstanding clause, he was persuaded to accept it 'rather than give up the idea of a charter altogether': Trudeau, 'Just Society' (n 10) 372.

37 For example, during parliamentary debate Lord Carrington observed that the *Charter* 'is still contested by Quebec and by some of the indigenous peoples of Canada': United Kingdom, *Parliamentary Debates*, House of Lords, 18 March 1982, vol 428 col 758. Members of the House of Commons encouraged their colleagues 'not to nit-pick' the legislation as it was 'the concern of the Canadian people': United Kingdom, *Parliamentary Debates*, House of Commons, 17 February 1982, vol 18, col 327 (Kevin McNamara). The *Charter* was also held up as a 'magnificent modern statement of the human rights and freedoms which the common law countries of the world seek to maintain [and a] magnificent contribution to the jurisprudence of human rights': United Kingdom, *Parliamentary Debates,* House of Lords, 18 March 1982, vol 428, col 794 (Lord Scarman).

38 *Canada Act 1982* (n 2).

39 Ibid s 52(3) provides that amendments to the Constitution of Canada must be made exclusively in accordance with the amendment formulae prescribed therein.

40 Notably, Quebec had already put in place its own bill of rights that had been in force since 1976: *Quebec Charter of Human Rights and Freedoms*, CQLR, c C-12.

application in the province,[41] the situation was far from ideal in terms of developing a new sense of Canadian national identity. For the next decade, the federal government sought to obtain Quebec's support for the *Charter* through a series of new constitutional amendments to deal with outstanding federalism issues: the politician's package. Fresh rounds of talks led to two major proposals, both of which failed. First, the 1987 Meech Lake Accord would have increased provincial powers and further protected Quebec's linguistic and cultural heritage as a 'distinct society'. The Accord failed to gain the legislative consent required by the *Constitution Act, 1982* within the prescribed time limit, despite the support of Prime Minister Brian Mulroney and all provincial premiers.[42] The process by which the Accord had been created—namely, closed door meetings between the prime minister and the provincial leaders at a wilderness resort—was viewed as secretive and undemocratic. Speaking from retirement, Trudeau stated that he opposed the Accord on the basis that it would make Canada 'totally impotent' by divesting power from the federal government and handing it to the provinces.[43] Aboriginal groups felt excluded by both the process and the substance of the proposal. Elijah Harper, a First Nations lawmaker in Manitoba, played a decisive role in the defeat of the Accord by blocking its progression in that province.[44]

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41 Quebec also claimed that it could veto the *Constitution Act, 1982*, but this argument was rejected by the unanimous Supreme Court of Canada in *Re: Objection by Quebec to a Resolution to amend the Constitution* [1982] 2 SCR 793.

42 For an overview of the Meech Lake Accord, including its political dynamics, see, eg, Patrick J Monahan, *Meech Lake: The Inside Story* (University of Toronto Press, 1991), doi.org/10.3138/9781487576691; Katherine E Swinton (ed), *Competing Constitutional Visions: The Meech Lake Accord* (Carswell, 1988); Pierre Fournier, *A Meech Lake Post-Mortem: Is Quebec Sovereignty Inevitable?* (McGill-Queen's University Press, 1991); Richard Simeon, 'Meech Lake and Shifting Conceptions of Canadian Federalism' (1988) 14(S) *Canadian Public Policy / Analyse de Politiques* 7, doi.org/10.2307/3551215; Katherine Swinton, 'Amending the Canadian Constitution: Lessons from Meech Lake' (1992) 42(2) *The University of Toronto Law Journal* 139, doi.org/10.2307/825875; Roderick A Macdonald, 'Meech Lake to the Contrary Notwithstanding (Part I)', (1991) 29 *Osgoode Hall Law Journal* 253; Louis Bruyere, 'Aboriginal Peoples and the Meech Lake Accord' (1988) 49 *Canadian Human Rights Yearbook* 49.

43 'Pierre Trudeau Comes Back to Tackle Meech Lake', *CBC Digital Archives* (Web Page) <www.cbc.ca/archives/entry/back-to-tackle-meech-lake> (site discontinued).

44 S 39(2) of the *Constitution Act, 1982* (n 2) imposes a three-year time limit for the requisite legislatures to adopt the amending resolution for the amendment to succeed. The period commenced when the National Assembly of Quebec adopted the resolution in 1987. In order for the resolution to come to the floor of the Manitoba Legislative Assembly nearly three years later, it required the unanimous consent of the members. This consent was not obtained because of the refusal of Elijah Harper. Notably, there remains some uncertainty about whether this timeline was actually applicable for an amendment package that included amendment proposals subject to different formulae: see, eg, FL Morton, 'How Not to Amend the Constitution' (1989) 12(4) *Canadian Parliamentary Review* 9.

The 1992 Charlottetown Accord was a second attempt by the federal government to secure Quebec's support for the *Constitution Act, 1982* and the *Charter.* While the Charlottetown Accord included constitutional reforms similar to Meech Lake, it also proposed to enhance the recognition of Aboriginal peoples and their right to self-government. In relation to national identity, it included a new provision that would have required the Constitution to be interpreted according to a list of Canadian values that included parliamentary democracy, federalism, Aboriginal peoples and self-government, Quebec's distinct society and culture including the *Code civil du Québec*,[45] linguistic minorities, racial and ethnic equality, diversity and multiculturalism, individual and collective rights and freedoms, and provincial equality with respect for different regional characteristics.[46] While not constitutionally required, Mulroney introduced legislation to facilitate a popular referendum on the Accord. The Accord was supported by the leaders of all major federal and provincial parties, but was again opposed by Trudeau.[47] In the end, the Accord was rejected by 55 per cent of Canadians.

The failure of the accords created a new sense of betrayal in Quebec, where political leaders reasserted the self-determination of the Quebec nation. It also increased support for Quebec independence with the Parti Québécois winning majorities in the provincial elections of 1994 and 1998 and the separatist Bloc Québécois forming the Official Opposition in Parliament after the 1993 federal election. The sovereignty movement reached its peak in a second cliffhanger Quebec referendum in 1995, in which 50.6 per cent of voters rejected the proposed separation arrangement.[48]

Transforming Trudeau's vision of a just society into legal text involved twists and turns along the way, not all of which could have been predicted from the outset. The political dynamics, including Trudeau's leadership style and his willingness to proceed unilaterally, along with the individual personalities of the provincial premiers and their interests, impacted the

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45 *Code civil du Québec*, c CCQ-1991.

46 'Charlottetown Accord: Document', *The Canadian Encyclopedia* (Web Page, 2006) Part I <www.thecanadianencyclopedia.ca/en/article/charlottetown-accord-document>.

47 Trudeau, *Memoirs* (n 12) 364.

48 For a popular account of the referendum, see Chantal Hébert and Jean Lapierre Source, *The Morning After: The 1995 Referendum and the Day That Almost Was* (Knopf, 2015). The referendum was followed by a groundbreaking unanimous Supreme Court of Canada reference case ruling on the legality of Quebec secession from Canada in *Reference re Secession of Quebec* [1998] 2 SCR 217. The principles from the judgment were later enacted as a federal statute: *Clarity Act*, SC 2000, c 26.

process and ultimately the outcome.[49] Parliamentarians on the joint committee helped shape the *Charter* text, as did the submissions received from hundreds of individuals and groups. The Supreme Court of Canada's ruling that discovered a constitutional convention of substantial provincial support for constitutional change gave the provinces a greater say in the *Charter* design part-way through the process, leading to the insertion of the notwithstanding clause. While the *Charter* succeeded in the sense that it was enacted as part of the *Constitution Act, 1982*, questions of national identity raised by the process were far from resolved. Trudeau's inability to obtain Quebec's support created a fresh national crisis with Quebec rethinking its place in Canada. The loss of this constituency nearly resulted in the breakup of Canada. Questions about Quebec's relationship with Canada dominated politics over the next decade and its reverberations are still felt.[50] The *Charter*'s birth therefore created an urgent imperative for the federal government to save the country all over again. A major new roadblock in responding to the crisis, however, was that any further constitutional change would now need to clear the *Constitution Act, 1982*'s amendment hurdles, a considerably more difficult way of getting things done as compared to simply asking Westminster. While the Constitution could now be said to truly belong to Canadians, its terms created new challenges for effecting change and were used by a single lawmaker in a province with less than 4 per cent of the country's population to block the Meech Lake Accord. Mulroney's decision to put the Charlottetown Accord to Canadians through a referendum carried its own risks, which ultimately materialised in its defeat.

III. Lessons from the Canadian *Charter* experience

The Canadian *Charter* experience provides several important lessons for creating constitutional change that is intended to reflect core values and build national identity. First, the process of proposing a constitutional amendment must be seen as legitimate. Opposition or resentment from key constituencies can limit or even prevent a successful outcome. The failure

49 Trudeau, *Memoirs* (n 12) 272. See also Trudeau, *Memoirs* (n 12) 300–2, 306, 310; Chrétien (n 9) 298–9.

50 For instance, in 2006, Parliament passed a motion recognising the Québécois as a nation within a united Canada: 'House Passes Motion Recognizing Quebecois as Nation', *CBC News* (Web Page, 27 November 2006) <www.cbc.ca/news/canada/house-passes-motion-recognizing-quebecois-as-nation-1.574359>.

to secure Quebec's support for the *Charter* is instructive of the risk and the challenging consequences that can follow. Legitimacy is enhanced, although not assured, by maintaining a high standard of transparency and consultation. The formulation of constitutional amendments should be carried out openly, such as the televised proceedings of the joint parliamentary committee that helped draft the *Charter* text.[51] This lesson was ignored by Mulroney in putting together the Meech Lake Accord behind closed doors, leading to its defeat. Because questions of national identity lie at the core of how individuals see themselves vis-a-vis the State, a legitimate consultation must include stakeholders and diverse communities to canvass a range of views. To build support, the process will need to demonstrate genuine engagement and responsiveness to different perspectives.[52] In addition, opening a constitutional dialogue on questions of national identity is bound to awaken dormant grievances. Skilful leadership will be needed to address the various challenges that arise. It should be remembered that the constitutional amendment process can be a useful opportunity to identify and remedy past injustices, while maintaining a forward-looking orientation.

Second, the drafting process must be taken seriously as a 'constitutional moment' and given the care and attention that it deserves. As Chrétien observed in his reflections:

> [C]onstitutional reform is very difficult to achieve and takes a long time. It requires compromise, negotiating ability, enormous political will and tenacity, and most of all, a substantial national consensus, which can come only after much debate and discussion.[53]

While it is sensible to first obtain a consensus for a high-level vision to guide the process, the detail resides in the text, and the proposal can be threatened by what may initially seem like a minor question of textual formulation. Translating constitutional vision into legal text is likely to be contentious. Draft text should be proposed and discussed early in the process to identify areas of disagreement and where there is already common ground. Legal text is always important, but especially so when it is constitutionally entrenched, as it will take priority over all other sources of law. Words and phrases must

51 Sarah Sorial, Chapter 13, this volume, discusses the Irish experience of citizen's assemblies.

52 Adapted from Jeremy Waldron, 'Principles of Legislation' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006) 15, 27, doi.org/10.1017/CBO9780511511035.003.

53 Chrétien (n 9) 308.

be carefully considered to ensure that the framers' intentions are expressed as clearly as possible and with the intended level of precision to create the appropriate degree of discretion for judicial interpretation.[54] The drafting process must also be sufficiently flexible for the proposal to evolve based on information that comes out of consultation. Patience will be needed. Even a small change to the text sought by one group may generate new demands for changes from the others. The goal is to make continual progress towards a consensus by revealing the interests of stakeholders, finding common ground and proposing compromises, all while staying true to the original vision.

Third, the decision-making process for moving the proposal forward will need to balance different interests and ultimately pick winners and losers. It will not be possible to accommodate all interests, as many will compete directly. Not all individuals or groups will support every part of the proposal, no matter how long it is discussed. Effective leadership will be necessary to encourage a broad consensus about the constitutional package as a whole on the understanding that nobody will get exactly what they want. The conversation should be pragmatic, reiterating to stakeholders the importance of the broader national interest and what progress can be achieved with an imperfect—but significantly improved—constitutional settlement. Yet, before moving the proposal forward, it is worth pausing to consider whether there are any final changes that should be made. Once closed, the window for constitutional change may not open again for some time. Problems that can be solved should not be avoided simply because there is agreement on a preliminary draft and a desire to move things along. Chrétien writes that:

> [T]he difficulty of obtaining constitutional change means that when made, it should be right or as right as possible. Changes—even improvements—cannot be easily made and flaws cannot be easily corrected. Flaws that are recognized while discussions are still going on should be corrected before they become entrenched in the Constitution as part of the basic law of the land, when they can be changed only by amendments to the Constitution.[55]

54 For example, the constitutional amendment procedure should be drafted with a high degree of precision to avoid any doubt over the applicable requirements to make future changes, whereas it may be desirable for a provision guaranteeing equal treatment to be drafted more simply and abstractly to allow flexibility in its application in future cases.

55 Chrétien (n 9) 308.

Such final changes will, however, require careful management to ensure that they do not risk derailing the entire proposal.

Fourth, the final text of the proposal must be shepherded through the formal constitutional amendment process. As discovered with the Meech Lake and Charlottetown Accords after the coming into force of the *Constitution Act, 1982*, the requirements of the process can themselves become a major obstacle to overcome. If a national referendum is part of the process, as it is in Australia,[56] a campaign strategy must be developed to promote the proposal and secure public support. Questions to be asked include: Who will be the public face of the campaign? Which individuals and groups are likely to support and oppose the proposal? How will the broad vision and the detail of the proposal be communicated? What are the issues that are likely to resonate with the public? How will misinformation and inaccuracies about the proposal be countered?

Fifth, thought must be given to what happens the day *after* the proposal succeeds. Again, a number of questions need to be considered: How will the transition process be managed? How are institutions likely to take up their new roles and adjust to a new balance of powers? What additional resources might they need? Will courts require new procedures for dealing with constitutional litigation? Which existing statutes and practices should be reviewed and possibly changed in light of the amendment?

It is clear from the *Charter* experience that there are many challenges to be overcome in the process of transforming constitutional vision into legal reality. The final proposal is unlikely to perfectly reflect the original vision. What emerges from the drafting process will instead be a different, and possibly more limited, version of the original. While constitutional amendment is difficult, it is only the beginning of a much longer process of transformation: changing the Constitution will set in motion a series of further changes. By way of example, an entrenched bill of rights like the *Charter* will create a new balance of powers and change institutional roles, the implications of which will only become clear over time. Litigants will begin contesting the meaning of the new constitutional provisions and seek to enforce their rights, sparking the creation of constitutional jurisprudence and its gradual accumulation into a new body of law. Through its power of interpretation, the Canadian judiciary became a part architect of the *Charter* and influenced the development of a new national identity.

56 *Constitution of the Commonwealth of Australia* s 128.

IV. A new balance of powers and institutional roles

The *Charter* recast the roles of Canadian legal and political institutions and shifted significant power over questions of public policy from the legislative branch to the judiciary. While some institutional changes were immediately obvious from the *Charter* text, others became clear only over time, resulting from a gradual institutional realignment in light of a new constitutional landscape. This process, which involved institutions working out a new balance of powers by testing their boundaries, did not always go smoothly. Institutional clashes brought contested roles and competing *Charter* interpretations into sharp relief and at times threatened to weaken democratic institutions.[57] The Supreme Court of Canada played a determinative role in resolving these contestations as the final arbiter of the new constitutional text, much of which had been framed broadly, inviting judicial interpretation. The Supreme Court, in turn, was influenced by the views of scholars, especially in relation to a newly minted dialogue theory of institutions.[58]

In terms of its content, the *Charter* proclaims that it guarantees various rights and freedoms, including those relating to conscience and religion; thought, belief and expression; peaceful assembly; association; democratic participation; mobility; life, liberty and security of the person; unreasonable search or seizure; equality; and the use of English and French.[59] The *Charter* protects individuals against arbitrary detention or imprisonment and requires reasons to be provided when a person is detained or arrested by an

57 For recent examples, see Benjamin Perrin, 'The Supreme Court *vs.* Parliament', *Macdonald-Laurier Institute* (Web Document, 2016) <www.macdonaldlaurier.ca/files/pdf/MLI_SupCourtYrReview_2016_Fweb.pdf>. In 2014, a clash between the federal government and the Supreme Court of Canada resulted in an unprecedented condemnation of the Canadian government by the International Commission of Jurists for infringing the integrity and independence of the judiciary: Mark Kennedy, 'International Panel Slams Stephen Harper for Treatment of Supreme Court Justice', *Ottawa Citizen* (Web Page, 25 July 2014) <ottawacitizen.com/news/national/international-jurists-slam-stephen-harper-for-his-treatment-of-supreme-court-justice>. For an overview of the events, see Aaron Wherry, 'Stephen Harper, Beverly McLachlin and an Historic Mess', *Macleans* (Web Page, 6 May 2014) <www.macleans.ca/politics/stephen-harper-beverley-mclachlin-and-historic-mess>; Jamie Cameron, 'Law, Politics, and Legacy Building at the McLachlin Court in 2014' (2015) 71 *Supreme Court Law Review* (2d) 1.

58 Peter McCormick, 'The Judges and the Journals: Citation of Periodical Literature by the Supreme Court of Canada, 1985–2004' (2004) 83(3) *The Canadian Bar Review* 633 (statistical overview); *Vriend v Alberta* [1998] 1 SCR 493, [137]-[139] (Iacobucci J) (endorsement of dialogue theory).

59 *Charter* (n 2) ss 2, 3, 6, 7, 8, 15, 16–22.

agent of the State.[60] When detained, an individual has the right to promptly retain and instruct counsel and to have the validity of their detention judicially reviewed.[61] In the context of criminal proceedings, the *Charter* provides a suite of protections for the benefit of the accused.[62] Notably, protections for private property rights are not included in the *Charter* text.[63]

While the *Charter* forms part of the supreme law of Canada,[64] its rights and freedoms are subject to a key overarching limitation: *Charter* guarantees can be constrained by 'reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society'.[65] In other words, *Charter* rights are limited in their application if the State seeks to justify a law that infringes a right and when a court is persuaded that the justification is reasonable. The Supreme Court of Canada has developed a body of law on what is necessary to justify a limitation of *Charter* rights in this way.[66] The balance struck between the individual and the public interest (as represented by the State) is therefore an essential part of cases where a *prima facie* infringement of the *Charter* is made out.

In terms of the scope of its application, the *Charter* extends to the federal and provincial governments, and while it does not directly bind private parties, it can extend to statutory authorities and other quasi-public bodies where there is a sufficient degree of government control.[67] To enforce *Charter* rights, a person may apply to a court for a determination and remedy.[68] As many *Charter* rights apply to both individuals and corporate entities, claims can be brought by corporations to protect their business interests from interference by legal regulation or State action—a fact that has not escaped academic attention.[69] Important *Charter* jurisprudence has

60 Ibid s 9, sub-s 10(a).
61 Ibid sub-ss 10(b)-(c).
62 Ibid ss 11–14.
63 Alexander Alvaro, 'Why Property Rights Were Excluded from the Canadian Charter of Rights and Freedoms' (1991) 24(2) *Canadian Journal of Political Science / Revue Canadienne de Science Politique* 309, doi.org/10.1017/S0008423900005102.
64 *Constitution Act, 1982* (n 2) sub-ss 52(1)-(2).
65 *Charter* (n 2) s 1.
66 *R v Oakes* [1986] 1 SCR 103 is the leading case.
67 *Douglas/Kwantlen Faculty Assn v Douglas College* [1990] 3 SCR 570; *McKinney v University of Guelph* [1990] 3 SCR 229; *Lavigne v Ontario Public Service Employees Union* [1991] 2 SCR 211. Note that Canadian common law is shaped by *Charter* values and, in this way, it has a horizontal effect on private parties: see, eg, *R v Salituro* [1991] 3 SCR 654.
68 *Charter* (n 2) sub-ss 24(1)-(2); *Constitution Act, 1982* (n 2) sub-s 52(1).
69 See, eg, Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (University of Toronto Press, 1997), doi.org/10.3138/9781442676466; Andrew Petter, *The Politics of the Charter: The Illusive Promise of Constitutional Rights* (University of Toronto Press, 2010), doi.org/10.3138/9781442698864.

therefore been forged in the context of a corporate claimant, including an early *Charter* ruling by the Supreme Court of Canada on the question of religious freedom and discrimination.[70]

Where a court has determined that a *Charter* claim has been successfully made out, broad remedial discretion is provided by the *Constitution Act, 1982*, giving courts the principal role in determining the legal effect of a *Charter* infringement.[71] *Charter* remedial jurisprudence continues to evolve: for example, monetary damages have in recent years been accepted for breaches of *Charter* rights by the police, such as in the case of an unreasonable search.[72] Courts have also crafted entirely unique remedies, including suspending a declaration of unconstitutionality for laws that infringe the *Charter*. Originally devised in a case where many Manitoba laws were unconstitutional for not being enacted in both English and French,[73] the remedy seeks to ameliorate the harsh consequences that can follow a finding of legal invalidity. It suspends the court's judgment for a certain period to give the legislature time to amend the law and cure the constitutional defect.[74] While the Manitoba case did not itself involve *Charter* rights, the remedy has since caught on and is now used in *Charter* cases. It has, however, attracted criticism on the basis that it portrays the court as initiating a 'dialogue' with the legislature, when in fact the legislature has little choice but to follow judicial directions to change the law to become *Charter* compliant within the time limit specified by the court.[75] Broad remedial discretion, including the use of a suspended declaration of invalidity, has therefore altered the pre-*Charter* institutional balance by placing courts in the position of 'suggesting' legislative amendment to Parliament in many different areas of law that implicate a *Charter* right.

Despite the significant expansion of judicial power under the *Charter*, the legislature holds a trump card in the form of a derogation. Section 33 allows federal and provincial legislatures to opt out of the application of certain *Charter* protections, ensuring legislation will have legal effect notwithstanding rights infringements. A justification or explanation is not

70 *R v Big M Drug Mart* [1985] 1 SCR 295.

71 *Charter* (n 2) sub-ss 24(1)-(2); *Constitution Act, 1982* (n 2) sub-s 52(1).

72 *Vancouver (City) v Ward* [2010] 2 SCR 28 (relating to police detention and search); *Henry v British Columbia (Attorney General)* [2015] 2 SCR 214 (relating to prosecution).

73 *Re Manitoba Language Rights* [1985] 1 SCR 721.

74 An extension of the time period was later granted.

75 Depending on the remedial specificity, there may be legislative discretion for how the law is changed to cure the defect. The amended law, however, may be challenged in court again.

required. To be effective, legislative declarations must only be passed by a legislative majority. Declarations automatically expire after five years, unless renewed. Certain core *Charter* guarantees are not subject to the exemption, including those related to citizen mobility and democratic rights.[76] As discussed earlier, this notwithstanding clause was inserted into the *Charter* as a last-minute compromise to secure provincial support. The provision has been seen by some scholars to establish a 'weak form' of constitutional review.[77] Yet it is likely that the provision increased judicial power as courts were emboldened in adjudicating *Charter* claims, secure in the knowledge that the legislature could opt out of their rulings. In reality, the provision is rarely invoked and remains controversial. Former Prime Minister Paul Martin promised to repeal the notwithstanding clause if re-elected, but was subsequently defeated in a general election.[78] Restricting *Charter* rights is likely to be politically unpopular. Recently, however, Quebec invoked the notwithstanding clause to shield a law that prohibits public employees from wearing prominent religious symbols from a *Charter* challenge.[79] The law has high levels of public support in Quebec and the government's use of the notwithstanding clause was likely seen as politically beneficial.[80] New Brunswick also introduced legislation to invoke the notwithstanding clause. The Bill required evidence of immunisation for children in public schools or a medical exemption. It was defeated on its third reading.[81]

Before the *Charter*, Canadian courts adopted a much more limited constitutional role that focused on questions relating to the division of powers between the federal and provincial legislatures.[82] While the *Canadian Bill of Rights* was enacted in 1960, it was limited in its application and remedies as earlier discussed. The *Charter* transformed the court into a powerful forum for enforcing rights by tasking judges with scrutinising legislation and State action for *Charter* compliance and invalidating what was found to be inconsistent with its rights and freedoms. In a break with the past, courts embraced this new role. Chief Justice Brian Dickson, writing in an early *Charter* case, held that judges should take a 'broad, purposive' approach

76 *Charter* (n 2) sub-s 33(1). In addition, other provisions of the *Constitution Act, 1982* (n 2), outside the *Charter*, are not subject to the notwithstanding clause.

77 See, eg, Mark Tushnet, 'The Rise of Weak-Form Judicial Review' in Tom Ginsburg and Rosalind Dixon (eds), *Comparative Constitutional Law* (Edward Elgar, 2011) 321, 325.

78 Thomas S Axworthy, 'The Notwithstanding Clause: Sword of Damocles or Paper Tiger?' (March 2007) *Policy Options* 58.

79 *Act Respecting the Laicity of the State*, L-0.3 (Q) s 34.

80 See <www.legnb.ca/en/legislation/bills/59/3/11/an-act-respecting-proof-of-immunization>.

81 *Bill 11, An Act Respecting Proof of Immunization* (NB).

82 *Constitution Act, 1867* (n 14) ss 91, 92.

in interpreting the *Charter* and see it as a living tree that could grow over time.[83] While providing flexibility, the approach adopted by the Supreme Court of Canada has not always produced interpretations of rights that would have been expected by the *Charter*'s framers.[84] This is not considered by Canadian judges to be problematic: they do not feel constrained by an originalist approach to interpreting the *Charter* and openly acknowledge constitutional evolution over time.[85] The questions are when, in what direction and to what extent the *Charter* should grow—questions that can bring judicial preferences and ideology into the mix.

In its *Charter* judgments, the Supreme Court of Canada has established jurisprudence to guide courts in the process of adjudicating *Charter* rights. The process typically involves a multi-step, structured legal test to explicitly take account of relevant interests.[86] While balancing interests through a multifactorial analysis pays attention to *Charter* values, and provides a measure of consistency and fairness across different cases and courts, there remains scope for judicial discretion.[87] Canadian judges have openly acknowledged the shift from legalism—the view that the correct answer to a legal dispute can be worked out simply by the proper application of

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83 *Hunter v Southam Inc* [1984] 2 SCR 145, 155–6, quoting Viscount Sankey in *Edwards v Attorney-General for Canada* [1930] AC 124, 136 (PC).

84 For example, the Supreme Court of Canada rejected that the *Charter* guarantee to freedom of association included a right to associate for the purpose of collective bargaining for 25 years. Only in *Health Services and Support—Facilities Subsector Bargaining Assn v British Columbia* [2007] 2 SCR 391 did it finally overrule its previous holding, observing that the 'framers of the *Charter* intended to include [collective bargaining] in the protection of freedom of association', at [40]. For other examples, see James B Kelly and Christopher P Manfredi (eds), *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (UBC Press, 2009); Jeremy Webber, 'Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms' (1993) 5 *Canterbury Law Review* 207.

85 For example, Chief Justice Brian Dickson observed in *Hunter v Southam Inc* (n 83) at 155 that the *Charter* 'must … be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers'.

86 US rights jurisprudence is frequently considered by the Supreme Court of Canada in developing these tests: see, eg, Christopher P Manfredi, 'The Use of United States Decisions by the Supreme Court of Canada under the Charter of Rights and Freedoms' (1990) 23(3) *Canadian Journal of Political Science / Revue Canadienne de Science Politique* 499, doi.org/10.1017/S0008423900012737.

87 The emphasis or weighting placed on different components of a legal test can be a matter of discretion, leading to a divided bench. In 2019, only 40 per cent of the Supreme Court of Canada's judgments were unanimous: Cristin Schmitz, 'Supreme Court of Canada Hits Record Low 40% Unanimity Rate in 2019; Many Appeals Came from Quebec', *The Lawyer's Daily* (Web Page, 20 January 2020) <www.thelawyersdaily.ca/articles/17529/supreme-court-of-canada-hits-record-low-40-unanimity-rate-in-2019-many-appeals-came-from-quebec>. For a study of judicial preferences at the Supreme Court of Canada, see CL Ostberg and Matthew E Wetstein, *Attitudinal Decision Making in the Supreme Court of Canada* (UBC Press, 2008); Benjamin Alarie and Andrew Green, 'Policy Preference Change and Appointments to the Supreme Court of Canada' (2009) 47(1) *Osgoode Hall Law Journal* 1.

precedent and the canons of construction—to judicial discretion.[88] Chief Justice Beverley McLachlin, who led the Supreme Court for nearly two decades, was particularly influential in this regard.[89] Through her speeches and published articles, McLachlin also increased the public profile of the Chief Justice as the spokesperson for the judiciary, with the goal of helping Canadians better understand the role of the courts under the *Charter*.[90]

Over time, the judicial consideration of complex social problems in *Charter* cases led to further institutional changes to the court. The transformation of courts into a forum to adjudicate *Charter* rights attracted new kinds of litigants who hired lawyers to dress their claims in the clothes of *Charter* rights. Many of these litigants were groups or individuals who had been unsuccessful (or who expected to be unsuccessful) in achieving their goals through direct government action or legislative reform. The resulting 'court party' has been criticised by both conservative and liberal scholars for privileging those with resources to pursue litigation and for creating opportunities for social engineering by judges who altered compromises among competing interests that had been struck by elected representatives.[91] In evaluating *Charter* claims, the Supreme Court of Canada began taking in more social science evidence and embracing individuals and groups as intervenors, to better inform itself of the relevant economic and social contexts.[92] In addition, greater public awareness of the Court's *Charter* judgments engaging with potent political issues such as criminal sentencing,

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88 See, eg, Chief Justice Beverley McLachlin, 'Judging in a Democratic State', *Supreme Court of Canada* (Web Page, 3 June 2004) <www.scc-csc.ca/judges-juges/spe-dis/bm-2004-06-03-eng.aspx>. The downside of this flexibility is lack of legal certainty and perhaps less rigorous *legal* analysis.

89 Ibid.

90 'Speeches', *Supreme Court of Canada* (Web Page) <www.scc-csc.ca/judges-juges/spe-dis/index-eng.aspx>.

91 See, eg, FL Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (University of Toronto Press, 2000) for a conservative critique. On the left, scholars tended to see judges as reflecting conservative values, thereby protecting private interests over the community and those who were disadvantaged: Petter (n 69). Notably, the federal government funds some *Charter* litigation (against itself) through the Court Challenges Program, cancelled during Stephen Harper's tenure as prime minister and reinstated by current Prime Minister Justin Trudeau: 'Court Challenges Program', *Government of Canada* (Web Page) <www.canada.ca/en/canadian-heritage/services/funding/court-challenges-program.html>.

92 Geoffrey D Callaghan, 'Intervenors at the Supreme Court of Canada' (2020) 43(1) *Dalhousie Law Journal* 1; Benjamin RD Alarie and Andrew J Green, 'Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance' (2010) 48(3) *Osgoode Hall Law Journal* 381; Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigation* (State University of New York Press, 2002). See also Lorne Neudorf, 'Intervention at the UK Supreme Court' (2013) 2(1) *Cambridge Journal of International and Comparative Law* 16, for a comparative perspective. The judiciary's embrace of intervenors may also assuage concerns about the limited policy experience of judges as compared to legislators, the court as an unsuitable forum for policy debates and even the lack of the judiciary's democratic credentials through a broad group of participants.

abortion, public health care, same-sex marriage, gun regulation, language rights, campaign finance and the corporal punishment of children led the Court to be seen more like a political institution.[93]

To counter perceptions of political interference, and to enhance its legitimacy in carrying out its *Charter* work, the Supreme Court of Canada sought to strengthen its impartiality and independence. While it acknowledged judicial discretion under the *Charter*, the Supreme Court made clear in the *Provincial Judges Reference* case[94] that it decided cases independent of government preferences, a major fairness concern as the State appeared in the Court as a litigant in *Charter* cases. Any suggestion of improper influence from the other branches, or even the *potential* for such influence, would be taken seriously. While judges are rightly concerned about their independence to preserve their status as a third party to a legal dispute, the Supreme Court arguably went beyond what was necessary to promote judicial legitimacy. In 1997, for example, it 'discovered' an unwritten constitutional principle of judicial independence that applied to all judges, not just the superior courts.[95] The majority found that the principle was grounded in the preamble to the *Constitution Act, 1867*.[96] The case was brought by provincial judges who challenged an across-the-board reduction of their salaries as part of public sector cost-cutting measures by provincial governments facing budget crises. The Supreme Court held that the reductions in judicial compensation were inconsistent with judicial independence and that governments would be required to establish independent compensation commissions to recommend judicial salaries to avoid direct negotiations between the judiciary and the executive.[97] Since 1997, litigation has continued in relation to this unwritten principle, including efforts by judicial officers to use it to challenge the renaming of a court building, overturn a decision to disallow a travel claim for a Swiss conference and to demand that the State pay legal fees to defend against allegations of misconduct.[98] In addition, the doctrine has been used by senior judges to rebuff civil litigation reforms to modernise

93 See, eg, FL Morton, 'The Political Impact of the Canadian Charter of Rights and Freedoms' (1987) 20(1) *Canadian Journal of Political Science* 31, doi.org/10.1017/S0008423900048939; Donald A Songer, *The Transformation of the Supreme Court of Canada: An Empirical Examination* (University of Toronto Press, 2008), doi.org/10.3138/9781442689473.

94 *Ref re Remuneration of Judges of the Prov Court of PEI; Ref re Independence and Impartiality of Judges of the Prov Court of PEI* [1997] 3 SCR 3 ('*Provincial Judges Reference*').

95 Ibid.

96 Originally referred to as the *British North America Act, 1867* (n 14).

97 *Provincial Judges Reference* (n 94) [113].

98 For an overview, see Lorne Neudorf, 'Judicial Independence: The Judge as a Third Party to the Dispute' (2015) *Oxford University Comparative Law Forum* 2, 5.2.3.

the litigation process.[99] One of the major challenges of this doctrine is that it involves judges deciding how far their own independence extends to shield them from what they see as improper interference—a context that strains perceptions of judicial impartiality. Unfortunately, these developments can have the effect of trivialising judicial independence as they are premised on an unrealistic view of Canadian judges as being willing to compromise their integrity in the absence of such protections.[100]

Growing judicial power and independence under the *Charter* also prompted closer judicial scrutiny: Who were the unelected judges interpreting and applying these new constitutional rights over other sources of law? What are their policy preferences and ideological commitments? Legal scholarship flourished to try to answer these questions. Researchers designed entirely new qualitative and quantitative studies on judicial appointments and preferences, influenced by the well-developed scholarship in this area in the US.[101] While less intense than the Senate confirmation process in the US, the appointment process for the Supreme Court of Canada has been reformed in recent years to partly depoliticise judicial selection and provide more transparency. The process now involves open applications, a shortlist of candidates compiled by a non-partisan committee and the prime minister's selection of the appointee from the shortlist.[102] A public parliamentary committee scrutiny process for potential appointees was initiated by former Prime Minister Stephen Harper and later abandoned.[103]

In the years following the enactment of the *Charter*, Canadian courts have emerged as a forum for drawing attention to important social challenges and the plight of minorities and disadvantaged persons. While *Charter*

99 Ibid.

100 Peter W Hogg, 'The Bad Idea of Unwritten Constitutional Principles: Protecting Judicial Salaries' in Adam Dodek and Lorne Sossin (eds), *Judicial Independence in Context* (Irwin Law, 2010) 25; Jamie Cameron, 'The Written Word and the Constitution's Vital Unstated Assumptions' in Pierre Thibault, Benoit Pelletier and Louis Perret (eds), *Essays in Honour of Gerald A Beaudoin* (Les Editions Yvon Blais, 2002) 89.

101 See, eg, Emmett Macfarlane, *Governing from the Bench: The Supreme Court of Canada and the Judicial Role* (UBC Press, 2013) (qualitative); Benjamin Alarie and Andrew Green, 'Should They All Just Get Along? Judicial Ideology, Collegiality, and Appointments to the Supreme Court of Canada' (2008) 58 *University of New Brunswick Law Journal* 73, doi.org/10.2139/ssrn.1091479 (quantitative). For a review of socio-legal scholarship noting US influence, see Harry W Arthurs and Annie Bunting, 'Socio-Legal Scholarship in Canada: A Review of the Field' (2014) 41(4) *Journal of Law and Society* 487, doi.org/10.1111/j.1467-6478.2014.00682.x.

102 'Supreme Court of Canada Appointment Process 2019, Appointment of the Honourable Nicholas Kasirer', *Government of Canada* (Web Page) <www.fja-cmf.gc.ca/scc-csc/2019/index-eng.html>.

103 See Lorne Neudorf, 'Independence and the Public Process: Evolution or Erosion?' (2007) 70(1) *Saskatchewan Law Review* 53.

rulings have at times been controversial, courts have also led public opinion and the Supreme Court of Canada has become an internationally respected institution.[104] But this growth in judicial power came largely at the expense of the legislature's role in formulating public policy.[105] By contrast, the executive branch has consolidated power in recent decades through the government's effective control of the legislature, often with majority governments elected through a first-past-the-post system of voluntary voting (although, as of writing, there is presently a minority federal government). The Senate remains an appointed chamber and, as such, it does not usually block government Bills. All provincial legislatures are unicameral, allowing majority governments to quickly pass any legislation they wish. In addition, tremendous lawmaking power has been delegated by legislatures to the executive branch, a trend that appears to be accelerating.[106] Pinpointing the *Charter*'s precise role in relation to this increase of executive power is elusive, but the *Charter*'s weakening effect on the legislature as a forum for formulating public policy has undoubtedly left it vulnerable to greater executive control and influence.

V. Did the *Charter* create a just society?

Nearly four decades after the *Charter* came into force, it is worth considering whether it has been able to deliver on its promise of creating a just society. The *Charter* has certainly contributed to the development of Canada as a modern and progressive country. Canada enjoys a reputation as an international leader in human rights, a status that is partly attributable to the *Charter*'s equality rights, which prompted important advances in Canadian law. In 2003, for instance, the Court of Appeal for Ontario held that the *Charter* required officials to grant marriage licenses to same-sex couples.[107] In light of this ruling, and subsequent rulings of other appeal

104 See, eg, Aharon Barak, 'A Judge on Judging: The Role of a Supreme Court in a Democracy' (2002) 116(1) *Harvard Law Review* 16, doi.org/10.2307/1342624, writing that the jurisprudence of the Supreme Court of Canada 'serves as a source of inspiration for many countries around the world', at 114.

105 See, eg, Lorne Neudorf, 'The Supreme Court and Parliament: Evolving Roles and Relationships' (2017) 78 *Supreme Court Law Review* (2d) 3, doi.org/10.2139/ssrn.3416995.

106 For my work on this topic, see Lorne Neudorf, 'Strengthening the Parliamentary Scrutiny of Delegated Legislation: Lessons from Australia' (2019) 42(4) *Canadian Parliamentary Review* 25; Lorne Neudorf, 'Reassessing the Constitutional Foundation of Delegated Legislation in Canada' (2018) 41(2) *Dalhousie Law Journal* 519; Lorne Neudorf, 'Rule by Regulation: Revitalizing Parliament's Supervisory Role in the Making of Subordinate Legislation' (2016) 39(1) *Canadian Parliamentary Review* 29, doi.org/10.2139/ssrn.3417001.

107 *Halpern v Canada (Attorney General)* (2003) 65 OR (3d) 161 (CA).

courts,[108] Parliament enacted the *Civil Marriage Act*,[109] extending same-sex marriage nationwide, one of the first countries in the world to do so. The *Charter* has expanded individual freedoms, including over one's body, such as when the Supreme Court of Canada struck down legislation restricting access to abortion services.[110] *Charter* protections have caused courts to invalidate or read down restrictions on religion and expression.[111] Individual freedom has also been enhanced by the *Charter*'s legal protections. For example, courts have excluded evidence in cases where it was obtained in an unreasonable search.[112] Police officers are trained to take into account *Charter* rights and their investigative techniques have adapted to better protect rights, thereby having a potentially powerful preventative effect on rights infringements.[113] Opportunities for citizen mobility have increased as courts have struck down interprovincial barriers, including those relating to the practice of a profession.[114] In terms of the use of English and French, the *Charter* facilitated important changes to the federal government that allow Canadians to communicate with and access services in the official language of their choice.[115] The *Charter*'s promotion of multiculturalism resulted in the enactment of the *Canadian Multiculturalism Act*,[116] establishing policies and authorising programs to support cultural diversity. While it is not officially part of the *Charter*,[117] s 35 of the *Constitution Act, 1982* protects existing Aboriginal rights. This section has led to the judicial recognition

108 A number of provincial and territorial courts followed the lead of the Court of Appeal for Ontario and declared same-sex marriage to be a requirement of the *Charter*'s equality guarantee. In addition, the Supreme Court of Canada decided a reference case clearing the way for Parliament to legislate to change the existing common law definition of marriage, while avoiding a ruling directly on the *Charter* requirement in light of the pending legislation: *Reference re Same-Sex Marriage* [2004] 3 SCR 698.

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

110 *R v Morgentaler* [1988] 1 SCR 30.

111 See, eg, *Loyola High School v Quebec (Attorney General)* [2015] 1 SCR 613 (religion); *Ford v Quebec (Attorney General)* [1988] 2 SCR 712 (expression).

112 See, eg, *R v Collins* [1987] 1 SCR 265.

113 Kathryn Moore, 'Police Implementation of Supreme Court of Canada Charter Decisions: An Empirical Study' (1992) 30(3) *Osgoode Hall Law Journal* 547.

114 See, eg, *Black v Law Society of Alberta* [1989] 1 SCR 591.

115 Guaranteed by the *Charter* (n 2) s 20. For an overview of bilingualism in Canada, see Linda Cardinal, 'The Limits of Bilingualism in Canada' (2010) 10(1) *Nationalism and Ethnic Politics* 79.

116 *Canadian Multiculturalism Act*, RSC 1985, c 24 (4th Supp).

117 The *Charter* comprises Part I, ss 1-34, of the *Constitution Act, 1982* (n 2). Aboriginal rights are guaranteed in s 35. Among other things, its placement means that it is not subject to the *Charter* limitations of ss 1, 33.

of constitutionally protected native title claims.[118] Finally, the *Charter* has become a powerful symbol that has helped create a sense of national identity around its rights and freedoms.[119]

The transformative potential of the *Charter* has, however, been limited in other ways. Litigated *Charter* claims do not always succeed. Racism and discrimination remain serious problems in Canadian society.[120] While the risk of Quebec separating has diminished in recent years, regionalism continues.[121] The *Charter* has also had a significant 'judicialising effect' on rights and freedoms. Governments see the *Charter* as an obstacle to avoid in making law and policy: its enforcement is the purview of judges. The judicialising of legal rights has encouraged governments to restrict freedoms up to the point of barely avoiding a *Charter* infringement, as opposed to taking *Charter* values to heart and championing them. The *Charter*'s guarantee against unreasonable search provides a compelling illustration of the phenomenon.[122] Despite the greater potential for citizen mobility, Canada is not economically egalitarian: income inequality is growing.[123] While bilingualism has moderately increased, less than one in five Canadians can have a conversation in both English and French.[124] Major problems continue to affect Canada's Aboriginal communities, including disgraceful conditions in reserves that suffer from a lack of adequate housing and clean

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118 See, eg, *Tsilhqot'in Nation v British Columbia* [2014] 2 SCR 257.

119 'Canadian Identity, 2013' (n 4).

120 See 'Building a Foundation for Change: Canada's Anti-Racism Strategy 2019–2022', *Government of Canada* (Web Page) <www.canada.ca/en/canadian-heritage/campaigns/anti-racism-engagement/anti-racism-strategy.html>.

121 The 2019 federal election laid bare an East–West division, with the governing Liberal Party failing to win a single seat in Alberta or Saskatchewan. The election prompted a minority of Western Canadians to advocate for separation from Canada: see 'Wexit Making Waves? Hundreds Rally for Western Separation in Edmonton', *CBC News* (Web Page, 2 November 2019) <www.cbc.ca/news/canada/edmonton/wexit-western-separation-rally-edmonton-1.5346025>. The separatist Bloc Québécois also won the most seats in over a decade.

122 Despite former Chief Justice Brian Dickson's warning that the *Charter* was 'not in itself an authorization for governmental action': *Hunter v Southam Inc* (n 83) 156. In the context of unreasonable search jurisprudence, the State tends to push against lines drawn by the court by adapting investigative techniques or technologies, inviting further *Charter* challenges. See Lorne Neudorf, 'Home Invasion by Regulation: Truckers and Reasonable Expectations of Privacy under Section 8 of the Charter' (2012) 45(2) *UBC Law Review* 551.

123 'Changes in Wealth across the Income Distribution, 1999 to 2012', *Statistics Canada* (Web Page) <www150.statcan.gc.ca/n1/pub/75-006-x/2015001/article/14194-eng.htm>.

124 Although it recently reached a new high of 17.9 per cent: 'English-French Bilingualism Reaches New Heights', *Statistics Canada* (Web Page, 2 August 2017) <www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016009/98-200-x2016009-eng.cfm>.

water.[125] Aboriginal peoples make up a disproportionate number of the criminally accused and prison population.[126] Canada has also been strongly criticised by the United Nations for its failings in relation to missing and murdered Aboriginal women.[127] While the Canadian government supports immigration and refugees, Canadians themselves have mixed views: two-thirds of Canadians believe that multiculturalism allows individuals to practice customs that are incompatible with mainstream values.[128]

Where does all of this leave us? It would be unfair to expect a document like the *Charter* to transform a society entirely on its own. The answer to the question of whether the *Charter* has created the just society envisioned by Trudeau is nuanced: there have been some successes, failures and unexpected outcomes. It is clear that the *Charter* has raised important issues and pulled the country towards Trudeau's articulation of liberal values. While Trudeau's vision of a just society may not be fully realised, the *Charter* cannot be characterised as a failure. The overall trend is progress towards the vision of its framers, which is perhaps the best that a legal document can do.

VI. Conclusion

The *Charter* has played an important role in building a sense of Canadian national identity. As the most significant constitutional development since the country's founding in 1867, the *Charter* ushered in radical changes to the legal order. It reshaped the institutional landscape, altering the balance of powers and enlarging the role of the judiciary. It created a constitutional yardstick for federal and provincial legislation and State action, measuring

125 'The Housing Conditions of Aboriginal People in Canada', *Statistics Canada* (Web Page, 25 October 2017) <www12.statcan.gc.ca/census-recensement/2016/as-sa/98-200-x/2016021/98-200-x2016021-eng.cfm>; Amanda Coletta, '"Third World Conditions": Many of Canada's Indigenous People Can't Drink the Water at Home', *Washington Post* (Web Page, 15 October 2018) <www.washingtonpost.com/world/the_americas/third-world-conditions-many-of-canadas-indigenous-people-cant-drink-the-water-at-home/2018/10/14/c4f429b4-bc53-11e8-8243-f3ae9c99658a_story.html>.

126 'Aboriginal Issues', *Office of the Correctional Investigator* (Web Page) <www.oci-bec.gc.ca/cnt/priorities-priorites/aboriginals-autochtones-eng.aspx>.

127 'Canada's Failure to Effectively Address Murder and Disappearance of Aboriginal Women a "Grave Rights Violation"—UN Experts', *United Nations Human Rights, Office of the High Commissioner* (Web Page, 6 March 2015) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15656>.

128 Douglas Todd, 'Multiculturalism "Incompatible" with Canadian Norms, Say Two of Three', *Vancouver Sun* (Web Page, 31 January 2017) <vancouversun.com/news/staff-blogs/multiculturalism-incompatible-with-canadian-norms-say-two-of-three>.

them against its rights and freedoms. The *Charter* facilitated progress towards the just society that was envisioned by its founders, despite this progress remaining incomplete or even stalled in some respects.

The *Charter* experience demonstrates that constitutions *can* contribute to building national identity. They do so by planting the seeds of a country's future direction and creating a common framework for the exercise of public power. Constitutions can encourage transformational change, but they are not likely to succeed on their own. Trudeau rightly observed that '[a] country is something that is built every day out of certain basic shared values'.[129] Constitutional text might describe fundamental rights, freedoms and values, but it requires institutions and individuals to give it meaning and life. Constitutions also set in motion a series of changes that are difficult to predict. They change political and power dynamics, create new winners and losers and are shaped by individual personalities as they become sewn into the legal, political and social fabric. Institutions may clash and their roles will enlarge or diminish as a result of these contests. An entrenched bill of rights will become a public forum in which ideas are contested and adjudicated. As the constitutional text is never complete, important details will be filled in by the courts in deciding individual cases. This continuing process to give the Constitution meaning and make it relevant in light of new contexts risks altering the course from the original vision. Other foundational unwritten principles and norms like judicial independence, the separation of powers and democratic accountability will also shape the constitutional landscape as they mesh with the amended constitutional text.

The project of building national identity through a constitution is always an experiment. Creating national identity in a multicultural, pluralist society presents a particular challenge. How can a constitution ask individuals to think beyond their own identities to something bigger like a nation and what that nation should become? What core values are shared in a heterogeneous population? While the *Charter* illustrates that there can be answers to these questions, and that constitutions can make progress towards their national identity–building goals, constitutional change will create new problems to be solved. The picture that ultimately emerges will be influenced by factors that can be difficult to accurately predict. It will also continue to change over time. Through comparative study, the experience of other jurisdictions like Canada can provide important insights to help identify and manage these risks and improve the prospect of the Constitution delivering on its promise.

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129 Trudeau, *Memoirs* (n 12) 366.

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