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*Volume 50, Issue 3 (Spring 2013)*  
*Rights Constitutionalism and the Canadian*  
*Charter of Rights and Freedoms*  
*Guest Editors: Benjamin L. Berger & Jamie*  
*Cameron*

Article 1

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1-1-2013

## The Charter at Thirty

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Introduction

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### Citation Information

Ignatieff, Michael. "The Charter at Thirty." *Osgoode Hall Law Journal* 50.3 (2013) : i-v.

DOI: <https://doi.org/10.60082/2817-5069.1013>

<https://digitalcommons.osgoode.yorku.ca/ohlj/vol50/iss3/1>

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## The Charter at Thirty

### Keywords

Canada. Canadian Charter of Rights and Freedoms

## Preface

### The *Charter* at Thirty

MICHAEL IGNATIEFF \*

THE *CHARTER*<sup>1</sup> IS A LEGAL, moral, and political document. All three dimensions need to be kept in focus as we think about what the *Charter* means for our country on its thirtieth anniversary. It is a defining statement of legal obligation for our country, a catalogue of rights enforceable at law. It is also a definition of moral values held in common: our commitments to the dignity and inviolability of persons; to their equality as moral beings; and to their right to think, act and speak freely within the rule of law. Justice is always at once local and universal, and so the *Charter* is both a statement of Canadian values and an affirmation that these values are consistent with universal moral norms and human rights obligations. Finally, the *Charter* is a political document, a palimpsest that bears the visible marks of all the pressures that went into its making. Its very existence is a testament to the implacable will of a single political figure, Pierre Elliott Trudeau, and his determination to give Canada its own constitution and bill of rights. No one could have predicted in, say, 1968, the year he took office as Prime Minister, that by 1982 the country would have a repatriated constitution and a charter of rights. The *Charter's* story tells us that it never pays to underestimate individual political will as a force that makes law. Nor does it pay to underestimate the importance of 'mere legal documents' as the embodiment and crystallization of a demand for social change.

The document that resulted from Trudeau's efforts bears the marks, of course, of many political wills besides his. The notwithstanding clause represents the countervailing power of provincial premiers who reasserted legislative and

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1. *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.

executive supremacy over judicial review. The *Charter* also bears the imprint of broad-based social struggles. The affirmation of Aboriginal rights and women's equality are each a result of the popular grassroots political forces that define it as a product of what I have called "the rights revolution" sweeping through all advanced industrial societies from the 1960s onwards.<sup>2</sup> The silences and omissions in the document—the absence of justiciable economic, social, and property rights—also lay bare the limitations of the rights revolution. Thanks to these silences and omissions, it has proved difficult to use the *Charter* to successfully frame and advance broad-based demands for social change.

The fact that the document is political through and through does not, in the end, detract from its legitimacy as the moral and legal rules of the road for our country. Canadians who know the history of the *Charter's* making do not think the less of it for knowing that it does not contain everything they would have liked to see included or that the compromises it embodies were of a time and place now past. The *Charter's* success as a binding document tells us something interesting about democracies: how we manage to put arguments behind us, accept less than perfect compromises, and move on. Legitimacy is a matter of coming to closure, and our country, by and large, has come to closure on the *Charter*. Closure does not mean that the arguments over the *Charter's* meaning and interpretation have come to an end or ever will. Closure simply means that the document is what we accept as the framing device to define terms when we argue about conflicting rights.

The *Charter* itself will remain a recurrent subject of political debate. It needs to be remarked that some of the organized political forces in our country do not view the *Charter* through the same lens: support for it is not unanimous in the House of Commons. The Liberal Party of Canada will continue to define itself as "the party of the *Charter*" and, together with the New Democratic Party of Canada, supported the Court Challenges Program (CCP)<sup>3</sup> and its important contributions to the advancement of language and equality rights. In contrast, the Conservative Party of Canada abolished the CCP and continues to identify itself more closely with the Diefenbaker *Bill of Rights*<sup>4</sup> and with the supremacy of parliamentary sovereignty over judicial review. These disagreements are as they should be: The appropriate balance between judicial, legislative, and executive

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2. Michael Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000).

3. Established in 1994, the Court Challenges Program is a national non-profit organization that provides financial assistance for important legal cases that advance language and equality rights.

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

power *should* be a constant matter of party political debate. The point is that the disagreement is not so fundamental as to jeopardize the legitimacy of our constitutional settlement or lock us into political stalemate. We disagree, yet we carry on. Most interestingly of all, many Quebecers continue to contest the legitimacy of the *Constitution Act*<sup>5</sup> because it did not receive formal ratification from the Quebec National Assembly, while at the same time, they accept as authoritative the decisions of the Supreme Court of Canada that interpret that *Constitution* and the *Charter* that forms part of it. What the *Charter*'s history tells us over thirty years is that constitutional legitimacy is a highly complex affair: Canadians accept the document as authoritative, but still argue over the compromises—between judicial and legislative power, federal and provincial jurisdiction, between and among rights—that shaped the politics of its making. The *Charter* is truly a living tree, but not just in the legal sense of a growing body of case law that now flowers out of the original clauses of the document. It is also a living tree in the political sense, in that we will continue to question the compromises that went into its making, and one day, if the political support for change reaches some unstoppable crescendo, graft a new branch or lop off an old one. The *Charter* is never finished business.

To say that the *Charter* has gained legitimacy over thirty years, then, is to say that we are reconciled to the political compromises that went into its making, not that we accept these as final or irrevocable. To say that it is legitimate for us is also to say that many, if not all of us, see ourselves reflected in the document. There are those of us who see it as a statement of who we are as a people and what we ought to be to each other. The *Charter* holds our loyalty because it serves as a statement of national values cast in rights language. It is also an affirmation of our belonging to an international order structured by the rights of citizens and the obligations of states.<sup>6</sup> To accept the *Charter* as legitimate and authoritative has a consequence we do not always like: that other members of the international community—UN bodies and international human rights NGOs—may, from time to time, look over our backyard fence and criticize our behavior as a country in terms of the standards we have set for ourselves, standards that are authoritative both internationally and nationally. To say that we live by the *Charter* is to say we live under the scrutiny of the wider world and also the interrogation of our own conscience. Since the gap between who we are and what we wish we were

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5. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

6. Louise Arbour & Fannie Lafontaine, “Beyond Self Congratulation: The *Charter* at 25 in an International Perspective” (2007) 45:2 *Osgoode Hall LJ* 239.

is always large, accepting the legitimacy of the *Charter* entails an obligation to eternal reform. The words of the *Charter* enjoin us to be better than we are.

The *Charter's* legitimacy, therefore, is injunctive: We hold to it because it holds us to higher standards. Its legitimacy is also performative, meaning that we hold to it because it has already made us better than we were. Many Canadians have come to see its legitimacy in terms of the good it has done us all. As Chief Justice Beverley McLachlin put it in her modest summary of the *Charter's* impact on Canadian society on the document's twenty-fifth anniversary:

The rights of those detained by the state are better protected because of the *Charter*. We have a fairer criminal justice system because of the *Charter*. The *Charter* has strengthened the protection of minority language rights and the mechanisms and attitudes that help our nation of diverse groups to live together. The *Charter* has brought the promise of a modest measure of accountability in the provision of medical and hospital services, under the rubrics of equality and security of the person.<sup>7</sup>

The performative legitimacy of the *Charter*—what it has done for us—is inseparable from its injunctive function—telling us what we must do. What it tells us as lawyers, citizens, members of the public, and professors is that we have entrenched the rights revolution—guaranteeing the formal legal equality of all persons—in law, but that we still have promises to keep to the very words of the *Charter* themselves. As Chief Justice McLachlin herself has admitted, justice is still slow and out of reach for many of our citizens, and *Charter* challenges have slowed it down still further.<sup>8</sup> For Aboriginal Canadians, the promise of protection for their rights in section 35 remains unfulfilled. More broadly, the entrenchment of formal juridical rights of equality for all Canadians remains a work in progress, and the gap between formal legal equality and social inequality remains large. It is a paradox that should be a matter of puzzlement and concern that the cresting tide of the rights revolution and the attainment of *Charter* rights for all Canadians coincided with the largest increase in income inequality in our history since 1945.<sup>9</sup> As long

7. Beverley McLachlin “The *Charter* 25 Years Later: The Good, The Bad and The Challenges” (2007) 45:2 Osgoode Hall LJ 365 at 366 [citations omitted].

8. *Ibid* at 373-74.

9. For the corrosive effect of economic inequality on the rule of law, see Joseph E Stiglitz, *The Price of Inequality: How Today's Divided Society Endangers our Future* (New York: WW Norton & Co, 2012) especially at ch 7. See also Richard Wilkinson & Kate Pickett, “Community Life and Social Relations” in *The Spirit Level: Why Equality is Better for Everyone* (London: Penguin, 2010). For comments on Canadian income inequality, see Armine Yalnizyan “Income Inequality is a Problem for Everyone,” *National Post* (20 September 2011), online: <<http://fullcomment.nationalpost.com/2011/09/20/armine-yalnizyan-income-inequality-is-a-problem-for-everyone/>>. See also studies by The Canadian Centre for Policy Alternatives, online: <<http://www.policyalternatives.ca>>. For data on Canadian income inequality see

as the law has promised equality for all citizens in a courtroom, there has been a conflict between the fairness a citizen can demand within the halls of justice and the unfairness and inequity they encounter on the street. But no legal system can serve as the alibi for an unjust social order for very long and if we do not use law and politics to renew the struggle to make our country more equal and more fair in reality, we will allow a gap to open up between the promise of the *Charter*, its vision of who we could be, and who we are—a gap that might become so wide as to make a mockery of the words themselves. When words are mocked by life and reality, they lose their purchase, their hold on our hearts, and, in short, their legitimacy. Defending the *Charter* at the next anniversary will not just be the work of keeping true to the promise of justice, but working as well as we can to make justice real for all citizens in the country we share.

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How Canada Performs, “Income Inequality: Canada and World Results,” online: <<http://www.conferenceboard.ca/hcp/details/society/income-inequality.aspx>>; Human Resources and Skills Development Canada, “Financial Security – Income Distribution: Indicators of Well-being in Canada,” online: <[http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=22#M\\_1](http://www4.hrsdc.gc.ca/.3ndic.1t.4r@-eng.jsp?iid=22#M_1)>.