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*Rights Constitutionalism and the Canadian Charter of
Rights and Freedoms*

Article 2

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Patterning Rights Constitutionalism: Thirty Years with the Charter

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Introduction

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Introduction

PATTERNING RIGHTS CONSTITUTIONALISM: THIRTY YEARS WITH THE *CHARTER*

BENJAMIN L. BERGER * & JAMIE CAMERON **

WRITING YEARS BEFORE THE PATRIATION of the Canadian constitution in 1982, the great Canadian constitutional scholar, advocate, and poet, F.R. Scott reflected on the moment of constitutional change and the political, normative, and even aesthetic registers in which such a moment sounds:

Changing a constitution confronts a society with the most important choices, for in the constitution will be found the philosophical principles and rules which largely determine the relations of the individual and of cultural groups to one another and to the state. If human rights and harmonious relations between cultures are forms of the beautiful, then the state is a work of art that is never finished. Law thus takes its place, in its theory and practice, among man's highest and most creative activities.¹

Did the poet overtake the constitutional scholar when Scott put pen to paper? To the contrary, the life and travails of the Canadian constitution thirty years since the *Constitution Act, 1982*,² and the introduction of the *Charter of Rights and Freedoms*,³ have proven the truth of Scott's words, in all of the creative struggle, ambition, and cultural complexity that they reflect.

In those thirty years, the *Charter* has reached a point of maturity that enables us to reflect from a wider perspective on how rights protection has transformed Canada's legal and political culture. As Michael Ignatieff suggests in his preface to this special issue of the *Osgoode Hall Law Journal*, the story of the *Charter* at

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1. Frank R. Scott, *Essays on the Constitution: Aspects of Canadian Law and Politics* (Toronto and Buffalo: University of Toronto Press, 1977) at ix.
2. *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
3. *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.

home is one of both continuity and significant change. In Scott's terms, "human rights and harmonious relations between cultures" are "forms of the beautiful" that defined our tradition long before the *Charter*. Yet by stitching a rights-protecting instrument into the Canadian constitutional fabric, the *Charter* afforded the Canadian public, politicians, and legal actors a new language of social and political justice. Although this language shares a lexicon with modern universal rights movements and with rights-protecting instruments in other traditions, its syntax remained insistently Canadian. Sujit Choudhry's contribution to this volume shows how this is so, offering a perspective on how the concepts of religious freedom and equality expressed in the *Charter* may be shaped by the deeper roots of cultural difference and constitutional history based in Quebec's distinctive history within Canada. John Borrows' article on Aboriginal treaty rights and violence against women similarly shows, albeit in a very different context, the way in which the new languages of the 1982 *Constitution* offered—and may continue to offer—promise and resources for progressive change. Yet he also shows that a new text—and even a new configuration of power within the branches of government—has as yet proven insufficient to lift the anchor on transformative change in the direction of social and historical justice. In her assessment of the social justice legacy of the first thirty years of the *Charter*, Margot Young points to the persistent influence of fundamental philosophical and political commitments in shaping and limiting the progressive potential of constitutional adjudication. Her article in this volume shows the provocative mix of transformation and continuity, and of meaningful legal victories and disappointing social justice shortfalls, that has characterized constitutional life with the *Charter*.

The historical particularities surrounding the introduction of the *Charter* underscore in dramatic fashion this dynamic, ever-evolving character of constitutional life. Over a century after Canada's constitution was established, the *Charter* reconfigured constitutional democracy and reshaped the distribution of legal and political authority within the institutions of government. And as is often the case with new languages, with a discourse of rights and judicial review came new modes of thought and new possibilities for criticism. The *Charter* made Canada a hotspot for constitutional theorizing and reflection on the political philosophy that subtends our constitutional tradition in particular and the nature of constitutions in general. In her article in this issue, Avigail Eisenberg reflects on the mutual imbrications of rights discourse, identity politics, judicial review, and democratic institutions that have emerged over the course of three decades under the *Charter*. Her critical review of the *Charter's* legacy, and the risks and promises of identity politics in rights litigation offers rich insight into the shifting nature of our

political and institutional commitments. Colleen Sheppard similarly draws lessons from the *Charter* experience about how the core project of constitutionalism might be conceived. In her contribution to this issue, she considers the democratic import of rights-protecting constitutions inhering in their process-based effects—namely, their influence on voice and inclusion—rather than principally in the substantive content of their normative prescriptions. Gavin Anderson picks up the important thread of critical legal scholarship on rights and judicial review, so active in Canada after the introduction of the *Charter*, and imagines the future fault lines and frontiers in critical constitutional thought; he invites us to imagine a sociological and transnational turn in constitutional theory that would be responsive to challenges of social justice in modern democratic life. The contributors to this special issue remind us that critical reflection on the legacy of the *Charter* is also a kind of philosophical reflection on the nature of constitutions and political communities at large.

In its distinctive agonistic expression of democratic supremacy and rights protection, the Canadian constitutional model—and the operation and impact of the *Charter* in particular—has influenced constitutional design, practice, and theory around the world. Since 1982, the *Charter* has been looked to in the design of parliamentary and constitutional bills of rights in New Zealand, the United Kingdom, Australian states, South Africa, and Israel. As a result, the 1982 *Constitution* moved Canada into a central position in the comparative study of rights constitutionalism. In this way, the 1982 *Constitution* moved Canada into a central position in comparative rights constitutionalism, and recent exercises in constitutional design have bypassed the exceptionalist system of American rights protection in favour of transformative approaches that recognize that rights protection is not singular, hegemonic, or static. Canada's *Charter* has demonstrated that protecting rights within a tradition of representative democracy is a matter of institutional design and has shown how key institutions—namely, courts and legislatures—can share that responsibility. Meanwhile, Canada has also modelled an alternative conception of rights that is inclusive of collective and community identities, and that to some extent protects affirmative entitlements. Indeed, in his article in this issue, Mark Tushnet argues that, in the last thirty years, the distinctive model represented by the *Charter* has made the Canadian *Constitution* and the Supreme Court of Canada more influential from a comparative perspective than the US *Constitution* and the US Supreme Court. Tushnet traces this ascendancy in influence to a variety of features of constitutional life in Canada, including the age of the *Charter*, the embrace and elaboration of proportionality tests, and the rejection of originalist interpretation

(save for the area of Aboriginal rights, as John Borrows argues). Rosalind Dixon emphasizes that it is not just the structural features of the Canadian *Constitution*, but also the patterns of logic and reasoning that have developed in the last thirty years in Canada, that offer Canadian lessons for comparative constitutional design. Dixon suggests that the Canadian experience shows the way in which particular conceptions of the prohibited grounds of discrimination can variously nourish or inhibit the progressive potential of equality guarantees. Evincing a complicated comfort with the tensions of modern constitutionalism—holding together, for example, equally fierce commitments to legislative sovereignty and the supremacy of rights, to the respect for difference and the protection of equality—Canada and its *Charter* have contributed important ideas to global patterns of rights constitutionalism.

The articles that form this special issue of the *Osgoode Hall Law Journal* were written for a symposium held at Osgoode Hall Law School in September of 2012, a symposium that took the 30th anniversary of the *Charter* as an occasion to reflect on the state of critical and comparative constitutional rights theory. This event brought together a group of leading constitutional scholars from Canada, the United States, the United Kingdom, and Australia, to discuss practical, theoretical, and comparative dimensions of the study of the *Charter* and of rights constitutionalism more generally. The day's conversations were facilitated by four discussants, who are distinguished constitutional scholars in their own right—Sonia Lawrence, Robert Leckey, Jennifer Nedelsky, and Bruce Ryder—and were joined in by graduate and J.D. students from Osgoode Hall Law School, the University of Toronto, and McGill University. As guest editors, we are grateful to the student editors of the *Osgoode Hall Law Journal* and to the editor-in-chief, Professor Stepan Wood, for their skill and professionalism in bringing this collection to publication. Together, these articles offer a formidable collection of insights on rights within democracies, on how societies and institutions accommodate change, on how political communities and institutions speak to each other, and on how constitutional transformations and innovations are shared and developed as they move across borders. Though they were occasioned by the 30th anniversary of the *Charter of Rights and Freedoms*, these articles collectively look forward, imagining the frontiers and points of struggle for constitutional justice, and participating in the core task of all constitutional thought: wrestling with the role of state and community in the pursuit of social and political justice.

“[T]he state,” as Scott wisely observes, “is a work of art that is never finished.”⁴

4. Scott, *supra* note 1 at ix.