

Volume 30, Number 3 (Fall 1992)
Impact of the Charter on the Public Policy Process
A Symposium

Article 6

The Charter: A Political Science Perspective

Alan C. Cairns

Follow this and additional works at: <http://digitalcommons.osgoode.yorku.ca/ohlj>
Special Issue Article

Citation Information

Cairns, Alan C.. "The Charter: A Political Science Perspective." *Osgoode Hall Law Journal* 30.3 (1992) : 615-625.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol30/iss3/6>

This Special Issue Article is brought to you for free and open access by the Journals at Osgoode Digital Commons. It has been accepted for inclusion in Osgoode Hall Law Journal by an authorized editor of Osgoode Digital Commons.

THE CHARTER: A POLITICAL SCIENCE PERSPECTIVE[©]

BY ALAN C. CAIRNS*

I. INTRODUCTION

A. *Political Purposes*

The *Charter*,¹ following in the footsteps of its predecessor, the Diefenbaker *Bill of Rights*,² had broad political purposes. It was to be an instrument of pan-Canadian unity by sustaining anglophone and francophone minorities in Quebec and the other nine provinces respectively; by restraining the centrifugal tendencies of federalism by establishing a floor of rights to be held in common by Canadians regardless of their provincial location; and by bonding Canadians to their political, coast-to-coast Canadian community and to the Constitution, which contained their rights. Indirectly, the central government would be strengthened by the *Charter's* support for the Canadian community, which Ottawa both served and shaped. In brief, the *Charter* was a powerful instrument of social engineering designed to transform the psyche and identities of Canadians.

B. *International Forces*

It is too easy, as well as misleading, to confine our search for the *Charter's* sources to domestic factors. In the same way as the

© Copyright, 1992, Alan C. Cairns.

* Professor of Political Science, University of British Columbia.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

² *Canadian Bill of Rights*, S.C. 1960, c. 44.

contemporary post-*Meech* constitutional process is partly driven by globalizing economic trends, which appear to dictate a more autonomous market indifferent to political boundaries, the drive for a charter of rights was also linked to international cues and incentives. The *Charter* was a response to evolving international norms of statehood that put parliamentary supremacy on the defensive and increasingly postulated a correlation between statehood and charters/bills of rights. Hence, the global diffusion of the *Charter* idea as a constitutional instrument, its ready acceptance by citizens, and the thesis that:

[T]here is now an area of domestic conduct in regard to human rights ... that is under the scrutiny of international law... [This] expose[s] the internal regimes of all the members of international society to the legitimate appraisal of their peers. This may turn out not to have been a negligible change in international society.³

The *Charter*, therefore, is in part a response to an emerging international criterion of statehood linked to more expansive notions of citizenship.

II. CHARTER IMPERIALISM

The *Charter* is imperialistic. Its various clientele seek to extend its jurisdiction. In a general way, the attitude of *Charterphiles* to their instrument is analogous to the attitudes of Oliver Mowat, W.A.C. Bennett, and Peter Lougheed to section 92 of the *BNA Act*,⁴ or of Lougheed to section 109. These premiers sought, at a minimum, to protect and, more ambitiously, to extend the scope of the powers crucial to their governing capacities. Thus, the Legal Education and Action Fund is to section 28 of the *Charter*, and the Canadian Ethno-cultural Council is to section 27, what Oliver Mowat was to section 92 of the *BNA Act*. The efforts of *Charter* supporters to eliminate the notwithstanding clause precisely parallel the efforts of provincial premiers to get rid of the federal power of disallowance. In each case, the purpose is to eliminate intrusions on one's constitutional territory. It is only slightly far-fetched to see the claims of *Charter* devotees for a role

³ R.J. Vincent, *Human Rights and International Relations* (New York: Cambridge University Press, 1986) at 152.

⁴ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (formerly *BNA Act*).

in the constitutional amending process as analogous to the historic efforts of premiers to secure protective amending vetoes for their provincial governments. While *Charter* supporters do not have a fully developed, compact theory to justify their participation, they can and do ground their claims on the fact that, like provincial governments, they too were present at the creation. The *taking of 28* by feminist groups,⁵ the winning of section 27 by multicultural groups, and the successful struggle to include "disabled" in section 15 of the *Charter* generate proprietary constitutional claims and participatory demands analogous to those of provincial governments.

The *Charter's* imperialism is further manifest in its take-over of much of the state's symbolism. It is, for many citizens, the primary vehicle that gives life and meaning to the Constitution. It works directly on the identities of citizens with its explicit message that they are constitutional somebodies.

III. THE CHARTER'S IMPACT

A. *Within Governments*

Domestically, the *Charter's* impact is multi-faceted. It affects government decision making at the policy process stage, but since that is the subject of many other papers in this volume, I will not tarry.

B. *Courts*

The *Charter's* most obvious locale, the courtroom, generates new groups of court watchers and interveners. They focus intensely on the fate of the clauses of most concern to themselves. They understand that judicial discretion is a fact of life, and that decisions emerge from the interaction of judge and company. Hence, they seek intervener status so that *company* will be sensitive to their constitutional interests.

Court watchers and interveners are also concerned with the composition and jurisprudential philosophies of courts, both of which

⁵ P. Kome, *The Taking of Twenty-eight: Women Challenge the Constitution* (Toronto: Women's Press, 1983).

are seen to have policy consequences. Thus, discussion about reforming the Supreme Court's nomination and appointment process no longer revolves exclusively around the relative roles of federal and provincial governments, a reasonable focus only as long as the "umpire of federalism" role virtually exhausted the Court's constitutional interpretive responsibilities. *Charter* and Aboriginal interests focus on the extent of ethnic, female, and other *Charter* categories on the bench, and the philosophies they bring to their judging of the citizen/state constitutional dimension.

C. Federalism

The *Charter's* relation to federalism is complex.⁶ The *Charter's* linking of citizens directly to the Constitution, and the positive response elicited, reveals the limited capacity of federalism to speak to and for the heterogeneous composition of a modern people.⁷ Federalism addresses Canadians in terms of the territorial communities it reflects and fosters, but we carry many other identities—as women, persons with disabilities, Aboriginals, visible minorities, linguistic minorities, *etcetera*. Although Aboriginals are in a special category, the *Charter* sharpens the identities of the groups it constitutionally recognizes. This social rootedness gives the *Charter* a positive symbolism that has already made it the best-known component of the Constitution.

The combination of non-territorial identities singled out by the *Charter* and its dimension of pan-Canadian rights explains why the drive for a *Charter* consistently emanated from Ottawa, while opposition came from provincial governments. Overall, the *Charter's* language is sympathetic to the pan-Canadian component of federalism that sustains the federal government, but is insensitive or indifferent to the provincial diversities that, sociologically, justify territorially-based sub-national governments.

⁶ A.C. Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (Montreal: McGill-Queen's University Press, 1992).

⁷ S.V. LaSelva, "Does the Canadian Charter of Rights and Freedoms Rest on a Mistake?" (1988) 8 Windsor Y.B. Access Just. 217.

D. *Citizenship*

At the most abstract level, the *Charter* elevates citizenship to a constitutional category. The citizens' possession of rights changes the relationship between the governors and the governed. This is true in the obvious sense that the rights of the latter are judicially enforceable against the rights violations perpetrated by the former. Citizens participate not only as voters influencing the composition of legislatures, but also in their capacity to trump the majority legally by resorting to the courts.

More important than the preceding are the subtle consequences that flow from the possession of rights enshrined in a symbolically potent constitutional document. New citizens are less likely to see themselves as subjects and more likely as actors. The distribution of deference versus a participatory egalitarianism is now more likely to emphasize the latter, than in pre-*Charter* days. This is not to suggest that we are on the verge of a participatory Utopia of an informed citizenry engaged in a pan-Canadian town-hall forum of discussion and decision making. It is to suggest, however, that a greater legitimacy now attaches itself to the citizens' role, and that dismissive repudiations of citizen input by our governors now appear old-fashioned. The *Charter*, accordingly, strengthens and transforms pre-existing weaker concepts of citizenship, or more accurately, turns citizenship into a new constitutional category, which requires us to rethink fundamentally the new constitutional order in which we now live.

The magnitude of this change should not be minimized. The obvious analogy is a massive extension of the franchise, with the difference being that this time it is not the number that is being increased, but the rights and responsibilities of all members of society. This must mean more than learning to employ the language and substance of rights for self-interested gain. Citizenship needs to be thought of as an honourable status or, more grandly, as an office that defines appropriate constitutional behaviour. The message of section 1 of the *Charter*, that its rights and freedoms are subject "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society," is a message to citizens as well as to governments. If it tells the latter that encroachments on rights require strong justification, it also tells the former that they have community

obligations, the observance of which require restraint in the aggressive pursuit of rights.

If this reciprocal message—for governments that parliamentary supremacy has limits, and for citizens that rights are limited—is not effectively socialized into the behaviours of both parties, the *Charter's* potential positive effects will be minimized. The goal is to find a new equilibrium between citizen and state, not to unleash a ruthless contest between atomistic pursuers of rights and their governmental opponents, who cynically manipulate rights rhetoric to keep the citizenry subservient.

IV. CONSTITUTIONAL REFORM

The *Charter* enters the constitutional reform process in two ways. Symbolically, it defines citizenship in terms of individual equality in the possession of rights. Hence the attack on the notwithstanding clause; hence the powerful reactions against *Bill 178*,⁸ which employed section 33 to sustain Quebec language legislation in conflict with the *Charter*; hence the hostility to the *Meech Lake* distinct society clause for Quebec. In general, the *Charter* fosters the view that deviations from the norm of equal and similar rights are un-Canadian and, accordingly, unacceptable. This restricts the possibilities available with which to respond to any demand for special treatment for Quebec that is seen to involve a differential rights regime.⁹

The second way the *Charter* enters the constitutional reform process is that, by connecting the citizenry directly to the Constitution and by linking particular categories of Canadians to specific constitutional clauses that they view as theirs, the *Charter* transmits the message that some degree of citizen participation in the constitutional reform process is logically necessary. Further, the fact that "rights" is the medium for this constitutional connection is psychologically empowering in a way that a more instrumental connection would not be.

Meech Lake underlines the *Charter's* challenge to the hegemony of executive federalism in formal constitutional change. Its simple

⁸ *An Act to Amend the Charter of the French Language*, S.Q. 1988, c. 54.

⁹ *Report of the Commission on the Political and Constitutional Future of Quebec* (Quebec: Commission sur l'avenir politique et constitutionnel du Québec, 1991) at 34.

message, that the Constitution does not belong to governments, and that they, therefore, do not have an unfettered right to modify it, suggests that the *Gang of Eight's*¹⁰ constitutional assumptions that inform the amending formula did not anticipate the *Charter's* impact on their domain. From one perspective, the *Charter* strengthens the impulse to constitutional participation and, thus, denies the Charles Taylor thesis that the *Charter's* stimulation of our litigious proclivities weakens our democratic participatory tendencies—that judicial arenas displace the democratic public arenas in which citizens, parties, and interests compete to influence the state's policy agenda.¹¹

On the other hand, the constitutional participant impulse takes a particular form when its major outlet is in committee fora after intergovernmental deals have been struck and positions hardened. In that setting, participating *Charter* and Aboriginal groups will self-centredly pursue their very particularistic objectives. They are not induced to think of different others, or to compromise for the sake of agreement. Elsewhere, I have labelled this tendency "constitutional minoritarianism."¹² It reduces constitutional citizenship to participation in a competitive constitutional marketplace in which the burden of reconciling competing demands is either attributed to an invisible hand that does not exist or is thrown back to executive federalism and first ministers, whose credentials are suspect.

The necessary revision of the overall amending process should be guided by two fundamental concerns. First, the political and bureaucratic managers of constitutional reform—the federal/provincial relations offices,¹³ *etcetera*—must be ever aware that they are not simply adjusting federalism to new realities. They are modifying a constitutional order in which the primacy of federalism for governments must be balanced against the primacy of the *Charter* for many

¹⁰ The *Gang of Eight* (all provinces but Ontario and New Brunswick) is the label applied to the provinces that opposed Trudeau's threatened unilateral patriation.

¹¹ C. Taylor, "Alternative Futures: Legitimacy, Identity and Alienation in Late Twentieth Century Canada" in A.C. Cairns & C. Williams, eds., *Constitutionalism, Citizenship and Society in Canada* (Toronto: University of Toronto Press, 1985) 183.

¹² A.C. Cairns, "Constitutional Minoritarianism in Canada" in R. Watts & D. Brown, eds., *Canada: The State of the Federation* (Kingston: Institute of Government Relations, 1990) 71.

¹³ This refers to both the federal Provincial Relations Office and its provincial counterparts, and to the departments responsible for intergovernmental and constitutional affairs.

Canadians. From this perspective, *Meech Lake* was a bureaucratic and political failure born of an anachronistic understanding by the governing élites of Canada's constitutional culture.

Second, the participant impulse tapped by the *Charter* and supported by broader global democratizing trends must be given outlets that appeal to our better, civic selves—not to our baser selves, our parochial selves, our irresponsible selves, not to our uninformed gut reactions to the moral complexities involved in major constitutional change. Interest group participation driven by a narrowly focused self-interest is insufficient, no matter how deserving and noble the goals of individual groups may be. The Spicer alternative of constitutional encounter groups that tap the hasty impressions of an uninformed citizenry are equally inadequate to our task of constitutional self-renewal. They trivialize citizenship. Robert Normand's dissenting comment in the *Report of the Citizens' Forum on Canada's Future* is apposite. The Forum:

basically limited itself to gathering only the superficial views of those Canadians who addressed it, in a fashion similar to that of open-line radio shows ... citizens had a tendency to limit themselves to stating first impressions, often based upon erroneous information that was not corrected, and adopted radical positions without first evaluating their possible consequences.¹⁴

Referenda that confront the citizenry with basic choices in settings which make it clear that their voting decision is pregnant with consequences deserve consideration. Unlike answers to pollsters, answers to referendum questions count. Unlike interest group participation that stresses particularistic self-interest and leaves out the unorganized, referendum questions on basic constitutional issues address us as citizens joined together in a community of fate. Now that citizens have become constitutional players, largely due to the *Charter* and Aboriginal constitutional clauses, it is necessary to develop and refine instruments that will make citizens responsible and accountable for their constitutional choices. *Meech Lake* informs us how not to proceed.

¹⁴ Citizens' Forum on Canada's Future, *Report to the People and Government of Canada* (Ottawa: Canadian Government Publishing Centre, 1991) at 144.

V. THE CHARTER AND THE THREE CANADIAN NATIONS

The imperialism of the *Charter* discussed earlier encounters opposition. Its generally positive reception is not evenly distributed across what we are learning to think of as the three Canadian nations—Aboriginal, Québécois, and Rest of Canada (ROC). The *Charter* has taken root most deeply in ROC, and in the anglophone and allophone communities in Quebec. Visible evidence comes from the *Meech Lake* hearings in which, again and again, identification with and defence of the *Charter* were cited as pervasive responses of the interveners.

Aboriginal attitudes are much less supportive, especially at the élite level. Aboriginal, treaty, or other rights, including the *Royal Proclamation of 1763*¹⁵ are, by section 25, not to be abrogated or derogated from by the *Charter*—an indication that Aboriginal constitutional identities and aspirations do not reside in *Charter* rights. Some Aboriginal scholarship is profoundly hostile to the *Charter*, which is viewed as incompatible with Aboriginal philosophies.¹⁶ The federal government proposals, *Shaping Canada's Future Together*, in which Aboriginal self-government is to be subject to the *Charter*—contrasted with the proposition that the *Charter* is to be made consistent with the distinct society of Quebec¹⁷—are scorned as a humiliating indignity by Professor of Aboriginal Studies, Tony Hall. “The clear assumption is that some kinds of people can be trusted with power and some kinds of people have to pass inspection before they can receive very constrained powers.”¹⁸ On the other hand, the application of the *Charter* to self-governing Aboriginal peoples is passionately advocated by the Native Women's Association of Canada, based on their members past experience of the predominantly male leadership on reserves.¹⁹

¹⁵ Reprinted in R.S.C. 1970, App. II.

¹⁶ M.E. Turpel, “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” (1989-90) Can. Hum. Rts. Y.B. 3.

¹⁷ *Shaping Canada's Future Together: Proposals* (Ottawa: Minister of Supply and Services, 1991) at 7 and at 10.

¹⁸ T. Hall, “Native Self-government: Comments on the Federal Proposals” (1991) The Network 7.

¹⁹ Native Women's Association, *Native Women and the Charter: A Discussion Paper* (Ottawa).

Given the manifold uncertainties that attend the constitutional status of Aboriginal peoples, it is plausible that self-governing Aboriginal communities of the future may be subject to a very different and lesser *Charter* regime than are other Canadians.

It would be premature to write off the *Charter* in Quebec. It has strong support from anglophone and allophone citizens. Occasionally, it has been given high praise by Quebec politicians. On the other hand, it would be naïve not to recognize that the *Charter's* reception among the Quebec nationalist élite and the francophone intelligentsia has ranged from hostility to indifference to lukewarm support. The *Charter* was sullied in Quebec by the inauspicious context of its origins as part of the *Constitution Act, 1982*, widely interpreted as a betrayal of Quebec. Further, the Parti Québécois government systematically used the notwithstanding clause across the board to mute the *Charter's* impact and to undermine the legitimacy of the *Constitution Act* of which it was an important part. Now, ten years after the *Charter's* introduction, and with the notwithstanding clause on the defensive in ROC, its strongest defenders are in Quebec. Further, in Quebec, the Canadian *Charter* encounters a rival Quebec *Charter*²⁰ that has the same nationalist credentials for Québécois that the Canadian *Charter* has for ROC—as a symbol of political nationhood and identity. The Belanger-Campeau Commission explicitly identified the *Charter's* universalizing conception of rights as a basic impediment to the constitutional recognition of Quebec's specificity.²¹ *Meech Lake's* "distinct society" clause and the present federal government proposals share the objective of filtering the *Charter's* impact on Quebec.

Pierre Fortin recently expressed a not atypical Québécois attitude to the *Charter* in the following blunt language: In the *Meech Lake* conflict, it was the "*Charter of Rights* against [the] distinct society," and the *Charter* triumphed.

²⁰ *Charte des droits et libertés de la personne*, L.R.Q., c. c-12.

²¹ The *Charter*-based political vision "perceives equality as having a strictly individual scope and applying uniformly across Canada: it does not make allowance for Quebec society to receive special constitutional recognition. The notion of a distinct Quebec society is thus understood as being a source of inequality and incompatible with the principle of equality of all Canadian citizens." *Supra* note 9 at 34.

The massive rejection of *Meech* outside Quebec sends the following message: French Quebec has no other legitimacy than as a collection of individuals whose rights are protected by the *Charter of Rights*, no more and no less than anyone else in Canada. To most Quebecers, including many Anglophones and Allophones, this message is simply outrageous, because it denies both the fact of the distinct society and its vulnerability in Anglophone North America. As Quebec novelist Yves Beauchemin ably put it: "We are a cube of sugar in a gallon of coffee." If the cube and the coffee are treated without distinction, one of the two is going to dissolve into the other, and there is no question which one it will be.²²

Given these unique factors that, in combination, generate a different *Charter* audience in Quebec than in any other province, an increasing divergence of the *Charter's* role in Quebec and in ROC cannot be ruled out. If so, some form of explicit constitutional recognition of that different *Charter* regime may ultimately follow.

To speculate in this manner about the relationship of Quebec and Aboriginal peoples to the *Charter* is simply to practise a rudimentary sociological jurisprudence that suggests that differences in the underlying social facts in Quebec and among Aboriginal peoples may have negative constitutional consequences for a charter designed as an instrument of pan-Canadian integration. In different language, the *Charter* is one of the sites of the struggle among the three competing nations of Canada for constitutional living space. The outcome of the struggle is unpredictable.

²² P. Fortin, "Quebec's Forced Choice" (Address to the Conference on the Future of Quebec and Canada, 17 November 1990) [unpublished].

