

# Book Note: The End of the Charter Revolution: Looking Back from the New Normal by Peter J McCormick

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## Book Note: The End of the Charter Revolution: Looking Back from the New Normal by Peter J McCormick

### **Abstract**

CANADA'S CONSTITUTIONALIZED BILL OF RIGHTS, the Charter of Rights and Freedoms,<sup>2</sup> unified the country under a set of principles that were designed to encapsulate liberty and equality, and safeguard an expansive set of rights and freedoms. Entrenched in 1982, the Charter fundamentally changed the Canadian legal landscape and allowed the Supreme Court of Canada to take center stage as the “best show in town,”<sup>3</sup> generously sketching out rights for all in a golden age of Canadian law. But, as Peter McCormick argues in his new book *The End of the Charter Revolution*, that golden age may be finished. The Charter revolution is over, McCormick argues, and the cases before the SCC are now “detail shufflers rather than groundbreakers.”<sup>4</sup> The bulk of support for McCormick’s bold theory is a narrative of each Court since the Charter’s birth. Chief Justice of Canada Brian Dickson’s court framed Charter rights, Antonio Lamer’s court expanded them, Beverly McLachlin’s court contained them—these narratives all support McCormick’s one simple thesis: the “forward motion of Charter interpretation is at an end.”<sup>5</sup> We have returned to a ‘new normal.’

## Book Note

***The End of the Charter Revolution:  
Looking Back from the New Normal*, by  
Peter J McCormick<sup>1</sup>**

LILLIANNE CADIEUX-SHAW

CANADA'S CONSTITUTIONALIZED BILL OF RIGHTS, the *Charter of Rights and Freedoms*,<sup>2</sup> unified the country under a set of principles that were designed to encapsulate liberty and equality, and safeguard an expansive set of rights and freedoms. Entrenched in 1982, the *Charter* fundamentally changed the Canadian legal landscape and allowed the Supreme Court of Canada to take center stage as the “best show in town,”<sup>3</sup> generously sketching out rights for all in a golden age of Canadian law. But, as Peter McCormick argues in his new book *The End of the Charter Revolution*, that golden age may be finished. The *Charter* revolution is over, McCormick argues, and the cases before the SCC are now “detail shufflers rather than groundbreakers.”<sup>4</sup>

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1. (Toronto: University of Toronto Press, 2015) 279 pages.
  2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.
  3. *Supra* note 1 at xviii.
  4. *Ibid.*

the “forward motion of Charter interpretation is at an end.”<sup>5</sup> We have returned to a ‘new normal.’

McCormick begins with Dickson’s creation of a flexible, purposive approach to Charter interpretation, where rights were painted in broad strokes to be filled in by later courts. McCormick explores the Dickson court’s “just trust us” approach, reminiscent of the “automobile ads on TV that tell you ‘Don’t try this at home, we are professionals.’”<sup>6</sup> McCormick then explores the importance of *R v Oakes*<sup>7</sup> in reigning in this Court and making their approach to *Charter* interpretation more predictable.

McCormick moves to the “cheerful imperialism”<sup>8</sup> of the Lamer court, which espoused a “willingness to answer questions much wider than anything it had actually been asked”<sup>9</sup>—the Lamer court extended analogous grounds of section 15 to include sexual orientation, and audaciously proclaimed judicial independence in the face of possible pay cuts to section 92 judges. McCormick ends the Lamer period with a review of different Charter remedies, noting that the Lamer court’s “bold exploration of the remedy spectrum” forever changed the SCC’s place in national politics by removing that credible divide between politics and law.

McCormick then reaches our present court—the McLachlin court—which focused on “moderation, containment and partial retreat.”<sup>10</sup> It was around this time that the *Charter* revolution saw its last glory days, though McCormick is cautious to note that we cannot reduce these trends to the Chief Justice alone, as they were often “products of the period more than the periods were products of them.”<sup>11</sup> McCormick delves into the ‘boomerang’ McLachlin cases where the McLachlin Court would “seem to have taken a big step forward, only to wind up very much where we started.”<sup>12</sup>

McCormick supports this entertaining narrative with his own empirical research in a chapter on ‘*Charter* by the Numbers,’ where McCormick provides 8 empirical pieces of evidence that the *Charter* revolution is good and dead. Two examples include: 1) a decline in the frequency of dissents and concurrences,

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5. *Ibid* at 168.

6. *Ibid* at 67.

7. *R v Oakes* [1986] SCR 103.

8. *Supra* note 1 at 117.

9. *Ibid* at 117.

10. *Ibid* at 90.

11. *Ibid* at 228.

12. *Ibid* at 143.

indicating that the court has generally settled on much of their interpretation and 2) less judicial citations, with citations mostly to older decisions, signaling a “much slower rate of replacement of “old” law with “new” law.”<sup>13</sup>

In his last chapter, McCormick explores whether this thesis is generalizable across courts and countries, and ultimately says that the Charter revolution was bound to slow down; courts and judges strive to be predictable, and so will always work “over time to contain novelty, to routinize it, to make it not novel any more.”<sup>14</sup>

The book has a sort of Hogg-sian style—he examines a broad set of cases, discovers and explores patterns among them, and sprinkles commentary ripe with personality and humour throughout—but McCormick makes it uniquely his own, using pop-culture analogies and casual language to great effect. All in all, McCormick has provided a compelling argument on why the “mighty *Charter* river”<sup>15</sup> has run dry, with original empirical research and sharp, entertaining insights on our highest court along the way.

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13. *Ibid* at 226.

14. *Ibid* at 238.

15. *Ibid* at 232.