

# DUAL(LING) CHARTERS: THE HARMONICS OF RIGHTS IN CANADA AND QUEBEC

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*As a result of the entrenchment of the Canadian Charter of Rights and Freedoms in 1982, there has emerged in the province of Quebec a corresponding call to entrench constitutionally the Quebec Charter of Human Rights and Freedoms, enacted six years earlier. In the fallout of the Meech Lake Accord, where the Canadian Charter was seen as a stumbling block to accommodating Quebec's demands for distinctiveness, these calls have been renewed in both academic and political circles. Despite the universalistic rights language which both Charters invoke, these apparently differing allegiances emerged, even more strengthened after 1990.*

*The author explores some of the reasons for these apparently differing allegiances. They are founded, in large part, on differing suspicions about what each Charter entails. By focusing on the terms of the Quebec Charter as compared to the Canadian one, the author attempts to undo some of those suspicions, making less alien the "other" Charter.*

*The entrenchment of the Quebec Charter, so as to override the Canadian one, should not be seen as an immense threat to the pan-Canadian vision of equal right-holders. Rather, the Quebec version shares with its Canadian counterpart a common language, a commit-*

*À la suite de l'enchâssement de la Charte canadienne des droits et libertés en 1982, des voix se sont élevées dans la province de Québec en faveur de la constitutionnalisation de la Charte des droits et libertés de la personne adoptée par le Québec il y a six ans. Après l'échec de l'Accord du lac Meech, alors que la Charte canadienne était considérée comme une pierre d'achoppement à la satisfaction des demandes du Québec concernant la reconnaissance de son caractère distinct, on a réitéré cette revendication tant dans les cercles universitaires que les cercles politiques. Bien que les deux chartes prônent la protection de droits universels, ces allégeances apparemment divergentes se sont manifestées avec encore plus de force après 1990.*

*L'auteur étudie certains des motifs de ces allégeances apparemment divergentes. Il estime qu'elles sont fondées, en grande partie, sur les doutes qu'on entretient, de part et d'autre, quant aux implications des deux chartes. En s'attachant à comparer les termes de la Charte québécoise avec ceux de la Charte canadienne, l'auteur essaie de dissiper quelques-uns de ces doutes et de faire mieux connaître « l'autre » charte.*

*L'enchâssement de la Charte québécoise, qui aurait prédominance sur la Charte canadienne, ne devrait pas*

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*ment to procedural liberalism, and a common multiplicity of potential interpretations.*

*être considéré comme une grande menace pour la vision pancanadienne selon laquelle les citoyens et les citoyennes sont titulaires de droits à l'égalité. Car les deux chartes ont des caractéristiques communes : elles utilisent le même langage, elles s'emploient à garantir le libéralisme en matière de procédure et elles peuvent être interprétées de multiples façons.*

[I]t is now accepted as common sense here that we feel we need a Charter of Rights — and we have one — but we take it as obvious that the Charter of Rights in Quebec would be different from that of the rest of Canada. This we don't plead. It is obvious.

Jacques Parizeau, Leader of the  
Parti Québécois in 1991<sup>1</sup>

In reality, there is no essential difference between the Charter included in the Canadian Constitution and the Quebec Charter as to the level of protection they both grant.

The Parti Québécois Government  
in 1985<sup>2</sup>

## INTRODUCTION

Rights rhetoric is, paradoxically, both universalistic and particularistic. It is universalistic because it appeals to expansive notions unconfined to, and rising above, the circumstances of the particular social order.<sup>3</sup> It also is particularistic, embedded in local realities and confined to a limited geographic spectrum within which citizens are to be treated equally and outside of which national treatment is unavailable.<sup>4</sup> Both the *Canadian Charter of Rights and Freedoms*<sup>5</sup> and the *Quebec Charter of Human Rights and Freedoms*<sup>6</sup> embody these paradoxes of universality and particularity. At once they are both “essentially the same” and “obviously different”.

The Canadian *Charter* was an initiative designed to create a pan-Canadian standard of rights and freedoms based on universalistic premises.<sup>7</sup> It undercut federalism, fostering a notion of citizenship tied to

<sup>1</sup> Quoted in D. Camp, “The Plot to Kill Canada” *Saturday Night* (June 1991) 12 at 61.

<sup>2</sup> See App. A: *Draft Agreement on the Constitution: Proposals by the Government of Quebec* in P.M. Leslie, ed., CANADA: THE STATE OF THE FEDERATION 1985 (Kingston: Institute of Intergovernmental Relations, 1985) 61 at 67 [hereinafter *Draft Agreement*].

<sup>3</sup> See R.M. Unger, *THE CRITICAL LEGAL STUDIES MOVEMENT* (Cambridge: Harvard University Press, 1986) at 24.

<sup>4</sup> See the extradition cases: *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, 67 C.C.C. (3d) 1 and *Reference re Ng Extradition (Can.)*, [1991] 2 S.C.R. 858, 67 C.C.C. (3d) 61. Consider also how our employment laws treat foreign domestic workers: see S. Razack, *Speaking for Ourselves: Feminist Jurisprudence and Minority Women* (1991) 4 C.J.W.L. 440 at 453-55. Nationalism, too, is expansive and an appeal to the rational; it is also particularistic, cultivating symbols appealing to a national character. See E. Balibar, *Paradoxes of Universality* in D.T. Goldberg, ed., *ANATOMY OF RACISM* (Minneapolis: University of Minnesota Press, 1990) at 283.

<sup>5</sup> Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act (1982)* (U.K.), 1982, c. 11 [hereinafter *Charter*].

<sup>6</sup> R.S.Q. c. C-12 [hereinafter *Quebec Charter*]. Unless otherwise specified, all further section references will be to the *Quebec Charter*.

<sup>7</sup> In 1968, then Minister of Justice, Pierre Trudeau, wrote “that the centuries-old interest in human rights is now, in the mid-twentieth century, of universal scope.” See Hon. P.E. Trudeau, *A CANADIAN CHARTER OF HUMAN RIGHTS* (Ottawa: Queen's Printer, 1968) at 12.

neither level of government, federal nor provincial, relying on the judiciary as guardians of rights and freedoms.<sup>8</sup> Public opposition to the 1987 Constitutional Accord demonstrated, in part, how this notion of constitutional citizenship has generated an astonishing measure of allegiance among the inhabitants of provinces outside of Quebec, and amongst anglo- and allophones within Quebec.<sup>9</sup> This has occurred despite the fact that the Canadian public did not have an opportunity, via either an election<sup>10</sup> or referendum, to approve the terms of the *Constitution Act, 1982*<sup>11</sup> and in spite of the Quebec government's denouncement of the whole of the package.<sup>12</sup> Notwithstanding the Canadian *Charter's* universalistic claims, it has not captured the imagination of Quebecers in the same way.

Instead, there appeared to emerge in Quebec a different but analogous bonding to the Quebec *Charter*. Elected officials and opinion leaders in Quebec led in this exercise by expressing a desire to entrench the Quebec *Charter* in a new Quebec constitution, usurping the pan-Canadian version of rights and freedoms. This demand arose initially as part of the package for constitutional renewal tendered by the Parti Québécois (P.Q.) government in May 1985 to newly elected Prime Minister Mulroney.<sup>13</sup> The P.Q. would have been prepared to permit those sections of the *Charter* dealing with democratic rights (sections 3-5: including the right to vote, the timing of elections) to apply to the government of Quebec without modification by the National Assembly.<sup>14</sup> As for the rest of the Canadian *Charter*, the Quebec *Charter* would operate in its stead.

The demand for differing charters was renewed after the demise of the Meech Lake Accord in both the Liberal Party of Quebec's Allaire Report and in the minority report of the Commission on the Political and Constitutional Future of Quebec (Bélanger-Campeau). The Allaire Report recommended that "to protect fundamental rights, the Québec Charter of human rights and freedoms will be entrenched in the new

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<sup>8</sup> See K.E. Swinton, *THE SUPREME COURT AND CANADIAN FEDERALISM: THE LASKIN-DICKSON YEARS* (Toronto: Carswell, 1990) at 340ff.

<sup>9</sup> See M. Adams & M.J. Lennon, *The Public's View of the Canadian Federation* in R.L. Watts & D.M. Brown, *CANADA: THE STATE OF THE FEDERATION 1990* (Kingston: Institute of Intergovernmental Relations, 1990) at 97.

<sup>10</sup> Except for citizens of the province of Manitoba who had elected an NDP government which had campaigned in opposition to then Premier Sterling Lyon's opposition to the Canadian *Charter*. See S.M. Dunn, *THE YEAR IN REVIEW 1981: INTERGOVERNMENTAL RELATIONS IN CANADA* (Kingston: Institute of Intergovernmental Relations, 1982) at 214. See generally, P. Russell, "Can Canadians Be A Sovereign People?" (1991) XXIV CAN. J. POL. SCI. 691.

<sup>11</sup> Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

<sup>12</sup> See G. Rémillard, *Legality, Legitimacy and the Supreme Court* in K. Banting & R. Simeon, *AND NO ONE CHEERED* (Toronto: Methuen, 1983) at 189.

<sup>13</sup> The conditions are reproduced in *Draft Agreement, supra*, note 2 at 66-68 and, in part, in B. Lauzière, ed., *LE QUÉBEC ET LE LAC MEECH: UN DOSSIER DU DEVOIR* (Montréal: Guérin littérature, 1987) at 61 [hereinafter *LE QUÉBEC ET LE LAC MEECH*].

<sup>14</sup> Those sections are not subject to legislative override (s. 33) and the P.Q. proposals would not have changed that situation. See *ibid*.

constitution of Québec.”<sup>15</sup> The Bélanger-Campeau Commission report extolled the virtues of the Quebec *Charter*: it “is among the most complete charters of human rights and freedoms adopted to date.”<sup>16</sup> The minority report echoed the request made in a number of briefs to the Commission that the Quebec *Charter* be entrenched in a new Quebec constitution.<sup>17</sup>

I would like to explore in this essay some of the reasons for these differing allegiances, despite each of the *Charters*' invocations of universalistic rights rhetoric. By assessing the terms of the Quebec *Charter* against those of the Canadian *Charter*, I hope to undo some of the misconceptions about the former, and the possibilities for change in the latter. My discussion will build principally upon the work of Alan Cairns, who has suggested that this asymmetry — a Quebec *Charter* to apply only in Quebec and a Canadian *Charter* to apply federally and in provinces outside of Quebec — may be more palatable to our existing notions of federalism and a possible way out of the post-1982 Quebec-Canada imbroglio.<sup>18</sup>

Cairns, in two recent essays,<sup>19</sup> suggests relaxing the pan-Canadian Charter norm. It would free up the government of Quebec to foster its own rights discourse, removing the serious irritant and present impediment to renewed federalism that the *Charter* represents. Guy Laforest, one of the more vociferous Quebec critics of the Canadian *Charter*, also has identified its centralizing tendencies as an impediment to constitutional accommodations: the “deep-seated aspiration for homogeneity conveyed by the *Charter* appears to augur ill for any plan to promote a distinct identity for Quebec.”<sup>20</sup> The nationalist agenda of the Canadian *Charter*, its homogenizing vision, Laforest argues, simply is incompatible with the nationalist agenda of Quebec.<sup>21</sup>

Relaxing the charter standard in Quebec, writes Cairns, would be “a clear and symbolically potent affirmation of Quebec's specificity”.<sup>22</sup>

<sup>15</sup> The Report was somewhat ambiguous on this point, recommending that Quebec “preserve the rights currently recognized by the Constitution of Canada and the courts, in particular aboriginal rights.” Report of the Constitutional Committee of the Quebec Liberal Party, *A Québec Free to Choose* (28 January 1991) at 32 [hereinafter Allaire Report].

<sup>16</sup> Quebec, *Report of the Commission on the Political and Constitutional Future of Québec* (March 1991) at 19 [hereinafter Bélanger-Campeau].

<sup>17</sup> *Ibid.* at 95.

<sup>18</sup> See A.C. Cairns, *Constitutional Change and the Three Equalities* in R.L. Watts & D.M. Brown, *Options for a New Canada* (Toronto: University of Toronto Press, 1991) at 77.

<sup>19</sup> A.C. Cairns, *Disruptions: Constitutional Struggles, from the Charter to Meech Lake*, D.E. Williams, ed. (Toronto: McClelland & Stewart, 1991) [hereinafter *Disruptions*] and *ibid.*

<sup>20</sup> See testimony of G. Laforest in Quebec, Commission on the Political and Constitutional Future of Quebec, *Journal des débats* (17 January 1991) 1921.

<sup>21</sup> See G. Laforest, *L'esprit de 1982* in L. Balthazar, G. Laforest & V. Lemieux, eds., *Le Québec et la restructuration du Canada: enjeux et perspectives* (Sillery: Septentrion, 1991) at 147.

<sup>22</sup> *Supra*, note 18 at 98.

Cairns recognizes that similar objections to rights asymmetry would be raised by those who opposed the weakening of the pan-Canadian standard by the Meech Lake Accord. But, he argues that, in constitutional terms, more may be less:

Constitutional indigestion is partly a product of whether Quebec is thought of as part of Canada, as a province (almost) like the others, as subject to the Charter, and as sharing a single Canadian citizenship. From these perspectives, at some point a larger Quebec package of demands is less challenging to Canadianism than is a smaller package. That an independent Quebec would not be subject to the Charter is tautological and innocuous, whereas the same statement about the province of Quebec is threatening. Thus, in certain circumstances less can be more, and more can be less.<sup>23</sup>

This, indeed, has been the strategy of the government of Quebec since the demise of Meech Lake: according to the Allaire Report, to propose "radical reform of political and administrative structures of the central government."<sup>24</sup> The strategy is hoped to have the effect of shaking Canada outside of Quebec out of its unyielding objection to recognizing Quebec's distinctiveness constitutionally.

A two-charter regime would be objectionable to many for some of the same reasons they found the "distinct society" clause in the Meech Lake Accord objectionable: it would untie the liberal binds that unite us, subverting the notion of equal citizens and equal provinces. It would be defended on similar grounds as that clause: Quebec is a modern society with as exemplary a record of rights protection as any province.<sup>25</sup> Essentially, the two camps likely would resurrect over apparently intractable terrain. I would like to explore the premises upon which much of the rhetoric in that debate has been based. This exploration may also have some resonance in discussions regarding the entrenchment of a distinct Aboriginal charter regime,<sup>26</sup> although that is not the focus of my discussion here.

My aim also is to make less alien the "other" *Charter*. In Canada generally there are underlying suspicions about the Quebec *Charter*, tied, as it is assumed to be, to Quebec's aspirations for cultural and linguistic autonomy. Quebec, it is argued, on most rights issues, of which language is paradigmatic, is devoted more to collective, than individual, rights.<sup>27</sup> It follows that the Quebec *Charter* would carve out greater scope

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<sup>23</sup> Cairns, *supra*, note 19 at 238-239. This argument is adopted by C. Taylor in "Lancer un ultimatum au Canada anglais" *Le Devoir* (20 December 1990) B-8, an excerpt from his submission to the Bélanger-Campeau Commission.

<sup>24</sup> Allaire Report, *supra*, note 15 at 4.

<sup>25</sup> See the essays on both sides of the debate collected in M.D. Behiels, ed., *THE MEECH LAKE PRIMER: CONFLICTING VIEWS OF THE 1987 CONSTITUTIONAL ACCORD* (Ottawa: University of Ottawa Press, 1989) at 137ff.

<sup>26</sup> See First Nations Circle on the Constitution, *To The Source* (Ottawa: Assembly of First Nations, 1992) at 63 (Co-chair: Rosie Mosquito & Conrad Sioui).

<sup>27</sup> See, e.g., C. Taylor, *Can Canada Survive the Charter?* (1992) XXX ALTA. LAW REV. 427.

for the protection of collective aspirations than would the Canadian *Charter*. It is true that the government of Quebec is devoted to protecting and promoting the French language, but this assumption may be less true when the language issue is less prominent or defused.<sup>28</sup> By examining the texts of the two *Charters*, the presumed boundaries between the *Charters* will become blurred, making the differences between them appear largely illusory.<sup>29</sup>

Kenneth Karst explores such suspicions in his *BELONGING TO AMERICA*<sup>30</sup>: "When the cultural Others no longer seem so alien, there is little occasion for us to fear them, to make them vessels for our negative identities, or to threaten them in ways that make them cling to each other for psychological defense against us." By exploring the premises upon which the Quebec and Canadian *Charter* allegiances are based, we might come to understand better the multiple loyalties that sustain us. We might come to recognize, again in Karst's words, that there are multiple "communities of meaning"<sup>31</sup> through which we arrive at an understanding of Canadian citizenship.

#### DIFFERING ALLEGIANCES

It is almost ten years since patriation. Even now, there continues a debate over whether the citizenry of Quebec supported the constitutional accommodation of 1982, despite their government's rejection of the deal struck. Pierre Fournier discusses Quebec public opinion polls around that time in a recent book, concluding that Quebecers were staunch opponents of the patriation compromise:

[S]urveys at the time showed that the Quebec population was strongly opposed to patriation. According to CROP, in March 1981 only 27 percent of respondents supported patriation, 54 percent were opposed, and 19 percent had no opinion. Later, in March 1982, opposition had remained remarkably stable: 26 percent in favour, 55 percent opposed, and 19 percent with no opinion.<sup>32</sup>

Pierre Elliott Trudeau, as expected, has critiqued this reasoning, arguing that Fournier relies on polling conducted before patriation in April 1982. Countering with other opinion poll data, he argues that public opinion in Quebec turned in favour of the accord, despite the Quebec

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<sup>28</sup> It might be argued that the language issue is hardly ever defused in Quebec. But I hope to show how the liberalism enshrined in the two *Charters* are more than compatible. See the opinion poll data reported in J.-F. Lisée, "Bons vivants, tolérants, pantouflards..." *L'actualité* (Janvier 1992) 20 at 22-23.

<sup>29</sup> See Z. Bauman, *Strangers: The Social Construction of Universality and Particularity* (1988-89) 78 *TELOS* 7 at 10-13.

<sup>30</sup> (New Haven: Yale University Press, 1989) at 174.

<sup>31</sup> *Ibid.* at 183.

<sup>32</sup> P. Fournier, *A MEECH LAKE POST-MORTEM: IS QUEBEC SOVEREIGNTY INEVITABLE?* (Montreal & Kingston: McGill-Queen's University Press, 1991) at 8 [hereinafter *Fournier*], citing *La Presse* (20 March 1982).

government's opposition.<sup>33</sup> He cites polls conducted at the end of January 1982 (also before patriation) showing that Premier Lévesque should have signed the November accord after modifications were made,<sup>34</sup> and polls in June 1982<sup>35</sup> (49% of Quebecers polled thought the new constitution a good thing for Canada) and December 1982 (58% of Quebecers polled believed that the country was not about to split up),<sup>36</sup> which indicate approval of the accord. Daniel Latouche excuses this opinion poll evidence on the basis that, at the time, "Quebec was experiencing its worst economic crisis" and "the integrity of several of its new institutions [i.e. Bill 101] was being threatened".<sup>37</sup>

Perhaps the most telling opinion poll data, cited by neither Fournier nor Trudeau, was that obtained in polling conducted four days after the November 1981 First Ministers' meeting. While the data showed that Quebecers were greatly dissatisfied with the outcome of the November accord, they were almost evenly divided on the issue of whether the government of Quebec should have signed it.<sup>38</sup> Public opinion data ten years later remains equivocal. Polls in April and May 1991 indicated that 47% of Quebecers agreed that all of Quebec's laws should be subject to the Canadian *Charter* in exchange for an acceptable constitutional deal for Quebec, while 42% preferred that Quebec's laws be supreme.<sup>39</sup>

Not having had a readily recognizable stake in the success of the *Constitution Act, 1982*, Quebecers did not develop any deep allegiance to the document. For the elites of Quebec, the Canadian *Charter* took on great symbolic importance, as an aspect of increasing Americanization and English Canadian imperialism.<sup>40</sup> In response to the pan-Canadian standard, and the loyal followers it generated outside of Quebec, political elites in Quebec began a public relations campaign designed to

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<sup>33</sup> See *Un dernier commentaire de Pierre Elliott Trudeau* in D. Johnston, ed., *LAC MEECH, TRUDEAU PARLE...* (LaSalle: Hurtubise HMH, 1989) 146 at 148.

<sup>34</sup> R. Sheppard, "Both governments losing favour in Quebec" *The Globe and Mail* (5 May 1982) 8.

<sup>35</sup> "75 p. cent des Canadiens appuient la nouvelle Constitution" *La Presse [de Montréal]* (19 Juin 1982) A11.

<sup>36</sup> "Les Canadiens sont plus confiants dans l'avenir de la Confédération" *La Presse [de Montréal]* (15 Décembre 1982) C6.

<sup>37</sup> D. Latouche, *CANADA AND QUEBEC, PAST AND FUTURE: AN ESSAY* (Toronto: University of Toronto Press, 1986) at 98. Bill 101 being R.S.Q. 1977, c. C-11.

<sup>38</sup> The numbers were 40% in approval with the refusal to sign and 42% disapproving. See "Quebecers split on BNA Pact: Poll" *The [Montreal] Gazette* (14 November 1981) 1.

<sup>39</sup> T. Wills, "Most in Quebec poll would scrap sign law in constitutional deal" *The [Toronto] Star* (2 June 1991) A14. A more recent poll, published after completion of this paper, suggests moderately higher levels of allegiance in Quebec to the Canadian *Charter*. See J.-F. Lisée, "Le Canada dans la peau" *L'actualité* (Juillet 1992) 21 at 26-28.

<sup>40</sup> See P. Mackay, *La Charte canadienne des droits et libertés de 1982 ou le déclin de l'empire britannique* in R.D. Bureau & P. Mackay, *LE DROIT DANS TOUS SES ÉTATS: LA QUESTION DE DROIT AU QUÉBEC 1970-1987* (Montreal: Wilson & Lafleur, 1987) 13.

boost the status of the Quebec *Charter*.<sup>41</sup> For the protection of individual rights and freedoms, Quebecers need have looked no further than their own local initiative.

There may be some grounds for generating such pride. Some Quebec *Charter* provisions were drafted initially as amendments to the *Civil Code* in 1966 by a committee chaired by F.R. Scott and composed of Jean Beetz, Gerald LeDain and Jacques-Yvan Morin.<sup>42</sup> These and other guarantees later were redrafted by Scott and Paul André Crépeau in 1971 into a bill of rights.<sup>43</sup> Passed in 1975 by the Liberal government as a companion piece of legislation to Bill 22, the Quebec *Official Language Act*,<sup>44</sup> the Quebec *Charter* was unprecedented in the scope of its protection of human rights and freedoms. No province in Canada had gone as far in codifying not only human rights, but significant social rights. Together with Quebec's unique civil law tradition of positive obligations on the part of both citizens and government, the Quebec *Charter* enshrined a *mélange* of both rights and duties. As others from within Quebec have written in detail about the Quebec *Charter's* provisions,<sup>45</sup> I will only highlight here some of its interesting and distinguishing characteristics.

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<sup>41</sup> *Ibid.* at 29 n. 36.

<sup>42</sup> See Civil Code Revision Office, *Report of the Civil Rights Committee* (Montreal: 1966).

<sup>43</sup> F.R. Scott & P.- A. Crépeau, *Report on a Draft Bill Concerning Human Rights and Freedoms* (25 July 1971). A complete history can be found in A. Morel, *La Charte québécoise : un document unique dans l'histoire législative canadienne* (1987) 21 R.J.T. 1.

<sup>44</sup> S.Q. 1974, c. 6. During the debates concerning the draft *Charter*, then Quebec Minister of Education, M. François Cloutier, stated in the National Assembly: "En ce qui concerne la loi 22, je me permets de rappeler qu'à maintes reprises, au cours du débat j'ai indiqué qu'elle devait être accompagnée d'une charte des droits de l'homme ou d'un texte législatif analogue, précisément parce que dans la mesure où la loi 22 affirmait, d'une façon claire, des droits collectifs, il était essentiel de protéger le plus possible les droits individuels" in *Journal des débats* (14 November 1974) at 2818.

<sup>45</sup> See, e.g., Morel, *supra*, note 43; Morin, *infra*, note 80; L. Lamarche, *Perspective féministe d'une certaine société distincte : Les Québécoises et l'Accord du Lac Meech* in K.E. Swinton & C.J. Rogerson, *COMPETING CONSTITUTIONAL VISIONS: THE MEECH LAKE ACCORD* (Toronto: Carswell, 1988) 21 at 27-30; and J. Woehrling, *La protection des droits et libertés, et le sort des minorités* in A.-G. Gagnon & F. Rocher, *RÉPLIQUES AUX DÉTRACTEURS DE LA SOUVERAINETÉ DU QUÉBEC* (Montréal: vlb éditeur, 1992) at 131.

TABLE 1  
THE CANADIAN AND QUEBEC CHARTERS:  
SELECTED UNIVERSALITIES

	Canadian Charter	Quebec Charter
Limitations Clause	Reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society (1)	Scope and limits of freedoms and rights may be fixed by law (9.1)*
Notwithstanding Clause	Law may expressly declare that it operates notwithstanding s. 2 or ss. 7-15 (33)	No law may derogate from ss. 1-38 unless law expressly states so (52)*
Fundamental Freedoms	Freedoms of conscience and religion; thought, belief, opinion and expression; peaceful assembly; and association (2)	Freedoms of conscience, religion, opinion, expression, peaceful assembly and association (3)
Democratic Rights	Every citizen has the right to vote and to be qualified for membership therein (3)	Every person legally capable and qualified has the right to vote and to be a candidate (22)
Legal Rights	<p>a. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice (7)</p> <p>b. Right to be secure against unreasonable search or seizure (8)</p> <p>c. On arrest or detention...the right to retain and instruct counsel without delay and to be informed of that right (10(b))</p> <p>d. Any person charged with an offence has the right...to be tried within a reasonable time (11(b))</p>	<p>a. No one may be deprived of liberty or rights except on grounds provided by law and in accordance with prescribed procedure (24)</p> <p>b. Every human being has a right to life, and to personal security, inviolability and freedom (1)*</p> <p>No one may be subjected to unreasonable search or seizure (24.1)*</p> <p>c. On arrest or detention, the right to immediately advise next of kin and have recourse to legal counsel and to be informed promptly of those rights (29)*</p> <p>d. Every accused person has a right to be tried within a reasonable time (32.1)*</p>

(continued)

TABLE 1 (continued)

	Canadian Charter	Quebec Charter
Equality Rights	Equality before and under the law and the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability (15)	Right to full and equal recognition and exercise of human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.* Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right (10)*

\* indicates amended or enacted by S.Q. 1982, c. 61.

() indicates section number

In addition to the guarantees of fundamental freedoms such as expression, religion, and assembly, the Quebec *Charter* guarantees the right to assistance to anyone whose "life is in peril".<sup>46</sup> It also guarantees the right to non-disclosure of confidential information.<sup>47</sup> Those nine sections grouped under the heading of fundamental rights and freedoms are subject to a limitations clause, with objectives similar to section 1 of the Canadian *Charter*, introduced in 1982 as part of a package of reforms designed to complement provisions in the Canadian *Charter*.<sup>48</sup>

The legal rights in the Quebec *Charter*, as a result of the 1982 amendments, are, in some respects, more expansive than the counterpart sections of the Canadian *Charter*. For example, the Quebec *Charter* provides the right to have recourse to counsel upon arrest or detention and to be represented by counsel before any tribunal, while the Canadian *Charter* provides expressly for a right to counsel only upon arrest or detention.<sup>49</sup> While the Canadian *Charter* grants broad remedial discretion to courts under section 24 for Charter infringements, section 49 of the Quebec *Charter* entitles claimants to injunctions and compensation including, in some instances, exemplary damages.<sup>50</sup>

<sup>46</sup> S. 2.

<sup>47</sup> S. 9.

<sup>48</sup> S.Q. 1982, c. 61. Some of those provisions are marked by an asterisk in Table 1, above. Section 20, which permits certain types of discrimination, can also be considered a limitations clause.

<sup>49</sup> Quebec *Charter*, s. 34 and Canadian *Charter*, s. 10(b).

<sup>50</sup> See discussion in J.-C. Hébert, *Le droit disciplinaire et les garanties juridiques fondamentales* (1987) 21 R.J.T. 125 at 163.

The Quebec *Charter's* enumerated equality rights guarantees are more generous for equality seekers, providing expressly greater grounds for complaints of discrimination than under the Canadian *Charter*. For example, the Quebec *Charter* prohibits discrimination by reason of political conviction or "social condition". Quebec courts have interpreted social condition to include discrimination based upon a person's birth, income or level of education.<sup>51</sup> The Quebec *Charter* also was one of the first human rights instruments in the country to include "sexual orientation"<sup>52</sup> and "pregnancy"<sup>53</sup> as grounds for complaint. Unlike the Canadian *Charter's* analogous grounds, the Quebec *Charter's* equality rights are limited to those grounds enumerated.

There has been some concern expressed that the Quebec *Charter* does not include protection from indirect or systemic discrimination.<sup>54</sup> As a result of Supreme Court of Canada jurisprudence on the subject,<sup>55</sup> there is today little doubt that the Quebec *Charter* prohibits such activity too.<sup>56</sup> Nevertheless, in their study of Quebec *Charter* complaints from 1985-86, André Côté and Lucie Lemonde report that not one investigation founded upon a complaint of systemic discrimination was pursued, despite their having identified in the course of their study complaints justifying such an investigation.<sup>57</sup>

More clearly absent from the Quebec *Charter* is a counterpart to section 28 of the Canadian *Charter*, which may immunize gender equality rights from the Canadian *Charter's* override. But, women from Quebec have not felt a similar attachment to and pride of authorship in section 28 as have women in the rest of Canada. Should the Quebec *Charter* be entrenched, presumably, women's groups within Quebec will either find the current equality guarantees adequate, or will push for its strengthening, likely in the direction of section 28.<sup>58</sup> Women outside of

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<sup>51</sup> See *Johnston v. Commission des Affaires Sociales* [1984] C.A. 61 at 69-70.

<sup>52</sup> S.Q. 1977, c. 6, s. 1.

<sup>53</sup> S.Q. 1982, c. 61, s. 3.

<sup>54</sup> See A Royal Commission Report, *Equality in Employment* (Ottawa: Supply and Services, 1985) (Commissioner: Judge R. Silberman Abella) at 239 and *Commission des droits de la personne du Québec v. Ekco Canada Inc.* [1983] C.S. 968.

<sup>55</sup> See *Ontario Human Rights Comm'n v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, 23 D.L.R. (4th) 321 and *Canadian National Ry Co. v. Canada (Canadian Human Rights Comm'n)*, [1987] 1 S.C.R. 1114, (*sub nom. Action travail des femmes v. Canadian National Ry Co.*) 40 D.L.R. (4th) 193.

<sup>56</sup> See *Québec (Ville) v. Québec (Comm'n des droits de la personne)* [1989] R.J.Q. 831 at 841-42, 11 C.H.R.R. D/500 at D/508 (C.A.). This was portended by Beetz J. in *Brossard (Ville) v. Québec (Comm'n des droits de la personne)*, [1988] 2 S.C.R. 279 at 301, 88 N.R. 321 at 342 and see the comments of H. Brun in his book *CHARTES DES DROITS DE LA PERSONNE: LÉGISLATION, JURISPRUDENCE ET DOCTRINE*, 4e éd. (Montreal: Wilson & Lafleur, 1990) at 341-42.

<sup>57</sup> See A. Côté & L. Lemonde, *DISCRIMINATION ET COMMISSION DES DROITS DE LA PERSONNE* (Montreal: Saint-Martin, 1988) at 18.

<sup>58</sup> For a proposal for a revised s. 28 see S. Day, *Constitutional Reform: Canada's Equality Crisis* in D. Schneiderman, ed., *CONVERSATIONS: WOMEN AND CONSTITUTIONAL REFORM* (Edmonton: Centre for Constitutional Studies, 1992) at 102 n. 27.

Quebec would have less to fear from an entrenched Quebec *Charter* than they may have had with the Meech Lake distinct society clause. There might be little or no impact on Canadian *Charter* equality jurisprudence.<sup>59</sup>

TABLE 2  
THE CANADIAN AND QUEBEC *CHARTERS*:  
SELECTED PARTICULARITIES

Canadian <i>Charter</i>	Quebec <i>Charter</i>
Democratic Rights regarding maximum duration of legislative bodies (5)	Right to assistance if life is in peril (2)
Mobility Rights (6)	Right to dignity, honour and reputation (4) and right to respect for private life (5)
Official language regime in all institutions of the Federal and New Brunswick governments (16)	Right to peaceful enjoyment of property (6)
Minority Language Educational Rights for the two official language groups (23)	Right to non-disclosure of confidential information (9)
Interpretive clauses for aboriginal, treaty or other rights or freedoms (25), and the multicultural heritage of Canadians (27)	Right to equal salary for equivalent work (19)
Guarantee of rights and freedoms equally to male and female persons, notwithstanding anything in the <i>Charter</i> (28)	Economic and Social Rights: <ol style="list-style-type: none"> <li>a. Right to free public education to the extent and according to standards provided by law (40)</li> <li>b. Right to religious or moral education in public schools (41)</li> <li>c. Right to information to the extent provided by law (44)</li> <li>d. Right to financial assistance provided by law susceptible of ensuring an acceptable standard of living (45)</li> <li>e. Right, in accordance with law, to fair and reasonable conditions of employment. (46)</li> </ol>

( ) indicates section number

<sup>59</sup> Such fears were expressed in L. Smith, *Could the Meech Lake Accord Affect the Protection of Equality Rights for Women and Minorities in Canada?* (1990) 1 CONSTIT. FORUM 12.

The economic and social rights in the Quebec *Charter*, for which, at present, there are no express parallels in the Canadian *Charter*,<sup>60</sup> provide guarantees in regard to such matters as a right to free public education, a right to financial assistance as provided by law to an acceptable standard of living, and the right to fair and reasonable conditions of employment. Significantly, these rights are not subject to government override, discussed below, rather, they are rights generally available only to the extent and according to the standards provided for by law. To the extent that legislative actors agree to provide those services, Quebecers are entitled to claim them.<sup>61</sup> The social aspects of the *Charter*, therefore, largely are formalistic guarantees permitting limited court oversight in the provision of a wide range of social services.

This part of the *Charter* also provides for a right to send children to private educational establishments and for the protection of cultural interests of ethnic minorities.<sup>62</sup> Both of these provisions are of potential symbolic importance to English-speaking communities in Quebec. Quebec courts, however, have construed this latter protection narrowly so as to exclude the Quebec anglophone community. Anglophones have not, according to the Quebec Superior Court, traditionally been considered an ethnic minority for whom protection under law was necessary for their survival.<sup>63</sup> While the Quebec *Charter*, unlike the Canadian *Charter*, does not otherwise provide for minority language educational guarantees,<sup>64</sup> it does include "language" as a prohibited ground of discrimination<sup>65</sup> and, as discussed below, it also protects language rights in part by its guarantee of freedom of expression.<sup>66</sup> Significantly, the P.Q. government in 1985 offered to continue the operation of the "Canada clause" in a new Quebec constitution as part of its package of constitutional proposals.<sup>67</sup>

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<sup>60</sup> These yet may be the subject of judicial creation under the Canadian *Charter*. See the judgment of Dickson C.J.C., Lamer and Wilson JJ. concurring, in *Irwin Toy Ltd v. Québec (A.G.)*, [1989] 1 S.C.R. 927 at 1003, 58 D.L.R. (4th) 577 at 633 [hereinafter *Irwin Toy*] ("rights to social security, equal pay for equal work, adequate food clothing and shelter" may fall within the scope of "security of the person" in s. 7). Also, proposals for a constitutionalized 'social charter' may achieve similar objectives.

<sup>61</sup> See *Lecours v. Québec (Ministère de la Main-d'oeuvre et de la Sécurité du revenu)*, J.E. 90-638 (C.S.) and *Méthot v. Commission des affaires sociales du Québec*, J.E. 91-1120 (C.S.).

<sup>62</sup> Sections 42 & 43.

<sup>63</sup> See *Campisi v. P.G. Québec*, [1977] C.S. 1067 at 1075.

<sup>64</sup> On the linguistic guarantees provided by the government of Quebec to the English-speaking communities in Quebec see R. Rudin, *Collective Rights, the English-Speaking Minority and the Québec Government 1867-1988* in D. Schneiderman, ed., *LANGUAGE AND THE STATE: THE LAW AND POLITICS OF IDENTITY* (Cowansville: Yvon Blais, 1991) at 243.

<sup>65</sup> See *Forget v. Québec (A.G.)*, [1988] 2 S.C.R. 90, 87 N.R. 37.

<sup>66</sup> See text associated with notes 89ff.

<sup>67</sup> See *Draft Agreement, supra*, note 2 at 66. On the "Canada clause" see text associated with notes 100-04.

The Quebec *Charter* is interesting not only for its guarantees regarding social welfare rights. It also guarantees a variety of privacy rights including the right to the peaceful enjoyment of property,<sup>68</sup> and a right not to enter upon property without consent.<sup>69</sup> Property right guarantees in the Canadian *Charter* were the subject of some debate at the time of the *Charter's* adoption,<sup>70</sup> and remain justifiably controversial today, although they were included in recent federal proposals for constitutional reform.<sup>71</sup> The right to safeguard one's reputation is also guaranteed in the Quebec *Charter*,<sup>72</sup> a likely impediment to the relaxation of defamation laws in the direction suggested by the United States Supreme Court in *New York Times Co. v. Sullivan*.<sup>73</sup> The Quebec *Charter* also guarantees the right to have children receive religious or moral education in public schools.<sup>74</sup> Provisions for religious education in Ontario public schools have been challenged successfully under the Canadian *Charter*.<sup>75</sup> The same result likely would not be obtained under the Quebec *Charter*.<sup>76</sup>

The Quebec *Charter* applies to all provincial laws unless the law expressly provides that it is to operate notwithstanding the Quebec *Charter*. But not all laws which derogate from rights and freedoms are then invalid. Only those which derogate from the rights and freedoms guaranteed in sections 1 to 38 cease to have effect<sup>77</sup> — in which case, in a provision analogous to section 33 of the Canadian *Charter*, most of these infringements can be saved by legislative override.<sup>78</sup> Thus,

<sup>68</sup> S. 6.

<sup>69</sup> S. 8.

<sup>70</sup> See J. Whyte, *Fundamental Justice: The Scope and Application of Section 7 of the Charter* in THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS: INITIAL EXPERIENCE, EMERGING ISSUES, FUTURE CHALLENGES (Cowansville: Yvon Blais, 1983) at 24 and J. Sallot, "Liberals defeat property rights motion" *The Globe and Mail* (3 May 1983) 1.

<sup>71</sup> See Canada, *Shaping Canada's Future Together: Proposals* (Supply and Services Canada, 1991) at 3.

<sup>72</sup> S. 4.

<sup>73</sup> 376 U.S. 254 (1964). See the discussion in R.G. Dearden, *Constitutional Protection for Defamatory Words Published About the Conduct of Public Officials* in D. Schneiderman, ed., FREEDOM OF EXPRESSION AND THE CHARTER (Toronto: Carswell, 1991) at 287.

<sup>74</sup> S. 41.

<sup>75</sup> Under the Canadian *Charter's* subsection 2(a) as interpreted in *Canadian Civil Liberties Assn v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 342 (C.A.). A similar challenge in Quebec would not likely succeed, not only because of this guarantee but by reason of the 1867 constitutional provision protecting denominational Protestant and Roman Catholic education in the province of Quebec. See *Reference re Bill 30, An Act to Amend the Education Act (Ont.)*, [1987] 1 S.C.R. 1148, 40 D.L.R. (4th) 18 [hereinafter *Bill 30*].

<sup>76</sup> See P. Garant, *La déconfessionnalisation des structures scolaires au regard de l'article 93 de la Constitution et de la Charte québécoise des droits et libertés* in W. Pentney et al., eds., CANADIAN HUMAN RIGHTS YEARBOOK 1984-85 (Toronto: Carswell, 1985) at 169.

<sup>77</sup> S. 52.

<sup>78</sup> *Ibid.*

although the Quebec *Charter* is an ordinary statute, it has, in large part, a "quasi-constitutional" status, invalidating contradictory laws unless the override clause has been invoked.<sup>79</sup> The Quebec government has invoked the clause on more than twenty occasions since 1976, most often to shield affirmative action programs from the operation of the Quebec *Charter*.<sup>80</sup> When Daniel Latouche asks rhetorically, in his reply to Philip Resnick's *LETTERS TO A QUÉBÉCOIS FRIEND*, "[W]hat kind of country puts in its constitutional books an escape clause that is only a trap to bring shame on its eventual user", he might have answered, "Quebec".<sup>81</sup>

The Quebec Human Rights Commission is empowered to promote the principles enunciated in the *Charter* by making recommendations,<sup>82</sup> and may investigate complaints in regard to violations<sup>83</sup> of all the rights guaranteed except for the "fundamental freedoms and rights" found in the first nine sections of the Quebec *Charter*. If complainants seek enforcement of those nine sections, their only recourse has been, and continues to be, the courts.<sup>84</sup> Until recently, and unlike human rights regimes in other provinces, enforcement of the Quebec *Charter* was ensconced in the courts.<sup>85</sup> By virtue of recent amendments, this is no longer the case.<sup>86</sup> The new Human Rights Tribunal is mandated to hear applications arising out of unresolved complaints before the commission.<sup>87</sup> Even with respect to fundamental freedoms and rights, the Commission makes submissions and recommendations in regard to prospective pieces of provincial legislation. It plays an independent advisory and watchdog role of government action as it impacts on all the guarantees in the Quebec *Charter*.

The Quebec Human Rights Commission has come under stinging criticism by Côté and Lemonde<sup>88</sup> for its conservative interpretations of provisions otherwise generous in their language, such as social condition,<sup>89</sup> for delay, particularly with respect to complaints based upon grounds of race,<sup>90</sup> and the very high standard of proof the Commission

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<sup>79</sup> See *Devine v. Que (A.G.)*, [1988] 2 S.C.R. 790 at 804, 55 D.L.R. (4th) 641 at 652 regarding the supremacy of the Quebec *Charter*.

<sup>80</sup> See J.-Y. Morin, *La constitutionnalisation progressive de la Charte des droits et libertés de la personne* (1987) 21 R.J.T. 25 at 54 and see Commission des droits de la personne, *Rapport annuel 1988* (Québec: Les Publications du Québec, 1989) at 10-11.

<sup>81</sup> *LETTERS TO A QUÉBÉCOIS FRIEND* (Montreal & Kingston: McGill-Queen's University Press, 1990) at 91.

<sup>82</sup> S. 82.

<sup>83</sup> S. 83.

<sup>84</sup> B. Vizkelely, *PROVING DISCRIMINATION IN CANADA* (Toronto: Carswell, 1987) at 7.

<sup>85</sup> See *Parliamentarians want major changes on QHRC* (1988) IV:6 CANADIAN HUMAN RIGHTS ADVOCATE 16.

<sup>86</sup> S.Q. 1989 c. 51.

<sup>87</sup> See S.Q. 1989, c. 51, s. 16.

<sup>88</sup> *Supra*, note 57.

<sup>89</sup> *Ibid.* at 20.

<sup>90</sup> *Ibid.* at 65.

demands of complainants.<sup>91</sup> The Fédération des femmes de Québec, in their submission to the Bélanger-Campeau Commission, have made similar criticisms.<sup>92</sup>

In many ways, the Quebec *Charter* operates as do many human rights regimes — slowly and conservatively — except for the significantly enhanced role the courts have had in its enforcement. Its range is much broader, giving it a quasi-constitutional reach not met by comparable codes. It also parallels, in significant ways, the provisions of the Canadian *Charter*. Individual parts of the Quebec *Charter* also are laudable attempts at enshrining a progressive social charter, something that Canadians might consider desirable for their own *Charter*. Alan Cairns may be mistaken, therefore, when he writes that “an asymmetrical Charter regime for Quebec’s domestic legislation has jurisdictional consequences as it subjects that legislation and administrative behaviour to *less onerous restraints* than are applied elsewhere” (emphasis mine).<sup>93</sup> Rather, the Quebec *Charter*, in many respects, subjects laws and practices to as onerous, and even more onerous, standards as those found in the Canadian *Charter*.

#### DUAL(LING) SUSPICIONS

##### *The Quebec Charter in Canada*

There is a wide-spread unfamiliarity with the Quebec *Charter* throughout most of English Canada. There are very few references to it in the legal literature outside of Quebec, and little inclination to refer to its terms for comparative purposes.<sup>94</sup> There also is likely a wide-spread suspicion about the Quebec *Charter*, fostered by the perception of Quebec society, by some in English Canada, as illiberal, xenophobic and rabidly nationalistic.<sup>95</sup> That suspicion likely was heightened by a number of significant events which occurred after the signing of the Meech Lake Accord in 1987, and which fuelled opposition to any distinct charter status for the province of Quebec. I refer, firstly, to the Government of

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<sup>91</sup> *Ibid.* at 92-93.

<sup>92</sup> See R. Fidler, ed., *CANADA ADIEU?: QUEBEC DEBATES ITS FUTURE* (Lantzville & Halifax: Oolichan Books & The Institute for Research on Public Policy, 1991) at 174.

<sup>93</sup> *Supra*, note 18 at 88.

<sup>94</sup> See, e.g., G.-A. Beaudoin & E. Ratushny, *THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS*, 2nd ed. (Toronto: Carswell, 1989) which, interestingly, has a number of Quebec contributors and P. Hogg, *CONSTITUTIONAL LAW OF CANADA*, 2nd ed. (Toronto: Carswell, 1985). Exceptions are materials dealing with more conventional human rights codes, see e.g., W.S. Tarnopolsky, *DISCRIMINATION AND THE LAW*, 2nd ed. rev'd by W.F. Pentney (Don Mills: De Boo, 1985) at 9-1 to 9-57 and *supra*, note 84.

<sup>95</sup> D.J. Bercuson & B. Cooper, *DECONFEDERATION: CANADA WITHOUT QUEBEC* (Toronto: Key Porter Books, 1991). Bercuson and Cooper argue that once Quebec and Canada separate, Quebec will become a more liberal society than it was in Canada.

Quebec's use of the notwithstanding clause to shield provisions of Bill 101 regarding the language of outdoor commercial signs and, secondly, to the initially successful application for an injunction restraining Chantal Daigle from obtaining an abortion.

There is, if not confusion, widespread misunderstanding about the use of the notwithstanding clause in commentary emanating from both anglophones<sup>96</sup> and francophones.<sup>97</sup> These commentators suggest that the Canadian *Charter* was invoked by the Supreme Court of Canada to render unconstitutional the language of commercial sign provisions of Bill 101. Anglophone suspicion is fuelled by the further hunch that the Quebec *Charter* would have permitted such infringements on freedom of expression that the Canadian *Charter* had outlawed.<sup>98</sup> It was the Quebec *Charter*, however, which the Supreme Court of Canada employed to strike down the outdoor commercial sign law, affirming the decision of the Quebec Court of Appeal. This was because the Canadian *Charter*'s override clause had been invoked less than five years earlier, in a 1983 amendment to Bill 101.<sup>99</sup> That part of Bill 101 requiring the exclusive use of francophone firm names was subject to scrutiny under both the Canadian and Quebec *Charters*. And it was the notwithstanding clause in both the Quebec and Canadian *Charters* which the government of Quebec invoked when it passed Bill 178 in 1988, shielding those provisions in Bill 101 from the scrutiny of either *Charter* and permitting the use of English on indoor commercial signs only.

Suspicion was heightened also by the 1989 ordeal of Chantal Daigle. Daigle was enjoined from obtaining an abortion by virtue of a court order obtained by Jean-Guy Tremblay. The application was founded upon the guarantee of the "right to life" enshrined in the Quebec *Charter*. While the Quebec Superior Court and Court of Appeal were willing to use the Quebec *Charter* to bar her access to an abortion, it was the Supreme Court of Canada which ultimately relieved her from these legal constraints, holding that the Quebec *Charter* was not intended to protect a foetus. By many outside of Quebec, the lower court rulings were seen as a severe deviation from the pan-Canadian standard and

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<sup>96</sup> See T.R. Berger, "Quebec's Rendezvous With Independence" *Canadian Forum* (April 1991) 5 at 8 ("In fact, it was the notwithstanding clause of the [Canadian] *Charter* that allowed Mr. Bourassa to enact his sign law despite the ruling of the Supreme Court that it was unconstitutional").

<sup>97</sup> See, e.g., Fournier, *supra*, note 32 at 93-94 and C. Dufour, A CANADIAN CHALLENGE — LE DÉFI QUÉBÉCOIS (Lantzville & Halifax: Oolichan Books & Institute for Research on Public Policy, 1990) at 156.

<sup>98</sup> There is the further hunch that if the distinct society clause in the Meech Lake Accord had been ratified, the outcome in the *Ford* case, *infra*, note 105, may have been different. See, e.g., D. Coyne, *Beyond the Meech Lake Accord* in Schneiderman, ed., *supra*, note 64, 437 at 454 and B. Slattery, *The Constitutional Priority of the Charter* in Swinton & Rogerson, eds., *supra*, note 45, 81 at 86. But see J. Woehrling, *A Critique of the Distinct Society Clause's Critics* in Behiels, ed., *supra*, note 25, 171 at 190.

<sup>99</sup> *An Act to amend the Charter of the French language*, S.Q. 1983, c. 56, s. 52.

solely the product of Quebec courts invoking Quebec *Charter* norms. But the rest of Canada may be too sanguine about that pan-Canadian standard. It has not yet been determined whether the "right to life" guarantee in section 7 of the Canadian *Charter* protects the life of a foetus, although the Supreme Court's decisions in *R. v. Morgentaler*<sup>100</sup> and *Tremblay v. Daigle*<sup>101</sup> may very well have settled the issue in favour of choice. The political orientation of the judges invoking the vague guarantees of the Quebec *Charter* may have been more responsible for the result than the provisions of the Quebec *Charter* itself. Moreover, if the pan-Canadian standard which is alleged to exist is one of women's control over reproduction, it should not be forgotten that it was a series of juries in Quebec, and subsequently the Quebec government itself, which relieved Dr. Henry Morgentaler of legal liability for what was, by most accounts, a flagrant disregard of the *Criminal Code* provisions regulating access to therapeutic abortions. A decade later, the province of Ontario, amongst others, still was prosecuting Morgentaler for that activity. In other words, English Canada may have few lessons to teach Quebecers about reproductive freedom.<sup>102</sup>

### *The Canadian Charter in Quebec*

Suspicion of the Canadian *Charter* in Quebec has taken some time to foster. As Gil Rémillard remarked in 1982, "Le ciel ne nous est pas tombé sur la tête, loin de là."<sup>103</sup> Nor, according to Daniel Latouche, did the "passage of the *Constitution Act, 1982*....send the citizens [of Quebec] running into the streets".<sup>104</sup>

Instead, the Quebec legislative assembly, almost immediately after the *Charter*'s proclamation, adopted wholesale invocations of the Canadian *Charter*'s notwithstanding clause.<sup>105</sup> Quebec elites were well aware of the political aim of the *Charter* to foster allegiance to the Canadian

<sup>100</sup> [1988] 1 S.C.R. 30, 82 N.R. 1 [hereinafter *Morgentaler*].

<sup>101</sup> [1989] 2 S.C.R. 530, 102 N.R. 81 [hereinafter *Daigle*].

<sup>102</sup> See, generally, C. Maillé, *The Women's Health Movement in Quebec Society: An Analysis for the Purpose of the Constitutional Debate* in Schneiderman, ed., *supra*, note 58 at 78. This is not to say that the Quebec government acted admirably in the case of *Daigle*. As Donna Greschner argues, "[t]he Quebec National Assembly did nothing to help Daigle, nor did the executive branch of the provincial government. The Attorney General of Quebec intervened before the Supreme Court to argue for the province's legislative jurisdiction over certain aspects of abortion, refusing to assert or accept Daigle's freedom." But, she adds, "[n]either did the Attorney General of Canada argue for women's freedom". See D. Greschner, *Abortion and Democracy for Women: A Critique of Tremblay v. Daigle* (1990) 35 MCGILL L.J. 633 at 636-37.

<sup>103</sup> "Interview : Gil Rémillard : la Constitution n'est pas si mauvaise...." *L'actualité* (May 1982) 15 at 18.

<sup>104</sup> *Supra*, note 37 at 97.

<sup>105</sup> See *An Act respecting the Constitution Act, 1982*, S.Q. 1982, c. 21. The constitutionality of this wholesale opting out of the *Charter* is considered in *Ford v. Quebec (A.G.)*, [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577 [hereinafter *Ford*].

state through the application of a pan-Canadian standard.<sup>106</sup> Moreover, the grand project of the *Charter* was to interfere massively in the realm of provincial jurisdiction. Section 23 was the most flagrant interference. The "Canada clause" of the Canadian *Charter* guaranteed the right of anglophones from anywhere in Canada, who received English primary school instruction in Canada, to English language education in Quebec.<sup>107</sup> The section had the deliberate effect of outlawing parallel Bill 101 provisions which guaranteed such rights only to anglophone parents who received an English language education in Quebec.<sup>108</sup> And, unlike most other provisions in the Canadian *Charter*, section 23 was not subject to the *Charter's* notwithstanding clause. The Government of Quebec could do nothing but abide by this repeal of otherwise valid provincial law.<sup>109</sup>

Quebec elites also were aware that the Canadian *Charter* severely curtailed the sovereignty of the government of Quebec more generally.<sup>110</sup> The locus of politics would move from the legislature to the courts, permitting judicial interpretations of the *Charter* to bind the Quebec government, subject to the availability of the notwithstanding clause. As well, with the Supreme Court of Canada as the court of last resort in Quebec, ultimately it would have the final word about the conformity of Quebec law to the pan-Canadian standard. Coupled with the suspicion in Quebec that the Supreme Court of Canada is a centralizing institution,<sup>111</sup> *Charter* review simply would increase the Court's role in this regard at the expense of Quebec's autonomy.

*Charter* guarantees to freedom of expression and religion would set pan-Canadian standards in the areas of language and culture; equality

<sup>106</sup> See, e.g., H. Pelletier-Baillargeon, *Délivrez-nous de nos amis!* in LA RÉPONSE DU QUÉBEC (Montreal: Libre Expression, 1980) at 220.

<sup>107</sup> Canadian *Charter* s. 23(1)(b).

<sup>108</sup> It has been argued that the government of Quebec waived their objections to such rights when they agreed at St. Andrews in August 1977 to the Premiers' "Statement on Language". The statement indicated their agreement to "make their best efforts to provide instruction in education in English and French wherever numbers warrant". But in their subsequent communiqué of February 1978 regarding language, the Premiers reaffirmed that commitment with the rider that "the implementation of the foregoing principle would be as defined by each province". See A.F. Bayefsky, CANADA'S CONSTITUTION ACT 1982 & AMENDMENTS: A DOCUMENTARY HISTORY (Toronto: McGraw-Hill Ryerson, 1989) at 339.

<sup>109</sup> See *A.G. (Quebec) v. Quebec Protestant School Boards*, [1984] 2 S.C.R. 66, 10 D.L.R. (4th) 321 [hereinafter cited to S.C.R.]. The Supreme Court of Canada, at 85-88, held that Bill 101 provisions which infringed s. 23 could not even be reasonable limits on the right under s. 1 of the *Charter*.

<sup>110</sup> Not only Quebec, but Canadian, elites foresaw this result. See P.H. Russell, *The Political Purposes of the Canadian Charter of Rights and Freedoms* (1983) 61 CAN. BAR REV. 30 at 41.

<sup>111</sup> See A. Lajoie, P. Mulazzi & M. Gamache, *Political Ideas in Québec and the Evolution of Canadian Constitutional Law, 1945 to 1985* in THE SUPREME COURT AS AN INSTRUMENT OF POLITICAL CHANGE (Toronto: University of Toronto Press, 1986) at 1-105 and E. Orban, *Constitution and Regional Cleavages: A View From Québec* in D. Smith, P. MacKinnon & J.C. Courtney, eds., AFTER MEECH LAKE: LESSONS FOR THE FUTURE (Saskatoon: Fifth House, 1991) 83 at 90-92.

rights could impugn legislative initiatives in these fields too.<sup>112</sup> Those fears were not far-fetched. The pan-Canadian standards likely would have the long-term effect of homogenizing provincial laws in areas that courts determine impact on rights and freedoms. A study of *Charter* activity by courts of appeal demonstrates that, while more federal than provincial laws were challenged, there was a much higher success rate in *Charter* challenges to provincial statutes than to federal ones. There was a qualitative difference as well: more than half of those successful challenges were to the substantive provisions of provincial laws, while the great majority of successful challenges to federal laws were to procedural provisions.<sup>113</sup> A later study of the Supreme Court of Canada's record indicates that, as applied against Quebec's domestic laws, the Canadian *Charter* has had the greatest success rate compared to all other provinces. All but one of those successful challenges to Quebec laws were recent policy initiatives dealing with the culturally sensitive matters of language and education.<sup>114</sup>

The *Charter's* greatest success may have been to foster a notion of equality of citizenship: each citizen an equal right-holder. Yet the *Charter* has had a differential impact on Quebec not just statistically. Canada is a country founded on two differing legal traditions, the civil law tradition found in Quebec and the common law tradition found in the rest of Canada. The common law governs the relationship of much private activity outside of Quebec. While the Canadian *Charter* most likely would apply to acts of the legislatures and parliament, it is less likely to apply to the common law, at least where there is no government actor present.<sup>115</sup> The province of Quebec, by operating under the *Civil Code* of Quebec, has, in effect, legislated in many of the fields which remain in the domain of the common law in the rest of Canada. The Canadian *Charter* likely applies indirectly, therefore, to a wide range of private activities that are exempt from *Charter* scrutiny in the rest of Canada.<sup>116</sup> Former Supreme Court of Canada Justice Bertha Wilson, in

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<sup>112</sup> According to J. Woehrling, s. 15 poses the greatest threat to the Government of Quebec's ability to legislate in areas necessary for the survival of Quebec's distinct society. See *LE QUÉBEC ET LE LAC MEECH* at 159.

<sup>113</sup> F.L. Morton *et al.*, *Judicial Nullification of Statutes Under the Charter of Rights and Freedoms, 1982-1988* (1990) 28 ALTA L. REV. 396 at 414.

<sup>114</sup> F.L. Morton, P.H. Russell & M. Withey, *The Supreme Court's First One Hundred Charter of Rights Decisions: A Statistical Analysis* (Calgary: Centre for Socio-Legal Studies, 1990) at 14-17.

<sup>115</sup> See *RWDSU v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, 71 N.R. 83 [hereinafter *Dolphin Delivery*].

<sup>116</sup> It could be argued that even interpretation of the civil code by the judiciary has created a civil "common law" which could be out of reach of the *Charter*. But this distinction between statutory creation and legislative interpretation makes little sense in application. See Y.-M. Morissette, *Certains problèmes d'applicabilité des Chartes de droits et libertés en droit québécois* in *Formation permanente Barreau du Québec, APPLICATION DES CHARTES DES DROITS ET LIBERTÉS EN MATIÈRE CIVILE* (Cowansville: Yvon Blais, 1988) 1 at 26-27.

the mandatory retirement case of *McKinney v. University of Guelph*,<sup>117</sup> frankly admitted this was the result of the Supreme Court of Canada's jurisprudence on applicability of the Canadian *Charter*:

I agree with the commentators that one of the consequences of *Dolphin Delivery's* refusal to apply the Charter to the common law absent government action is that the Charter will have a broader application in Quebec than in the other provinces. However, it seems inescapable that all legislation including the *Civil Code of Lower Canada* is subject to Charter review under section 32(1). I see no basis on which the *Civil Code* can be distinguished for this purpose from other legislation. One might speculate as to whether Parliament overlooked this problem when it enacted s. 32(1), particularly if Professor Hogg is correct that the legislative history supports the view that Parliament did not intend the Charter to apply to private action.<sup>118</sup>

The *Charter's* impact in the province of Quebec thus could be massive compared to the range of its impact in the rest of the country. But Quebecers cannot argue that such standards deserve no place in Quebec's private law. The effect of the Quebec *Charter* is likely to invade identical spheres of activity: it applies to "those matters that come under the legislative authority of Québec".<sup>119</sup> Thus, the two *Charters* have jurisdiction over similar private law matters.<sup>120</sup> But, the Canadian *Charter* may have the more profound effect of the two. With the status of "constitutional law", the Canadian *Charter* would integrate the pan-Canadian standard developed by Canadian courts into the law of Quebec. Many Quebecers would find this invasion not only objectionable, but paradoxical; Quebec, never having assented to the 1982 constitutional compromise, finds the whole of its civil law subject to a "roving normative Canadianism".<sup>121</sup>

The Quebec *Charter* itself has not been free of the homogenizing influence of the Canadian *Charter*. The Supreme Court of Canada has ruled that the Quebec *Charter's* guarantee of freedom of expression should be interpreted in a manner similar to the Canadian *Charter's* guarantee.<sup>122</sup> As André Morel has pointed out, this has the effect of isolating Quebec *Charter* provisions from other related ones. For example, might interpretation of the Quebec *Charter's* guarantee of freedom of expression be coloured by its provisions regarding a right to informa-

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<sup>117</sup> [1990] 3 S.C.R. 229, 76 D.L.R. (4th) 545 [hereinafter *McKinney* cited to D.L.R.].

<sup>118</sup> *Ibid.* at 560-61. The majority of the Court did not discuss the impact of *Dolphin Delivery* in Quebec and, therefore, it cannot be implied that Justice Wilson reflected the view of the Court. But the applicability of the *Charter* in the private law of Quebec may have motivated Laforest J.'s restrictive definition of the word "government" in his majority reasons.

<sup>119</sup> S. 55.

<sup>120</sup> See M. Caron, *L'égalité sous le Code civil: l'incidence des Chartes* (1990) 24 R.J.T. 433 at 437.

<sup>121</sup> *Supra*, note 18 at 80. See the discussion in H. Brun & G. Tremblay, *DRIT CONSTITUTIONNEL*, 2e éd. (Cowansville: Yvon Blais, 1990) at 806.

<sup>122</sup> *Ford, supra*, note 105 and *Irwin Toy, supra*, note 60.

tion? The Supreme Court also has ruled that the limitations clause in the Quebec *Charter* should be interpreted in the same manner as the Canadian *Charter's* as set out in the Court's ruling in *R. v. Oakes*.<sup>123</sup> Yet the wording of the two clauses is significantly different, and the operation of the Quebec *Charter's* clause is limited to the fundamental rights and freedoms elaborated in the first nine sections, while the Canadian equivalent applies to all of the rights and freedoms set out therein.<sup>124</sup> This wide-ranging application of the Canadian *Charter's* limitation clause reasonably should be seen to have influenced the Supreme Court's evolving *Oakes* test, while a different test may have been appropriate for the Quebec *Charter*. This phenomenon has not been confined only to Supreme Court of Canada jurisprudence: Quebec courts also have been inclined to adopt Canadian *Charter* interpretations as appropriate for the Quebec *Charter*.<sup>125</sup>

### *The Legitimacy of Either Charter*

Significantly, there is one ingredient absent from the terms of the present discussion over entrenching two *Charter* regimes. Probably the most contentious debate amongst Canadian constitutional scholars in recent years has been over the legitimacy of *Charter* review:<sup>126</sup> the counter-majoritarian difficulty of unelected judges overruling decisions made by democratically elected legislative bodies. As the Quebec *Charter* is a statute subject to amendment by a majority of the Quebec legislature, there has been less of a legitimacy problem than in the Canadian case, where *Charter* amendment requires invoking a lengthy and cumbersome process. Governments operating under either *Charter* can, for most purposes, invoke a notwithstanding clause, undercutting further the critics' legitimacy argument. But there still remain a number of potent critiques.<sup>127</sup> Having judges interpret and apply *Charter* guarantees, for example, narrows the range of possible legislative responses; most legislative bodies would be loathe to contradict a rights ruling made by the judiciary. Where laws are unsuccessfully challenged under the *Charter*, those laws are given the *Charter* stamp of approval, legiti-

<sup>123</sup> [1986] 1 S.C.R. 103, 65 N.R. 87 [hereinafter *Oakes*].

<sup>124</sup> See the discussion in F. Chevrete, *La disposition limitative de la Charte des droits et libertés de la personne : le dit et le non-dit* (1987) 21 R.J.T. 461.

<sup>125</sup> See *Larose v. Malenfant*, [1988] R.J.Q. 2643, 18 Q.A.C. 145. This phenomenon is not confined to Quebec. In Alberta, see *Dickason v. University of Alberta* (1991) 81 ALTA. L. REV. (2d) 393, 117 A.R. 11 (C.A.), leave to appeal to the Supreme Court of Canada granted 12 December 1991, 82 ALTA L. REV. (2d) lxv. On the Canadian *Charter's* influence on the *Civil Code*, see *Parent v. Gazette* (1991), 81 D.L.R. (4th) 689, 38 Q.A.C. 46.

<sup>126</sup> D. Beatty, *The End of Law: At Least As We Have Known It* in R. Devlin, ed., *CANADIAN PERSPECTIVES ON LEGAL THEORY* (Toronto: Emond Montgomery, 1990) at 391.

<sup>127</sup> Many can be found in H.J. Glasbeek, *A No-Frills Look at the Charter of Rights and Freedoms or How Politicians and Lawyers Hide Reality* (1989), 9 WINDSOR YEARB. ACCESS JUSTICE 293.

mizing what may be poor, even repressive, legislative choices.<sup>128</sup> Yet these arguments have had little appeal to Canadian sensibilities. This is made evident by the present debate over entrenching the Quebec *Charter*, expanding the Canadian *Charter* guarantees, and even doing away with the latter's notwithstanding clause.<sup>129</sup> In Quebec the concern is not with judicial legitimacy more generally, but with Supreme Court of Canada review in Quebec matters more particularly.<sup>130</sup>

There is lacking in this debate, for lack of a better description, any post-modern sensibility; an acknowledgment that liberal rights discourse is universalistic (despite regional particularities), filled with contradiction, and not culturally sensitive or specific. Placing emphasis on rights rhetoric as cultural practice reinforces the appearance of *Charters* as transformative when, on the contrary, they can stifle transformative change. Indeed, this is the irony of the *Ford* and *Daigle* cases. The invocation of rights language found in the Quebec *Charter* in both cases undermined Quebec's own long-term social policy goals.

#### HOW TO LIVE WITH TWO CHARTERS

Entrenchment of the Quebec *Charter*, with a view to overriding the Canadian *Charter*, should not be seen as an immense threat to the emerging pan-Canadian regime of citizens as equal rights-holders. Essentially, many of the rights and freedoms are the same, or identical, while others, as interpreted by courts both federal and provincial, are being given similar meanings so as to blunt any serious cleavage between the two *Charters*. The "fear" that the Quebec *Charter* is more concerned with collective rights than the Canadian *Charter* largely is unfounded — only to the limited extent that the former guarantees certain social and economic, but not language, rights. On the whole, in the Quebec *Charter*, like the Canadian, "l'individu, la personne est au centre de la Charte".<sup>131</sup> Should Supreme Court of Canada jurisdiction over the Quebec *Charter* be removed, it may be that a more particularized jurisprudence that is more sensitive to the collective interests of francophones in Quebec will develop. But this development is far from certain for at least two related reasons.

First, Quebec courts likely will continue to borrow and feed off of the jurisprudence of other courts who are interpreting provisions in similar rights regimes. If Quebec courts follow the lead of the Supreme

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<sup>128</sup> In regard to the labour trilogy, see L. Panitch & D. Swartz, *THE ASSAULT ON TRADE UNION FREEDOMS* (Toronto: Garamond Press, 1988) at 47-66.

<sup>129</sup> See, e.g., C. Banerjee *et al.*, *Rule of Law Betrayed: A Charter With an Expedient Override* (mimeo. 3 July 1991).

<sup>130</sup> See the testimony of H. Brun before the Commission on the Political and Constitutional Future of Quebec, *Journal des débats* (19 Décembre 1990) No.23, 1601-04.

<sup>131</sup> M. Caron, *Les nouvelles dispositions de la Charte des droits et libertés de la personne du Québec vues sous l'angle des droits individuels et collectifs*, monograph, cat. 500-20 (Montreal: Commission des droits de la personne, 1984).

Court of Canada in *Ford*, the limitations clause in the Quebec *Charter* will be interpreted in a manner similar to the Canadian *Charter*, that is, pursuant to the evolving test originally formulated in *Oakes*. As a result, limitations on the Quebec *Charter*'s fundamental rights and freedoms (sections 1-9) will be interpreted with reference to "other free and democratic societies". Whether it be the Supreme Court of Canada, the United States Supreme Court, or the European Court of Human Rights, the rhetoric of universalistic rights will continue to break down geographic boundaries.

Second, the very terms of the Quebec *Charter* are borrowed from a variety of international human rights instruments and, as a result of the 1982 amendments to the Quebec *Charter*, the Canadian *Charter* itself. Thus, a "roving normativism" likely would continue to influence Quebec *Charter* jurisprudence.

Quebeckers also should realise that, conversely, application of the Canadian *Charter* in Quebec generally should not pose a far more serious constraint on the National Assembly than does the Quebec *Charter*. Rather, the larger limitation the Canadian *Charter* poses is in its perception in the rest of Canada as a standard by which Quebec may not deviate, even with overwhelming support within Quebec for use of the notwithstanding clause. It is this preemptive limitation on Quebec's long-term policy goals that likely offends Quebec sensibilities, and may prove to be one of the blocks upon which past and future constitutional reform may stumble.

This is not to say that there would not be significant impact on the rights regime within Canada. Living with two *Charters* will, at base, threaten the constitutionally entrenched regime of minority language education rights and official bilingualism. Mr. Trudeau was right to say, but in the wrong context, that French-speaking Canadians in provinces outside of Quebec would be devastated by the prospects of two *Charters*, or two constitutions.<sup>132</sup> This will be explored further, as I briefly explore three possible scenarios that we may encounter along the path of constitutional reform, though perhaps not in the immediate future. My discussion here will be modest — much work could be done regarding each of them.

In the first scenario, the Canadian and Quebec *Charters* are entrenched constitutional documents within Canada outside of Quebec and Quebec, respectively — the scenario discussed throughout most of this paper. In the second scenario, the Canadian *Charter* is amended with the dual aim of reflecting some aspects of the Quebec *Charter* and some of the demands of the Government of Quebec. In the third scenario, the status quo in respect of the two *Charters* continues, but with a twist: Quebec legislation is subject to a two-*Charter* regime — both the Canadian and Quebec *Charters* are entrenched constitutionally and the

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<sup>132</sup> P.E. Trudeau, *We, The People of Canada* in D. Johnston, ed., *WITH A BANG, NOT A WHIMPER: PIERRE TRUDEAU SPEAKS OUT* (Toronto: Stoddart, 1988) at 98-99.

Canadian *Charter* continues to operate in Quebec. I will address each scenario *seriatim*.

1. *The Quebec Charter Attains Primacy over the Canadian Charter*

This first scenario tests directly the bounds of Canadian citizenship. The Quebec *Charter* would be entrenched in a new Quebec constitution, with a new amending formula and would, thereby, not be easily amended. As I have argued above, while it would mean that the pan-Canadian standard would cease to bind Quebeckers, in many material respects, the same, if not more, rights and freedoms would accrue to Quebeckers. Many of those rights could be enforceable before the Quebec Human Rights Commission, not requiring the costly enforcement mechanism of Canadian *Charter* litigation.

The regime would replicate, to some extent, the relationship between the *Canadian Bill of Rights*<sup>133</sup> and the Quebec *Charter* in the period 1975-82. Each would be confined in their operation to federal and Quebec legislative jurisdictions, respectively. As in the earlier period, they would coexist yet work in tandem to cover the federal and provincial legislative field within Quebec, but with some significant differences. Unlike each of their predecessors, both would have constitutional status and more effective disabling mechanisms.

Entrenching two *Charters* may be the impetus for repeal or revision of the minority language guarantees in the Canadian *Charter*. Section 23 of the Canadian *Charter* (the "Canada clause"), guaranteeing English language education in Quebec for all English-schooled Canadian citizens, may be abandoned. Most indications are, however, that language education rights for indigenous anglophone Quebeckers would be guaranteed eventually in the Quebec *Charter*.<sup>134</sup> As well, denominational school guarantees in section 93 likely would continue unabated in Quebec and Ontario. Repeal or removal of section 23 could have a severe negative impact on French language communities outside of Quebec who do not have a similar fall-back position. The impetus for French language education guarantees might be seen by the rest of Canada to have dissipated with the removal of *Charter* guarantees for the English minority in Quebec. This could lead to perilous consequences for embattled francophone minority communities outside of Quebec and should be resisted fiercely.

Those consequences aside, it should be seen that having the Quebec *Charter* take supremacy in Quebec would not create the asymmetry that many fear would result. Given the objections which accompanied even a "distinct society" interpretive clause modifying the Canadian *Charter*,

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<sup>133</sup> R.S.C. 1985, App. III.

<sup>134</sup> See Allaire Report, *supra*, note 15 and Bélanger-Campeau, *supra*, note 16. The 25th Quebec Liberal Party convention adopted the Allaire Report with the amendment that the new Quebec constitution "Protect the recognized historic rights of anglophone Quebeckers [and specifically the right to] their own social and cultural institutions, as well as the right to manage their development" (at 6).

many Canadians would object deeply to this exemption from the universal Canadian standards enshrined in the *Charter*. But those standards, for the reasons outlined above, would continue, modified or embellished only slightly. Guarantees of procedural liberalism, as enshrined in the Canadian *Charter*, would remain mostly intact in Quebec. As Charles Taylor has commented, "what can and ought to bind us together are precisely the procedural norms that govern our interaction....it also seems to be the only unquestionable common ground."<sup>135</sup>

## 2. *Amending the Canadian Charter*

This scenario would see amendments to the Canadian *Charter* and would have a two-fold aim; it might accommodate Quebec's concerns regarding the presently worded *Charter* as it regards language rights and could thereby create a deeper allegiance to the document in Quebec that has so far proved elusive. This could complete the Trudeau project of national unity around a framework of rights and freedoms.

Any amendments, aside from those to minority language education guarantees, which appear to derogate from existing rights might be resisted, as the Meech Lake precedent suggests. But rather than ameliorate existing rights, rights could be beefed up to conform to the Quebec *Charter*. This approach would accord with calls from the federal New Democratic Party and the Government of Ontario to provide a constitutional "social charter". One of the principles Premier Rae says will guide Ontario in constitutional negotiations at the time of writing will be "an affirmation of rights and an extension of those rights to include some broader social and economic principles."<sup>136</sup> The Canadian *Charter* could be amended to include some of the economic and social rights or enhanced political rights, such as the twin rights to confidentiality of private information and the right to freedom of information, found in the Quebec *Charter*.<sup>137</sup>

This could also be seen as an opportunity by certain provincial governments to enshrine concepts of private property, which are provided for in the Quebec *Charter*. For good reasons, it is likely that this would be fiercely resisted by the New Democratic governments in Ontario, British Columbia and Saskatchewan.<sup>138</sup>

<sup>135</sup> *Supra*, note 27 at 444.

<sup>136</sup> Quoted in R. Mackie & G. Allen "Rae urges stronger Charter" *The Globe and Mail* (28 March 1991) A6. See *A Canadian Social Charter: Making Our Shared Values Stronger* (Toronto: Ministry of Intergovernmental Affairs, Sept. 1991). Curiously, in the discussion paper and in background documents, there is no discussion of the Quebec *Charter*.

<sup>137</sup> Since the time of writing, the Special Joint Committee on a Renewed Canada (Beaudoin-Dobbie) has reported to Parliament with the recommendation that a non-justiciable "social covenant" be included in the constitution. No relationship has been drawn between this proposal and the terms of the Quebec *Charter*.

<sup>138</sup> See discussions in R.W. Bauman, *Living in a Material World: Property Rights in the Charter* (1992) 3 CONSTIT. FORUM 49 and J. Bakan, *Against Constitutional Property Rights* in D. Cameron & M. Smith, eds., *CONSTITUTIONAL POLITICS* (Toronto: Lorimer, 1992) 117.

Under this scenario, we might see substantial changes, some might say substantial improvements, to the Canadian *Charter's* guarantees. As in the first scenario, the tolerance in the rest of Canada to the continued existence of French-speaking communities outside of Quebec would be severely tested.

### 3. *Canadian Charter Remains Intact — Quebec Charter is Entrenched*

In the long term, this might be the most acceptable and interesting outcome. The Canadian *Charter* may be gaining sufficient public support in Quebec to make such an option viable. In his now famous 1986 speech at Mont Gabriel, where Quebec Minister of Intergovernmental Affairs Gil Rémillard outlined his government's five demands to have his province assent to the 1982 Constitution, Rémillard acknowledged that the Canadian *Charter* was "a document of which we as Quebecers and Canadians can be proud."<sup>139</sup> After the release of the Liberal Party's Allaire Report, which suggested the entrenchment of the Quebec *Charter*,<sup>140</sup> Jean Allaire is reported to have acknowledged that the continued dominance of the Canadian *Charter* was desirable under a renewed federalism.<sup>141</sup>

As an important symbolic development in Quebec, and part of a package of renewed federalism, the Quebec *Charter* also could be given express constitutional status. Under the present amending formula, this could be accomplished unilaterally by the Quebec National Assembly<sup>142</sup> or, for more certainty, with the assent of Parliament.<sup>143</sup> Each of the Quebec and Canadian *Charters* would continue to apply within Quebec. In the event of duplication in operation, either *Charter* could be enforced, and the more stringent would be expected to be complied with. In the event of conflict, as in federalism disputes generally, the Quebec *Charter* could expressly provide that the Canadian *Charter* would be paramount.<sup>144</sup>

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<sup>139</sup> See Speech by Gil Rémillard to the Mont Gabriel Conference in P.M. Leslie, ed., *CANADA: THE STATE OF THE FEDERATION 1986* (Kingston: Institute of Intergovernmental Relations, 1985) 97 at 99.

<sup>140</sup> *Supra*, note 15.

<sup>141</sup> See S. Scott "Allaire sees lasting role for federal rights charter" *The [Montreal] Gazette* (1 March 1991) A5. See also the recent public opinion poll evidence in *L'actualité*, *supra*, note 39.

<sup>142</sup> Section 45 of the *Constitution Act, 1982*. It might be argued that the Quebec *Charter* already is a component of the "constitution of the province".

<sup>143</sup> Perhaps through s. 43 of the *Constitution Act, 1982*. It has been proposed, e.g., that the Metis Settlement Accord reached recently between the Government of Alberta and Alberta Metis be "entrenched" with the participation of Parliament. See Alberta, Report of the Alberta Select Special Committee on Constitutional Reform, *Alberta in a New Canada: Visions of Unity* (March 1992) at 15.

<sup>144</sup> If the arrangement is "entrenched" with the cooperation of Parliament, this would avoid potential conflict which could arise by virtue of *Bill 30, supra*, note 75. If enacted by the National Assembly only, the Canadian *Charter* most likely would remain paramount: see *R. v. Mercure*, [1988] 1 S.C.R. 234 at 270-272, 2 W.W.R. 577 at 635-36.

We have experienced in Canada and Quebec the development of a new legal tradition in the two *Charters* which will forge future meanings. As Bruce Ackerman has written about the American constitutional experience, so might it be said of the Canadian: the “narrative we tell ourselves about our Constitution’s roots is a deeply significant act of collective self-definition; its continual re-telling plays a critical role in the ongoing construction of national identity.”<sup>145</sup> That narrative has developed, adopting the words of Robert Cover, a language and a mythos:

These myths establish the paradigms for behaviour. They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves — a lexicon of normative action — that may be combined into meaningful patterns culled from the meaningful patterns of the past.<sup>146</sup>

Those meaningful patterns have converged into the universalistic language of rights. Each of Canada and Quebec demand that its particular version take precedence over the other. Can the two *Charters* coexist when the myth of each calls for abolition of the other and the language of each is a call for respect and toleration of the “other”? The myths can be overcome by recognizing the artificial paradox of dual(ling) *Charters*, that the non-self-executing standards which we have chosen to govern us share a common “language” and a common multiplicity of interpretations.

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<sup>145</sup> B. Ackerman, *WE THE PEOPLE: FOUNDATIONS* (Cambridge: Harvard University Press, 1991) at 36.

<sup>146</sup> “Foreword: *Nomos* and Narrative” (1983) 97 *HARV. L. REV.* 4 at 9.

