

Talking Back: An Examination of Legislative Sequels Produced by the National Assembly
of Quebec in Response to Judicial Invalidation of the *Charter of the French Language*

Sophia F. Müller

Thesis submitted to the
Faculty of Graduate and Post-Doctoral Studies
in partial fulfillment of the requirements for
the Doctorate in Philosophy degree in Political Science

School of Political Studies
Faculty of Social Sciences
University of Ottawa

© Sophia F. Müller, Ottawa, Canada, 2017

Abstract

Grounding its approach in historical and discursive institutionalist frameworks, this thesis examines the process of judicial review through an evaluation of Hogg *et al.*'s *Charter* dialogue hypothesis as it pertains to judicial invalidation of sections of the *Charter of the French Language* (CFL) and the legislative sequels produced by the National Assembly of Quebec (i.e. Bills 178 and 86).

When examined from an historical institutionalist perspective, the National Assembly of Quebec appears to have strategized its response through an assertion of parliamentary sovereignty, rather than the desire to engage in a “dialogue” with the Supreme Court of Canada. However, a closer examination of how the Bourassa government crafted Bill 178 reveals that the first ‘legislative response’ to the Supreme Court’s decision in *Devine* and *Ford* was crafted exclusively by the executive branch, in virtual secrecy among a handful of Bourassa’s cabinet members.

Displeased with the outcome of Bill 178, Anglophone civil society actors challenged the legitimacy of the CFL, as well as the notwithstanding mechanism at an international level, with their submission of *Ballantyne, Davidson, McIntyre v. Canada* to the United Nations Human Rights Committee (UNHRC). In 1993, the UNHRC ruled that Bill 178 violated sections of the *International Covenant on Civil and Political Rights*. The UNHRC’s decision eventually pressured the National Assembly of Quebec to amend Bill 178 with the passage of Bill 86, and consequently brought the Supreme Court’s remedies into partial effect.

However, Quebec’s subsequent amendment to the CFL, Bill 86, was not a “legislative sequel” in response to judicial nullification; rather it was primarily a response to comply to international human rights norms. Bill 86 amended sections 58 and 68 of the CFL, but contrary to the recommendations of linguistic equality set forth by the Supreme Court, the Bourassa government ensured that French remained the predominant language on signage. The evidence in this thesis suggests that *Charter* compliance was an almost secondary effect caused by the primary objective of Quebec’s adherence to international human rights norms for the purpose of continued participation in international affairs.

In its rejection of the *Charter* dialogue model, this thesis uncouples the pairing of the notwithstanding clause with the notion of parliamentary sovereignty and, in doing so, raises critical questions regarding the roles of the provincial executive and legislative branches during the process of constitutional interpretation. This thesis concludes that in lieu of *Charter* dialogue, a modified version of Baker’s model of coordinate interpretation is a more appropriate model of judicial review for summarizing the interaction of actors within the case studies of Bills 178 and 86.

Acknowledgements

I would like to formally thank and acknowledge the support of Dr. Linda Cardinal for her supervision and guidance throughout this process. I would also like to acknowledge and thank Dr. Francois Rocher and Dr. Luc Turgeon for their thoughtful advice with respect to the research design of this thesis.

On a more personal note, I would like to thank my parents, Sylviane and Heinz, for their unwavering support and for having inspired a commitment to curiosity, critical thought and life-long learning. I also owe a special thanks to my sister, Julia, and partner, Brad, for their insightful reflections, advice and good humour over these past years.

Table of Contents

Abstract	ii
Acknowledgements	iii
Table of Contents	iv
Chapter One: Introduction	1
1. Introduction.....	1
2. Research Focus and Question	4
3. Research Question	5
4. Frameworks: Historical institutionalism, incrementalism and discursive institutionalism ..	6
5. Organization of the Thesis.....	7
6. Major Themes	11
7. Contribution to the Advancement of Knowledge	16
Chapter Two: Canadian Models of Constitutional Interpretation	17
1. Introduction.....	17
2. A Continuum between Weak and Strong Models of Judicial Review in Canada	18
2.1 Canadian Judicial Review in Transition: from Parliamentary Supremacy toward a Stronger form of Judicial Review	21
3. A Typology of Metaphors commonly used to explain the Process of Constitutional Interpretation.....	24
3.1 Strong Forms of Judicial Review in Canada	24
3.1.1 Rights Revolution and the Rise of Strong-Form Judicial Review	25
3.1.2 The Growth of Judicial Power and the Court Party	28
3.1.3 Legislative Deference and the Rise of Judicial Supremacy	31
4. <i>Charter</i> Dialogue and Its Variants.....	33
4.1 History and Origins of the <i>Charter</i> Dialogue Metaphor	33
4.2 <i>Charter</i> Dialogue Model in Canada	39
4.3 Overview of Different Metaphors Closely Related to <i>Charter</i> Dialogue	43
4.3.1 The Court as Arbiter in Federal Relations.....	43

4.3.2 The Court as a Quasi-Political Actor	44
5. Coordinate Interpretation.....	46
5.1 History and Origins of the Coordinate Interpretation Model	47
5.2 Baker’s Coordinate Interpretation	49
6. Conclusion	51
Chapter Three: Theoretical Framework and Methodology	53
1. Introduction.....	53
2. What’s missing from Judicial Review and Judicial review Literature?	56
3. Historical Institutionalism and the Study of Quebec’s response to Judicial Nullification .	59
3.1 Complementing Historical Institutionalism with Incrementalism and Discursive Institutionalism	62
3.1.1 Incrementalism	63
3.1.2 Discursive Institutionalism.....	65
3.2 Interactions between Institutions and Ideas	72
4. Research Design	73
4.1 Dependant and Independent Variables	77
4.2 Methodological Considerations	77
5. Conclusion	80
Chapter Four: Negotiating Constitutional Interpretation.....	82
1. Introduction.....	82
2. Judicial review in Canada prior to 1960: A few Highlights	84
3. 1960-1969: Court as Umpire in federal-provincial disputes	86
4. 1970-1976: The Fight for a Charter of Rights and the End of Biculturalism.....	94
5. 1976-1981: Confusion Reigns and the Beginning of the End of the Court as Umpire Model.....	98
5.1 Constitutional Conference 1978: End of the ‘Court as Umpire’ Model	98
5.2 Constitutional Conference 1979	103
5.3 Constitutional Conferences: 1980 – 1982	106
5.4 Constitutional Conferences 1981-1982: Notwithstanding Clause and the Charter.	111
6. Judicial review Post-1982.....	113
7. Conclusion	114

Chapter Five: The First ‘Legislative Sequel’	118
1. Introduction.....	118
2. Le Visage linguistique du Québec: The Use of French within the “Common Sphere” and the development of the Charter of the French Language	121
3. The <i>Charter of the French Language</i> goes to the Supreme Court: The Cases of <i>Ford v. A.G. Quebec</i> and <i>Devine v. A.Q. Quebec</i>	126
3.1 The Case of Ford and Devine: An Overview of the Arguments and Positions of the Appellant, Respondent and Intervenors.....	127
3.2.1 Section 58 and 69 and the Question of Commercial Expression and on how Language rights were conceptualized	128
3.2.2 Sanctions included in Section 58 of the <i>Charter of the French Language</i>	130
3.3.3 The use of Section 1 and 33 (notwithstanding clause).....	131
4. The Legislative Response – Bill 178 or “Ce compromis mi-chair, mi-poisson”	136
4.1 The Tabling of Bill 178 and Dissecting a Response to Judicial Nullification.....	139
4.1.1 A Swift Response, with Virtually No Consultation	139
4.1.2 A Secretive and Executive-Directed Response to Judicial Nullification	141
3.1.3 Use of the Notwithstanding Clause and Federal Executive Pressure.....	144
5. A re-evaluation of the dialogue hypothesis regarding the legislative sequel of Bill 178 .	148
5.1 Executive Power and the Veneer of Parliamentary Sovereignty	150
5.2 How are we to understand parliamentary sovereignty in the context of this case? ...	152
5.3 A Case for Coordinate Interpretation: and the need for descriptive and normative forms of coordinate interpretation	155
6. Conclusion	158
Chapter Six: The Second ‘Legislative Sequel’	160
1. Introduction.....	160
2. “To Get a Little Justice”: Civil Society Actors Go to the UNHRC.....	163
3. UNHRC Reviews Bill 178.....	168
3.1 Strategy of the Federal Government	169
3.2 Strategy of the Province of Quebec.....	170
3.3 The Follow-up from Quebec and Canada	172
4. Government of Quebec and Bill 86.....	173
4.1 The Legislative Process and Bill 86: Two steps forward, one step back	174

4.2 A Legislative Response to the Supreme Court: Resisting the centralization of Charter federalism and role of the judiciary	176
4.3 Response to International Pressure.....	179
4.4 The Outcome of Bill 86: Partial Compliance	182
5. Conclusion	184
Chapter Seven: Conclusion	187
1. Introduction.....	187
2. Evaluating the Charter dialogue hypothesis	187
3. Coordinate Interpretation and Moving beyond the question of: ‘Who has the final word’?	190
4. Key Contributions to the advancement of literature and future research	194
Bibliography	197
Annex A: Ethics Approval Notice	214
Annex B: Sample Interview Questions	216

Chapter One: Introduction

1. Introduction

In her remarks presented at the *Law and Parliament Conference 2006*, the Right Honourable Beverley McLachlin stated that judicial accountability resides in a dialogical relationship between the Supreme Court of Canada and the legislatures:

Professor Hogg, among others, uses the *metaphor of dialogue* to explain the ensuing dynamic between the branches of governments. *The result, the record shows, is often a better law, a more effective administrative procedure.* In the last resort, *Parliament and the provincial legislatures retain the power to override a finding of unconstitutionality* under section 2 and sections 7 to 15 of the *Charter* by invoking the notwithstanding clause, section 33.¹

Justice McLachlin's direct reference to Hogg and Bushell's text "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)" is demonstrative of the attention it has received in legal and social science scholarship these past decades. The prominence of *Charter* dialogue theory is such that, as Hogg, Bushell-Thornton and Wright note in their article "*Charter* Dialogue Revisited":

By 2006, a total of 27 reported decisions (ten Supreme Court of Canada decisions, five provincial appellate decisions, seven decisions by the superior courts of the provinces or territories, on decisions of the Federal Court of Appeals, and one of a provincial court) had referred to the concept of *Charter* dialogue. *Charter* dialogue has been the subject of speeches by members of Parliament and members of the judiciary, and has been a topic for academic discussion in numerous courses in law and political science.²

Although the *Charter* dialogue model is accepted by a vast number of legal practitioners and scholarly experts, it is not without critics that have raised issues with the empirical and conceptual strength of this theorization.³

¹ Beverley McLachlin, "Keynote Address," Presented at the 2006 Law & Parliament Conference, Carleton University, Ottawa, 2 November 2006. [Emphasis added]

² Peter W. Hogg, Allison Thornton and W.K. Wright, "*Charter* dialogue revisited—or 'Much Ado about Metaphors,'" *Osgoode Hall Law Journal* 45, no. 1 (2007): 5.

³ Christopher Manfredi and James.B. Kelly, "Six degrees of dialogue: A response to Hogg and Bushell," *Osgoode Hall Law Journal* 37 no. 3 (1999); Frederick Lee Morton and Rainer Knopff, *The Charter Revolution and the Court Party*, (Michigan: Broadview Press 2000).

Indeed, the use of the dialogue metaphor raises a number of theoretical challenges, such as: What constitutes a ‘dialogue’? Does the notion of dialogue imply equal power among interlocutors? Are there different types of dialogical responses? Moreover, as a theorization for the relationship between the Supreme Court and other branches of government, the quantitative analysis used to prove a dialogical relationship has come under scrutiny by a number of legal and political scholars, due to the selection bias of case studies and vague definitions of the term “dialogue.” Yet, in spite of these critiques, the *Charter* dialogue model persists as an influential method of conceptualizing judicial accountability due to its identification of Canada’s “weak” model of judicial review.⁴

Dialogical models of judicial are particularly popular among commonwealth countries that are trying to reconcile the co-existence Westminster parliamentary traditions, such as, parliamentary sovereignty, with a strengthening and constitutional formalization of rights regimes. The version of dialogue employed in this thesis is firmly rooted in the Canadian conceptualization of inter-institutional exchanges. Specifically the hypothesis of this thesis tests a version of dialogue theory that is advanced by Hogg and Bushell (later Thornton) in their articles, “The *Charter* Dialogue Between Courts and Legislatures”⁵ and “*Charter* dialogue revisited—or ‘Much Ado about Metaphors,’”⁶

While Hogg and Bushell’s *Charter* dialogue model has garnered considerable attention, Canadian constitutional theorists have found themselves sometimes arguing past one-another given that scholars have difficulty agreeing upon the definition of what empirically constitutes a dialogue, and the whether the dialogue model is a normative or descriptive model.⁷ Given the variety of definitions of dialogue, it is worth noting that the theorization of *Charter* dialogue employed by this thesis is largely characterized as descriptive. In its descriptive use, the *Charter* dialogue model articulates how “institutional interactions surrounding rights operate in practice or how particular features of a bill of

⁴ Mark Tushnet, “Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law,” (Princeton: Princeton University Press, 2009), 19.

⁵ Hogg and Bushell, “*Charter* dialogue between courts and legislatures,” 76

⁶ Hogg, Thornton and Wright, “*Charter* dialogue revisited—or ‘Much Ado about Metaphors,’”

⁷ See: Emmett Macfarlane. 2012. “Conceptual Precision and Parliamentary Systems of Rights: Disambiguating “Dialogue” *Review of Constitutional Studies/Revue d’études constitutionnelles*. Volume 17, Issue 2, p. 73-100

rights can serve as mechanisms to facilitate responses from one branch of government to the actions of the other.”⁸

In keeping with Hogg and Bushell’s definition of Charter dialogue, dialogue ought also to be understood as articulated procedural interactions. These procedural interactions are defined as the process through which a judicial decision is open to legislative reversal, modification, or avoidance by a legislative body.⁹ The procedure consists of the legislature producing legislation which is presented to the judiciary for review, and in turn, sent back to the legislature if any modifications are necessary. The essence of this dialogue lies in the ability of the legislature to reverse, modify, or avoid judicial invalidation through the enactment of alternative statutes. To reverse or modify judicial invalidation, legislatures can use one of two *Charter* mechanisms: invocation of section 33, which grants legislatures the ultimate power of override;¹⁰ or invocation of, section 1, which allows legislatures to implement alternative means of achieving important objectives.¹¹ Taken as a whole, these features of the *Charter* mean that it has the potential to serve as a catalyst for two-way exchange between the judiciary and the legislature on the topic of human rights and freedoms, but it rarely raises an absolute barrier to the wishes of democratic institutions.¹²

Further to sequential characteristics, the procedural nature of dialogue also outlines the actors engaged in inter-institutional exchanges. Within Hogg and Bushell’s definition of dialogue, the actors are restricted to the Supreme Court of Canada and the legislative branch. The extent to which Hogg and Bushell’s use of the term legislature includes the executive branch is somewhat unclear, given that the authors make no express mention of the executive. Reading between the lines of Hogg and Bushell’s use of the term ‘legislative’ this thesis takes the term to mean exclusively the legislative branch. While this may be considered a rather literal interpretation, Hogg and Bushell are keen to note that legislative responses are imbued with the idea of deliberative engagement with the judicially invalidated legislation. Furthermore, the notion of legislative deliberation is also bolstered

⁸ Emmett Macfarlane. 2012. “Conceptual Precision and Parliamentary Systems of Rights: Disambiguating “Dialogue”. *Review of Constitutional Studies/Revue d’études constitutionnelles*. Volume 17, Issue 2, p. 73-100

⁹ *Ibid.*, 79.

¹⁰ *Ibid.*, 83.

¹¹ *Ibid.*, 84.

¹² *Ibid.*, 81.

by the tradition of parliamentary sovereignty, wherein the elected branches of government, representing the majoritarian premise, are capable of protecting human rights.

Although the *Charter* dialogue model has become a popular tool for conceptualizing the democratic legitimacy of judicial review in a post-*Charter* era, only a limited amount of scholastic attention has focused on the quantitative and qualitative examination of the use (and validity) of the *Charter* dialogue model with respect to the Supreme Court of Canada. Furthermore, although scholars have focused their efforts on understanding the role of the Supreme Court of Canada within *Charter* dialogue, there is currently little research pertaining to the examination of how legislatures (both federal and provincial) have responded to the *Charter* dialogue model,¹³ as well as whether legislatures perceive themselves to be in a dialogical relationship with the Supreme Court.

2. Research Focus and Question

Grounding its approach in historical and discursive institutionalist frameworks, this thesis seeks to understand how the province of Quebec has strategized responses to judicial invalidation by the Supreme Court of Canada. Given the vast scope of such an undertaking, this thesis will limit its analysis to two case studies that consist of amendments to the *Charter of the French Language*, Bills 178 and 86. The rationale for selecting language rights stems largely from the fact that the province of Quebec has entered into substantive challenges to the Supreme Court on cases such as: *Ford v. Quebec (AG)* [1988] and *Devine v. Quebec (AG)* [1988], which resulted in a partial amendment to the *Charter of the French Language* through the passage of Bill 178. For the sections of the *Charter of the French Language* that remained constitutionally invalid, Bill 178 invoked the notwithstanding clause thereby shielding the controversial sections of the bill from further court challenges for five years.

In response to passage of Bill 178, Anglophone civil society actors challenged the legitimacy of the *Charter of the French Language* and the use of the notwithstanding clause

¹³ See: Janet Hiebert, "Parliamentary Engagement with the *Charter*," *Supreme Court Law Review* 58 (2012): 93.; Janet Hiebert, "Interpreting a bill of rights: The importance of legislative rights review," *British Journal of Political Science* 35 (2005).

at the international level. The United Nations Human Rights Committee reviewed the *Ballantyne, Davidson, McIntyre v. Canada* case, and in 1993 ruled that Canada (and Quebec) were in violation of the *International Covenant on Civil and Political Rights*. The UNHRC's decision eventually pressured the National Assembly of Quebec to amend Bill 178 with the passage of Bill 86, and consequently brought the Supreme Court's remedies into effect. Consequently, The National Assembly of Quebec offers valuable insight into understanding how a democratically elected body produces legislative responses to judicial invalidation and, in turn, how provincial governments contribute to the process of constitutional interpretation.

3. Research Question

In circumstances where laws, particularly those pertaining to the *Charter of the French Language* (Bill 101), failed to comply with Canadian *Charter* provisions, the National Assembly of Quebec chose to produce responses that re-affirmed the legal significance of the *Charter*. For example, in the case of *Ford v. AG Quebec* [1988], the National Assembly's response to the judicial nullification, was not to question or outright reject the legitimacy of the *Charter*, but rather to utilize section 33 of the *Charter* to produce a legislative sequel that allowed Bill 178 to remain until its amendment in 1993, in which Bill 178 was replaced by Bill 86, which partially implemented the remedies in the *Ford* and *Devine* cases, thereby bringing the *Charter of the French Language* into greater *Charter* compliance. What this example, and others pertaining to language rights, demonstrates is that Quebec has engaged substantively with *Charter* provisions, in spite of its abstained signature from the *Constitution Act, 1982*. In light of these conditions, this thesis seeks to respond to the following research questions:

Regarding the power dynamics and institutional relationship between the Supreme Court and the Quebec government, ***how have judicial invalidations of sections of the Charter of the French Language been interpreted by actors within the Quebec government? How did Quebec government actors engage with the Court's decision? What model of judicial review most accurately characterises the institutional dynamics between the Quebec government and the Supreme Court of Canada?***

In response to this research question, the thesis tests the validity of Hogg's Charter dialogue hypothesis as it pertains to judicial invalidation and legislative sequels to the *Charter of the French Language*. In other words, this thesis asks: Based on the contextual analysis of two case studies, is the Charter dialogue metaphor appropriate for the perceived relationship between the Quebec government and the judiciary? If Charter dialogue is not an appropriate model, then what model or theory of judicial review would be more suitable for understanding the power dynamics and institutional relationship between the Supreme Court and the Quebec government on the topic of language rights?

4. Frameworks: Historical institutionalism, incrementalism and discursive institutionalism

This thesis assesses the merits of the dialogue hypothesis using two bounded case studies, Bill 178 and 86. To test the hypothesis, this thesis employs historical institutionalism as the primary theoretical framework. Given the importance of institutional change and ideas in this thesis, historical institutionalism is complemented by two secondary theoretical approaches: incrementalism and discursive institutionalism. For the purpose of this study, incrementalism provides a useful analytic lens for understanding how constitutional negotiations regarding the development of the *Charter of Rights and Freedoms* and institutional transformations of the Supreme Court altered the practice and perception of judicial review in Canada. Whereas incrementalism focuses on the strategies and negotiations of actors, discursive institutionalism provides a broader framework for mapping the interaction between ideas and institutions, as well as the transformative effects of ideas upon those institutions. For the purpose of this study, discursive institutionalism is particularly helpful in examining the tension between Quebec's assertion of maintaining the principle of parliamentary sovereignty as a model of judicial review versus stronger-forms of judicial review advanced by the federal government in constitutional conferences.

5. Organization of the Thesis

This dissertation examines two bounded case studies spanning from 1988 to 1993. The cases are not only bound by institutions (namely, interactions between the National Assembly of Quebec and the Supreme Court of Canada), but also by subject matter (official language rights outlined in sections 16-23 of the Canadian *Charter*). Moreover, these case studies represent critical moments within a longer history of constitutional disputes and negotiations. Given that historical institutionalism privileges the structural mechanisms utilized by actors to organize and execute their strategies, it is one of the theoretical frameworks employed to examine these case studies.

The first case study, Bill 178, examines the primary legislative response to judicial invalidation of the *Charter of the French Language* by the Supreme Court in *Ford v. A.G. Quebec* [1988] and *Devine v. A.G. Quebec* [1988]. Bill 178 represents a significant point of analysis for Hogg *et al.* because Quebec only partially implemented judicial recommendations, thereby passing a bill that was knowingly non-charter compliant. According to Hogg *et al.*, the inclusion of the notwithstanding clause in Bill 178 represents an important “dialogical” relationship for the National Assembly of Quebec because the legislature was able to assert the historic principle of parliamentary sovereignty in opposition to judicial power.

The second case study, Bill 86, examines the actors and pressures that influenced the Quebec government to eventually implement the remedies of these Supreme Court cases following the expiry of the notwithstanding clause. Further to the scope of Hogg *et al.*'s analysis, this thesis examines the events and cases involving Bill 178 that go beyond domestic constitutional politics but nevertheless contributed to the drafting of Bill 86, such as the case of *Ballantyne, Davidson, McIntyre v. Canada* (1993) that essentially challenged the legitimacy of Bill 178 under the *International Covenant on Civil and Political Rights* at the United Nations Human Rights Committee. In the wake of Bill 178, the civil society actors adopted a strategy wherein they challenged the majoritarian premise and the “will of the National Assembly” by turning to transnational activism. Through the *International Covenant on Civil and Political Rights* and the UNHRC the civil society actors were able to force the government of Quebec to re-examine its position on Bill 178. From this case

study, it is clear that Bill 86 was not primarily a “legislative sequel” in response to judicial nullification, but rather a response to comply to international human rights norms.

Chapter 2 – Models of Canadian Judicial review

Chapter Two provides a typology of the various theories, models and metaphors used to describe the institutional dynamics between the appointed Justices of the Supreme Court and elected members of the Quebec National Assembly. This chapter analyzes the ideational reception these models, with a particular focus on their origin, use of evidence, function and reception by the Canadian legal-political community. Particular attention is granted to metaphors such as the Court party,¹⁴ and *Charter* dialogue¹⁵ with an inclusion of authors that discuss alternative forms of dialogue,¹⁶ and coordinated interpretation.¹⁷

Chapter 3 – Historical and Discursive Institutionalism: Observing Charter Dialogue Theory in the National Legislative Assembly of Quebec

Chapter Three examines the theoretical and methodological foundations of the thesis. Section one provides a brief analysis of the theoretical and methodological approaches employed by scholars to examine the practice of judicial review and judicial review in Canada. The chapter examines the trend in constitutional studies from quantitative to qualitative analysis of judicial review in Canada, as well as the tendency of scholars to limit their analysis of judicial review to federal institutions.

Section two examines the suitability of historical institutionalism as the primary theoretical framework employed in this thesis. Given the importance of institutional change and ideas, historical institutionalism is complemented by two secondary theoretical

¹⁴ F.L. Morton, *Law Politics and the Judicial Process in Canada*, (Calgary: University of Calgary Press, 2002).

¹⁵ Peter Hogg and Allison Bushell, “The Charter *Dialogue* Between Courts and Legislatures,” *Osgoode Hall Law Journal* 75 (1997): 75.

¹⁶ Gerald Baier, “Judicial Review and Canadian Federalism,” in *Canadian Federalism, Effectiveness, and Legitimacy*, eds. Herman Backvis and Grace Skogstad (Toronto: Oxford University Press 2002), 24-39; James Kelly and Michael Murphy, “Shaping the Constitutional dialogue on federalism: Canada’s Supreme Court as meta-political actor,” *Publius* 35, no. 4 (2005).; A.W. MacKay, “The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?” *Canadian Bar Review* 80 (2001).

¹⁷ Denis Baker, *Not Quite Supreme: The courts and coordinate constitutional interpretation*, (Montreal: McGill-Queen’s University Press 2010).

approaches: incrementalism and discursive institutionalism. For the purpose of this study, incrementalism provides a useful analytic lens for understanding how constitutional negotiations regarding the development of the *Charter of Rights and Freedoms* and institutional transformations of the Supreme Court altered the practice and perception of judicial review in Canada. Whereas incrementalism focuses on the strategies and negotiations of actors, discursive institutionalism provides a broader framework for mapping the interaction between ideas and institutions, as well as the transformative effects of ideas upon those institutions. Discursive institutionalism offers a secondary analytic lens through which one can better understand the impact of ideas on institutions, notably the tension between Quebec's assertion of maintaining the principle of parliamentary sovereignty as a model of judicial review versus stronger-forms of judicial review advanced by the federal government in constitutional conferences.

Chapter 4 – Theoretical and Historical Influences for understanding the relationship and role of the National Assembly of Quebec within Charter dialogue

Chapter Four analyses the subject of *judicial review* within the context of Quebec and federal government relations. In order to fully appreciate the complex interactions between Quebec, the Supreme Court and the federal government in *Ford v. AG Quebec* and *Devine v. AG Quebec* cases this chapter analyzes the transformations and conflicts throughout constitutional conferences from 1968 to 1985 on topics such as: the role of the judiciary in Canada as well as the power of the province of Quebec to legislate on linguistic and educational matters relevant to the preservation of Quebec's unique cultural heritage. The purpose of this chapter is to establish a historical context in order to better understand the Quebec government's response to the judicial invalidation of laws encapsulated in the *Charter of the French Language*.

The archival materials examined within the scope of this study reveals a clear desire by the federal government to transition away from the principle of parliamentary sovereignty toward a stronger form of judicial review. The efforts of the federal government to attain this objective consisted of a series of incremental changes throughout the course of numerous constitutional negotiations. While the federal government incrementally moved

toward a stronger model of judicial review (while simultaneously espousing that “nothing would change”), Quebec remained suspicious of the federal government’s proposals, and repeatedly reasserted its support for the maintenance of parliamentary sovereignty.

Chapter 5 – Bill 178 and the ‘First Legislative Sequel’

When examined from a historical perspective, as in Chapter Four, the National Assembly of Quebec appears to have strategized its response by asserting the principle of parliamentary sovereignty, rather than the desire to engage in a “dialogue” with the Supreme Court of Canada. However, a closer examination of how the Bourassa government crafted its response to judicial invalidation reveals that the ‘legislative response’ to the Court had little involvement with National Assembly. In contrast to the rhetoric of parliamentary sovereignty advanced by the province in earlier constitutional conferences and *facta* submitted to the SCC in *Ford* and *Devine*, the legislature had virtually no involvement in the drafting of Bill 178 and the decision to invoke the notwithstanding clause. Rather, Bill 178 was crafted exclusively by the executive branch, in virtual secrecy among a handful of Bourassa’s cabinet members. This conference of power for the creation of Bill 178 was to the exclusion of Bourassa’s own caucus members (including Members of the National Assembly that represented predominantly Anglophone ridings), other members of the National Assembly of Quebec, as well as civil society organizations.

This chapter concludes that the most appropriate model of judicial review for understanding the institutional dynamics between the Supreme Court and the Government of Quebec with respect to the *Ford* and *Devine* cases is a version of coordinated interpretation, albeit with a number of modifications that account for the executive branch’s primacy in response to judicial nullifications.

Chapter 6 – Bill 86 and the ‘Second Legislative Sequel’

Chapter Six examines Bill 86 as the second of two legislative sequels to judicial invalidation of sections of the *Charter of the French Language*. In the wake of the passage of Bill 178 into law and the invocation of the notwithstanding clause, civil society actors

resorted to transnational activism whereby they engaged other state actors and international institutions. This transnational activism culminated with a small group of Anglophones who submitted a complaint to the United Nations Human Rights Committee, accusing the Canadian and Quebec governments of contravening provisions of the *International Covenant on Civil and Political Rights*. This submission represented a deep embarrassment to the Canadian and Quebec governments, and while the decision of the UNHRC was not legally binding, the decision produced a significant pressure on the Quebec government to replace Bill 178 with Bill 86 and bring the *Charter of the French Language* (CFL) into greater compliance with the *Canadian Charter of Rights and Freedoms* as per the recommendations stipulated by the Supreme Court of Canada in *Ford* and *Devine* five years earlier.

As the second ‘legislative response’ to Supreme Court’s invalidation of the *Charter of the French Language*, Bill 86 raises important questions regarding the types of actors and institutions involved in constitutional interpretation. Consistent with the arguments presented in Chapter Five, this chapter concludes that the accuracy of the dialogue hypothesis is further diminished, and challenges the assumption that Bill 86 was drafted with the intention of bringing the CFL into greater compliance with the *Canadian Charter of Rights and Freedoms*. Rather, it is opined that this step toward compliance was motivated by international pressure and human rights norms rather than through a dialogical response to the Supreme Court of Canada. The chapter concludes that an accurate model of judicial review, with respect to the question of the constitutional compliance of the *Charter of the French Language*, must be a considerably modified type of coordinate interpretation that extends beyond domestic actors (i.e. the Supreme Court of Canada, the federal government and the National Assembly of Quebec) to include civil society actors and international institutions (in this case UNHRC and the *International Protocol on Civil and Political Rights*).

6. Major Themes

Through an examination of historical data,¹⁸ this thesis concludes that the *Charter* dialogue hypothesis does not accurately describe the National Assembly of Quebec's response to judicial invalidation of the *Charter of the French Language* sections, nor does it accurately capture the scope of actors involved in constitutional interpretation. The case studies of Bill 178 and 86 reveal three significant findings. First, when examined from an historical institutionalist perspective, the National Assembly of Quebec appears to have strategized its response through an assertion of parliamentary sovereignty, rather than the desire to engage in a "dialogue" with the Supreme Court of Canada. Secondly, while the principle of parliamentary sovereignty was repeatedly invoked by Quebec, a closer examination of the Bourassa government's drafting of Bill 178 reveals that the first 'legislative response' to the Supreme Court's decision in *Devine* and *Ford* was crafted exclusively by the executive branch, in virtual secrecy among a handful of Bourassa's cabinet members. Third, Quebec's second "legislative sequel," Bill 86, was not in response to the Supreme Court but rather an expression of compliance to international human rights norms and the UNHRC. Consequently, an appropriate model of judicial review must account for the influence of civil society actors and international institutions on the process of Canadian constitutional interpretation.

6.1 Domestic v. Federal v. International Institutions, and accounting for different actors

Most models of judicial review examine tensions between the appointment of judges and the elected representative. Within the Canadian context, scholars have mostly examined this dynamic at the federal level, analyzing how federal Parliament responds to the Supreme Court. This thesis sought to contribute further to the study of judicial review in Canada by

¹⁸ Research materials were obtained from the following sources: National Library and Archives, La Bibliotheque Nationale de Quebec, and access to information requests made to a variety of federal departments and Quebec ministries. This immense amount of data was organized and sorted according to three thematic priorities: federalism (with a focus on language); role and function of the supreme court (for models of constitutional interpretation); and the importance of parliamentary supremacy (as a counter argument advanced by Quebec to judicial power). The archival material is further contextualized through scholastic publications, news and media reports as well as interviews.

examining responses to judicial review across levels of federalism, namely at the provincial level. Somewhat surprisingly, in examining the provincial responses, these case studies ultimately also required analysis of international institutions. Consequently, the federal-provincial tension was interrupted by yet another interlocutor: the United Nations Human Rights Committee. The introduction of this international body was due to civil society actors who, up until that point, had been shut-out from the institutional back-and-forth between the Supreme Court and Quebec.

While the findings of the UNHRC were not legally binding, the pressure for Quebec to honour its requirements under the *International Covenant of Civil and Political Rights* created insurmountable pressure for the Bourassa government to respond to the UNHRC's findings. In this case, an international institution, coupled with a popular support for adherence to human rights norms, form important "downward" pressure. Furthermore, the inclusion of an international body such as the UN in the further review of Bill 178 was due to civil society actors.

6.2 Executive Power

Of particular note, the case studies exemplify a rejection of legislative participation in responding to judicial nullification. For example, in the immediate response to *Ford* and *Devine*, the actors involved in crafting a response to judicial invalidation were surprisingly few. Archival research reveals that crafting of Bill 178 was done behind a "veil of secrecy" among a remarkably small group of cabinet members and legal staff. In their drafting of Bill 178, the Premier of Quebec, Robert Bourassa, and Gil Remillard worked in close consultation, to the exclusion of most other Cabinet Ministers (including those that represented significant Anglophone ridings). Furthermore, Bourassa made no efforts to solicit input or feedback from the Liberal caucus, let alone from opposition parties in the National Assembly. Additionally, Bourassa did not solicit feedback from civil society actors. Despite his best efforts to shut-out further input, Bourassa did receive unsolicited input from Prime Minister Mulroney, requesting that Bill 178 conform to the Supreme Court remedies and that Bill 178 explicitly should not make use of the notwithstanding clause.

6.3 A Need to critically examine the concept of Parliamentary Sovereignty

The concept of parliamentary sovereignty is a re-occurring theme throughout this thesis that takes various forms ranging from a principled argument to an instrumental one. In chapter one, the concept is explored primarily as a theoretical element within a broader philosophical tradition of human rights recognition and democratic governance. More specifically, within the Canadian context, it represents a majoritarian capacity to safeguard human rights which is grounded in the Westminster parliamentary tradition.

Chapter Three examines the transformation of Canadian judicial review and human rights deliberation from its historically weak form of judicial review (embodied in the principle of parliamentary sovereignty), to a stronger model of judicial review ushered in by the *Canadian Charter of Rights and Freedoms*. A review of constitutional conferences from the 1960s to 1980s, reveals a diminished role for parliamentary sovereignty in favour of a counter majoritarianism that was realized by the entrenchment of the *Canadian Charter of Rights and Freedoms* and enhanced judicial power. However, the federal government's introduction of a stronger form of judicial review in Canada was not without its opponents; throughout the course of these conferences, Quebec repeatedly articulated its suspicion and concern regarding what it perceived as the *Charter* (and Supreme Courts) role in centralizing Canadian federalism. Consequently, Quebec reaffirmed its opposition to encroachment of federal jurisdiction via the *Charter* by repeatedly invoking the tradition of parliamentary sovereignty. What emerges from this historical overview is that, for Quebec, the concept of parliamentary sovereignty became provincial majoritarian rebuke of federal centralization efforts. Therefore, within the context of Chapter Four, parliamentary sovereignty is largely advanced as a matter of tradition fundamentally rooted in the manner by which Quebecers govern themselves and honour human rights obligations.

Chapters Five and Six critically examine how the 'legislative sequels' to judicial invalidation were formulated following the *Ford* and *Devine* cases. Within these chapters, the concept of parliamentary sovereignty is repeatedly used by the province to justify the use of the notwithstanding clause and reaffirm the legitimacy of non-charter complaint sections of the *Charter of the French Language*. However, upon closer examination of how amendments to the *Charter of the French Language* (Bills 178 and 86) were drafted and debated in the National Assembly, it becomes evident that parliamentary sovereignty is less a matter of principled governance and more of a rhetorical device. For example, Bill 178

was drafted in virtual secrecy by a handful of cabinet members and there was virtually no consultation within the Quebec Liberal party, let alone with other members of the National Assembly or conventional stakeholders.

6.4 An Alternate Model of Constitutional Interpretation: Coordinate Interpretation

In lieu of the *Charter* dialogue model, this thesis argues that a modified version of coordinate interpretation offers a more nuanced and accurate model of constitutional interpretation. The strength of the coordinate interpretation model lies in its rejection of the question: “Who has the final word in constitutional disputes?” Rather, coordinate interpretation advances a pluralist approach to problem-solving. Rather than the Supreme Court producing a “final” decision, coordinate interpretation approaches judicial review as a process characterized by complex relationships between branches of government that are “structured upon the notion *that each institution contributes to the operation of the rule of law in a functionally distinct manner.*”¹⁹

While Baker’s coordinate interpretation is helpful for providing a model of judicial review that includes all three branches of government, it fails to account for dynamics between federal and provincial levels of government. The federal bias of Baker’s coordinate interpretation is highlighted not only by the case studies of Bill 178 and 86, but also through an analysis of provincial-federal constitutional negotiations examined in Chapter Four. Consequently, one of the modifications proposed to Baker’s model is that it must engage with judicial review in order to create a model that fundamentally explores the role of federal as well as provincial institutions in constitutional interpretation.

In addition to affirming the primacy of the provincial executive branch in the process of constitutional interpretation, this thesis concludes that civil society actors and international institutions ought to be included as other “coordinate actors” involved in the judicial review of Bills 178 and 86. The ambiguity of the human rights issues, such as language rights (and freedom of expression) is demonstrative of Baker’s conceptualization of coordinated interpretation as a model wherein the direction of power is not unidirectional;

¹⁹ Baker, *Not Quite Supreme*, 14 [emphasis added]

rather, judicial power is coordinate with parliamentary power,²⁰ and extends to international institutions, international human rights norms and civil society actors.

7. Contribution to the Advancement of Knowledge

This thesis' primary contribution to the advancement of knowledge lies in its methodological approach to examining the process of constitutional interpretation. Through analytic techniques such as examining slow incremental changes to institutional dynamics (such as the role of the Supreme Court through decades of constitutional negotiations), this thesis uses historical data to critically examine the process through which the National Assembly of Quebec strategized its responses to judicial invalidation of sections of the *Charter of the French Language*. While the case studies examined in the breadth project are admittedly narrow (i.e. Bill 178 and 86), this focused approach permits greater contextual analysis of the variables that influence the process of constitutional interpretation. Through this methodological approach, the thesis challenges the accuracy of the *Charter* dialogue model as it applies to the landmark cases of *Ford* and *Devine*.

In lieu of the *Charter* dialogue model, this thesis advances a modified version of coordinate interpretation given its capacity to account for the nuanced and ambiguous participation of various branches of government. For example, the first "legislative sequel", Bill 178, underscores the prominence of the provincial executive branch in producing a response to judicial nullification. Furthermore, the second legislative sequel examined in this thesis, Bill 86, demonstrates that judicial review should expand to include international human right norms and civil society actors. While the inclusion of civil society actors and international human rights norms fall beyond conventional definitions of coordinated interpretation, the addition of these two factors and their influence on the creation of Bill 86 represent an important facet of constitutional interpretation.

²⁰ Baker, *Not Quite Supreme*, 145.

Chapter Two: Canadian Models of Constitutional Interpretation

1. Introduction

Virtually all Canadian models of judicial review address the tension between majoritarian politics and constitutionally anchored restraints. On the one hand democratic institutions are loosely characterized as mechanisms of popular sovereignty, anchored in the belief that legitimacy is derived from a numerous, or majority, consent of citizens through periodic elections. On the other hand, appointed judges are charged with the responsibility of protecting constitutional principles necessary for the function of a liberal democracy. Through the principle of judicial independence, these judges are – theoretically – beyond the reproach of popular sovereignty and yet they have the power to remove certain decisions and abilities from elected representatives.²¹ Understanding the tension produced by this counter-majoritarian dilemma is particularly difficult in Canada, wherein scholars try to reconcile the conflict between the historic prominence of the parliamentary sovereignty principle and the more recent commitment to the robust protection of rights articulated in the *Canadian Charter of Rights and Freedoms, 1982*. In an attempt to describe (and in some cases reconcile) this new institutional dynamic legal-political scholars have produced a number of theories regarding the relationship between the Supreme Court of Canada and elected branches of government. The metaphors used to describe the institutional dynamics between these branches of government vary drastically; from a collaborative “*Charter* dialogue”²² to a self-interested and elitist “Court Party.”²³

Though these models are varied, scholars frequently use these metaphors to succinctly communicate intricate (and often confusing) institutional dynamics found within

²¹ See: Stephen Holmes, “Gag Rules and the Politics of Omission,” *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad (Cambridge University Press, 1988): 19.; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University, 1980); Ronald M. Dworkin, *A Matter of Principle*, (Cambridge: Harvard University Press, 1985); Jeremy Waldron, “A Right-Based Critique of Constitutional Rights,” *Oxford Journal Legal Studies* 13 (1993): 13.; John Rawls, *Political Liberalism* (Cambridge: Harvard University Press, 1993).

²² Peter W. Hogg and Allison Bushell, “Charter dialogue between courts and legislatures,” *Osgoode Hall Law Journal* 35, no. 1 (1997): 75.

²³ Frederick Lee Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (University of Michigan: Broadview Press, 2000).

the process of constitutional interpretation. The use of these metaphors invites “conceptual analogies” and evokes different “analogical inferences.”²⁴ Through circulation, discussion and legitimation on the part of academics, media, legal practitioners and even Supreme Court justices, these metaphors contribute substantially to shifts in how the role and function of the judicial and legislative branches are conceptualized.²⁵ For example, Haigh and Sobkin, analyzed all uses of the *Charter* dialogue metaphor in decisions produced by both the Supreme Court of Canada and lower courts and concluded that the metaphor is used most often descriptively, but on some occasions is used to prescribe what the relationship between courts and legislatures ought to be.²⁶

Given the importance and variety of these models of constitutional interpretation, the chapter seeks to provide a typology of the various theories, models and metaphors used to describe the institutional dynamics between appointed members of the judicial branch and elected members of parliament. Furthermore, this chapter seeks to analyze the ideational reception of these models, with a particular focus on their origin, use of evidence, function and reception by the legal-political community. Particular attention is granted to metaphors such as the Court Party,²⁷ and *Charter* dialogue,²⁸ with an inclusion of authors that discuss alternative forms of *Charter* dialogue²⁹ and coordinate interpretation.³⁰

2. A Continuum between Weak and Strong Models of Judicial Review in Canada

²⁴ Paul H. Thibodeau and Lera Boroditsky, “Metaphors We Think With: The Role of Metaphors in Reasoning,” *Plos ONE* 6, no. 2 (2011): 1.

²⁵ *Ibid.*, 1.

²⁶ See Richard Haigh and Michael Sobkin, “Does the Observer have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada’s Courts,” *Osgoode Hall Law Journal* 45, no. 1 (2007)

²⁷ *Ibid.*, 67

²⁸ Peter Hogg and Allison Bushell, “Charter dialogue between courts and legislatures,” *Osgoode Hall Law Journal* 35, no. 1 (1997): 57; Peter W. Hogg, Allison Thornton and W.K. Wright, “Charter dialogue revisited—or ‘Much Ado about Metaphors,’” *Osgoode Hall Law Journal* 45, no. 1 (2007)

²⁹ Gerald Baier, “Judicial Review and Canadian Federalism,” *Canadian Federalism, Effectiveness, and Legitimacy*, eds. Herman Backvis and Grace Skogstad (Toronto: Oxford University Press 2002).; James Kelly and Michael Murphy, “Shaping the Constitutional dialogue on federalism: Canada’s Supreme Court as meta-political actor,” *Publius* 35, no. 4 (2005): 217.; A.W. MacKay, “The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?” *Canadian Bar Review* 80 (2001): 241.

³⁰ Denis R. Baker, *Not Quite Supreme: The Courts and Coordinate Constitutional Interpretation*, (Kingston and Montreal: McGill-Queen’s University Press, 2010).

The metaphors examined in this section are organized according to Tushnet's differentiation between strong and weak forms of judicial review; in *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (2009), Tushnet provides a description of significant theoretical approaches commonly utilized in comparative judicial studies. One of these theoretical approaches employs the distinction between strong and weak forms of judicial review as an important indicator for comparing different models of judicial review. According to Tushnet, strong and weak forms of judicial review characterize the two means of interaction between judicial and elected branches of government from the early nineteenth century until the late twentieth century.³¹

2.1 Strong and Weak Judicial Review in Canada

Within a Canadian context the concept of a weak-form of judicial review is historically linked to the Westminster concept of parliamentary sovereignty which “allowed for democratic self-governance - surrounded by some institutional constraints on power-holders and many more normative ones.”³² Arising out of this tradition, Canada has for most of its history experienced a weak-form of judicial review characterized by “judicial interpretations of constitutional provisions [that] can be revised in the relatively short term by a legislature using a decision or rule not much different from the one used in the everyday legislative process.”³³ Under weak-forms of judicial review, the Court performs a primarily interpretative function, whereby it interprets substantive rights protections and then determines whether a contested statutory provision is consistent with the interpretation of the rights protections.³⁴ Additionally, a system of weak-form judicial review can produce an environment that allows for reasonable disagreement between the Court and elected branches of government over the meaning of constitutional provisions.³⁵ The result of this disagreement is that “legislatures in successful weak-form systems must sometimes, and not

³¹ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, (Princeton: Princeton University Press, 2009), 19.

³² *Ibid*

³³ *Ibid.*, 24.

³⁴ *Ibid.*, 26.

³⁵ *Ibid.*, 26.

rarely, respond to judicial interpretation by asserting their own, contrary understanding of the constitution, but they cannot do so too often, or routinely.”³⁶ While Tushnet still characterizes Canada as adhering to a weak-form of judicial review it is important to note that over the last three decades, the practice of parliamentary sovereignty has waned in Canada.³⁷

In contrast to weak-form judicial review and its legacy of parliamentary sovereignty, the latter half of the twentieth century witnessed the development of judicial review as a practice which created a separate institution that was “removed from the direct influence of politics and staffed by independent judges charged with the job of ensuring that the legislature remained within constitutional bounds.”³⁸ In strong-form judicial review the court’s “reasonable constitutional interpretation” trumps the interpretation of the legislature resulting in a judiciary whose decisions are “final and irreversible.”³⁹ As such, under strong-form judicial review, judicial “interpretations of the Constitution are final and irreversible by ordinary legislative majorities.”⁴⁰ According to Tushnet, the function and role of the US Supreme Court demonstrates a contemporary example of strong-form judicial review, perhaps best demonstrated in the landmark case of *Cooper v. Aaron*, where the US Supreme Court described the federal courts as “supreme in the exposition of the law of the Constitution, and inferred that legislatures have a duty to follow the Court’s interpretations.”⁴¹ There are, however, limits to judicial supremacy even within strong-form judicial review; as Tushnet notes, decisions reached under strong-form of judicial review “are not permanently embedded in the law,” because in the US “judicial interpretations can be rejected by the special majorities required for constitutional amendment, and they can be

³⁶ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, (Princeton: Princeton University Press, 2009), 24-25.

³⁷ See: Janet Hiebert, “New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights,” *Texas Law Review* 82 (2004): 1963.; Christopher Manfredi and Antonia Maoini, “Judicializing health policy: unexpected lessons and an inconvenient truth,” *Contested constitutionalism reflections on the Canadian Charter of Rights and Freedoms*, eds. Christopher Manfredi and James B. Kelly, (Vancouver: UBC Press 2009): 129.

³⁸ Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, (Princeton: Princeton University Press, 2009), 19-20.

³⁹ *Ibid.*, 21.

⁴⁰ *Ibid.*, 33.

⁴¹ *Ibid.*, 21.

repudiated by the courts themselves, either after new judges join the highest court or after some of the original judges rethink their position.”⁴²

The distinct characteristics of weak and strong-form judicial review provide a useful tool for categorizing and comparing various theories of constitutional interpretation. Moving beyond a simplified dichotomy, Tushnet acknowledges that, in practice, models of judicial review fall along a continuum between these two contrasting positions. Using a continuum, Tushnet notes that the difference between strong and weak forms of judicial review can be narrow and subtle: “legislatures in a successful weak-form systems must sometimes, and not rarely, respond to judicial interpretations by asserting their own, contrary understandings of the constitution, but they cannot do so too often or routinely. The reason is that the system is effectively strong-form in the absence of legislative responses, and effectively parliamentary supremacy if legislative responses are too common.”⁴³ Indeed, the subtle differences between weak and strong forms of judicial review are perhaps best illustrated by the historic placement, and subsequent movement, of Canada’s model of judicial review along this continuum, as discussed in the following paragraphs.

2.1 Canadian Judicial Review in Transition: from Parliamentary Sovereignty toward a Stronger form of Judicial Review

Both exogenous and endogenous pressures have influenced Canada’s transition from parliamentary supremacy to a stronger-form of judicial review. In terms of exogenous pressures, Canada experienced a shift toward a more robust human rights regime due, in part, to historic events such as the establishment of the United Nations (1945) and the *Universal Declarations of Human Rights* in the wake of the atrocities of the Second World War. These events granted greater legitimacy to strong-form rights protections, which in turn, diminished the significance of rights protection through legislative bodies.⁴⁴ Within Canada, exogenous forces were complemented with domestic pressures for constitutional

⁴²Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*, (Princeton: Princeton University Press, 2009), 33-34.

⁴³ *Ibid.*, 25.

⁴⁴Alain Cairns, “The past and future of the Canadian administrative state,” *University of Toronto Law Journal* 10 (1990): 335.

transformations that distanced Canada from its institutional ties to Great Britain.⁴⁵ For example, the *Statute of Westminster* (1931) granted Canadian Parliament the power to abolish appeals to the Judicial Committee of the Privy Council in 1949, replacing it with the *Supreme Court Act* (1949), rendering the Supreme Court of Canada as the final court of appeal and the highest legal authority in the Canadian justice system.⁴⁶ Efforts to strengthen the human rights regime in Canada included provincial rights documents such as the *Saskatchewan Bill of Rights* (1947) and Diefenbaker's *Canadian Bill of Rights* (1960). While these documents held quasi-constitutional status, the Canadian human rights regime was substantively strengthened through the entrenchment of the *Canadian Charter of Rights and Freedoms* in 1982.

Following the entrenchment of the *Charter*, Canada's endogenous rights-transformation resulted in a shift away from its tradition of parliamentary sovereignty and toward a stronger form of judicial review, due to a combined effect of: changing societal attitudes regarding the role of the judiciary and prominence of human rights,⁴⁷ long historic institutional transformations in bolstering judicial independence⁴⁸, the increase in the frequency of *Charter*-based litigation,⁴⁹ the inclusion of *Sections 1* and *33* of the *Charter*,⁵⁰ and the reluctance of parliament to invoke these *Charter* provisions.⁵¹ All together these factors, in varying degrees, contributed to a shift from Canada's tradition of parliamentary sovereignty to an enhanced, yet still weak form of judicial review.

In his comparative study of international models of judicial review, Tushnet categorizes Canada as having a weak-form of judicial review due to the dialogical

⁴⁵ Alain Cairns, "Citizens (outsiders) and governments (insiders) in Constitution making: The case of Meech Lake," *Canadian Public Policy* 14 (1988): 127.

⁴⁶ See: Peter Russell, *The Court and the Constitution: Leading cases* (Toronto: Edmond Montgomery Publications, 2008).

⁴⁷ Charles Epp, *The Rights Revolution: Lawyers, Activist and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

⁴⁸ John T. Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*, (Toronto: University of Toronto Press 2004).

⁴⁹ F.L. Morton, "The Charter Revolution and the Court Party," *Osgoode Hall Law Journal* 30, no. 3 (1992): 633.

⁵⁰ Peter Hogg and Allison Bushell, "The Charter Dialogue Between Courts and Legislatures," *Osgoode Hall Law Journal*, 75 (1997): 199.

⁵¹ See: Janet Hiebert, "The Canadian *Charter* of Rights and Freedoms," in *Oxford Handbook of Canadian Politics*, eds. John C. Courtney and David E. Smith (New York: Oxford University Press, 2010): 54-71.; Christopher Manfredi, *Judicial Power and the Charter: Canada and the paradox of liberal constitutionalism*, (Toronto: McClelland & Stewart, 1993).

relationship between the Supreme Court and Parliament.⁵² However, contrary to Tushnet's acceptance of the accuracy of the dialogue metaphor, a number of Canadian scholars and jurists lament the waning participation of the legislative branches within this dialogical relationship over the past twenty years. Most notably, Hiebert has documented that in the thirty years following entrenchment of the *Charter*, it is unclear whether dialogue has frequently occurred.⁵³ Hiebert concludes that one of the key reasons for diminished parliamentary sovereignty is the politicians' unwillingness to create legislation that may appear to be non-compliant with the *Charter*. As former Supreme Court Justice Louise Arbour noted: "Unfortunately, political parties have been impoverished by the rise of judicial prominence, or perhaps simply in parallel to it. The disenchantment with political life is currently widespread in mature democracies. But in terms of substance, the calendar of the Supreme Court of Canada compares very favourably with the platform of political parties."⁵⁴

The transformation of Canada as a country that has historically exercised parliamentary sovereignty to a relatively stronger form of judicial review has contributed to the development of numerous and varied theories of constitutional interpretation. For most of its history, Canada has exercised the principle of parliamentary sovereignty, rooted in the Westminster tradition of legislative guarantee and the protection of rights. However, exogenous pressures such as a global rise in human rights consciousness following the Second World War, and the waning power of the British Empire in the wake of anti-colonial nationalism gave rise to endogenous transformations such as the creation of a *Canadian Bill of Rights*, 1960, repatriation of the constitution and entrenchment of the *Canadian Charter of Rights and Freedoms*, 1982. These significant changes altered the role and function of the judiciary, and, in turn, have caused scholars to create different types of metaphors describing their comprehension of constitutional interpretation.

⁵² Tushnet, "Weak Courts, Strong Rights," 25.

⁵³ Hiebert, Janet, "The Canadian *Charter* of Rights and Freedoms."

⁵⁴ Lousie Arbour, "How the Charter helped define Canada," *Globe and Mail*, April 16, 2012, <http://www.theglobeandmail.com/opinion/how-the-charter-helped-define-canada/article4239318/>.

3. A Typology of Metaphors commonly used to explain the Process of Constitutional Interpretation

Although not exhaustive, the following section attempts to capture significant contributions to our understanding of judicial review within the context of Canadian legal-political scholarship. Prominent models of judicial review can be summarized in three general categories: first, the Court Party metaphor, which articulates a strong-form of judicial review; second, *Charter* dialogue, which strikes a balance between elements of strong and weak-form judicial review; and third, coordinate interpretation which upholds the principle of parliamentary sovereignty, but reconciles this role with the function of the judiciary in a post-*Charter* environment.

3.1 Strong Forms of Judicial Review in Canada

Situated at one end of the spectrum, strong-form models of judicial review are offered by a number of scholars such as Morton, Knopff, Epp and Cairns. These authors share a common description of the Supreme Court as exercising a strong-form of judicial review, which they believe is in sharp contrast to the Westminster tradition of parliamentary sovereignty. Consequently, these authors express a certain concern for what they perceive to be the usurpation of power by the judiciary from elected branches of government following the entrenchment of the *Charter* in 1982.

Although the term “Court Party” coined by Morton and Knopff in 2000 has come to encapsulate scholastic and legal fears regarding judicial power, the observations of strong-form of judicial review in Canada were preceded by Epp and Cairns. The literature which examines strong-form judicial review in Canada can be roughly divided into two categories. The first group of authors perceive strong-form judicial review as a result of a social transformation, or “rights revolution” that has culminated in a popular perception of the courts as protectors and guarantors of rights.⁵⁵ This popular support, in turn, provided an environment rife with opportunities for judges and interest groups to assume greater power, resulting in the encroachment of the judicial branch into the legislative realm of policy-

⁵⁵ Epp, *The Rights Revolution*, 4.

making.⁵⁶ Morton and Knopff's Court Party metaphor contains two significant elements regarding its theory of judicial review: first, it primarily articulates a strong-form of judicial review, and; second, the judiciary itself has not been made more powerful exclusively by the entrenchment of the *Charter*; rather judges have utilized institutional mechanisms and opportunities to confer greater authority and finality to judgements produced by the Supreme Court of Canada. The second point argued by Epp, Cairns, Morton and Knopff is that the *Charter* has also altered the accessibility and influence of actors outside of government.

While Canada has undergone a rights revolution the second group of authors, Hiebert, Huscroft and Brodie,⁵⁷ argue that the shift toward a strong-form of judicial review is not because judges have sought to actively assume a newfound power, but rather because legislatures have relegated their traditional responsibility to engage in rights-based debates. In other words, the source of judicial empowerment comes as a result of legislative deference. Although the *Charter* contains *sections 1* and *33* as mechanisms for elected representatives to assert parliamentary supremacy, politicians are hesitant to use these clauses out of fear of being labeled “anti-*Charter*” or “anti-rights.”⁵⁸

3.1.1 Rights Revolution and the Rise of Strong-Form Judicial Review

Prior to popularizing the metaphor of the “Court Party,” a number of theorists have described the practice of judicial review in Canada as a process that occurs primarily between judges, lawyers and rights-advocacy organizations, but excludes the legislative branch of government from any meaningful participation. Epp and Cairns, in a similar vein to Morton and Knopff, argue that rights-advocacy organizations require substantive institutional mechanisms to facilitate legal mobilizations, such as “government, or foundation funding of test cases, and the availability of sympathetic and competent lawyers.”⁵⁹ Morton and Knopff also identify Cairns' term “*Charter* Canadians” to describe

⁵⁶ Morton and Knopff, *The Charter Revolution and the Court Party*, 57.

⁵⁷ See Janet Hiebert, “The Canadian Charter of Rights and Freedoms,” in *The Oxford handbook of Canadian politics*. eds. J. Courtney & D. Smith, (Don Mills, Canada : Oxford University Press Canada, 2010), 54; Grant Huscroft and Ian Brodie, “Introduction,” in *Constitutionalism in the Charter era*, eds. Grant Huscroft and Ian Brodie, (Toronto: LexisNexis Butterworths, 2004).

⁵⁸ See: Hiebert, “The Canadian Charter of Rights and Freedoms,” 54; Grant Huscroft and Ian Brodie, “Constitutionalism in the *Charter* Era.”

⁵⁹ Morton and Knopff, *The Charter Revolution and the Court Party*, 57.

many of the groups that form part of the Court Party coalition: “Some of these groups were active in shaping the *Charter*’s content in 1980-81 and then contributing the support necessary for its adoption; others sprang up in response to the *Charter*. They all seek to constitutionalize policy preferences that could not easily be achieved through the legislative process.”⁶⁰ The following section examines in greater depth the contributions of these authors to the development of a strong-form of judicial review metaphor.

Writing from a US political-legal tradition, Charles Epp makes an important contribution to the concept of the “rights revolution” and the rise in judicial supremacy. Drawing heavily from Anglo-American legal-political theoreticians and practitioners, including James Madison and A.V. Dicey,⁶¹ Epp’s notion of judicial-supremacy arises out of his analysis of implementing institutional mechanisms necessary for the execution of “a rights revolution”; while the normative underpinnings of a rights-bearing document are of great significance, it is the “support structures for legal mobilization” that fundamentally shape the scope and limits of how these rights are applied.⁶²

Consistent with Epp’s account of structural mechanisms that enable a rights revolution, Cairns provides an historical analysis of the institutional transformations within Canada. Cairns’ historical analysis identifies that: the inclusion of a group of lobbyists and special interest groups (referred to as the ‘Citizens Constitution’ group) have negotiated greater prominence and power through the entrenchment of the *Charter*. Furthermore, the entrenchment of the *Charter*, paired with the ‘Citizens’ Constitution’ group has increased the power of the judiciary at the cost of the legislature. This is caused by both a cultural shift in how citizens understand and value the role and legitimacy of judicial review in Canada. Together, these factors permit strategically positioned elites to leverage institutional mechanisms presented by the new-found power of the judiciary to interpret the *Charter* and engage in policy-making.

Cairns argues that the *Constitution Act, 1982* not only secured freedoms, as well as democratic and legal rights, but also served to include a broad grouping of citizens previously excluded from substantive participation in the drafting of legislation and policy. The inclusion of these actors marked a dramatic shift in the nature and number of actors

⁶⁰ Ibid., 57.

⁶¹ Epp, *The Rights Revolution*, 15-16.

⁶² Ibid., 18.

participating in constitutional interpretation. Cairns argues that the inclusion of these actors “supplements the still powerful government actors with various citizen groups who are directly linked to the post-*Charter* constitution.”⁶³ While the government institutions continued to remain the primary actors in constitutional matters, citizen groups remained involved by keeping government actors in “a context of high visibility and public pressure which had major effects on the outcome.”⁶⁴ These mobilized elites, paired with the newly entrenched *Charter of Rights and Freedoms* represented a “remarkable development in Canadian constitutional culture.”⁶⁵

In addition to the involvement of citizen groups, the entrenchment of the *Charter* also marked a re-arrangement of government structure. According to Cairns, entrenchment contributed to a significant power shift in favour of the courts, to the detriment of the legislatures.⁶⁶ Most notably, Cairns argues that the entrenchment of the *Charter* “enhances the status of citizenship and brings the citizenry into the constitutional order. It links them to the constitution that is 'the supreme law of Canada ...' (S(52)(1)). [The *Charter*] gives citizens rights that are enforceable against governments. In some circumstances, as in official language minority education rights, it requires positive action by governments.”⁶⁷ According to Cairns, in the years that followed entrenchment it became clear that the tradition of parliamentary sovereignty had waned and granted an increase in the power of the judiciary and interest groups: “The *Charter's* confrontation with parliamentary supremacy, somewhat modified by section 33 and its 'notwithstanding' clause, is self-evident. It is also worth noting, however, that the enhancement of the judicial role at the expense of Parliament is accompanied by the stimulation of interest group activity focused on the courts, thus weakening the role of parties whose concentration is fixed on Parliament.”⁶⁸ In 1990, Cairns articulated a fear shared by a growing number of scholars that Canada was transitioning to a strong-form of judicial review. Drawing upon the example of US institutions, Cairns (like many of his peers) feared that: “In its new guise the constitution undoubtedly will come to

⁶³ Alain Cairns, “Citizens (outsiders) and governments (insiders) in Constitution making,” 128.

⁶⁴ *Ibid.*, 141.

⁶⁵ *Ibid.*, 142.

⁶⁶ *Ibid.*, 124.

⁶⁷ *Ibid.*, 124.

⁶⁸ Alain Cairns 1990 “The past and future of the Canadian administrative state,” *University of Toronto Law Journal* 40, no. 3 (1990): 334.

play a role in Canadian constitutional culture similar in magnitude, if different in particulars, to the role of the US constitution in symbolizing and defining the nature of the American political community and the experiment it is engaged in.”⁶⁹

3.1.2 The Growth of Judicial Power and the Court Party

Whereas Epp and Cairns examine the broad normative and institutional changes that occurred in the wake of *Charter* entrenchment, Morton and Knopff focus their analysis on the judges and the interest-groups which assisted to spur a more robust form of judicial review in Canada.⁷⁰ According to Morton and Knopff, the *Charter* had a revolutionary effect on the Canadian political system, resulting in judicial encroachment on legislative and executive functions through the practice of judicial activism by an “elitist Court Party.” Although Morton and Knopff discuss the institutional transformations that have arisen from the entrenchment of the *Charter*, the crux of their argument focuses on the agency of judges and special interest groups in transforming the function and power of the judiciary. The entrenchment of the *Charter* itself did not spur this shift in judicial power; had the tradition of judicial restraint been upheld in Canada the *Charter* might not have been as problematic. As Morton and Knopff state: “Clearly, the activist or restrained exercise of judicial review under an entrenched constitution is more an attribute of the judges than of the document being interpreted.”⁷¹ To this Morton and Knopff add, “entrenched documents do not guarantee judicial activism. The *Charter* may enhance the policy involvement of activism judges, but it rarely requires their policy innovations. Judges drive the *Charter*, not vice-versa.”⁷²

The premise of Morton and Knopff’s piece is that “elite groups,” motivated by a rational choice for greater power in policy decisions, have transformed the function of the Supreme Court. In the case of judicial transformations, it is the actors that have been more

⁶⁹ Ibid., 331.

⁷⁰ For compelling rebuttals to Morton and Knopff’s allegations of judicial activism, see: Beverly McLachlin, “Courts, Legislatures, and Executives in the Post-*Charter* Era,” in *Judicial Power and Canadian Democracy* eds. Paul Howe and Peter H. Russell (McGill-Queen’s University Press: Montreal & Kingston, 2000).; Patrick J Monahan, “The Supreme Court of Canada in the 21st Century,” *Canadian Bar Review* 80, no. 1 (2001): 374-398.

⁷¹ Morton and Knopff, *The Charter Revolution and the Court Party*, 11.

⁷² Ibid., 12.

influential than the institutional transformation of *Charter* entrenchment. Morton and Knopff agree with Cairns' assertion that the *Charter* did not produce the structural transformation necessary for a strong-form of judicial review; rather, actors took advantage of the institutional transformations and, in turn, exercised their ability to further influence the practice of judicial review in Canada.⁷³ Morton and Knopff point directly to judges as the key actors involved in influencing the transformations to the judiciary:

A revolution cannot occur without leaders and the support of interested classes. Judges are professionally obliged to declare that the *Charter* "requires" their decisions, but this kind of formal legalism is hardly persuasive outside the courtroom. In fact, the *Charter* rarely required the full extent of legal transformation undertaken in its name. Something in addition to the document is at work. Judges themselves are at work, of course.⁷⁴

According to Morton and Knopff, judges were "seduced" by the opportunity presented by the entrenchment of the *Charter* and broad public support for human rights.⁷⁵ The presence of this power lured a new generation of judges into a practice of judicial review which asserted the power of the courts and eroded Canada's history of parliamentary sovereignty.

The judges were not alone in manufacturing a strong-form of judicial review in Canada. Enabling the exercise of power by judges, Morton and Knopff identify a number of interest groups which support judicial activism and the intervention of judiciary into the realm of policy-making. Morton and Knopff referred to these interest groups collectively as the "Court Party." Members to the Court Party include feminist organizations (such as LEAF and the Canadian Civil Liberties Association), the *Charter* Committee on Poverty Issues, Equality for Gays and Lesbians Everywhere (EGALE), the Canadian Prisoners' Rights Network, Canadian Committee on Refugees, the Equality Rights Committee of the Canadian Ethnocultural Council, among other groups.⁷⁶

In addition to the groups that advanced individual civil liberties, Morton and Knopff also identify official language minority groups as central participants in the Court Party. According to Morton and Knopff official language minority organizations benefited from

⁷³ F.L. Morton and Rainer Knopff, "Judges, the Court Party and *Charter* Revolution," *Policy Options* 21, no.3 (2000): 55.

⁷⁴ *Ibid.*, 55.

⁷⁵ *Ibid.*, 55.

⁷⁶ *Ibid.*, 58.

constitutional negotiations two-fold; first through funding and the creation of programs, which in turn, permitted these groups to take full advantage of the policy windows created through the negotiation, and secondly, through the entrenchment of the *Charter*. One such example is the Court Challenges Program that was created in response to the Supreme Court cases *AG Quebec v. Blaikie* [1979] and *AG Manitoba v. Forest* [1979], where the protection of language rights was challenged.⁷⁷ In the case of *Blaikie*, “the courts were being asked to determine whether the *Charter of the French Language* prejudiced the application of sections 93 and 133 of the Constitution.”⁷⁸ In a similar vein, the case of *Forest* raised the issue of “whether the restrictions on the use of French imposed by the province in 1890 violated the rights protected by the Constitution under section 23 of the *Manitoba Act, 1870*.”⁷⁹ The interrelationship between minority language rights, the *Charter* and the Court Challenges Program is further underscored when one examines the parallel evolution of the *Charter* and the Court Challenges Program.⁸⁰ For example, in 1978 the Trudeau government provided the Court Challenges Program with financial support for constitutional challenges to language legislation in several provinces, including Quebec.⁸¹ From 1978 to 1982, the program funded a total of six cases, half of which were exclusively challenges to the Quebec’s *Charter of the French Language* (referred to also as Bill 101).⁸² With the entrenchment of the Canadian *Charter of Rights and Freedoms*, and its inclusion of guarantees for official-language minorities in the 1982, Trudeau ensured further funding for the Court Challenges Program.⁸³ This example is illustrative of Morton and Knopff’s claim that, “The *Charter* may enhance the policy involvement of activist judges, but it rarely requires their policy innovations. Judges drive the *Charter*, not vice-versa.”⁸⁴

Morton notes that the rise in judicial activism can also be attributed to legislative deference, which produces “*Charter monologue*”, wherein “judges [are] doing most of the

⁷⁷ Linda Cardinal, “Le pouvoir exécutif et la judicialisation de la politique au Canada. Une étude du programme de contestation judiciaire,” *Politique et sociétés* 19 (2000).

⁷⁸ Marie-Ève Hudon, *Official Languages Act: Understanding Its Principles and Implementation* (Ottawa: Library of Parliament, 2011), 3.

⁷⁹ Hudon, *Official Languages Act*, 3.

⁸⁰ Cardinal, “Le pouvoir exécutif et la judicialisation de la politique au Canada,” 44.

⁸¹ Ian Brodie, “Interest Group Litigation and the Embedded State: Canada’s Court Challenges Program,” *Canadian Journal of Political Science* 24, no. 2 (2001): 364.

⁸² The other three challenges were to language legislation in Manitoba and Saskatchewan.

⁸³ Brodie, “Interest Group Litigation and the Embedded State,” 364.

⁸⁴ Morton and Knopff, *The Charter Revolution and the Court Party*, 57.

talking and legislatures [are] doing most of the listening.”⁸⁵ Although critics are quick to point to elected members as lacking the personal courage to challenge the Supreme Court, Morton argues the contrary: institutional structure lends itself to parliamentary paralysis.⁸⁶ According to Morton, “in certain circumstances, legislative non-response in the face of judicial activism is the “normal” response. When the issue in play is cross-cutting and divides a government caucus, the political incentive structure invites government leaders to abdicate responsibility to the courts – and this may be even more true in a parliamentary as opposed to a presidential system.”⁸⁷

3.1.3 Legislative Deference and the Rise of Judicial Supremacy

Although not all authors may agree with the characterization (and perhaps even vilification) of the judicial branch in Morton and Knopff’s *Court Party*, there are a number of authors that agree with the conclusion that, since the entrenchment of the *Charter*, Canada experiences a stronger-form of judicial review. Authors such as Huscroft and Hiebert have noted that the judiciary’s increased power is the result of Court’s new role as the guardian of the *Canadian Charter of Rights and Freedoms*, which has diminished the power of the other branches of government. Moreover, not only has the judicial branch asserted its new found power, but legislatures have assisted in this institutional shift by deliberately relegating their involvement in issues framed as a question of human rights. These authors often argue that the metaphor of a dialogue between the courts and legislatures is far from the norm in Canadian practices of judicial review. For example, Huscroft dismisses the *Charter* dialogue metaphor as “a means of rationalizing [a] world of judicial interpretive supremacy.”⁸⁸ Like Morton and Knopff, Huscroft shares the position that the Supreme Court has assumed the sole responsibility for the overview and preservation of rights: “The *Charter* is the Court’s to interpret, so much so that their elected representatives – the same ones who wrote and entrenched the *Charter* are the enemy of rights and freedoms, while the

⁸⁵ F.L. Morton, *Law Politics and the Judicial Process in Canada*, (Calgary: University of Calgary Press, 2002): 117.

⁸⁶ *Ibid.*, 117.

⁸⁷ *Ibid.*, 117.

⁸⁸ Grant Huscroft, “Rationalizing Judicial Power: The mischief of dialogue theory,” in *Contested Constitutionalism*, eds. James B. Kelly and Christopher P. Manfredi (Vancouver: UBC Press, 2009): 50.

Court is their champion. It follows that interpretation of the *Charter* outside the Court must be illegitimate.”⁸⁹

Whereas Morton and Knopff focus on the role of “elites” and the Court Party as the source of a radical shift in the practice of judicial review in Canada, Huscroft believes that much of the Supreme Court’s power is derived from the fact that other branches of government have relegated their involvement toward constitutional matters. This position is shared by Hiebert who concludes that an “emerging public confidence in the judiciary as the primary interpreter of rights, which makes it politically risky for politicians to defend positions that seem contrary to judicial views on *Charter* compatibility, or to invoke the notwithstanding clause in the event the Supreme Court sets aside inconsistent legislation.”⁹⁰ Furthermore, political apprehension to contradict judicial decisions and override sections of the *Charter* has given rise to a number institutional mechanisms such as: the process of legislative rights review, the centralized function of the Department of Justice in providing advice on *Charter* consistency to government, and the absence of ministerial reporting on *Charter* inconsistency.⁹¹ The result of these bureaucratic transformations is that “Parliament has become even more marginalized in terms of its influence on government than before the *Charter* was adopted.”^{92, 93}

Although the theorists examined in this section may have nuanced differences in their theoretical approaches and the evidence employed to support their arguments, they fundamentally agree that through the entrenchment of the *Charter* Canada has shifted towards a stronger model of judicial review. However, the *Charter* itself did not alter the practice of judicial review in Canada; rather it created institutional opportunities for “elites” and interest groups to participate in constitutional negotiations and a number of *Charter*-based litigation campaigns. These policy entrepreneurs, in turn, mobilized broad public

⁸⁹ Huscroft, “Rationalizing judicial power,” 50.

⁹⁰ Janet Hiebert, “Parliamentary Engagement with the *Charter*,” *Supreme Court Law Review* 58 (2012): 93.

⁹¹ *Ibid.*, 93.

⁹² *Ibid.*, 100.

⁹³ In contrast to Morton and Knopff and Smith, Hiebert’s research can be situated somewhere between the structure versus agency debate. The focus of Hiebert’s work is not placed on a “judicial-centric approach”, but rather an interest in examining the role of the *Charter* on parliament. In this sense, Hiebert’s text is part structure, part agency: structure insofar as the *Charter* has opened the opportunities for judicial activism, however it is the agency of rationally-motivated parliamentarians to avoid politically costly decisions-making, and take advantage of this structural shift.

support for the normative institutions of social, legal and democratic rights. This resulted in diminished public support for the use of *Sections 1* and *33* of the *Charter* for the assertion of parliamentary supremacy, which in turn, contributed to bolstering strong-form judicial review.

4. *Charter* Dialogue and Its Variants

Charter dialogue is a relatively recent theorization of the relationship between the appointed officials of the Supreme Court of Canada and the elected officials of parliament and provincial legislatures. This section seeks to provide an explanation for how the *Charter* dialogue theory has developed, while simultaneously providing an overview of how *Charter* dialogue theory has influenced the study Canadian federalism through its characterization of the interaction between judicial and legislative branches. Section one examines the development of *Charter* dialogue theory. In the interest of providing a clear overview of how this metaphor has evolved in the last thirteen years, *Charter* dialogue is presented as a dialogue between a key group of legal scholars and academics. Section two presents the diffusion of the *Charter* dialogue theory into the study of federalism, and inter-institutional dynamics. An important theme discussed within this section pertains to how scholars believe the *Charter* has influenced the role and dynamic of the Supreme Court in relation to the provincial legislatures; authors such as Baier, Kelly and Murphy understand the function of the Supreme Court as an arbiter of intergovernmental dialogue, whereas MacKay perceives the Supreme Court as a “limited” political actor.

4.1 The History and Origins of the *Charter* Dialogue Metaphor

Although the *Charter* dialogue metaphor is a recent development in Canadian constitutional studies, it has deeper roots which derive from both from Canada’s Westminster heritage and US constitutional debates. Canada’s Westminster heritage is one of the ideational and institutional influences in bringing about the notion of “dialogue” between the Supreme Court and legislative branches. Prior to the entrenchment of the *Charter*, Canada was governed through the principle of parliamentary sovereignty whereby

“the decisions of Canadian federal and provincial legislatures were generally beyond judicial reproach, provided they complied with the Constitution's division of powers between federal and provincial legislatures, and were consistent with the rule of law.”⁹⁴ However, in 1982 the principle of parliamentary sovereignty was transformed as “courts are now authorized to review legislation for its consistency with rights and to provide remedies for breaches that can include the invalidation of legislation.”⁹⁵ As a result, parliamentary systems were pressured to “reassess political and judicial behaviour with respect to the treatment of individual rights.”⁹⁶ Given the historic prominence of parliamentary sovereignty in Canada, it is of little surprise that a popular constitutional metaphor would have to provide a narrative that would have to include a notion in which the legislature retains some of its historic supremacy.

The notion of “dialogue” has its roots firmly planted in US constitutional debates. Prior to the discussion of a “dialogue” between elected branches of government and the courts in Canada, Tushnet points to US scholars who have put forth “a standard political science model of the interaction between the United States Supreme Court and the political branches which observes a dialogue occurring over a relatively long time frame.”⁹⁷

Robert Dahl presented his hypothesis as a rejection of the dominant theory of institutional checks and balances, wherein the judiciary performs the function of the counter-majoritarian branch of government. Rather, Dahl argues that, in a dialogical relationship branches of government work in concert with one another:

[The Supreme Court of the United States of America] is an essential part of the political leadership and possesses some bases of power of its own, the most important of which is the unique legitimacy attributed to its interpretations of the Constitution. This legitimacy the Court jeopardizes if it flagrantly opposes the major policies of the dominant alliance; such a course of action, as we have seen, is one in which the Court will not normally be tempted to engage.⁹⁸

⁹⁴ Hiebert, “The Canadian *Charter* of Rights and Freedoms,” 55.

⁹⁵ *Ibid.*, 55.

⁹⁶ Janet Hiebert, “Interpreting a bill of rights: The importance of legislative rights review,” *British Journal of Political Science* 35 (2005): 236.

⁹⁷ Tushnet, “Weak Courts, Strong Rights,” 34.

⁹⁸ R.A. Dahl, “Decision-making in a democracy: The Supreme Court as a national policy-maker,” *Journal of Public Law* 6, no. 2 (1957): 294.

In suggesting that the US Supreme Court behaves in concert with majoritarian values and democratically elected political elites, the function of the Supreme Court could not be reduced to one of merely defending minority interests against the tyranny of the majority. The dialogue between the Supreme Court and elected branches of government occurs as a set of “alliances.” Dahl provides historic examples of the alliances, including the:

Jeffersonian alliance, the Jacksonian, the extraordinarily long-lived Republican dominance of the post-Civil War years, and the New Deal alliance shaped by Franklin Roosevelt. Each is marked by a break with past policies, a period of intense struggle, followed by consolidation, and finally decay and disintegration of the alliance. Except for short-lived transitional periods when the old alliance is disintegrating and the new one is struggling to take control of political institutions.⁹⁹

Through these alliances, Dahl argues that the Supreme Court is an unlikely source of counter-majoritarianism, and subsequently, it is “least likely to be successful in blocking a determined and persistent lawmaking majority on a major policy.”¹⁰⁰ Using a set of laws passed under Roosevelt’s *New Deal* as his case study, Dahl argues that “a lawmaking majority with major policy objectives in mind usually has an opportunity to seek for ways of overcoming the Court’s veto. It is an interesting and highly significant fact that Congress and the President do generally succeed in overcoming a hostile Court on major policy issues.”¹⁰¹ Therefore, as a part of this informal dialogue, Dahl concludes that “Supreme Court is inevitably a part of the dominant national alliance. As an element in the political leadership of the dominant alliance, the Court of course supports the major policies of the alliance. By itself, the Court is almost powerless to affect the course of national policy.”¹⁰²

In a similar tradition to Dahl, Friedman argues that the conceptualization of the US Supreme Court as a counter-majoritarian check-and-balance to the elected branches of government is inaccurate.¹⁰³ Rather, Friedman argues that “the everyday process of judicial review integrates all three branches of government: executive, legislative, and judicial. Our Constitution is interpreted on a daily basis through an elaborate dialogue as to its

⁹⁹ Dahl, “Decision-making in a democracy,” 294.

¹⁰⁰ Ibid., 286.

¹⁰¹ Ibid., 288.

¹⁰² Ibid., 293.

¹⁰³ B.K. Friedman, “An intent-based approach to the acceptance of benefits doctrine in the federal courts,” *Michigan Law Review* 92, no. 3 (1993): 742.

meaning.”¹⁰⁴ In the context of his work, Friedman uses the term “dialogue” to describe a model of judicial review which seeks to “integrate courts rather than alienating them.”¹⁰⁵ As a consequence, the dialogue takes place between a multitude of interlocutors, including the executive and legislative branches of government as well as other constituents (such as the media, individual citizens, various levels of government etc.), whereby the court serves in a mediational function.¹⁰⁶ Moreover, Friedman’s use of the term dialogue “emphasizes that judicial review is significantly more interdependent and interactive than generally described. The Constitution is not interpreted by aloof judges imposing their will on the people. Rather, judicial review is an elaborate discussion between judges and the body politic.”¹⁰⁷ According to Friedman, the function of the Court within the dialogue is twofold in the sense that Court is simultaneously the interlocutor and the facilitator. As the speaker within the dialogue, the Court provides an articulation of its interpretation, and subsequent position regarding a text: “In some instances the courts declare a right, accompanied by a clear and simple mandate, and the mandate is carried out. But in other cases the judicial decision is filtered and watered down, evaded, and avoided...”¹⁰⁸ As a facilitator and shaper of constitutional debates, the court produced decisions that spark dynamic debate: “Courts act as go-betweens in the dialogue, synthesizing the views of society and then offering the synthesis to society for further discussion. Courts serve as society's tennis partner, always volleying the ball back.”¹⁰⁹

In their 1997 article, Hogg and Bushell discuss the influence of US ‘dialogue-theory’ on their own research. In their examination of the impact of the Warren court on US jurisprudence, Hogg and Bushell comment that: “The great bulk of the academic commentary was devoted to advancing ingenious theories to justify judicial review, and each new theory provoked a further round of criticism and new theories until the literature reached avalanche proportions. Most of the ideas are somewhat relevant to Canada as well as the United States, and some Canadian law professors joined the debate and attempted to

¹⁰⁴ Friedman, “An intent-based approach to the acceptance of benefits doctrine in the federal courts,” 580-581.

¹⁰⁵ *Ibid.*, 581.

¹⁰⁶ *Ibid.*, 654.

¹⁰⁷ *Ibid.*, 653.

¹⁰⁸ *Ibid.*, 668.

¹⁰⁹ *Ibid.*, 669.

apply the ideas to judicial review in Canada.”¹¹⁰ Moreover, Hogg *et al.* maintain that, “in 1997, the literature on judicial review was predominantly American, and the Canadian contributions naturally drew inspiration from the American literature.”¹¹¹ Hogg and Bushell’s work is part of the movement to apply the American model of dialogue to post-1985 Canadian constitutional studies. Moreover, in their footnotes, they provide a list of authors that they have found to be influential in American debates:

Some conceptions of “dialogue” as an interplay between the courts and the legislators or the people, are explored in the American literature by G. Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass.: Harvard University Press, 1982) c. 11; P.R. Diamond, *The Supreme Court and Judicial Choice: The Role of Provisional Review in Democracy* Ann Arbor, Mich.: University of Michigan Press, 1989) at 4-5; E. Keynes & R.K. Miller, *The Court vs. Congress: Prayer, Boozing, and Abortion* (Durham, N.C.: Duke University Press, 1989) at xvi-xvii; and Perry, *supra* note 10 at 112- 113. Judicial-legislative interplay is discussed in the Canadian context by B. Slattery, “A Theory of the *Charter*” (1987) 25 *Osgoode Hall L.J.* 701; and J. Jai, “Policy, Politics and Law: Changing Relationships in Light of the *Charter*” (1997-98) 8 *N.J.C.L.*¹¹²

Having reviewed the US literature, it is evident that in the US version of dialogue the Supreme Court is not “supreme” in its constitutional interpretation, but rather an essential institutional component of broader formal and informal institutional reasoning. Moreover, the dialogue is not facilitated by any legalistic mechanism *per se*, meaning that there are no prescriptive legal remedies for other branches of government to engage the court’s decisions (contrary to section 1 and section 33 of the *Canadian Charter of Rights and Freedoms*). As such, the US notion of dialogue is both more informal and has a broader inclusion of interlocutors than its Canadian counter-part. Additionally, in the US context, the dialogical account of judicial review is utilized primarily as a descriptive account of judicial politics, and contrasts to other theories of judicial review legitimation derived from a counter-majoritarian tradition.

In their 2007 publication, Hogg *et al.* note that their definition of dialogue differs from how US scholars use the term:

Moreover, as we recognized in “*Charter Dialogue Revisited*,” a considerable body of literature exists in the United States on “dialogue.” However, in the American

¹¹⁰ Hogg and Bushell, “*Charter* dialogue between courts and legislatures,” 78.

¹¹¹ Hogg, Thornton and Wright, “*Charter* dialogue revisited—or ‘Much Ado about Metaphors,’” 4.

¹¹² Hogg and Bushell, “*Charter* dialogue between courts and legislatures,” 79.

literature, “dialogue” is a term that has as many meanings as there are American commentators. Since the publication of “*Charter Dialogue*,” we have tried to check periodically on the state of the American literature, and we continue to be surprised that there is no published American study that tracks the legislative sequels to all the cases in which laws were struck down by the U.S. Supreme Court for breach of the American Bill of Rights. In short, there is no study that uses the term “dialogue” in the sense that we used it, or that offers a direct comparison to our “*Charter Dialogue*” and “*Charter Dialogue Revisited*” articles, with their appendices of legislative sequels.¹¹³

While Hogg *et al.* note that US scholarship encapsulates varied uses of the term “dialogue”, this chapter argues that there are some key differences between the usage of the term by prominent legal scholars in the US and Canada. Broadly, the Canadian iteration contains three significant points of divergence from its American counter-part.

The first point of divergence emerges from the fact that US scholars understand judicial dialogue as descriptive rather than normative theory, insofar as US theorists see dialogue theory as a departure from their understanding of how judicial review *ought to* happen and it offers a description of what actually happens within institutional spaces and between actors. By understanding judicial dialogue as strictly descriptive theory, US scholars do not perceive judicial dialogue as a theory of legitimization for the practice of stronger-from judicial review. This represents a marked turn from the Canadian iteration of the dialogue model which often blurs normative and descriptive uses of the metaphor. For example, in their 2007 retrospective, Hogg *et al.* note that:

The authors are at pains to note that their idea of dialogue was descriptive, by which they mean that they intended to show “how legislatures did behave—rather than how they should behave—following a court decision striking down one of their laws on *Charter* grounds. We have since come to appreciate that the notion of dialogue may also have some limited normative content, and we have also come to appreciate that dialogue may influence content, and we have also come to appreciate that dialogue may influence courts as well as legislatures – something we did not anticipate in 1997.¹¹⁴

More pointedly, within the Canadian context, use of the dialogue model’s interpretation as a theory of judicial legitimacy has resulted in both its descriptive, as well as normative applications by Supreme Court Justices.¹¹⁵

¹¹³ Hogg, Thornton and Wright, “*Charter dialogue revisited—or ‘Much Ado about Metaphors,’*” 200.

¹¹⁴ *Ibid.*, 26.

¹¹⁵ Haigh and Sobkin, “Does the Observer have an Effect?” 67.; Hogg, Thornton and Wright, “*Charter dialogue revisited—or ‘Much Ado about Metaphors,’*” 26.

The second marked Canadian departure from the US tradition of dialogue emphasizes the informal institutional relations between branches of government, which appear to act in concert throughout periods of major social and legal transformation. Within the context of Canadian studies, the focus of dialogue theory remains primarily on formalized institutional mechanisms which permit an exchange between the legislative and judicial branches of Canada's federal government.

The third difference between the Canadian and US discussions of dialogue lies in the broad inclusion of actors common to US theorists' definition of dialogue. The US version encompasses more than two branches of government; it also includes a dialogue with the executive branch, media, lobbyist, social movement networks as well as individuals affected by the case. Through this inclusion, US scholars identify a number of actors, all of which exercise various amounts of power and influence, but nevertheless are involved in the process of constitutional interpretation. This marks a stark divergence from the dialogue model in Canada which emphasizes the dynamics between the legislative branch of Parliament and the Supreme Court of Canada.¹¹⁶

4.2 Charter Dialogue Model in Canada

Bearing in mind the origin of dialogue studies and the differences between Canadian and US scholarly uses of the term, the next section provides a detailed description of the dialogue model as it is described by Hogg and Bushell (and later Wright). Out of all models of judicial review examined in this chapter, *Charter* dialogue has perhaps exercised the greatest influence in terms of garnering professional and academic debate, as well as providing a metaphor for the practice of judicial review which has been referenced in Supreme Court decisions. Although influential, the dialogue model has also attracted a wealth of criticism, as well as authors that have proposed modifications to both the implied meaning of "dialogue" as well as to the description of the process of judicial review itself. In her remarks presented at the "Law and Parliament Conference 2006," the Right

¹¹⁶ It is worth noting that in Hogg, Thornton and Wright, "*Charter* dialogue revisited—or 'Much Ado about Metaphors,'" the authors also briefly examine the role of appellate courts and provincial legislatures with in *Vriend* and *M v. H*

Honourable Beverley McLachlin stated that judicial accountability resides in a dialogical relationship between the Supreme Court of Canada and the legislatures.¹¹⁷ Justice McLachlin's direct reference to Hogg and Bushell's text "The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn't Such a Bad Thing After All)" is demonstrative of the attention it has received in legal and social science scholarship these past decades. The prominence of *Charter* dialogue theory is such that, as Hogg, Thornton and Wright note in their article "*Charter* Dialogue Revisited,"

By 2006, a total of 27 reported decisions (ten Supreme Court of Canada decisions, five provincial appellate decisions, seven decisions by the superior courts of the provinces or territories, on decisions of the Federal Court of Appeals, and one of a provincial *court*) had referred to the concept of *Charter* dialogue. *Charter* dialogue has been the subject of speeches by members of Parliament and members of the judiciary, and has been a topic for academic discussion in numerous courses in law and political science.¹¹⁸

Although the *Charter* dialogue model is accepted by a vast number of legal practitioners and scholars, the model is not without critics¹¹⁹ that have raised issues with the empirical and conceptual strength of this theorization.

Indeed, the use of the dialogue metaphor raises a number of theoretical challenges, such as: What constitutes a 'dialogue'? Does the notion of dialogue imply equal power among interlocutors? Moreover, as a theorization for the relationship between the Supreme Court and other branches of government, the quantitative analysis used to prove a dialogical relationship has come under scrutiny by a number of legal and political scholars, due to the selection bias of cases studies and vague definitions of the term "dialogue." Yet, in spite of these critiques, the *Charter* dialogue model persists as an influential method of conceptualizing judicial review due to its identification of Canada's "weak" model of judicial review.

The literature pertaining to the definition and critique of *Charter* dialogue is best characterized as a dialogue in-and-of itself that spans over a decade, between the proponents

¹¹⁷ Beverly McLachlin, "Keynote address," presented at the *Law and Parliament Conference*. 2 November 2006.

¹¹⁸ Hogg, Thornton and Wright, "*Charter* dialogue revisited—or 'Much Ado about Metaphors,'" 5.

¹¹⁹ See: Christopher Manfredi and James B. Kelly, "Six degrees of dialogue: A response to Hogg and Bushell," *Osgoode Hall Law Journal*, 37, no. 3 (1999): 513-527; Morton and Knopff, *The Charter revolution and the court party*, 2000.

of *Charter* dialogue, Hogg and Bushell (later Thornton), and those who dispute the empirical and normative validity of *Charter* dialogue theory, namely Manfredi and Kelly. The following paragraphs provide a brief overview of the academic history of *Charter* dialogue, while highlighting the normative and empirical debates that surround the theory.

The theorization of a *Charter* dialogue first emerged within Canadian academic and legal discourse in a text by Peter Hogg and Allison Bushell (later Thornton) entitled “The *Charter* Dialogue Between Courts and Legislatures.” Hogg and Bushell present *Charter* dialogue as a response to the argument that “judicial review of legislation under the *Canadian Charter of Rights and Freedoms* is illegitimate because it is undemocratic.”¹²⁰ According to Hogg and Bushell, the theorization of *Charter* dialogue is grounded primarily in the “American experience” of judicial review.¹²¹ To support their theorization of a dialogical relationship between the Supreme Court and legislatures, Hogg and Bushell provide empirical analysis of sixty-six cases in which a judicial decision struck down legislation on *Charter* grounds, and Parliament or provincial legislatures responded by producing a “legislative sequel.” In their selection criteria of sixty-six cases, Hogg and Bushell examined “decisions involving judicial invalidation as well as important trial and appellate court decisions that did not reach the Supreme Court.”¹²²

Hogg and Bushell argue that a dialogue between legislatures and the Supreme Court occurs when a “judicial decision is open to legislative reversal, modification, or avoidance...[by a] competent legislative body.”¹²³ The metaphor of a dialogue refers to the method through which legislation is created by the legislature, presented to the judiciary for review, and in turn, sent back to the legislature if any modifications are necessary. The essence of this dialogue lies in the ability of the legislature to reverse, modify, or avoid judicial invalidation through the enactment of alternative statutes. The *Charter* facilitates this dialogue in four ways: first section 33 grants legislatures the ultimate power of override;¹²⁴ second, section 1 allows legislatures to implement alternative means of achieving important objectives;¹²⁵ and third, some rights are internally qualified and

¹²⁰ Hogg and Bushell, “*Charter* dialogue between courts and legislatures,” 76

¹²¹ *Ibid.*, 78.

¹²² *Ibid.*, 81.

¹²³ *Ibid.*, 79.

¹²⁴ *Ibid.*, 83.

¹²⁵ *Ibid.*, 84.

therefore do not constitute an absolute prohibition on certain actions, and lastly, the *Charter* offers alternative solutions to nullification.¹²⁶ Taken as a whole, these features of the *Charter* mean that it has the potential to serve as a catalyst for two-way exchange between the judiciary and the legislature on the topic of human rights and freedoms, but it rarely raises an absolute barrier to the wishes of democratic institutions.¹²⁷

Some ten years following their initial introduction of *Charter* dialogue to Canadian scholars, Hogg, Thornton (formerly Bushell) and Wright sought to respond to critics of the model. To further clarify their initial argument and assuage their critics, Hogg *et al.* rebuked:

In “*Charter* Dialogue,” we referred to the sequence of new laws following *Charter* decisions as a “*Charter* dialogue” between the courts and legislatures. By this, we did not mean that the courts and legislatures were literally “talking” to each other. We made it clear that all that we meant by the dialogue metaphor was that the court decisions in *Charter* cases usually left room for a legislative response, and usually received a legislative response. In other words, the *Charter*’s influence was much less direct than the simple rule by judicial decree that was assumed by the critics of judicial review. Metaphorically speaking, there were at least two “voices” translating *Charter* requirements into laws, but the most important of those voices was the competent legislature.¹²⁸

We should make clear at the outset that we are not especially interested in debating the critics on the question of whether the word “dialogue” is an apt description of the dynamics between the legislative and judicial branches in respect of *Charter* decisions. We accept, of course, that people may reasonably disagree about whether “dialogue” is the proper word to use (although no alternative has been suggested).¹²⁹

It is important to note that in spite of Hogg and Bushell’s characterization of the *Charter* as a device for exchanges between the judiciary and the legislature on the topic of human rights has received considerable acceptance from the legal community. In fact, in the case of *Vriend v. Alberta*, Justice Frank Iacobucci invoked the metaphor of *Charter* dialogue to explain the “proper balance between individual rights and common purposes.”¹³⁰ Although Hogg and Bushell-Thornton may have never intended for scholars and practitioners to

¹²⁶ *Ibid.*, 87-91.

¹²⁷ *Ibid.*, 81.

¹²⁸ Hogg, Thornton and Wright, “*Charter* dialogue revisited—or ‘Much Ado about Metaphors,’” 5-6.

¹²⁹ *Ibid.*, 7.

¹³⁰ Christopher Manfredi and James.B. Kelly, “Six degrees of dialogue: A response to Hogg and Bushell,” *Osgoode Hall Law Journal* 37, no. 3 (1999): 513.

interpret the dialogue metaphor so literally, the model has nevertheless caught the imagination of many researchers and practitioners.

4.3 Overview of Different Metaphors Closely Related to *Charter* Dialogue

Although *Charter* dialogue has attracted much attention as metaphor for explaining the democratic legitimacy of judicial review, comparatively, little attention has been given to how *Charter* dialogue has influenced federalism since 1982.¹³¹ A common trend found among the theorists within this section is a general acceptance of Hogg *et al.*'s conclusion that, in spite of the entrenchment of the *Charter*, Canada experiences a “weak” form of judicial review. Weak judicial review is characterized by the Supreme Court's decisions as “one variable among a host impacting particular policy fields.”¹³² Although not all the authors examined in this literature review necessarily agree with Hogg *et al.*'s use of the *Charter* dialogue metaphor (notably Kelly), these authors do, at the very least, engage with the concept of a dialogical relationship between the Supreme Court and provincial legislatures.

The acceptance of a weak form of judicial review, however, has not led to a consensus between authors on the level of agency exercised by the judiciary. The current state of *Charter* dialogue literature highlights a key tension between two schools of thought pertaining to the characterization of the Supreme Court's involvement in federal relations; Baier, Kelly and Murphy advance a notion of the court as an arbiter of federal-provincial disputes, whereas MacKay presents the Supreme Court as a quasi-political actor.

4.3.1 The Court as Arbiter in Federal Relations

Baier advances a nuanced understanding of the role of Supreme Court as an arbiter in federal issues and argues that the Supreme Court exercises only a limited ability to produce informal changes to constitutional arrangements. According to Baier, judicial review remains an important formal structure that: resides over jurisdictional disputes;

¹³¹ Hogg, Thornton and Wright, “*Charter* dialogue revisited—or ‘Much Ado about Metaphors,’” 7.

¹³² Baier, “Judicial Review and Canadian Federalism,” 25.

enforces the constitutional accountability of federal and provincial governments; and manifests a critical capacity to protect weaker actors within an unbalanced federation.¹³³ The role of arbiter, however, is ultimately re-affirmed by Baier's understanding that the judiciary "keeps the rules of the federal game clear and promotes legal accountability and protection of federal and provincial actors."¹³⁴

Similarly, in their article "Shaping the Constitutional Dialogue on Federalism: Canada's Supreme Court as Meta-Political Actor," Kelly and Murphy argue that within the process of managing Canada's "constitutional architecture and the reconciliation of unity and diversity in the federation" the Supreme Court undertakes a meta-political role.¹³⁵ Kelly and Murphy argue that the Court is meta-political in the sense that it "supplements rather than subverts the constitutional role of political actors," meaning it does not remove power from conventional actors.¹³⁶ Furthermore, because the Supreme Court understands its role as one which ought to encourage constitutional dialogue, the Supreme Court therefore, "encourages political actors to assume the lead in defining and implementing fundamental constitutional rights" or the Court can offer "authoritative guidelines on constitutional controversies where political processes either fail to emerge or break down."¹³⁷ Within their analysis, Kelly and Murphy use a nuanced notion of *Charter* dialogue as an analytic tool for understanding the role of the Supreme Court within inter-institutional and intergovernmental affairs.¹³⁸ Kelly and Murphy argue that within their nuanced version of *Charter* dialogue, the Supreme Court is understood as meta-political because "it studiously avoids imposing comprehensive solutions and instead articulates the constitutional bounds within which political actors can agree on such solutions through consultation and negotiation."¹³⁹

4.3.2 The Court as a Quasi-Political Actor

¹³³ Baier, "Judicial Review and Canadian Federalism," 33.

¹³⁴ *Ibid.*, 35.

¹³⁵ James B. Kelly and Michael Murphy, "Shaping the Constitutional Dialogue on Federalism: The Canadian Supreme Court as Meta-Political Actor," *Publius: The Journal of Federalism* 35, no. 4 (2005): 218.

¹³⁶ *Ibid.*, 218.

¹³⁷ *Ibid.*, 218.

¹³⁸ *Ibid.*, 221.

¹³⁹ *Ibid.*, 222.

In his article “The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?” MacKay notes: “Federalism, although one of the founding principles upon which this nation was built has received very little academic attention since the advent of the Canadian *Charter* of Rights and Freedoms.”¹⁴⁰ However, contrary to this academic trend, MacKay asserts that federalism remains a relevant and important aspect of Canadian constitutional law. The apparent absence of federalism is due, in part, to a deliberate attempt by theorists to frame discussions around the Supreme Court of Canada; this has affected the division of power among the three branches of government:

Traditionally the Court has been reluctant to acknowledge the political dimensions of allocating powers between different levels of government. The Court has described its activity in this area by using the legal term “division of powers” instead of the political term “federalism.”¹⁴¹

MacKay argues that in spite of these attempts, there is no clear conceptual delineation that effectively differentiates the terms “division of powers” and “federalism.” This is a point which is further underscored by the reality that, “at a political as well as a legal level, federalism remains high on the national agenda and is an important aspect of major issues such as the appropriate degree of autonomy in Quebec, the emergence of Aboriginal self-government, and issues of western alienation.”¹⁴²

In his examination of how the entrenchment of the *Charter* has changed the role of the Supreme Court vis-à-vis the deliberation of important federal issues, MacKay rejects the traditional theorization of the Supreme Court as a “neutral” arbiter that was epitomized by the Judicial Committee of the Privy Council era.¹⁴³ Rather, MacKay advances the metaphor of the Supreme Court as an active –but restrained– “player” within federalism; active insofar as the Supreme Court demonstrates flexibility in its ability to adapt federalist theory to the changing demands of a complex Canadian society, yet, it remains restrained in so far as it must operate within the limits of the judicial role and remain accountable to the constitutional texts.¹⁴⁴

¹⁴⁰ MacKay, “The Supreme Court of Canada and Federalism,” 242.

¹⁴¹ *Ibid.*, 245.

¹⁴² *Ibid.*, 245.

¹⁴³ *Ibid.*, 279.

¹⁴⁴ *Ibid.*, 279.

It is interesting to note that, although MacKay does not explicitly engage with the concept of *Charter* dialogue, his text is heavily influenced by the work of Hogg and Bushell-Thornton. For example, MacKay accepts the assumption that the Supreme Court exercises a “weak” form of judicial review, and that “the Court has an important role to play in the resolution of disputes between federal government and the provinces [...] the Court does not always give the final word in the federal-provincial dispute resolution process, but it does facilitate the resolution of conflict in the federal system.”¹⁴⁵

5. Coordinate Interpretation

Of all the metaphors examined, coordinate interpretation is the weakest form of judicial review. As a model of constitutional interpretation, coordinate interpretation examines “considerable inter-institutional participation in the exercise of any power but only within the limits of formal assignment of power.”¹⁴⁶ In terms of judicial power, the model of coordinate interpretation suggests that: “(1) the legislature may exert partial agency over the judicial power to interpret, and (2) the judicial interpretive power may not exceed partial agency over the assigned powers of other branches.”¹⁴⁷ Rejecting the orthodoxy of a need for institutional check-and-balances within the Westminster Parliamentary model, Baker advances a theory of judicial review in which “the relationships between [branches of government] are structured upon the notion *that each institution contributes to the operation of the rule of law in a functionally distinct manner.*”¹⁴⁸

At its core, coordinate interpretation advances a pluralist approach to problem-solving. Rather than the Supreme Court producing a “final” decision, coordinate interpretation approaches a judicial decision from the perspective “where the community as a whole is attempting to resolve some issue concerning the rights of all the members of the community and attempting to resolve it on a basis of equal participation.”¹⁴⁹ The notion of an elected body participating in the process of rights protection is not foreign to Canadian

¹⁴⁵ Ibid., 246.

¹⁴⁶ Denis Baker, *Not Quite Supreme: The courts and coordinate constitutional interpretation*, (Kingston and Montreal: McGill-Queen’s University Press 2010), 13.

¹⁴⁷ Ibid., 13.

¹⁴⁸ Ibid., 14 [emphasis added]

¹⁴⁹ Waldron cited in Baker, *Not Quite Supreme*, 50.

history; as Baker, among others (notably Hiebert and Roach) argue, prior to 1982 parliament was the protector of human rights.

Although this Chapter advances Baker’s theory of judicial review as “coordinate interpretation,” it is important to note that authors (such as Manfredi, Nagel and Huscroft) have made contributions to similar notions of weak form judicial review, whereby elected branches of government participate in the interpretation the *Charter*. The result of these interpretations is that the legislative and executive branches of government participate more substantively in the production of laws through a more thorough engagement with decisions produced by the judiciary. Coordinate interpretation focuses on the deliberation of unelected judges and elected officials pertaining to marginal cases. In these circumstances, the issues encapsulated in the court cases elicit legislative responses that go beyond invocations of *Sections 1* and *33*. Rather, these cases demonstrate that legislatures are observant of judicial decisions – especially those in which a case is decided by only a slight majority.

5.1 History and Origins of the Coordinate Interpretation Model

While the term “coordinate interpretation” may be relatively new to Canadian legal-political studies, the idea of water-tight compartments working in concert with one another has a long-standing tradition.¹⁵⁰ In 1961, Vincent MacDonald, Justice of the Supreme Court of Nova Scotia, advanced the idea of the Supreme Court of Canada as an “umpire of the federal system”. In an address to the Osgoode Law School, MacDonald stated:

It is the prime function of the final Court to keep the exercise of legislative powers by Parliament or Legislatures within the limits marked out for them. For that purpose it must interpret the heads of jurisdiction relevant to each exercise of asserted legislative power in reaching its conclusion of validity or invalidity. A Constitution consists of two things: the words in which legislative powers were distributed, and the purpose and philosophy of the document as a whole, as enshrining the original concept of the kind of government envisaged for the future.¹⁵¹

¹⁵⁰ The Living Tree metaphor has not been included within the scope of this chapter because it is not a theory about judicial review that addresses institutional dynamics, rather it a doctrine that legitimizes the progressive interpretation of constitutional documents. See: W. J. Waluchow, *A Common Law Theory of Judicial Review: The Living Tree* (Cambridge: Cambridge University Press 2007).

¹⁵¹ V.C. MacDonald, *Legislative power and the Supreme Court in the fifties* (Toronto: Buttersworth, 1961), 26.

According to MacDonald, the function of the court is to two-fold: to provide continuous review of the constitution and to provide stability through enforcing the institutional roles of each branch of government, as articulated by the constitution. Firstly, “Implicit in any Constitution, in my opinion, is the idea of continuous review by the Court of the terms of the Constitution, and their adaptation to developing needs and circumstances as they present themselves in the cases which arise for decisions; an attitude made imperative by the difficulty of the amending process in Canada.”¹⁵²

Secondly, MacDonald’s metaphor of “Court as umpire” is intended to “provide stability” and serve as a mechanism for ensuring that each branch of government perform its particular function as defined by the constitution: “...it is [the Court’s] function to maintain the purpose and philosophy of stability, to maintain the dichotomy of powers in the same relative position in a world of movement, as existed in the world of its original conception. This does involve some element of judicial policy-making but if marked by due restraint is merely the expertise of that degree of discretion proper to all constitutional interpretation.”¹⁵³ When confronted with the reality of revolutionary forces in social, environmental, and institutional transformations, the Court, MacDonald states: “This does not imply that Courts must become dedicated to the promotion of their own views of what is proper or expedient, for that area of policy belongs to the Legislators. Nor does it mean that they should remould the Constitution into something that is alien from its basic purpose and underlying philosophy.”¹⁵⁴

In a more recent publication, Greschner revives the umpire model as one that “aids our understanding of the new features of the constitutional landscape that were added by the *Constitution Act, 1982*.”¹⁵⁵ According to Greschner, the umpire metaphor offers theorists a way of understanding the role of judicial review within the context of federalism. It is important to note that both the dialogue and umpire metaphor offer an understanding of judicial review as on-going and dynamic process “that is never-ending, and therefore the dialogue metaphor may also be useful to guide federalism decisions.”¹⁵⁶ However,

¹⁵² MacDonald, *Legislative power and the Supreme Court in the fifties*, 26.

¹⁵³ *Ibid.*, 27.

¹⁵⁴ *Ibid.*, 27.

¹⁵⁵ Donna Greschner, “The Supreme Court, Federalism and Metaphors of Moderation,” *The Canadian Bar Review* 79 (2000): 48.

¹⁵⁶ *Ibid.*, 73.

Greschner notes that in the context of federalism, the umpire metaphor offers a considerable advantage in its ability to capture the authority of the Supreme Court in adjudicating disputes and interpreting law, as well as, the distinct jurisdictional roles of legislatures and courts.¹⁵⁷

5.2 Baker's Coordinate Interpretation

Baker's metaphor of coordinate interpretation rejects the notion that responsible government has fused together the executive and legislative branches of government: "The overstatement (or formalization) of this fact has skewed Canadian constitutional theory to the point that it can be seriously suggested that no institutional separation of powers exists in Canada but that between the judiciary and the elected institutions."¹⁵⁸ As such, Baker argues that the desire for an American-style system of checks and balances has driven scholars to overstate the independence of the judiciary.¹⁵⁹ For scholars that sought to reinforce the judicial branch as a counterbalance to fused branches of the executive and legislature, the entrenchment of the *Canadian Charter of Rights and Freedoms* was an opportunity to augment the power of the judiciary against the other branches.¹⁶⁰

Baker rejects this simple dichotomy of trumps, and argues that which branch has the "final say" with respect to human right issues is "highly ambiguous."¹⁶¹ The ambiguity arises out of instances where judicial power is subordinate to the interpretive power of the legislature and vice-versa. However, Baker argues that the direction of power is not unidirectional; rather, judicial power is coordinate with parliamentary power.¹⁶² Coordinate interpretation examines the interaction of not only the legislature, but the executive as well, and understands the distinct role that each of these branches has in its interactions with judicial decisions. Additionally, the metaphor of coordinate interpretation also lends itself to going beyond formulaic legislative sequels found in *Charter* dialogue (legislation - challenged by judicial invalidation – re-legislate or utilize override). Therefore, coordinate interpretation is conducive to producing a collaborative and "evolving" relationship between

¹⁵⁷ Ibid., 74.

¹⁵⁸ Baker, *Not Quite Supreme*, 9.

¹⁵⁹ Ibid., 9.

¹⁶⁰ Ibid., 9.

¹⁶¹ Ibid., 145.

¹⁶² Ibid., 145.

the branches of government in the production of laws. This is attributed to the notion that coordinate interpretation advances “sincere inter-institutional exchanges” by fostering political involvement that supersedes the legislative sequels found in *Charter* dialogue, to focus rather on the manner in which the legislature might “try, fail, and learn.”¹⁶³

Coordinate interpretivists make no claim regarding which branch of government reigns supreme.¹⁶⁴ According to Baker, the coordinate approach incorporates “formal and informal powers [and] allows for constitutional supremacy with no concomitant institutional supremacy. From this perspective the *Constitution Act, 1982* is best understood as elevating the judiciary from a subordinate constitutional branch to a co-equal branch capable of asserting itself independently, without the additional step of judicial superiority.”¹⁶⁵ Through an appreciation for the formal and informal institutional mechanisms, coordinate interpretation advances a theory of judicial review wherein the power of the Court is formally weak, because its power applies “only to discrete cases and [is] not determinative for other branches.”¹⁶⁶ However, the court is also informally strong because it often persuades the other branches “if only because its power over discrete cases will act controlling on a case-by-case basis.”¹⁶⁷ The agency exercised by the Court is, however, limited and merely partial as it must coordinate its decision with the legislative branch. As Baker explains, “Should the legislature wish to confine a judicial error in interpretation and/or send a constitutional hint to the Court suggesting a preferred interpretation [...] it may continue legitimately to hold and act upon an interpretation that is contrary to the Court’s.”¹⁶⁸

Coordinate interpretation can also be observed in the doctrine of judicial deference. In the practice of judicial deference, the court abstains from “interfering with a legislative or executive decision based on concerns about the limits of their institutional role in the constitutional framework.”¹⁶⁹ According to Kavanagh, judges “owe a degree of deference to the elected branches of government because of ‘that respect which once great organ of the

¹⁶³ Baker, *Not Quite Supreme*, 37.

¹⁶⁴ *Ibid.*, 150.

¹⁶⁵ *Ibid.*, 151.

¹⁶⁶ *Ibid.*, 151.

¹⁶⁷ *Ibid.*, 151.

¹⁶⁸ *Ibid.*, 151.

¹⁶⁹ A. Kavanagh, *Constitutional review under the UK Human Rights Act* (Cambridge: Cambridge University Press 2009), 190.

State owes to another'. In other words, it is a requirement of inter-institutional comity – the requirement of mutual respect between branches of government. Although comity does not require the courts to agree with everything Parliament or the executive does, it does require them to pay respect to their decisions.”¹⁷⁰ The institutional dynamic is thus directed by a fundamental respect on the part of the judiciary for the decision made by the elected branches, and refrain from providing commentary that might belittle, ridicule or delegitimize parliament.¹⁷¹

Coordinate interpretation advances a model of judicial review that emphasises the importance of legal pluralism. In many respects, it is a model of judicial review that was exercised broadly with little controversy prior to the *Constitution Act, 1982*.¹⁷² At its core, coordinate interpretation advances a theory of judicial review where the branches of government provide input into constitutional disputes, while exercising a degree of restraint based on their respective function and role. In doing so, coordinate interpretation rejects the simple dichotomy of judicial versus parliamentary supremacy.

6. Conclusion

This chapter contextualizes the emergence, development and prevalence of three models of judicial review within Canadian legal-political studies. Canada’s history of Parliamentary supremacy paired with the entrenchment of the *Charter of Human Rights and Freedoms* leads to a number of starkly varied models of judicial review.

The strong-form model of coordinated interpretation advanced by a number of scholars such as Morton and Knopff, Epp and Cairns. These authors share a common description of the Supreme Court exercising a strong-form of judicial review, which they believe is in sharp contrast to the Westminster tradition of parliamentary supremacy. Consequently, these authors express a certain concern for what they perceive to be the usurpation of power by the judiciary from elected branches of government following the entrenchment of the *Charter* in 1982.

¹⁷⁰ Kavanagh, *Constitutional review under the UK Human Rights Act*, 188.

¹⁷¹ *Ibid.*, 189.

¹⁷² Baker, *Not Quite Supreme*, 151.

Out of all three models of judicial review examined in this chapter, *Charter* dialogue has perhaps exercised the greatest influence in terms of garnering professional and academic debate, as well as providing a metaphor for the practice of judicial review which has been referenced in Supreme Court decisions. The metaphor of a dialogue refers to the method through which legislation is created by the legislature, presented to the judiciary for review, and in turn, sent back to the legislature if any modifications are necessary. The essence of this dialogue lies in the ability of the legislature to reverse, modify, or avoid judicial invalidation through the enactment of alternative statutes. Within this model, the *Charter* has the potential to serve as a catalyst for two-way exchange between the judiciary and the legislature on the topic of human rights and freedoms, but it rarely raises an absolute barrier to the wishes of democratic institutions.

The weakest form of judicial review can be found in the theory of coordinate interpretation, because it emphasizes a model of judicial review in which branches of government collectively participate in constitutional issues, with each branch performing a specific role and function. At its core, coordinate interpretation advances a pluralist approach to problem-solving. This is attributed to the notion that coordinate interpretation advances “sincere inter-institutional exchanges” by fostering political involvement that supersedes the legislative sequels found in *Charter* dialogue, to focus rather on the manner in which the legislature might “try, fail, and learn.”¹⁷³

Having examined the breadth judicial review models in Canadian legal scholarship, the question remains: which – if any – model of judicial review is most accurate in depicting the institutional dynamics between elected branches of government and the judiciary post-*Charter*? The next chapter examines two theoretical approaches, historical and discursive institutionalism, applied to the study of the institutional dynamics between the National Assembly of Quebec and the Supreme Court of Canada.

¹⁷³ Baker, *Not Quite Supreme*, 37.

Chapter Three: Theoretical Framework and Methodology

1. Introduction

This chapter examines the theoretical and methodological foundations of the thesis. The chapter is divided into three sections. Section one provides a brief analysis of the theoretical and methodological approaches employed by scholars to examine the practice of judicial review and judicial review in Canada. The observations derived from this section include: 1) a shift from quantitative to qualitative studies; 2) a need to move beyond the judiciary as a primary area of focus to include other institutions (e.g. executive and legislative branches) and actors (e.g. civil society actors); and 3) the growing importance of historical institutionalism to contextualize the political dynamics of judicial review.

Section two examines the suitability of historical institutionalism as the primary theoretical framework employed in this thesis. Given the importance of institutional change and ideas, historical institutionalism is complemented by two secondary theoretical approaches: incrementalism and discursive institutionalism. For the purpose of this study, incrementalism provides a useful analytic lens for understanding how constitutional negotiations regarding the development of the *Canadian Charter of Rights and Freedoms* and institutional transformations of the Supreme Court altered the practice and perception of judicial review in Canada. Whereas incrementalism focuses on the strategies and negotiations of actors, discursive institutionalism provides a broader framework for mapping the interaction between ideas and institutions, as well as the transformative effects of ideas upon those institutions. Discursive institutionalism offers a secondary analytic lens through which one can better understand the impact of ideas on institutions. For the purpose of this study, discursive institutionalism is particularly helpful in examining the tension between Quebec's assertion of maintaining the principle of parliamentary sovereignty as a model of judicial review versus stronger forms of judicial review advanced by the federal government in constitutional conferences.

This thesis will test the hypothesis of a dialogical relationship between the Supreme Court and Quebec government using two bounded case studies: Quebec's amendments to the *Charter of the French Language*, Bills 178 (1988) and 86 (1993). Section three provides

an overview of the application of historical and discursive institutionalism to the study of judicial review encompassed by the two case studies and provides information regarding the project's dependant and independent variables as well as archival research methods.

2. Current Theoretical and Methodological Approaches to Judicial Review in Canada

Among the models of judicial review examined in Chapter Two, only a handful of methodological and theoretical approaches are utilized. Earlier studies of judicial review focused primarily on quantitative analysis.¹⁷⁴ While quantitative analysis is useful in providing a survey of judicial review in Canada, many of these approaches are scrutinized due to project design and sample selection as well as the observation that quantitative approaches fail to account for contextual details regarding the institutional dynamics between the Supreme Court and other branches of government. More specifically, a quantitative approach does not provide sufficient insight into the rationale of a judicial decision or legislative response, nor does it provide any further insight into the political process of crafting a legislative response to judicial nullification.¹⁷⁵

Debates regarding the methodological merits of constitutional interpretation, particularly that of *Charter* dialogue, appear to have outweighed the substantive assessment of the accuracy and applicability of these models to actual case studies. In light of this trend, over the past decade, the literature has undergone a shift toward a qualitative approach to the study of judicial review.¹⁷⁶

¹⁷⁴ For examples, see: Peter W. Hogg and Allison Bushell, "*Charter* dialogue between courts and legislatures," *Osgoode Hall Law Journal*, 35 no. 1 (1997): 75; Peter W. Hogg, Allison Thornton and W.K. Wright, "*Charter* dialogue revisited—or 'Much Ado about Metaphors,'" *Osgoode Hall Law Journal*, 45 no. 1 (2007).; Christopher P. Manfredi and James B. Kelly, "Six degrees of dialogue: A response to Hogg and Bushell," *Osgoode Hall Law Journal*, 37 no. 3 (1999): 513.; Chrstopher P. Manfredi, "The day the dialogue died," *Osgoode Hall Law Journal*, 45 no. 1 (2007): 105.

¹⁷⁵ The need for greater institutional analysis to complement quantitative studies, particular in the field of judicial attitudinal analysis is addressed by Emmett MacFarlane, "The Supreme Court of Canada and the Judicial Role: An historical institutionalist account" (PhD thesis., Queen's University, 2009): https://qspace.library.queensu.ca/bitstream/1974/5313/1/Macfarlane_Emmett_200911_PhD.pdf.

¹⁷⁶ See: Richard Haigh and Michael Sobkin, "Does the Observer have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada's Courts," *Osgoode Hall Law Journal* 45, no. 1 (2007).; Kent Roach, "Sharpening the dialogue debate: The next decade of scholarship," *Osgoode Hall Law Journal*, 45, no. 1 (2007): 169.; Kent Roach, "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures," *La Revue du Barreau Canadien* 80 (2001); Andrew Petter, "Taking dialogue theory much too seriously (or perhaps dialogue isn't such a good thing after all)," *Osgoode Hall Law Journal*, 45, no. 1 (2007); Donna Greschner, "The Supreme Court, Federalism and Metaphors of Moderation," *The Canadian*

The ‘qualitative turn’ in *Charter* studies has resulted in an emphasis on the examination of in-depth case studies. To examine their case studies, scholars have employed theoretical approaches such as rational choice¹⁷⁷ and historical institutionalism.¹⁷⁸ For example, the vast majority of authors examined in Chapter Two utilize an historical institutionalist approach to assess the influence of the entrenchment of the *Charter* and whether it has created structural mechanisms that alter political opportunities for interest-groups, social movements, provinces, legislatures, judges, and lawyers, which in turn produces tangible outcomes in how federal and provincial government policy is created or altered. The application of historical institutionalism to the study of judicial review reveals that critical junctures and path dependencies codified within constitutional documents are often better understood through an examination of historic origins and their evolution throughout shifts in constitutional regimes.¹⁷⁹

Historical institutionalism is characterized by a historical perspective, or rather a notion of time that is focused on the “longue durée”, granting analytic primacy to long-term historical structures, rather than short-term analysis.¹⁸⁰ As a theoretical framework, historical institutionalism privileges continuity and examines slow, uninterrupted transformations to institutional order. It is important to note that continuity does not mean a state of stasis; rather, it emphasizes the clear connection and sources of stability between periods of transformation.

Historical institutionalists examine “institutions shape action because they offer opportunities for action and impose constraints.”¹⁸¹ Emphasis on the structural features of institutions also leads authors such as Smith to examine judicial empowerment within a

Bar Review 79 (2000): 47.; A.W. MacKay, “The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?” *Canadian Bar Review* 80 (2001).

¹⁷⁷ F.L. Morton, F. L. and Rainer Knopff, *The Charter revolution and the court party* (Toronto: University of Toronto Press Higher Education, 2000).; Christopher P. Manfredi, *Feminist Activism in the Supreme Court Legal Mobilization and the Women's Legal Education and Action Fund*. Law and Society Series (Vancouver: UBC Press, 2004).

¹⁷⁸ Regardless of differences in their methods and conclusions, authors such as Hiebert (1996; 2002), MacFarlane (2013), Smith (2011) and Baker (2010) all utilize analytic techniques commonly associated with historical institutionalism.

¹⁷⁹ Jörg Broschek, “Conceptualizing and theorizing constitutional change in federal systems: Insights from historical institutionalism,” *Regional & Federal Studies* 21, no. 4/5 (2011): 540.

¹⁸⁰ André Lecours, *New Institutionalism Theory and Analysis: Studies in Comparative Political Economy and Public Policy*, (Toronto: University of Toronto Press, 2005), 9.

¹⁸¹ *Ibid*, 9.

broad, historical perspective. For example, according to Smith, “judicial empowerment is a long-term historical process and that its effects must be explored through a longitudinal study of the impact of court and justifiable human rights protections.”¹⁸²

2.1 What’s missing from Judicial Review and Judicial review Literature?

The recent emphasis on qualitative approaches to studying judicial review has ushered a trend toward theoretical frameworks that privilege greater contextual analysis of constitutional interpretation. In turn, these theoretical approaches have raised greater awareness surrounding the need for case studies to examine the process of judicial review and its implications for other institutions. In particular, a broader contextual analysis of judicial review, through the examination of specific case studies, allows scholars to go beyond the question of: ‘who has the last word’? For example, authors such as Roach and Hogg *et al.* have indicated that there is need for greater contextual analysis of how legislatures engage with Supreme Court decisions pertaining to the *Charter*:

Like Roach, we feel that much could be learned from case studies examining the conditions under which legislatures have successfully revised or rejected court decisions and the conditions under which they have failed to do so...Such studies would be very likely to affirm the thesis of our article by showing that *Charter* decisions are carefully reviewed within government and consideration is given to a variety of legislative or executive responses that does not involve abandoning the policy that the court struck down.¹⁸³

Case studies offer an analytic lens through which we can better examine the variety of formal and informal actors, as well as enhance the capacity for scholars to understand how other government institutions contribute to constitutional interpretation.

While there is a growing interest in examining the process of judicial review through case studies, there is an even greater need to examine judicial review by various actors in cases that are bound by a common topic or theme. The assumption herein is that the nature of institutional dynamics within judicial review is likely to change based on the content (or subject matter) of the legislation under question. For example, could legislative responses

¹⁸² Miriam Smith, “Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada,” *Politics and Society* 33, no. 2 (2005): 329.

¹⁸³ Hogg, Thornton and Wright, “*Charter* dialogue revisited—or ‘Much Ado about Metaphors,’” 46.

regarding *section 7* (legal rights) undertake different strategies and engagements in contrast to legislative sequels that involve violations of *section 15* (equality rights), or *section 23* (minority education rights)? A case-specific analysis, or analysis of a small number of cases bound by a common topic might be able to expose: a) descriptive analysis of strategic executive and legislative responses; b) the socio-legal context of executive, legislative and judicial decision-making as it pertains to constitutional interpretation; and c) the potential for further developing different models or forms of judicial review that go well beyond the commonly referenced *section 1* and *section 33* legislative sequels encapsulated in the *Charter* dialogue model. A thematically-bound case study would be particularly insightful for the examination of how the *Charter* has shaped the interaction and power dynamics between the judiciary and other institutions.

A small number of authors have undertaken thematic analysis of judicial review in Canada.¹⁸⁴ Among them, the subject matter of the case studies has changed over the past two decades. Earlier post-*Charter* case studies, scholars focused on case studies pertaining to feminism and collective group rights with a particular emphasis on indigenous¹⁸⁵ and language groups.¹⁸⁶ However in the past ten years, there appears to be a growing emphasis on examining cases that involve salient issues such as the environment and same-sex rights.¹⁸⁷

From a political perspective, judicial review is a process that has far-reaching implications, well beyond the confines of the Supreme Court. Yet, a majority of studies overwhelmingly prioritize the Court as the focus of study and analysis. There are a handful of authors that have made important contributions to contemporary discussions regarding the political significance of judicial review for other branches of government and on civil

¹⁸⁴ Miriam Smith, *Political Institutions and Lesbian and Gay Rights in the United States and Canada*, (New York: Routledge, 2008).; Manfredi, *Feminist Activism in the Supreme Court Legal Mobilization and the Women's Legal Education and Action Fund.*; Robert A. Harvie and Hamar Foster, "Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law under the Charter," *Ottawa Law Review* 24, no. 1 (1992).

¹⁸⁵ James Tully, "The struggles of indigenous peoples for and of freedom," *Political theory and the rights of Indigenous peoples* (2000).; Michael Hartney, "Some confusions concerning collective rights." *Can. JL & Jurisprudence* 4 (1991). Robert N. Clinton, "The Rights of Indigenous Peoples as Collective Group Rights," *Ariz. L. Rev.* 32 (1990).

¹⁸⁶ See: Manfredi, *Feminist Activism in the Supreme Court Legal Mobilization and the Women's Legal Education and Action Fund.*; Morton and Knopff, *The Charter Revolution and the Court Party.*

¹⁸⁷ See: Miriam Catherine Smith. *Political Institutions and Lesbian and Gay Rights in the United States and Canada*, (New York: Routledge, 2008).

society actors. For example, Kelly's *Governing with the Charter* argues that the expanded role post-*Charter* of the Supreme Court is not a product of unrestrained judicial power; rather, the Supreme Court is part of a broader collection of institutions, notably the federal executive branch and bureaucracy that contribute to the interpretation of constitutional documents.¹⁸⁸

By comparison, little research has been done on the role of the provincial executive and legislative branches with respect to the process of constitutional interpretation. This presents a significant gap in the existing literature given that a number of significant cases are between the Supreme Court and other branches of provincial government. For example, from 1982 to 1985, the province of Quebec invoked the clause for every new statute. Then in 1988, in an effort to render French the primary language of commerce in the province, Quebec used the notwithstanding clause to protect the *Charter of the French Language* from further judicial scrutiny. Other provinces have also made use of the clause, such as Saskatchewan in 1986 to shield back-to-work legislation from judicial invalidation, and in Alberta in an effort to shield the *Marriage Act* in 2000. Furthermore, the use of section 33, the notwithstanding clause, of the *Charter* has only ever been invoked by provinces.¹⁸⁹ The use of the notwithstanding clause is, however, an example of overt and substantive disagreement with the Supreme Court. Inclusion of the notwithstanding clause into legislation requires the legislature and the executive to explicitly acknowledge that, at the very least, a piece of legislation will likely be contradictory to *Canadian Charter of Rights and Freedoms*, thereby requiring the executive and/or legislative body to express a clear majoritarian will in the face of counter-majoritarian opposition.

Although authors such as Roach, Mackay and Braier, Kelly and Murphy, and Petter address the potential implications of post-*Charter* judicial review on federal relations, the analysis of these authors privileges the role and function of the Supreme Court. What remains to be examined is the response on the part of provincial governments to the Supreme Court. For example, it is necessary to examine how provincial governments strategize legislative responses to the Supreme Court, and under what conditions do legislatures

¹⁸⁸ James B. Kelly. *Governing with the Charter Legislative and Judicial Activism and Framers' Intent* (Vancouver: UBC Press, 2005).

¹⁸⁹ Tsvi Kahana, "The notwithstanding mechanism and public discussion: Lessons from the ignored practice of section 33 of the *Charter*," *Canadian Public Administration*, 44, no. 3 (2001), 257.

negotiate their responses (i.e. Do members of provincial legislatures perceive themselves as being in a “dialogue” with the Supreme Court? To what extent is knowledge of the *Charter* dialogue model prevalent among members of provincial parliament?). Furthermore, there are outstanding questions, such as: the analysis of provincial legislative sequels could undertake a socio-legal approach, wherein authors might analyze the type of issues, or cases, that initiate legislative sequels (i.e. issues pertaining to minority identities, as in the instance of Quebec’s legislative response to invoke *Section 33*, in response to *Ford v. A.G. Quebec*).

3. Historical Institutionalism and the Study of Quebec’s response to Judicial Invalidation

Applied to the subject of this dissertation, a number of significant structural elements have fundamentally shaped the institutional dynamics between the Supreme Court of Canada and the National Assembly of Quebec such as: the precedent established by case law, Constitutional documents (*Constitution Acts I (1867) and II (1982)*, *Bill of Rights (1961)*, *Charter of Human Rights and Freedoms (1982)*), *Supreme Court of Canada Act (1949)*, and provincial legislation (such as the *Charter of the French Language* and *Quebec Charter of Human Rights and Freedoms*). Further to written structural elements, there are a number of unwritten conventions that guide institutional dynamics between the National Assembly of Quebec and the Supreme Court of Canada. From a legal perspective, conventions are “constitutional rules” that prescribe the manner in which legal powers ought to be exercised, but are not explicitly written.¹⁹⁰ While conventions may be acknowledged by the Supreme Court, they are not enforced. However, there are a number of instances where the Supreme Court of Canada has provided directive regarding constitutional conventions. Two notable cases involving Quebec’s constitutional interests are the *Patriation Reference* and the *Quebec Veto Reference (1982)*. Hogg notes that these two cases presented an important precedent to the expansion of judicial power. The questions pertaining to the use of convention in both the *Patriation Reference* and the *Quebec Veto Reference* raised no legal issues; therefore “it was generally assumed that there was no judicial procedure for

¹⁹⁰ Peter Hogg, *Constitutional Law of Canada: 10th Student Edition*, (Scarborough: Carswell, 2010): 1-21.

adjudicating a dispute about whether a particular practice was a convention or a usage. Since no legal consequence could flow from the answer, the issue appeared to be non-justiciable.”¹⁹¹ Whereas the Court had historically exercised restraint from answering questions that were unsuitable for judicial determination,¹⁹² these two cases involving Quebec’s constitutional interests created a situation where the Supreme Court overstepped its boundaries:

Was the Supreme Court of Canada wrong to answer the questions? [...] The issue really comes down to the question whether the convening questions were suitable for judicial determination. **The only possible effect of answering the convention question in the Patriation Reference was to influence the outcome of the political negotiations over the 1981-82 constitutional settlement.** [...] In my view, the Court, which is not an elected body, and which is not politically accountable for its actions, should have confined itself to answering the legal question, and **should not have gone beyond the legal question to exert any further influence over the negotiations.**¹⁹³

As demonstrated by this excerpt from Hogg, both formal and informal structural elements create constraints and opportunities for political actors. These structural elements, in turn give rise to path-dependency.

Within this dissertation, path-dependency emerges as an essential concept to examining foundational ideas within common law, as well as the broader socio-political context of Canadian constitutional disputes and negotiations. Path-dependency, however, is more than the mere assertion that “history matters;” rather, path-dependency claims that “we cannot understand the significance of a particular social variable without understanding ‘how it got there’ the path it took.”¹⁹⁴ Path-dependency emerges as a consequence of self-reinforcing or positive feedback processes.¹⁹⁵ Pierson’s notion of “increasing returns” loosely applies elements of rational actor theory to explain why political actors are enticed to perpetuate a particular policy trajectory. According to Pierson, once a political or policy decision is made, it may be costly or difficult to *radically* alter the direction of decision. Subsequent decisions, therefore, are often built upon similar assumptions and constraints present in the

¹⁹¹ Hogg, *Constitutional Law of Canada*, 1-26.

¹⁹² *Ibid.*, 1-26.

¹⁹³ *Ibid.*, 1-26.

¹⁹⁴ Paul Pierson, “Increasing Returns, Path Dependence, and the Study of Politics,” *The American Political Science Review* 94, no. 2 (2000): 252.

¹⁹⁵ *Ibid.*, 252.

previous decision, creating a series of ideational links that together form a ‘chain of events.’ Pierson notes that the same principle can be applied to better understand the path-dependency of political action and organization: “In addition, many types of collective action involve high start-up costs, which reflects the fact that considerable resources (material or cultural) need to be expended on organizing before the group becomes self-financing.... Whether you put energy into developing a new party, or join a potential coalition, or provide resources to an interest group may depend to a considerable degree on your confidence that a large number of other people will do the same.”¹⁹⁶

While path-dependency is helpful in not only explaining deeply entrenched policies and political behaviour, but also in explaining and rationalizing changes within political and policy trajectories. Peters advances understanding of path-dependency which grants greater weight to the potential transformations imbedded in small, incremental changes: “small choices in institutional arrangements can have remarkable consequences at a later date (regardless of whether they were adopted purposefully or unthinkingly), and that some policy choices may prove almost irreversible.”¹⁹⁷ Formative and foundational decisions bind future decisions through a number of constraints, however, these subsequent decisions are not necessarily limited to a strictly linear outcome. While the major trajectory may lead in a general direction, decisions made incrementally over time may alter the course of a policy in a manner that was not originally intended. In other words: path-dependency does not guarantee that future decisions will be consistent with the original intent of a policy trajectory.

Although historical institutionalism is most often associated with explaining continuity, it also offers a lens through which we can understand and rationalize institutional change and transformation. This chapter identifies two analytic points that contribute to developing a theory of change within historical institutionalism. The first of these points is that historical institutionalism acknowledges transformations to a policy, in spite of its path-dependency. While Pierson’s idea about increasing returns explains further entrenchment of policy trajectory, it can also be used to explain why actors may choose to deviate from a particular trajectory: “previous events in a sequence influence outcomes and trajectories but

¹⁹⁶ Pierson, "Increasing Returns, Path Dependence, and the Study of Politics," 258.

¹⁹⁷ Guy B. Peters, Jon Pierre, and Desmond S. King. “The Politics of Path Dependency: Political Conflict in Historical Institutionalism,” *Journal of Politics* 67, no. 4 (2005): 1287.

not necessarily by inducing further movement in the same direction. Indeed, the path may matter precisely because it tends to provoke a reaction in some other direction.”¹⁹⁸ In other words, the costs of switching alternative policy directions often increases as time progresses. Consequently, “increasing returns processes can also be described as self-reinforcing or positive feedback processes.”¹⁹⁹

Secondly, institutional transformations can arise out of “formative moments” and critical junctures. As Peters *et al.* explain, “Historical institutionalism conceives of public policymaking and political change as a discrete process, characterized by extended time periods of considerable stability, referred to as “path-dependency,” interrupted by turbulent, “formative moments.”²⁰⁰ During those formative periods “public policy is assigned new objectives, new priorities are established, and new political and administrative coalitions evolve to sustain those new policies.”²⁰¹ For example, with respect to this thesis, the constitution conferences of 1971-1982 were filled with a wealth of opportunities for negotiating the strength of the Supreme Court of Canada, the nature of collective and individual rights in Canada, and the power of Quebec to legislate its cultural and linguistic policies. Moreover, the case studies examined in this dissertation are riddled with critical junctures, such as the blanket use of the notwithstanding clause by the province of Quebec, and its inclusion in Bill 178 as a response to judicial invalidation of the *Charter of the French Language* in *Ford v. A.G. Quebec* (1988).

3.1 Complementing Historical Institutionalism with Incrementalism and Discursive Institutionalism

Given that historical institutionalism privileges the state traditions and structural mechanisms utilized by actors to organize and execute their strategies, it is one of the theoretical frameworks employed in this dissertation. In order to accommodate the scope of this study, historical institutionalism is further complemented by the use of incrementalism and discursive institutionalism as secondary theoretical frameworks. Incrementalism

¹⁹⁸ Pierson, “Increasing Returns, Path Dependence, and the Study of Politics,” 252.

¹⁹⁹ *Ibid.*, 252.

²⁰⁰ Peters et al., “The Politics of Path Dependency,” 1276.

²⁰¹ *Ibid.*, 1276.

focuses on the microcosmic elements of institutional change, and analyzes public policy decision-making as a concatenation of negotiations, bargaining and conflicts between decision-makers. Much like incrementalism, discursive institutionalism also examines the transmission of ideas through institutions over time. However, discursive institutionalism provides a broader framework for mapping the interaction between ideas and institutions, as well as the transformative effects of ideas upon those institutions. This section examines the merits of supplementing historical institutionalism with incrementalism and discursive institutionalism for the study of judicial review in Canada on the topic of the *Charter of the French Language*.

Of the institutional approaches available to scholars, discursive institutionalism is best suited for scope of this thesis given that the framework focuses “on the role of ideas in shaping institutions and the behavior of individuals within those institutions.”²⁰² Models of judicial review are merely *ideas* about how the judicial and legislative branches interact; consequently, examining the reception of these models requires a theoretical framework that primarily analyzes the reception of ideas by institutions. Lastly, discursive institutionalism is augmented through the use of ideational mapping, a methodological approach that is further discussed in this chapter.

3.1.1 Incrementalism

While historical institutionalism provides a meta-structural²⁰³ context for the practice of judicial review in Canada, this dissertation examines a number of unprecedented institutional transformations between executive, legislative and judicial branches of government in Canada. Institutional transformations to the fabric of federalism and constitutionally defined powers in the latter half of the twentieth century were the product of successive debates and negotiations among political actors. As such, the institutional transformations ushered by fallout of the constitutional negotiations of 1971-1994 can be better understood as a negotiation and competition of ideas that contributed to a series of

²⁰² Peters et al., "The Politics of Path Dependency," 112.

²⁰³ By meta-structural, I am referring to the major constitutional structures that remained constant and unchanged through this period of time (i.e. fundamental constitutional arrangements, historical legacies etc.)

slow, incremental changes regarding the role of the judiciary and provincial control over language.

Incrementalism's assessment of small, slow and gradual transformations has become a suitable accompaniment to historical institutionalism to explain how change occurs in the absence of exogenous shocks within an historical institutionalist framework.²⁰⁴

Incrementalism focuses on the microcosmic elements of institutional change, choosing to privilege the analysis of small groups of actors in a well-defined institutional space. Popular in the field of policy studies, incrementalism offers an alternative model to examining the process of decision-making as analytic and technical. Rather, incrementalism looks at public policy decision-making as a concatenation of negotiations, bargaining and conflicts between decision-makers.²⁰⁵

Further to serving as an analytic tool, authors have observed incrementalism applied as a political strategy in and of itself. To these authors, ideas become the currency of these political negotiations and strategies. Writing from his own experiences while researching material for his book *Agendas, Alternatives and Public Policy*, Kingdon observes that:

Incrementalism is also treated in the interviews, not as a description of the way the world is but as a strategy that one might use to manipulate outcomes. People are sometimes reluctant to take big steps. Apprehensive about being unable to calculate the political fallout, politicians shy away from grand departures. Apprehensive about not fully understanding the unanticipated consequences that might ensue, specialists also avoid significant changes.²⁰⁶

Within the context of this dissertation, incrementalism assists in explaining two occurrences regarding the development and application of judicial review metaphors. The first occurrence that can be examined through incrementalism is that following the entrenchment of the *Charter*, there was a flurry of debates attempting to predict and describe the “new” relationship between the judiciary and legislatures. The second occurrence can be

²⁰⁴ See: J.M. Walter and Frans-Bauke Van Der Meer, “Small, Slow, and Gradual Reform: What Can Historical Institutionalism Teach Us?” *International Journal of Public Administration* 34, no. 8 (2011).

²⁰⁵ Michael Howlett and M. Ramesh, *Studying Public Policy: Policy Cycles and Policy Subsystems*, 2nd ed. (Don Mills: Oxford University Press, 2003).

²⁰⁶ John W. Kingdon, *Agendas, Alternatives, and Public Policies*, 2nd ed. (New York: HarperCollins College Publishers, 2003): 80.

summarized by the overwhelming influence of US legal scholarship and its influence on Canadian jurisprudence.²⁰⁷

In addition to examining the competition of ideas, incrementalism also analyzes the development of alternative proposals, and how these ideas are altered, accepted or discarded by institutional actors.²⁰⁸ Incrementalism offers a dynamic approach to ideas, meaning it assumes that ideas are not stable entities because they often undergo a number of transformations. As demonstrated in Chapter Two, ideas can transform based on who employs them, the context (or cases) to which they are applied, and manner in which these metaphors – or ideas about the role and function of the judiciary – are appropriated and communicated.²⁰⁹ Given its analytic emphasis on understanding policy as the result of political negotiation and strategy, incrementalism provides an analytic lens through which we can examine transformations in how the National Assembly of Quebec altered its responses to judicial invalidation from invoking Section 33 in 1988, to accepting the judicial direction in 1993 with the passage of Bill 86.

3.1.2 Discursive Institutionalism

Much like incrementalism, discursive institutionalism also examines the transmission of ideas through institutions over time. Whereas incrementalism focuses on the strategies and negotiations of actors, discursive institutionalism provides a broader framework for mapping the interaction between ideas and institutions, as well as the transformative effects of ideas upon those institutions and the actors therein. For the purpose of this study, discursive institutionalism is particularly helpful in examining the reception of judicial review models by the National Assembly of Quebec and the Supreme Court of Canada.

In the constitutional negotiations leading to the entrenchment of the *Charter*, much debate, speculation, and even anxiety, surrounded the new function and power of the

²⁰⁷ See: Peter McCormick, "American Citations and the McLachlin Court: An Empirical Study," *Osgoode Hall Law Journal* 47, no. 1 (2009).

²⁰⁸ Kingdon. *Agendas, Alternatives, and Public Policies*, 82.

²⁰⁹ A particularly good example of this Haigh and Sobkin's analysis of prescriptive and descriptive uses of the *Charter* dialogue metaphor in judicial decisions. See: Richard Haigh and Michael Sobkin, "Does the Observer have an Effect?: An Analysis of the Use of the Dialogue Metaphor in Canada's Courts," *Osgoode Hall Law Journal* 45, no. 1 (2007).

judiciary. These speculations, in turn, fuelled the articulation of new alternative forms of judicial review in Canada. The debate involved a broad range of actors, including elected members of government, judges, legal professionals, academics and media. The content of these debates included matters such as: concern regarding the rise of judicial activism, the “Americanization” of Canadian judicial review and the erosion of democratic governance.²¹⁰

Due to the flurry of public (and at times esoteric) debates surrounding the role of the judiciary and legislative branches, discursive institutionalism’s emphasis on the communication of ideas lends itself to be combined with theoretical approaches and methods that undertake ideational mapping. As a variant of institutional theory, discursive institutionalism “depends much more heavily on ideas than do other versions”, and emphasizes “the goals and ideas that are pursued by the institution” consequently, discursive institutionalism places a greater emphasis on the role of substantive policy ideas.²¹¹

The following section is divided into three parts: 1) a general overview of discursive institutionalism as a theoretical framework; 2) the need for ideational mapping; and 3) the application of these frameworks to the study of the interaction between the Supreme Court and the National Assembly of Quebec regarding judicial invalidation of sections of the *Charter of the French Language*.

Similar to other conventional forms of institutionalism, the discursive approach emphasizes the structural and mutable elements of institutions, the impact of institutions on action, and the formative and transformative qualities of institutions.²¹² In contrast to the other forms of institutionalism, discursive institutionalism “considers the discourse that actors engage in the process of generating, deliberating, and/or legitimizing ideas about political action in institutional context according to a ‘logic of communication.’”²¹³ Therefore, discursive institutionalism places primary analytic emphasis on the significance of political ideas.²¹⁴

²¹⁰ See: Seymour Martin Lipset, *Continental Divide: The Values and Institutions of the United States and Canada*, (New York: Routledge, 1991).

²¹¹ Peters et al., "The Politics of Path Dependency," 113.

²¹² Lecours, *New Institutionalism: Issues and Questions*, 4.; Miriam Smith, ‘Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada,’ *Politics and Society*, 33 no. 2 (2005): 329.

²¹³ Vivien Schmidt, “Reconciling Ideas and Institutions through Discursive Institutionalism” in *Ideas and Politics in Social Science Research*, eds. Daniel Beland and Robert Henry Cox, (New York: Oxford University Press, 2010): 47.

²¹⁴ Peters et al., "The Politics of Path Dependency," 113.

One of the central assumptions of discursive institutionalism is that the language used by actors within an institution can reveal important ideas, objectives, assumptions and priorities that enrich our understanding of institutional change.²¹⁵ Thus, discursive institutionalism attempts to merge the work of institutionalism with that of discursive analysis.²¹⁶ Like discursive analysis, discursive institutionalists believe that language provides clues to how institutions are “constituted, framed, and transformed through the confrontation of new and old discursive structures – that is, systems of symbolic meaning codified in language that influence how actors observe, interpret, and reason in particular social settings.”²¹⁷

Due to its emphasis on ideas and language, discursive institutionalism is the least structural approach.²¹⁸ It privileges the analysis of ideas formulated and communicated within institutional environments and that formal structures are of secondary significance.²¹⁹ As such, discursive institutionalism is perhaps best understood as “an umbrella concept for the vast range of works in political science that take account of the substantive content of ideas and the interactive processes of discourse that serve to generate those ideas and communicate them to the public.”²²⁰ Therefore, a key assumption of this framework is that power is contained not only in structural arrangements, but also in discourse and ideas.²²¹ In this sense, discursive institutionalism acknowledges institutional structures, both material and immaterial, but is more flexible in terms of how it conceptualizes the agency of actors and their ability to transform institutions through discourse and ideational processes. Moreover, language itself constitutes a system imbued with structures that modify the transmission of ideas: “To understand how ideas are structured, we may compare this understanding of language to our definition of an idea: the idea functions much like a

²¹⁵ Vivien Schmidt, “Discursive Institutionalism: The Explanatory Power of Ideas and Discourse,” *Annual Review of Political Science*, 11 (2008).

²¹⁶ Partice A. Dutil and Peter Malachy Ryan, “The Bonds of Institutional Language: A Discursive Institutional Approach to the Clerk of the Privy Council’s Annual Report,” *Canadian Public Administration* 56, no. 1 (2013).

²¹⁷ John L. Campbell, and Ove Kaj Pedersen, *The Rise of Neoliberalism and Institutional Analysis*. (Princeton, N.J.: Princeton University Press, 2001): 9.

²¹⁸ Peters et al., “The Politics of Path Dependency,” 113.

²¹⁹ Ibid.

²²⁰ Schmidt, “Reconciling Ideas and Institutions through Discursive Institutionalism,” 47.

²²¹ See: Michel Foucault, *The Archaeology of Knowledge* (New York: Harper & Row, 1976).

language system and the elements of meaning as words within the system. In this way we can speak of an idea as constituted by a *web of related elements of meaning*.”²²²

Discursive institutionalism is a relatively recent addition to institutionalist approaches for the study of Canadian politics.²²³ The notion that institutions are shaped by ideas has appeared in a number of studies that examine institutional change.²²⁴ However, the most robust analysis of the interplay between institutional change and ideas is advanced by Vivien Schmidt. As Béland notes in his article, “Ideas, Institutions and Public Policy Change,” historical institutionalists have sought to amend their “continuity-centric” framework through the inclusion of factors that might account for structural changes and shifts.²²⁵ Theorists, particularly in the subfields of political economy and policy studies, have identified ideas and discourses as factors that may have the capacity to account for change; however what remains the key defining feature between ideational-theorists is the extent to which they believe the interplay between ideas and institutions deserves to be a theoretical framework in-and-of-itself. Perhaps the most notable advantage of discursive institutionalism, as mentioned by Schmidt, Pierson and Béland, is that it accounts for greater agency of action, due to its emphasis on the creation and diffusion of ideas within institutional frameworks.

Using these assumptions, Schmidt has created a system of institutional analysis that is “defined by ideas, as well as by the manner in which these ideas are communicated within the structure.”²²⁶ It is important to note that in contrast to the aforementioned theorists, Schmidt is the first to undertake an analysis of the central elements necessary to mapping ideational changes within institutions. The following section provides further information pertaining to Schmidt’s particular account of discursive institutionalism. Central to discursive institutionalism is the analysis of ideas and discourse on institutional change and continuity. In her account of discursive institutionalism, Schmidt provides a clear categorization pertaining ideas and discourse. Therein, she identifies two types of ideas

²²² Martin B. Carstensen. “Ideas Are Not as Stable as Political Scientists Want Them to Be: A Theory of Incremental Ideational Change.” 59, no. 3 (2011): 600.

²²³ Peters et al., “The Politics of Path Dependency.”

²²⁴ See: Colin Hay, and Andreas Gofas. *The Role of Ideas in Political Analysis : A Portrait of Contemporary Debates*. (New York: Routledge, 2010).

²²⁵ Daniel Béland, “Ideas, Institutions, and Policy Change,” *Journal of European Public Policy* 16, no. 5 (2009).

²²⁶ Peters et al., “The Politics of Path Dependency,” 112.

(cognitive and normative) and two types of discourse (communicative and coordinated). The following paragraphs provide a brief clarification on what these terms respectively signify within her version of discursive institutionalism.

Applied to the study of judicial review and judicial review, discursive institutionalism provides analytic emphasis on the philosophical disputes and terminology used by actors to articulate competing ideas about human rights regimes, the role of the Supreme Court and the power of elected branches of government. Furthermore, the analysis of discourse goes well beyond the content of ideas; who says what to whom, are significant points of inquiry within discursive institutionalism. As Schmidt notes, “Discourse is not only what you say, however; it includes to whom you say it, how, why, and where in the process of policy constructions and political communication in the ‘public sphere.’”²²⁷ To provide greater insight into the manner in which ideas are communicated to audiences, Schmidt provides a key differentiation between communicative and coordinative discourse, as well as the directionality of discourse and ideas.

Communicative discourse is characterized as the exchange of ideas within a public sphere which “consists of the individuals and groups involved in the presentation, deliberation, and “legitimation” of political ideas to the general public.”²²⁸ In this sense, communicative discourse takes place on a macrocosmic level, encompassing a broad spectrum of actors from different fields such as formal politics, media, think tanks, citizens etc., hence Schmidt’s notion that this is a “public” form of discourse.²²⁹ With respect to the subject matter of this thesis, examples of communicative discourse are likely to be found in public debates and opinions regarding political contentious relationships between Anglophone communities and the Quebec government surrounding Bill 178. Anglophone civil society actors were particularly adept at leveraging national media coverage of Quebec provincial politics in an effort to gain broader federal political support. The strategic use of communicative discourse by Anglophone civil society groups reached a crescendo in 1993 with the *Ballantyne, Davidson, McIntyre v. Canada* at the United Nations Human Rights Committee.

²²⁷ Vivien Schmidt, “Discursive Institutionalism,” 310.

²²⁸ *Ibid.*, 310.

²²⁹ *Ibid.*, 310.

By contrast coordinative discourse “consist[s] of the individuals and groups at the center of policy construction who [are] involved in the creation, elaboration and justification of policy and programmatic ideas.”²³⁰ Therefore, coordinative discourse can be understood as the development and communication of ideas by an elite group, comprised of “civil servants, elected officials, experts, organizes interests and activists... Thus coordinative discourse may be the domain of individuals loosely connected in epistemic communities...”²³¹ Given that a model of judicial review is an idea that is articulated within the Canadian academic community, and thereafter utilized almost exclusively by academics, elected and appointed officials, this project situates models of judicial review (such as *Charter* dialogue, Court Party and coordinated interpretation) within the category of coordinative discourse.

Further to identifying the importance of who speaks to whom, Schmidt also underscores the importance of directionality; that is to say, is discourse produced and delivered from the top-down, or vice versa? Schmidt notes that the “arrows of discursive interaction often appear to go from the top down. Policy elites generate idea, which political elites then communicate to the public...the master discourse provides a vision of where the polity is, where it is going, and where it ought to go.”²³² By contrast, as in the case of social movements, discourse from the “ground-up” also have the power to shape both civil society, as well as national and transnational policy agendas.²³³

Applied to the models of judicial review examined in Chapter Two (e.g. Court Party, coordinated interpretation and *Charter* dialogue), the directionality of discourse somewhat defies a simple vertical characterization. For example, the metaphor of Court Party has gained momentum from various media sources and academic interlocutors, including Jeffery Simpson whose article “The Court of No Resort,” was published in the *Globe and Mail*: “[The *Sauvé* decision] is one of the most aggressive [cases] in asserting judicial supremacy over Parliament. It [the Supreme Court] dismissed parliamentary debates on the issue as having ‘more fulmination than illumination’. It [the Supreme Court] was manifestly

²³⁰ Schmidt, “Discursive Institutionalism,” 310.

²³¹ *Ibid.*, 310.

²³² *Ibid.*, 311.

²³³ *Ibid.*, 311.; See also: Sidney Tarrow, *The New Transnational Activism* (New York: Cambridge University Press, 2005).

unimpressed with the issue in two bills, a long parliamentary committee study, parliamentary debates and a royal commission on electoral reform.”²³⁴ In a more recent article for the *National Post*, Preston Manning, former Leader of the Reform Party, articulated the long-standing frustration of conservatives with the post-*Charter* Supreme Court: “If you believe in the supremacy of the Parliament, which I do — and I think Stephen [Harper] does — you have real reservations about the *Charter* and the *Constitution Act* [1982]...It, in essence, undermined the supremacy of Parliament and gave the judges a much more active role in overriding decisions of Parliament.”²³⁵ Furthermore, Ian Brodie, former Chief of Staff to the Prime Minister Stephen Harper also contributed to the popularity and diffusion of the Court Party, arguing that interest-group litigation has enhanced the ability of electorally disadvantaged groups to challenge policies through the Courts, on topics such as same-sex marriage and abortion.²³⁶

By comparison, the discourse of *Charter* dialogue has conceptually moved diagonally, as well as across disciplines; that is to say, it has moved horizontally from the field of legal scholarship to political science scholarship, and then from a largely academic audience it moved “up” to the Supreme Court of Canada, where it has received institutional validation through its inclusion in judicial decisions. What remains unclear is the question of whether *Charter* dialogue discourse has either moved “down”²³⁷ to the provincial level, and whether it been accepted by the government of Quebec, or whether the Quebec legislature has at any point perceived itself in a dialogical relationship with the Supreme Court of Canada, thereby demonstrating a discursive move upwards.

²³⁴ Jeffrey Simpson, “The Court of No Resort,” *Globe and Mail*, 22 November 2002.

²³⁵ Jen Gerson, “Judge Dread: Recent rulings only reawakening Tories’ long-held hostility toward the top court,” *National Post*, May 9, 2014. <http://news.nationalpost.com/news/canada/canadian-politics/na0510-harper>.

²³⁶ See: Ian Brodie, *Friends of the Court: The Privileging of Interest Group Litigants in Canada*, (Albany: State University of New York Press, 2002), xiii-xiv.

²³⁷ The use of the term “down” is perhaps somewhat contentious in the context of *Charter* Dialogue, given that some authors (such as Kelly and Manfredi 1999; Kelly and Murphy 2005) argue that the metaphor of a dialogue underscores a fundamental equality between interlocutors, in this case the Quebec legislature and the federal power of the Supreme Court of Canada. Considering this interpretation of the term dialogue, it might be more appropriate to categorize the discursive move as “horizontal” between Supreme Court and provincial legislature.

3.2 Interactions between Institutions and Ideas

Consistent with other forms of new institutionalism, discursive institutionalism “treats institutions as given (as the context within which agents think, speak, and act) and as contingent (as the result of agents’ thoughts, words and actions)”²³⁸, institutions are understood to consist of both material constructs (e.g.: Quebec Legislature, Supreme Court of Canada), as well as immaterial constructs (e.g. language, norms and values). However, in contrast to the other forms of institutionalism, discursive institutionalism is not bound to the notion that institutions are “external rule-following structures...that serve primarily as constraints on actors, whether as rationalist incentives, historical paths, or cultural frames.”²³⁹ Rather, Schmidt argues that institutions serve as both,

...Constraining structures and enabling constructs internal to ‘sentient (thinking and speaking) agents whose ‘background ideational abilities’ explain how they create and maintain institutions at the same that their “foreground discursive abilities” enable them to communicate critically about those institutions to change or maintain them.²⁴⁰

It is also important to note that Schmidt conceptualizes discursive institutionalism as being compatible with other new intuitionist approaches. This, she argues, is the case in-so-far as discursive institutionalism can comply or accept some of the structural features of other institutionalisms, while simultaneously accounting for the agency of political actors found within their “discursive spaces,” such as ideational rules and processes.

It is important to underscore that little research exists regarding how models of judicial review have undergone a process of legitimation among practitioners, particularly by politicians and members of the Supreme Court. As mentioned previously, Haigh and Sobkin are one of the few scholars that have discussed the use of the *Charter* dialogue by Supreme Court Justices. According to Haigh and Sobkin, “to date the criticism has focused on whether courts are using dialogue to justify striking down laws in some cases and upholding them in others. The critics, however, fail to explain how the courts have impermissibly used the metaphor for these opposing ends.”²⁴¹ Although Haigh and Sobkin implicitly discuss the

²³⁸ Schmidt, “Discursive Institutionalism,” 314.

²³⁹ Schmidt, “Reconciling Ideas and Institutions through Discursive Institutionalism,” 48.

²⁴⁰ *Ibid.*, 48.

²⁴¹ Haigh and Sobkin, “Does the Observer have an Effect?” 70.

reception of *Charter* dialogue by Supreme Court Justices, the emphasis of their study is rather an analysis whether or not Justices have employed the metaphor in either descriptive or prescriptive manner. As such, little of their analysis discusses *how* the idea of *Charter* dialogue has come to be accepted by the Supreme Court Justices.

In spite of studies that have meticulously demonstrated the weakness of the *Charter* dialogue model,²⁴² the *Charter* dialogue model persists as a popular model of constitutional interpretation. This could perhaps be explained through factors attributed to the validity gained through the people that have developed and engaged with the *Charter* dialogue metaphor. In this case, the professional organization to which these actors belong provide a set of immaterial structures (such as epistemic communities, professional organizations, access to legal and academic conferences, publications, etc.), which allow for these actors to exchange and discuss ideas pertaining to *Charter* dialogue.²⁴³ Moreover, the fact that these elite actors belong to clear professional and academic communities, thereby upholding a strict code of legal, professional, intellectual and ethical obligations, it can be said that these elite actors internalize the structural elements of their profession.

The second level of interaction between the idea of *Charter* dialogue and institutions is found in the manner it has become embedded into institutional processes. For example, the fact that Supreme Court Justices, on a number of occasions, have made reference to *Charter* dialogue in their rulings, and on some occasions have even utilized the *Charter* dialogue in a prescriptive manner. In circumstances such as these (albeit rare), *Charter* dialogue itself becomes a structural arrangement whereby Supreme Court Justices use the metaphor to describe a set of constraints and paths that legislators ought to pursue in order to amend their legislation.

4. Research Design

This thesis seeks to respond to the following research questions:

²⁴² See: Emmet MacFarlane, “Dialogue or compliance? Measuring legislatures’ policy responses to court rulings on rights,” *International Political Science Review* 34, no. 1 (2013).

²⁴³ MacFarlane has also documented the popularity of the Charter dialogue internationally, see: MacFarlane, “Dialogue or Compliance?,” 40.

Regarding the power dynamics and institutional relationship between the Supreme Court and the Quebec government, *how have constitutional invalidation of sections of the Charter of the French Language been interpreted by actors within the Quebec government? What model of judicial review characterizes the reaction of Quebec actors to the Supreme Court's constitutional invalidation?*

Given the prominence of the *Charter* dialogue metaphor, and the use of Quebec's Bill 178 as an example of substantive dialogue in response to judicial nullification, this thesis utilizes Hogg et al.'s *Charter* dialogue model as the basis of its hypothesis. If an examination of these two legislative sequels reveals that the *Charter* dialogue hypothesis is false, then *what* metaphor of judicial review is appropriate for the perceived relationship between the Quebec government and the judiciary? If *Charter* dialogue is not an appropriate metaphor, then what metaphor, model or theory would be more suitable for understanding the power dynamics and institutional relationship between the Supreme Court and the Quebec government?

This thesis will test the hypothesis of a dialogical relationship between the Supreme Court and Quebec government using two bounded case studies: Quebec's amendments to the *Charter of the French Language* Bills 178 (1988) and 86 (1993). These case studies represent two 'legislative sequels' to judicial nullification. The first case study, Bill 178, was a direct response to judicial invalidation of the *Charter of the French Language* by the Supreme Court in *Ford v. A.G. Quebec* [1988] and *Devine v. A.G. Quebec* [1988]. Bill 178 represents a significant point of analysis for Hogg *et al.* because Quebec only partially implemented judicial recommendations, thereby passing a bill that was knowingly non-*Charter* compliant. According to Hogg *et al.*, the inclusion of the notwithstanding clause in Bill 178 represents an important "dialogical" relationship for the National Assembly of Quebec because the legislature was able to assert the historic principle of parliamentary sovereignty in opposition to judicial power.

The second case study, Bill 86, examines the actors and pressures that influenced the Quebec government to eventually implement the remedies of these Supreme Court cases, following the expiry of the notwithstanding clause. Further to the scope of Hogg *et al.*'s analysis, this thesis also examines the events and cases involving Bill 178 that go beyond domestic constitutional politics but nevertheless contributed to the drafting of Bill 86, such

as the case of *Ballantyne, Davidson, McIntyre v. Canada* (1993) that essentiality challenged the legitimacy of Bill 178 under the *International Covenant on Civil and Political Rights* at the United Nations Human Rights Committee.

Although much of the recent literature focuses on case studies pertaining to environmental or gay/lesbian rights legislation, cases pertaining to official language rights and minority language education rights from Quebec and New Brunswick have produced some of the richest exchanges between provincial legislatures and the Supreme Court. As Kelly and Murphy note, “the *Charter* has more serious implications for provincial autonomy, particularly Quebec. For example, the minority-language education rights in section 23 were drafted to challenge directly the constitutionality of the *Charter of the French Language* implemented by Quebec in 1977.”²⁴⁴

Through the development of this thesis, I hope to gain some modest insight into how, within the context of official language and minority education rights, the Quebec provincial legislature theorized its relationship with the Supreme Court, and developed its political response. In sum, my project seeks to examine the “provincial voice” in *Charter* dialogue. To do so, this thesis examines two bounded case studies spanning from 1988 to 1993. The cases are not only bound by institutions (namely, interactions between the National Assembly of Quebec and the Supreme Court of Canada), but also by subject matter (official language rights outlined in Sections 16-22). Moreover, these case studies represent critical moments within a longer history of constitutional disputes and negotiations. Given that historical institutionalism privileges the structural mechanisms utilized by actors in organizing and executing their strategies, it is one of the theoretical frameworks employed in this dissertation.

In contrast to how other researchers have sought to conceptualize pan-Canadian, or “essentially Canadian” model of judicial review, this dissertation takes a rather different approach; it limits analysis to the interaction between one province and the Supreme Court of Canada. By focusing on the province of Quebec, this dissertation does not attempt to

²⁴⁴ James B. Kelly and Michael Murphy, “Shaping the Constitutional Dialogue on Federalism: The Canadian Supreme Court as Meta-Political Actor,” *Publius: The Journal of Federalism* 35 no. 4 (2005): 219

extrapolate any generalizations or conclusions about the practice of judicial review as it is experienced in other provinces, or all of Canada.

A vast number of methodological critiques have been levied against Hogg *et al.* regarding their definition of judicial-legislative “dialogue” as well as a bias in the selection of cases to support their thesis.²⁴⁵ With respect to Hogg *et al.*’s use of the *Ford v. A.G. Quebec* as an example of *Charter* dialogue facilitated through *section 33*, the dialogical relationship between the Supreme Court of Canada and the Quebec legislature appears to be fairly superficial, raising the question: how much of a “dialogue” occurs when the Supreme Court of Canada issues a remedy and the Quebec legislature eventually implements it? Merely because the National Assembly implemented the remedy, it does not mean that a dialogue – defined broadly as an exchange among legislative and judicial branches - may have occurred. To examine the outcome of a model of judicial review in terms of teleology (i.e. ultimate outcomes regarding ‘who has the final word’) excludes important information regarding the process and anatomy of how the legislative and judicial branches respond to one another within any model of judicial review (dialogical, coordinate or otherwise). In other words: *why* and *how* the National Assembly sought to amend the *Charter of the French Language* from 1988 to 1993 are important questions which Hogg *et al.* fail to address, and these are the very questions which this thesis seeks to answer.

By providing a contextual analysis of the method through which the National Assembly of Quebec passed amendments to the *Charter of the French Language*, this thesis argues that a dialogue did not substantively occur exclusively between the National Assembly of Quebec and the Supreme Court, *per se*. Rather, examining these case studies within a historic and political context reveals that the decision from the United Nations Human Rights Committee had a substantive bearing on the production of Bill 86 as an amendment to the *Charter of the French Language*, which was at least equally influential to the Supreme Court remedy in the *Ford* and *Devine* cases in 1988. The idea of a dialogical relationship, exclusively between the Supreme Court and National Assembly of Quebec, is further diminished when one considers the influence of civil society actors via international

²⁴⁵ See: Mark Tushnet, “Judicial Activism or Restraint in a Section 33 World,” *University of Toronto Law Journal* 53 (2003): 89 ; Manfredi, Christopher, and James Kelly, “Six Degrees of Dialogue,” *Osgoode Hall Law Journal* 37 (1999); Kent Roach, “A Dialogue About Principle and a Principle Dialogue,” *University of Toronto Law Journal* 57, no. 2 (2007).

institutions on the decision of the Bourassa government to pass Bill 86. What emerges from this contextual analysis is a web of influence on the National Assembly of Quebec with actors and institutions from both national and international levels of governance.

4.1 Dependant and Independent Variables

The dependant variable for this project is the modification to the *Charter of the French Language* (Bill 101) and its subsequent amendments, Bills 178 and 86. The independent variables for this project are the institutions and actors that have influence on modifications to the *Charter of the French Language*. More specifically, they are the institutions and actors that have produced amendments to the *Charter of the French Language*, Bill 101 (1977) such as Bill 178 (1988) and Bill 86 (1993). Consequently, the primary independent variable of this project is the legislature of Quebec (or the Quebec National Assembly), as it is legislative body which has the exclusive power to pass amendments to the *Charter of the French Language*.

The secondary independent variables examined in this project are actors and institutions which do not have a direct input with respect to altering the *Charter of the French Language*, but nevertheless have some bearing (or influence) on the decision of the Quebec legislature to modify existing legislation. Therefore, the secondary independent variables of this project include domestic institutions such as the Supreme Court of Canada, international institutions such as the United Nations Human Rights Committee, and civil society actors such as Alliance Quebec.

4.2 Methodological Considerations

This thesis sets to test the merits of the dialogue hypothesis using two bounded case studies, Bill 178 and 86. To test the hypothesis, this thesis primarily undertakes a historical institutionalist approach because the process of constitutional interpretation, as it occurs in the study of Bills 178 and 86, is significantly influenced by institutional structures and norms that go well beyond the scope of judicial invalidation of the *Charter of the French Language* in *Ford* and *Devine*. Underlying questions regarding the new found role and

power of the Supreme Court in a post-*Charter* era, and the implications this has for historic legacies of parliamentary sovereignty and provincial autonomy, radically inform how various government actors (especially the government of Quebec) conceptualize a legitimate process of judicial review and judicial review.

The conflicts and various perspectives surrounding judicial review in Canada are particularly well captured in primary and secondary documentation from the constitutional conferences of 1971-1994. These conferences represent the most significant constitutional negotiations since confederation and repeatedly address the themes of federalism (in the form of negotiating who has power over language and culture), role and function of the Supreme Court (i.e. as arbiter or rights enforcer), and lastly, the issue of parliamentary sovereignty. The data derived from these conferences are discussed in Chapter 3, wherein I provide a summary of the path-dependencies and institutional transformations that influenced the Quebec government's legislative responses, Bill 178 and 86. Having identified the contextual groundwork, Chapters 4 and 5 examine the legislative sequels using an incrementalism and discursive Institutionalism approach to understand the manner in which *Charter* dialogue has been received by the Quebec legislature. This analysis entails the critical examination of:

- a. The ideas and norms that are encapsulated within the *Charter* dialogue model (e.g. stronger rights regime in Canada and the legacies of parliamentary sovereignty), as well as the manner in which this model has accumulated legitimacy and salience within the legal and political communities.²⁴⁶ For example, this raises questions such as: What is the implicit power-structure found within the *Charter* dialogue model? Why has *Charter* dialogue become a popular metaphor for narrating the relationship between appointed judges and elected representatives? What are the norms and political conventions that inform inter- institutional communication between the Quebec legislature and the Supreme Court of Canada?
- b. Who are the actors that have articulated *Charter* dialogue, and under what circumstances. In particular, have members of the Quebec legislature utilized terminology or ideas related to *Charter* dialogue? Where did they derive the idea of a dialogical process and how did it make its way into the National Assembly of Quebec? To what extent is the idea of dialogical relationship instrumental to provincial legislators (i.e. was the idea well received)?

²⁴⁶ Emmett MacFarlane, "Administration at the Supreme Court of Canada: Challenges and Change in the Charter Era," *Canadian Public Administration* 52, no. 1 (2009): 13.

- c. How the idea of *Charter* dialogue model has influenced the strategies regarding positive legislative responses. This raises questions, such as those discussed by Hiebert in *Charter Conflicts: What is Parliament's Role?*: “How influential are the government’s legal advisers? How risk-averse or risk tolerant are government ministers when pursuing legislative goals that are likely to result in *Charter* litigation?”²⁴⁷
- d. The broader institutional environment²⁴⁸ which might enable and/or constrain the legislature from engaging in a *Charter* dialogue. This raises questions, such as: What consideration is given to public opinion, or to the dialogical experiences of other provincial legislatures?

Given the emphasis on their historical and institutional context, Chapters Four to Six rely primarily on archival research and access to information requests. The archival research itself consisted on a combination of techniques. A review of the National Library and Archives revealed a veritable treasure-trove of materials, and collections undoubtedly filled with valuable data and intrigue. However, the most interesting and pertinent collections, with respect to the subject matter of this thesis, remain behind closed doors. Given that the National Library and Archives relies primarily on private donations, donors can stipulate the terms under which the material can be viewed by the public. Consequently, due to the politically sensitive nature of these constitutional negotiations leading up to repatriation of the Constitution and the entrenchment of the *Charter*, as well as the general sensitivity regarding identify politics in Canada (especially true in the wake of Quebec nationalism and sovereignty movements in the latter half of the twentieth century), many of these fonds remain beyond my grasp (and in some cases will remain beyond the gasp of scholars for another 100 years).

However, where conventional archival research may have failed, formal and informal, access to information requests under the *Access to Information and Privacy Act* yielded fantastic results. Informal access to information requests made to the Intergovernmental Affairs Secretariat of the Privy Council Office were tremendously fruitful. Political research often benefits from good luck and the kindness of strangers. In my case, it was the added benefit that the head archivist at IAS was in the process of

²⁴⁷ Janet Hiebert, *Charter Conflicts: What Is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002), 10.

²⁴⁸ MacFarlane, "Administration at the Supreme Court of Canada," 13.

digitizing materials from the constitutional conferences. It is primarily through this bounty of data from a variety of materials (e.g. briefing notes, correspondence, transcripts, backgrounders, agendas, summaries and even some cabinet documents) that I was able to extrapolate a clear evolution of the conceptualization and judicial review and judicial review in Canada over a period of thirty years. The description and analysis of this historical evolution is firmly grounded in the empirical data drawn from over a hundred informal access to information requests.

With considerable perseverance and patience, formal access to information requests also revealed significant data, particularly with respect to the material examined in Chapters Five and Six. This thesis encompasses material derived from over sixty access to information requests to Department of Justice, Privy Council Office, Department of Foreign Affairs, Trade and Development, Canadian Heritage, the Conseil Exécutif of Quebec, the ministère des Relations internationales et de la Francophonie Québec, Ministère de la Culture et des Communications Quebec, Conseil Exécutif (Secretariat aux Affaires intergouvernementales canadiennes) Québec, Ministère de la Justice du Québec, and the Secrétariat à la politique linguistique Québec. In addition to these archival documents, this thesis also includes evidence from an interview with Dr. Richard French, one of the three Anglophones that resigned from the Quebec Liberal party in the wake of Bill 178.

5. Conclusion

This thesis sets to test the merits of the dialogue hypothesis using two bounded case studies, Bill 178 and 86. To test the hypothesis, this thesis employs historical institutionalism as the primary theoretical framework. Given the importance of institutional change and ideas in this thesis, historical institutionalism is complemented by two secondary theoretical approaches: incrementalism and discursive institutionalism. For the purpose of this study, incrementalism provides a useful analytic lens for understanding how constitutional negotiations regarding the development of the *Charter* of Rights and Freedoms and institutional transformations of the Supreme Court altered the practice and perception of judicial review in Canada. Whereas incrementalism focuses on the strategies and negotiations of actors, discursive institutionalism provides a broader framework for mapping the interaction

between ideas and institutions, as well as the transformative effects of ideas upon those institutions. For the purpose of this study, discursive institutionalism is particularly helpful in examining the tension between the Government of Quebec's assertion of maintaining the principle of parliamentary sovereignty as a model of judicial review versus stronger-forms of judicial review advanced by the federal government in constitutional conferences.

Chapter Four: Negotiating Constitutional Interpretation

1. Introduction

Having discussed popular models of judicial review in Canada, the following chapter seeks to place the topic of judicial review within the context of Quebec and federal government relations. Understanding the practice of judicial review in Canada is more than an answer to the question of: “Who has the final word?” As the case studies discussed in Chapters Five and Six affirm, judicial review is a process that requires years of deliberation, argumentation as well as political, private and civil engagement. To essentialize this complex process is to negate the important inputs and actors that contribute to formulation of constitutional laws and transformations.

In order to fully appreciate the complex interactions between Quebec, the Supreme Court and the federal government in the *Ford v. A.G. Quebec* and *Devine v. A.G. Quebec*, it is necessary to examine the historic position of Quebec on the very questions that are at the heart of these cases. Namely, questions regarding federal division of: the role of the judiciary in Canada as well as the power of the province of Quebec to legislate on linguistic and educational matters relevant to the preservation of Quebec’s unique cultural heritage.

Through an historical institutionalist approach and an examination of archival material, this chapter provides an historical overview of the positions asserted by both the federal and Quebec governments with respect to the division of power in two thematic areas: culture (including language) and the role of the Supreme Court of Canada in constitutional interpretation. The purpose of this chapter is to establish a historical context in order to better understand how the Quebec government responded to the judicial invalidation of laws encapsulated in the *Charter of the French Language*, examined in later chapters.

The archival materials examined within the scope of this study reveal a clear desire by the federal government to transition away from the principle of parliamentary sovereignty toward a stronger form of judicial review. The efforts of the federal government to attain this objective consisted of a series of incremental changes throughout the course of numerous constitutional negotiations. The following paragraphs highlight some of these significant incremental changes proposed by the federal government, as well as the

opposition presented by the Quebec government. While the federal government incrementally moved toward a stronger model of judicial review (while simultaneously espousing that “nothing would change”), Quebec remained suspicious of the federal government’s proposals, and repeatedly reasserted its support for the maintenance of parliamentary sovereignty.

The following chapter provides an overview of models of judicial review from the 1960s to 1980s. Further to identifying the transformation regarding how the federal and Quebec governments conceptualized judicial review in Canada, each of these sections also seeks to highlight the position of the Quebec and federal governments with respect to language rights and the composition and role of the Supreme Court. This timeline is broken into three periods:

1960-1969: The ‘Court as umpire’ in federal-provincial disputes, wherein parliamentary sovereignty is the norm with an emergence in the support for formalized and entrenched human rights, e.g. Diefenbaker’s *Bill of Rights*.

1970-1976: Negotiating rights and the federal push for the entrenchment of a *Charter of Rights*.

1978-1981: A strengthening in the support for a *Charter of Rights and Freedoms*, but the question remains: who will interpret the charter and who will have the last word? While the federal government provides repeated assurances that a charter of rights will not strengthen the power of federal government at the expense of the provincial legislatures, it provides limited insight into the actual institutional dynamics that would arise with respect to the implementation of interpreting a charter.

1982-1988: The erosion of parliamentary sovereignty and the birth of stronger-form judicial review, the Supreme Court is no longer perceived as an impartial ‘umpire’ of federal-provincial disputes by the province of Quebec.

Also, this chapter will examine the theme of justiciability as it pertains to the federal government (i.e. negotiating for the entrenchment of a charter of rights) and for Quebec (i.e. retaining the power of parliamentary sovereignty and provincial autonomy on language and cultural affairs). For the purpose of this thesis, the term justiciability can be broadly understood as: “a set of judge-made rules, norms and principles delineating the scope of judicial intervention in social, political and economic life.”²⁴⁹ It can also be understood in terms of the capacity of the judiciary to undertake a legitimate form of judicial review, decide on the constitutional separation of power and define the types of disputes heard by the court.²⁵⁰ As discussed in this chapter, from 1960 to 1988, Canada experienced significant transformations in the role and function of the judiciary, which in turn resulted in transformations pertaining to the justiciability of Quebec legislation, such as the *Charter of the French Language*.

2. Judicial review in Canada prior to 1960: A few Highlights

The numerous and varied of models of judicial review discussed in Chapter Two are a consequence of the significant transformations to the role of the judiciary throughout Canadian history; ranging in scope from the Supreme Court as an arbiter of federal-provincial disputes to the interpreter and protector of fundamental rights and freedoms. In 1949, the *Supreme Court Act* marked the abolition of all appeals to the Judicial Committee of the Privy Council²⁵¹ Prior to the encroachment of the rights revolution into judicial affairs, the function of the Supreme Court was primarily that of an arbiter of federal-provincial disputes. In this sense, the Supreme Court had clearly inherited the legacy of the Judicial Committee of the Privy Council where: “The courts refused to concern themselves with the wisdom or fairness of legislation, or even the possibility of abuse of a legislative power, so long as the impugned legislation was not being used as a means of invading a forbidden area under the guise of exercising a power given to the enacting Legislature. That

²⁴⁹ Lorne Sossin, *Boundaries of Judicial Review: The Law of Justiciability in Canada*, (Scarborough: Carswell, 1999), 7.

²⁵⁰ Sossin, *Boundaries of Judicial Review*, 7.

²⁵¹ Canada, Supreme Court of Canada, “Creation and Beginnings of the Court,” 11 April 2016. <http://www.scc-csc.gc.ca/court-cour/creation-eng.aspx>

is, provided that the federal authorities did not infringe on provincial powers, nor the provinces on the federal power, the courts would not interfere.”²⁵² Therefore the primary focus of the Supreme Court managing federal disputes, as Strayer notes: “In its origins, however, judicial review in Canada was a product of the Imperial system, based on a jurisdiction implicit in the Imperial statutes which distributed legislative power with respect to Canadian affairs...Its primary focus was the protection of federalism, not of individual rights.”²⁵³

While the Supreme Court fulfilled the function of provincial-judicial arbiter, parliament was charged with the task of preserving human rights and freedoms. Rooted firmly in the tradition of parliamentary sovereignty,²⁵⁴ wherein the most important function is that of “collective self-government,”²⁵⁵ the concept is generally understood as “preventing courts from declaring legislation invalid from a rights perspective when legislation is duly enacted and consistent with the rule of law. This does not mean that individual rights are not protected through interpretations of the common law.”²⁵⁶

The principle of parliamentary sovereignty is not mutually exclusive to the protection of rights through common law.²⁵⁷ However, with the advent of the rights revolution and the introduction of Diefenbaker’s *Bill of Rights* in 1960, the federal government began to take incremental steps toward enhancing the capacity for the Supreme Court to provide more substantive review of human rights matters.

Amidst the major institutional transformations to the practice of judicial review in Canada, Quebec was concerned about the role and composition of the Supreme Court as a final court of appeal. The distrust surrounding the establishment of such an institution has deep roots that hark back to Confederation. In his historical research of judicial review, Strayer writes:

²⁵² Barry L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*, 3rd ed. (Toronto: Butterworths, 1988), 4-5.

²⁵³ Strayer, *The Canadian Constitution and the Courts*, 5.

²⁵⁴ Referred to also as parliamentary supremacy and legislative supremacy.

²⁵⁵ Janet L. Hiebert, “New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights?,” *Texas Law Review* 82, no. 7 (2004): 1964.

²⁵⁶ *Ibid.*, 1964. For more regarding the principle of parliamentary sovereignty see Dicey: A.V. Dicey, *Introduction to the Study of Law of the Constitution*, 10th ed. (London: MacMillan Papermac, 1961), 39.

²⁵⁷ *Ibid.*, 1964.

There were probably sound political reasons for not expressly creating this court at the time of Confederation...The problems involved and the attitude of French-speaking Canada to a new Canadian tribunal have been adverted to previously. French Canadians feared that a final Court of Appeal for the whole of the Dominion would be composed predominantly of English-speaking protestant common lawyers who would neither understand the civil law nor be impartial where language or religious issues were involved...Henri A. Taschereau, speaking in the Confederation Debates, asserted that his compatriots would “assuredly be less satisfied with the decisions of a Federal Court of Appeal than with those of Her Majesty’s Privy Council. Cartier, in response to a question concerning the possible Court of Appeal, reassured the House in these words: ‘but I do hold, and the spirit of the conference at Quebec indicated, that the appeal to the judicial committee of Her Majesty’s Privy Council must always exist, even if the Court in question is established.’ On this basis the Lower Canadians permitted s. 101 of the B.N.A. Act to become law.²⁵⁸

The explicit preference of Quebec for the preservation of the Judicial Committee of the Privy Council as the final arbiter of federal-provincial disputes is an important aspect for the evolution of judicial review in Canada, as it indicates a clear distrust of a “homegrown” or domestic final court of appeal (or Supreme Court). As is demonstrated in this chapter, that distrust of judicial power permeates many of the constitutional negotiations throughout the latter half of the twentieth century. There are two sources of anxiety: first, the federal appointment process to an impartial final court of appeal; and second, through the adoption of a bill of rights or charter, the Supreme Court would transform from a mere arbiter of federal-provincial disputes, to an institution that would have an almost ubiquitous influence on policies and issues over both levels of government and across virtually all jurisdictions.

3. 1960-1969: Court as Umpire in federal-provincial disputes

The constitutional negotiations in the late 1960s took place against a backdrop of tremendous societal and institutional transformations, marked by “an open dialogue and debate about the nature of Canada that died with the end of that decade...During the 1960s francophone and anglophone Canadians confronted, in a way they never had before, their fundamentally divergent conceptions of Canada.²⁵⁹ Set against the backdrop of nationalist debate, the seeds of a human rights revolution began to take deeper root in Canada. Whereas

²⁵⁸ Strayer, *The Canadian Constitution and the Courts*, 22.

²⁵⁹ Kenneth McRoberts, *Misconceiving Canada the Struggle for National Unity* (Toronto: Oxford University Press, 1997) 31.

the advocacy for entrenchment for human rights within Canada focused almost exclusively on negative rights, the movement during the 1960s and 1970s focused on positive rights that sought to enable broad social change within established institutional frameworks.²⁶⁰

The beginning of the 1960s was marked by the passing of the *Canadian Bill of Rights* introduced by the Conservative government of Diefenbaker. Much like the *Supreme Court Act*, the *Bill of Human Rights* was not constitutionally entrenched and was created through conventional parliamentary process. For Diefenbaker, the *Bill of Rights* represented the “culmination of a long-standing personal campaign to make the rights and privileges of Canadian citizenship explicit.”²⁶¹ Despite its quasi-constitutional status, the *Bill of Rights* nevertheless was an incremental step toward the strengthening of the judiciary as an interpreter and defender of human rights. Within a decade of its passage into law, the Supreme Court of Canada, in *Regina v. Drybones*, found that a provision of the *Indian Act* was discriminatory with respect to the matter of race. The Supreme Court’s decision found Section 94 of the *Indian Act* to be inoperative because “it denied, on account of race, the right of the individual to equality before the law, contrary to the *Canadian Bill of Rights*.”²⁶² The *Drybones* case marked the first application of the *Bill of Rights* by the court “as a law capable of imposing restraints on legislative and administrative action which infringes any of its guarantees”²⁶³, thereby granting “new life to the *Bill of Rights* which [until then] had remained dormant at the behest of [the] judiciary.”²⁶⁴ Consequently, the case demonstrated a trend summarized by Cavalluzzo’s assertion in 1971 that the Supreme Court of Canada “will play a greater role in our political system.”²⁶⁵

Position of the Federal Government under Pearson

²⁶⁰ See: Dominique Clément, *Canada's Rights Revolution Social Movements and Social Change, 1937-82* (Vancouver: UBC Press, 2008).

²⁶¹ McRoberts, *Misconceiving Canada the Struggle for National Unity*, 37.

²⁶² Grant Sinclair, “The Queen v. Drybones: the Supreme Court of Canada the Canadian Bill of Rights,” *Osgoode Hall Law Journal* 8, no. 3 (1970): 599.

²⁶³ *Ibid.*, 600.

²⁶⁴ Paul Cavalluzzo. “Judicial Review and the Bill of Rights: Drybones and Its Aftermath,” *Osgoode Hall Law Journal* 9, no. 3 (1971): 511.

²⁶⁵ *Ibid.*, 511.

Anticipating a tension and transformation in Quebec-Canada relations, upon assuming office in 1963, Pearson sought to implement a strategy to reinforce dualism within the Canadian order. At the heart of the strategy was the *Royal Commission on Biculturalism and Bilingualism*.²⁶⁶ In his opening address at the 1968 constitutional conference, Pearson did not mince words regarding the dissatisfaction of Quebec within Confederation: “The reasons for [Quebec’s dissatisfaction] are complex and of varying significance. I have said in the past, and repeat now, that I believe most of those reasons to be entirely justified...if it is allowed to continue without remedy, it could lead to separation and the end of Confederation.”²⁶⁷

At their core, the federal proposals at the constitutional conference were “designed to set in train a process of constitutional review so that Quebec may have the largest possible scope for the development of its own society, its own destiny, in Canada.”²⁶⁸ One of the first items of Pearson’s program to bring about a “new federalism,” an agreement on the part of the provinces to accept the recommendations of the *Royal Commission on Bilingualism and Biculturalism*, granting English and French as the status of official languages.²⁶⁹ The second item on the agenda was to establish agreement “on the principle that certain basic rights should be constitutionally secured for all Canadians,”²⁷⁰ at a time when provinces were adopting their own human rights legislation.

In February of 1968 Pearson convened the first round of federal-provincial constitutional conferences. At the opening of the conference, Pearson unveiled *Federalism for the Future: A Statement of Policy by the Government of Canada*. The policy statement sought to enumerate outstanding constitutional issues. Among these issues was the question of constitutional entrenchment of a charter of rights, as well as the future role of the Supreme Court of Canada within federalism. Entrenchment of a charter, Pearson argued, would “prevent the Federal parliament and the provincial legislatures from depriving the individual of the remedy of *habeas corpus*, and would assure such rights as the presumption that a person is innocent until proven guilty, the right to be represented by counsel, and the rights

²⁶⁶ McRoberts, *Misconceiving Canada the Struggle for National Unity*, 39.

²⁶⁷ Canada, Office of the Prime Minister, “Statement by the Prime Minister of Canada at the Opening of the Constitutional Conference.” Presented at the Constitution Conference, Ottawa, February 5, 1968., 3-4.

²⁶⁸ *Ibid.*, 7.

²⁶⁹ *Ibid.*, 1-12.

²⁷⁰ *Ibid.*, 11.

to a fair hearing.”²⁷¹ In a further effort to capitalize on the findings of the *Royal Commission on Bilingualism and Biculturalism*, Pearson added that an entrenched charter of human rights would “contain a fourth part designed to protect those linguistic rights identified by the *Royal Commission on Bilingualism and Biculturalism* in book one of its report.”²⁷²

In his address to the premiers, Trudeau, Justice Minister and Attorney General of Canada, provided a high-level acknowledgement for the need for constitutional change. He also underscored the federal government’s commitment to the creation of a charter of rights, which would entail constitutional entrenchment, and consequently “will require co-operation among the several governments.”²⁷³ The vision of the federal government in 1968 was the creation of a charter of rights for Canadians that would “act as a fetter on the unlimited exercise of power not only of Parliament, but of the provincial legislature as well, and which by its place in the constitution will possess a measure of performance not now attaching to the 1960 bill which is in the form of an ordinary statute, subject to repeal at will.”²⁷⁴ While acknowledging that the charter was intended to limit the power of federal parliament and provincial legislatures, Trudeau in the same breath sought to reassure the provinces that “the federal government was not seeking any power at the expense of the provinces.” Rather, Trudeau framed the proposed charter as a “surrendering” of parliamentary and legislative power to the people of Canada.²⁷⁵ He added that “admittedly, some aspects of these rights fall within the exclusive legislative competence of parliament, some aspects fall within the exclusive competence of the provinces, and some are subject to shared competence.”²⁷⁶ While underscoring that the majority of the rights categories fell under federal jurisdiction, and therefore represented a significant sacrifice on the power of Parliament, the topic of linguistic rights would require co-operation between federal and provincial governments.²⁷⁷ Most notably absent from Trudeau’s address to the premiers was *any* reference to which institutional body might oversee disputes of powers between “people of Canada” versus

²⁷¹ Canada, *Federalism for the Future: A statement of policy by the Government of Canada*, presented at the Opening Address of the Constitutional Conference, Ottawa 5-7 February 1968, 20.

²⁷² *Ibid.*, 20.

²⁷³ Canada, *Statement by the Honourable Pierre Elliott Trudeau Minister of Justice and Attorney General of Canada on a Constitutional Charter of Human Rights*, presented at the Constitutional Conference, Ottawa 5-7 February 1968, 5.

²⁷⁴ *Ibid.*, 6.

²⁷⁵ *Ibid.*, 7.

²⁷⁶ *Ibid.*, 8.

²⁷⁷ *Ibid.*, 8.

parliament or provincial legislatures. Nor did Trudeau make any reference to what institutional body would serve as an interpreter and arbiter in those disputes.

In contrast to the ambiguities presented by Trudeau on the implementation of an entrenched charter of rights, Prime Minister Pearson clearly articulated the role of the Supreme Court within “new federalism”:

There have been serious discussions in Canada concerning the composition, jurisdiction and procedures of our final constitutional court, the supreme court of Canada; these properly should be considered in any review of the constitution. For example, the Supreme Court both as a general court of appeal and the final court in constitutional matters now operate under an ordinary statute. It has been urged that its constitution and role should be set forth in the fundamental law.²⁷⁸

In Pearson’s opinion, the necessity of the Supreme Court to serve as an impartial umpire to constitutional questions and uncertainties was paramount:

First, there is a functional need, in a Federal System such as ours, **for a body to settle the jurisdictional conflicts and uncertainties to which all Federal constitutions inevitably give rise.** Separately, is such a body is to enjoy the respect and authority which it needs in order properly to discharge its functions, **it must retain a judicial character and be able to perform its functions impartially. Thirdly the independence of the judiciary is a fundamental principle of the constitution which must be protected accordingly.**²⁷⁹

Pearson’s position regarding the role of the Supreme Court was fairly consistent with the popular Canadian conception of judicial function and the low institutional profile of the Supreme Court.

Position of the Quebec Government under Johnson

While in 1968 the Government of Quebec had already committed to seeking early legislative adoption of the *Quebec Charter of Human Rights*,²⁸⁰ it expressed grave concern and suspicion of the federal government’s intentions to do the same. Specifically, in Quebec’s *Brief on the Constitution*, the provincial government was concerned that the

²⁷⁸ Canada, *Federalism for the Future: A statement of policy by the Government of Canada*, presented at the Opening Address at the Constitutional Conference, Ottawa 5-7 February 1968, 26.

²⁷⁹ *Ibid.*, 28. (Emphasis added)

²⁸⁰ Quebec, *Opening Address by the Honourable Daniel Johnson, Prime Minister of Quebec to the Canadian Intergovernmental Conference*, presented at the Canadian Intergovernmental Conference Ottawa, 5 February 1968, 26.

Supreme Court would be seen as the natural institution to uphold and interpret a bill of rights. For example, the brief submitted by Premier Johnson's government stated:

In a unitary country with a homogenous society, it is possible to think of bills of rights as summarizing the ethical philosophy endorsed by the whole population, and to allow all the other rights of the citizens to proceed from them. The result is the acceptance in the constitution of the trend towards homogeneity of ethical concepts whose recognition becomes the responsibility of the courts. We feel that in a Federal System and especially the case of Canada it would be serious political error to precede in this way. By tradition, civil law in Quebec, and the manner in which the judiciary upholds fundamental rights, differs greatly from common-law procedures. Should a bill of rights be considered so essential as to be entrusted in its interpretation to a constitutional court, we must insist on the institution of that tribunal be examined first.²⁸¹

Pearson and Trudeau's silence on the role of the Supreme Court in interpreting a charter further fueled the speculation and suspicion of the Quebec government. In its preparation for the conference, Quebec suspected that the federal government leaned toward the Supreme Court as the potential interpreter of a new charter. In response to this assumption, the Johnson government firmly rejected the Supreme Court as the institutional body to interpret a charter and, in its place, recommended the creation of a special court to preside over human rights disputes:

We have already indicated on several occasions that because of the way in which the Supreme Court is constituted, it is difficult to accept this court as a constitutional tribunal of last resort. This important point will have to be included in a new constitution before we can concur in a constitutional bill of rights. On this subject, we think it necessary to point out that the various agreements appended²⁸² all provide it for a special court to bring judgment in disputes between states in these matters."²⁸³

While Johnson accepted that a bill of rights ought to be included as part of the constitution, the position of the Quebec government was that discussions pertaining to rights should be excluded from the constitutional conferences for the near future and be deferred to an *ad hoc* committee: "[discussions regarding a bill of rights] would more appropriately fall within the purview of an *ad hoc* commission appointed by this conference and whose recommendations

²⁸¹ Ibid., 26-27.

²⁸² The agreements appended in the report correspond to the foreign relations of provinces and the power of the federal government to ratify international covenants on behalf of provinces.

²⁸³ Ibid., 29.

would bear not only on the contents but also on the form and relative sequence of the bill or bills of rights in question.”²⁸⁴

The Quebec government was also wary about the encroachment of the federal government into matters of provincial jurisdiction through a charter of rights. The concern of Quebec regarding encroachment covered a broad scope of issues, ranging from transformation to Canada’s federal character and the distribution of powers, to rights regarding civil law, property and language. At the 1968 constitutional conference, Johnson made it abundantly clear that, with respect to provincial jurisdiction of these rights (and particularly language rights), Quebec was “not prepared to waive this responsibility.”²⁸⁵

Throughout the 1960s, and under Johnson, Quebec advanced the concept of two founding nations and in 1966, Premier Johnson declared that Quebec should be exclusively responsible for the cultural ‘management’ of its population. Subsequently, he demanded that from hence forth all federal initiatives with respect to the jurisdiction of culture should be authorized prior to being implemented in Quebec.²⁸⁶ Furthermore, he concluded that the government of Quebec did not accept the distinction between education and culture, as it was advanced by the federal government. In discussing the scope of provincial powers during the 1967 Confederation of Tomorrow conference, Johnson articulated his position regarding the scope of powers which he felt were necessary for Quebec’s interest:

Plus précisément, que veut le Québec? Comme point d’appui d’une nation, il veut être maître de ses décisions en ce qui a trait à la croissance humaine de ses citoyens (c’est-à-dire à l’éducation, à la sécurité sociale et à la santé sous toutes leurs formes), à leur affirmation économique (c’est-à-dire au pouvoir de mettre sur pied les instruments économiques et financiers qu’ils croient (sic) nécessaires), à leur épanouissement culturel (c’est-à-dire non seulement aux arts et aux lettres, mais aussi à la langue française) et au rayonnement de la communauté québécoise (c’est-à-dire aux relations avec certains pays et organismes internationaux).²⁸⁷

²⁸⁴ Quebec, *Opening Address by the Honourable Daniel Johnson, Prime Minister of Quebec to the Canadian Intergovernmental Conference*, presented at the Canadian Intergovernmental Conference Ottawa, 5 February 1968, 28.

²⁸⁵ *Ibid.*, 27.

²⁸⁶ *Ibid.*, 29.

²⁸⁷ Quebec, *Opening Address by the Honourable Daniel Johnson, Prime Minister of Quebec to the Canadian Intergovernmental Conference*, presented at the Canadian Intergovernmental Conference Ottawa, 5 February 1968, 29.

In February 1968, Premier Johnson reiterated the position of Quebec, underscoring that it was necessary for the province to assume leadership in the promotion of French language and culture in Canada:

Quels sont donc ces pouvoirs que le Québec doit récupérer ou se voir reconnaître afin d'être en mesure de remplir son rôle de "leadership pour la promotion de la langue et de la culture françaises au Canada? Pour répondre entièrement à cette question, il faudra éventuellement, au moment des négociations à ce sujet, faire le tour de toutes les compétences constitutionnelles et différencier celles qui devraient ressortir au gouvernement canadien de celles qui doivent être confiées aux provinces.²⁸⁸

Toward the end of the 1960s, the federal and Quebec governments were largely in agreement that the model of the 'court as umpire' in federal-provincial disputes was an appropriate characterization of the role of the Supreme Court in the process of constitutional interpretation. However, this historic capacity for the Court was beginning to change, as the judiciary waded more substantively into the protection of rights by leveraging the Bill of Rights in *Drybones*. The expansion of the judiciary into the promotion of human rights was further enhanced by the federal government's advancement of recommendations for a constitutionally entrenched rights document. The federal government failed to reveal information pertaining to the tangible institutional consequences for the entrenchment of a charter. These events signaled to Quebec the need to both assert and defend its preference for the historic principle of parliamentary sovereignty, a strategy that would define the position of Quebec in the decades to come.

In a similar vein, during the 1960s, Quebec and the federal governments appeared to have largely agreed on a fundamentally dualistic notion of Canadian identity in the form of biculturalism and bilingualism. However, here too the agreement was only tacit on the part of Quebec; the Johnson government held reservations regarding the possibility that these policies might eventually lead to the encroachment of the federal government into Quebec's provincial jurisdiction of language and culture. As a counter-measure, Johnson made it abundantly clear to his federal counter-parts that Quebec was ready to pass legislation in support of the preservation and promotion of the French language.

²⁸⁸ Quebec, *Mémoire sur la question constitutionnelle*, presented at the Conférence intergouvernementale canadienne, Ottawa, 5-7 February 1968, 9-10.

4. 1970-1976: The Fight for a Charter of Rights and the End of Biculturalism

In 1968, Pierre Trudeau's Liberal government was elected to Parliament. Shortly thereafter, in 1970, Robert Bourassa and the Quebec Liberal Party won a majority government in the National Assembly of Quebec. The relations between Bourassa and Trudeau were marked with considerable tension regarding Quebec's repeated requests for greater autonomy, and culminated with the failure of the Victoria conference. Preceding the Victoria Conference, from 1968 to 1971, First Ministers participated in six plenary sessions, "with many sessions of Ministers on special subjects, and some two dozen meetings of officials."²⁸⁹ The content of these meetings between 1968 and the Victoria conference focused on social policy, poverty alleviation and a formula for amending the constitution. At the forefront of First Minister's meetings were discussions pertaining to the ratification of the United Nation's *Covenant on Civil and Political Rights and its Optional Protocols* by the provinces and federal government.

Position of the Federal Government under Trudeau

A high watermark of this period was the Victoria Conference in June 1971. In celebration of British Columbia's centennial anniversary of entry into Confederation, Trudeau opened the conference signaling a desire to complete the "unfinished task" harking back to confederation. The task at hand, according to Trudeau, was to produce an amending formula that would permit Canadians to alter their constitution and no longer resort to British Parliament to implement decisions.²⁹⁰ Further to the fight for an amending formula, the federal government also sought to reach an agreement on the inclusion of fundamental political and linguistic rights into the constitution, as well as a constitutional guarantee of the Supreme Court of Canada.²⁹¹ The federal and provincial governments had attempted to

²⁸⁹ Canada, Office of the Prime Minister, *Prime Minister's Opening Statement: Opening of the Victoria Conference*, presented at the Victoria Conference, 14 June 1971, 3.

²⁹⁰ *Ibid.*, 2.

²⁹¹ *Ibid.*, 6.

undertake this very task on a number of previous occasions, all of which had ended in failure.²⁹²

Position of the Quebec Government under Bourassa

Of particular interest to Quebec at the Victoria Conference were the topics of the “general responsibility of the providing for the welfare”²⁹³ of Quebec’s population and the special responsibility of Quebec with respect to the “continuance of the culture of the vast majority of [its] population.”²⁹⁴ With respect to these two topics, Quebec wanted the Victoria Conference to address the “distribution of legislative and fiscal powers between the Federal Government and those of the provinces.”

Further to an argument in favor of decentralization with the respect to cultural and social matters,²⁹⁵ the identity of Quebec was once again at the forefront of constitutional discussions. Bourassa reminded his audience that Quebec was in a minority position on the North American continent and consequently, “it is clear that Quebec is and will remain the main center of French culture in this country, its Government cannot abandon that responsibility.”²⁹⁶ With respect to its unique role, Bourassa underscored the determination of Quebec to retain the constitutional power to clearly guarantee “the means to fulfill our responsibility regarding the culture of the vast majority of the population.”²⁹⁷ Bourassa once again firmly underscored the interdependence of language and culture: “The question of

²⁹² Conferences which included discussions regarding an amending formula include: Federal-Provincial Conference in 1927, 1935, 1950, 1960-61 and 1964.

²⁹³ With respect to social policy, Quebec’s proposal was that “provincial legislatures should have the power to limit the authority of Parliament to make income security payments such as old age pensions and family allowances within their province.” Trudeau opposed such as proposal based on the argument that “Taxpayers would be less prepared to pay taxes to the federal government for programs controlled by provincial government other than their own...the constitutional change proposed by Quebec would, over the years, lead to an erosion of federal income security programs and their replacement by purely provincial plans.” See: Canada, Office of the Prime Minister, *Prime Minister’s Opening Statement: Opening of the Victoria Conference*, presented at the Victoria Conference, 14 June 1971, 1.

²⁹⁴ Quebec, *Victoria Conference Notes for the Opening Statement by Mr. Robert Bourassa*, presented at the Victoria Conference, 14 June 1971, 1.

²⁹⁵ *Ibid.*, 2-3.

²⁹⁶ *Ibid.*, 3.

²⁹⁷ *Ibid.*, 3.

culture cannot be limited to language alone, since it also affects human activities as a whole: work, recreation, the family, and political, economic and social institutions.”²⁹⁸

According to Bourassa, the vision of Quebec’s interests in constitutionalism, and by extension federalism, was one which affirmed the principals of biculturalism and the two-founding nations:

Seeking to build a culturally self-assured Quebec does not mean renouncing Canada. On the contrary, it means enriching the Canadian cultural personality with the vigor of French culture. This is how Quebec’s approach is to be interpreted – as a wish to assert a different culture and a desire to offer Canada a contribution that is absolutely essential to the assertion of a truly Canadian identity. The Government of Canada has accordingly always had a dual objective in the field of constitutional reform: centralized federalism and the promotion of Quebec’s distinctive personality.²⁹⁹

Following a series of exhaustive working sessions at the Victoria conference, the First Ministers concluded negotiations with a draft charter. The Victoria Charter, while only a draft, contained a number of provisions which would survive scrutiny and eventually be included in the final version of the *Canadian Charter of Human Rights and Freedoms, 1982*. The Victoria Charter also contained a formula for amending the Constitution entirely within Canada, and a number of provisions to be incorporated into the Constitution at the time of patriation.³⁰⁰ The Victoria amending formula was premised on a regional concept: “Parliament and any province having or once having twenty-five per cent of the national population (a perpetual veto for Ontario and Quebec), along with two provinces in Atlantic Canada and any two in the West, with the latter two having at least fifty percent of the population of that region. There would be no opting out; the agreement would be binding on all.”³⁰¹

With respect to the courts, the Victoria Charter contained a number of provisions which remained problematic for Quebec. Among them, were the provisions regarding the role of the Supreme Court; while the Quebec government of Bourassa was amenable to the inclusion of an article in the Charter that would state the Supreme Court should have “the

²⁹⁸ Ibid., 3.

²⁹⁹ Ibid., 5.

³⁰⁰ Canada, *Secretariat of the Constitutional Conference, “Statement of Conclusions,”* presented at the Victoria Conference, 14-16 June 1971, 2.

³⁰¹ Robert Sheppard and Michael Valpy. *The National Deal: The Fight for a Canadian Constitution*, (Toronto: Fleet Books, 1982), 354.

general appellate jurisdiction over constitutional, civil and criminal matters,”³⁰² the Quebec government took issue with the judicial appointment process. In their reservations to the provisions of Article 25³⁰³ and 26, Quebec offered the following alternative proposal for nominating council: “...appointments to the Supreme Court would be made after agreement between the Attorney General of Canada and the Attorney General of the Province concerned. In the absence of agreement, a council consisting of the federal Attorney General, the provincial Attorney General, the Chief Justice of the Supreme Court, and the provincial Chief Justice would have authority to resolve the matter.”³⁰⁴

The fact that the Bourassa government accepted the allocation of the Supreme Court of Canada as the final court of appeal on civil rights and the Victoria Charter presented a marked departure from the position of his predecessor, Johnson who, only three years earlier, had expressed his government’s desire to have a special constitutional tribunal charged with the interpretation of a bill of rights. The expansion in the scope of responsibility of the courts was further complemented by a number of institutional factors, such as a statutory change in 1975 which “shifted the bulk of the Supreme Court of Canada’s docket from the “appeals by right” category to the “discretionary leave” category, thereby increasing the Court’s discretion over which cases it would hear.”³⁰⁵

Bourassa was initially supportive of the Victoria Charter and its inclusion of a veto power for Quebec, as well as the acknowledgement of Quebec as the “guardian of French culture.”³⁰⁶ However, the constitutional negotiations of the Victoria Charter failed to produce the constitutional guarantees for enhanced fiscal and legislative provincial autonomy which Quebec had sought to obtain. Due to the failure to obtain enhanced provincial autonomy,

³⁰² Canada, Canadian Constitutional Conferences Secretariat, *Draft Canadian Constitutional Charter*, presented at the Intergovernmental Affairs Conference, 31 May – 1 June, 1971, section v.

³⁰³ Article 25 reads: “Where a vacancy arises in the Supreme Court of Canada, the Attorney General of Canada shall make all reasonable effort to reach agreement with the Attorney General of the appropriate Provinces before a person is appointed to the court, and no person shall be appointed to the court in the absence of an agreement of the Attorney General of the appropriate Province, unless, after the lapse of ninety days from the day the vacancy arose, agreement has not been reached.”

³⁰⁴ Canada, Intergovernmental Affairs, Canadian Constitutional Conferences Secretariat. *Notes to Section V, Articles 25 and 26 in the Draft Canadian Constitutional Charter*, presented at the Intergovernmental Affairs Conference, 31 May – 1 June, 1971.

³⁰⁵ Ran Hirsche. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. (Cambridge, Mass.: Harvard University Press, 2004), 20.

³⁰⁶ Kate Puddister, “The Most Radical Amendment of All: the Power to Secede and the *Secession Reference*,” *Constitutional Amendment in Canada*, ed. Emmett MacFarlane (London: University of Toronto Press, 2016), 274.

Bourassa eventually rejected the Victor Charter amendments, which in turn resulted in the federal government's abandonment of the Victoria Charter.³⁰⁷

5. 1976-1981: Confusion Reigns and the Beginning of the End of the Court as Umpire Model

Writing in 1979, Philip Rosen in a backgrounder to Parliament, noted:

The process of constitutional changes, a feature of Canadian political life for half a century, became during the past 13 years an almost continuous preoccupation. The emergence of a strong nationalist sentiment in Quebec, which culminated in the Parti Québécois election victory in 1976, the evolution of the West into area of expansive economic growth and aggressive self-confidence, and a new sense of "Canadianism" following the 1967 centennial celebrations have all contributed to the liveliness of the debate on constitutional reform...Although a general tendency to overhaul the institutions of federalism, particularly the Senate and the Supreme Court, in favor of greater provincial leverage have manifested itself, no single plan acceptable to all which would achieve this objective is in sight.³⁰⁸

The victory of the Parti Québécois in the provincial election of 1976 represented a critical juncture in the constitutional negotiations. The rise of René Lévesque to Premier ushered in an era of change, one as equally drastic to the ascension of Trudeau from Justice Minister to Prime Minister in 1970. The period of 1977 to 1978 marked two years of special committees and reports at both the provincial and federal levels. In the wake of the Parti Québécois electoral victory, Trudeau appointed Jean-Luc Pépin and John Robarts to the Task Force on Canadian Unity. The task force was given the mandate to "to examine the state of the Canadian Confederation and to suggest changes and improvements."³⁰⁹

5.1 Constitutional Conference 1978: End of the 'Court as Umpire' Model

Prior to the 1978 constitutional conference, the metaphor of a "Court as umpire" was circulated broadly by politicians and constitutional experts. However, by the 1978 constitutional conference, there was a clear termination to the popularity of the "Court as

³⁰⁷ Ibid., 274.

³⁰⁸ Philip Rosen, Library of Parliament. Research Branch Constitutional Reform, *Federal Institutions Current Issues*, (Ottawa: Government of Canada, 13 November 1981), 2.

³⁰⁹ Ibid., 14.

umpire” model. Most notably, Quebec and British Columbia questioned the ability of an exclusively federal institution to objectively oversee matters pertaining to federal-provincial relations and interests. From documentation circulated at the conference, it is evident that provinces were cognizant of the increase in the number of cases on the Supreme Court of Canada docket. According to British Columbia’s *Constitutional Proposals: Paper No. 4 Reform of the Supreme Court of Canada*, the past decade was marked by the robust involvement of Trudeau as Justice Minister (1968) and then Prime Minister (1970). In light of this, the 1970’s bore witness to an increase in the number of constitutional cases the Supreme Court of Canada presided over from an average of four cases per year from 1950-1974, to six cases per year from 1974-1977, and twelve constitutional cases in 1978 alone.³¹⁰ Not only was the docket of the Supreme Court growing but British Columbia, in firm agreement with Quebec, argued that the relevance in terms of the subject matter of these cases increased as well: “What is particularly significant is not so much the increasing number of cases the Court is deciding but rather the significance of the Court’s role in the great importance of the issues it is considering. In the past two years the Court has made decisions (or is about to make them) on issues unrivalled in significance since the famous judicial decision of the Privy Council invalidating much of Prime Minister R. B. Benner’s New Deal legislation in 1937.”³¹¹

In Quebec and British Columbia’s final point of criticism of the aggressive new direction of the Supreme Court, the document squarely placed blame on the influence of Trudeau:

Throughout the 1960s the operation of Pearsonian co-operative federalism kept almost every potential constitutional issue out of the courts. But after 1968, the combination of Prime Minister Trudeau’s more rigid approach to federalism and the growth of expertise, confidence –and power –in the provinces has meant that it has not been possible to work out, on a co-operative intergovernmental basis, an increasing number of federal-provincial issues. Accordingly, in recent years (particularly the last three) a large number of important federal-provincial issues have found their way to the Supreme Court of Canada.³¹²

³¹⁰ British Columbia, *British Columbia’s Constitutional Proposals Paper No. 4: Reform of the Supreme Court*, presented at the 18th Annual Premiers’ Conference, St. Andrews, New Brunswick, 18-19 August 1978, 7.

³¹¹ *Ibid.*, 8.

³¹² *Ibid.*, 7.

The increasing number of constitutional matters addressed by the Supreme Court underscored yet another point of contention that was a persisting legacy from the failed Victoria Charter in 1971. Specifically, Quebec (as well as British Columbia) remained critical of the judicial appointment practices. First was the issue that all members of the Court continued to be appointed by the federal government. Second, by 1978, there was still no requirement for the federal government to consult with the provinces, nor was there any mechanism for confirmation by the House of Commons, the Senate or any other body.³¹³ From the perspective of the provinces, the Supreme Court became an ever-growing extension of federal will. For example, in the preface of their submission for constitutional reform of the Supreme Court, British Columbia posed the question: "...the Supreme Court of Canada is an institution whose very existence, as well as its composition and jurisdiction, are entirely dependent on the Federal Government...How can a Court subject to these constraints fairly fulfill its role as impartial umpire of the Federal system?"³¹⁴ The urgency of the question was further underscored by the number of judicial appointments made by Trudeau; by the end of 1978 Trudeau had appointed a simple majority of the justices to the Supreme Court bench.³¹⁵

Position of the Federal Government under Trudeau

The pressure and distrust of the provincial governments was such that, in a rare public address, even Supreme Court Chief Justice Bora Laskin felt compelled to re-affirm the "Court as umpire" model amidst waning provincial belief in the capacity of the Supreme Court to be an impartial arbiter: "We are the umpire of the Canadian constitutional system, the only umpire; and in enforcing the rules under which the system operates, rules which we did not formulate but which we are sworn to apply, we are getting an occasional sting from some of the players and even from some of those on the sidelines, much like the soccer referee sometimes from the frenzy that in some places seizes both players and spectators at a

³¹³ Rosen, "Federal Institutions Current Issues" 2.

³¹⁴ British Columbia, *British Columbia's Constitutional Proposals Paper No. 4*, iii.

³¹⁵ Justices appointed by Trudeau up until 1978 were: Bora Laskin; Robert George Brian Dickson; Jean Beetz; Louis-Phillip Grandpré and Willard Zebedee Estey. Shortly thereafter, in 1979, Trudeau appointed his sixth justice to the SCC bench, William Rogers McIntyre.

soccer final.”³¹⁶ In his address to the Premiers, Justice Minister Lang sought to mitigate the concerns of the Premiers by assuring them that entrenchment would not remove legislative power from the provinces:

I am aware that at the Annual Premiers’ Conference last August some provinces favored the principle of constitutional entrenchment, while others preferred protecting individual rights by basic constitutional traditions and ordinary laws. Nevertheless, it is our sincere hope that during this meeting we will be able on the principle of constitutional entrenchment of a measure along the lines set forth in the Constitutional Amendment Bill. **Such entrenchment would not involve any transfer of legislative powers. Rather, it would entail a common agreement to restrict the powers of both orders of government to interfere improperly with the basic rights of the people.**³¹⁷

However, the Justice Minister’s address did not provide any further insight into how entrenchment would alter the role of the judiciary, especially with respect to federal-provincial disputes.

Furthermore, the Justice Minister provided limited insight into how a charter might alter the jurisdiction and power of the federal government and provinces with respect to language and cultural matters. In the months that preceded the 1978 Premier’s Conference, during the discussions of the Special Joint Committee which took place in August, Justice Minister Otto Lang, noted that on the topic of language rights, a charter or bill of rights, would represent little to change to the status quo:

The fourth category related to language rights which are described in section 133 of the *B.N.A. Act* and section 23 of the *Manitoba Act*. Neither of these section would be amended immediately by the [Constitutional Amendment Bill (Bill C-60³¹⁸)] although on ultimate entrenchment they would be replaced by section 13 to 22 of the Bill. **The language rights that would become immediately applicable once the Bill is enacted would apply only at the federal level: they would apply legislatively at the provincial level in future only with provincial consent.** These changes would add to the language rights presently guaranteed by the

³¹⁶ Chief Justice Bora Laskin, 1978, in a rare public speech, published in Valpy and Sheppard, *The National Deal*, 224.

³¹⁷ Canada, *Opening Statement by the Honorable Otto Lang, Minister of Justice and Attorney General of Canada on the Canadian Charter of Rights and Freedoms*, presented at the Federal-Provincial Conference, 20 October 1978, 1. [Emphasis added]

³¹⁸ Bill C-60 was the Constitutional Amendment Bill which proposed the incorporation of the Charter of Rights into the Constitution and changes to various institutions such as the Supreme Court and Senate.

Constitution in the same way that the federal and *New Brunswick Official Languages Act* do now.³¹⁹

However, the Minister of Justice added that Parliament did have the power to add language rights to the Charter, regardless of what the provinces desired: “It has already been held by the Supreme Court of Canada in a case involving the federal *Official Languages Act* that Parliament may add to language rights set out in section 133 of the B.N.A. Act, though it cannot derogate from them.”³²⁰

A couple months later, during the Premier’s Conference of 1978, the Justice Minister took a more authoritative tone with respect to the implementation of language rights - gone were the promises of “provincial consent.” The consent-laden rhetoric was firmly supplanted with a clear federal directive requiring provinces to acknowledge constitutional recognition of basic linguistic rights for both French and English minorities:

Obviously the proposed Charter deals with many matters which are either partly or wholly within the domain of the provinces since our objective was to develop a Charter which we could all subscribe to and which would ultimately have application to both orders of government... This is particularly the case with respect to the proposed language rights at the provincial level. If Canada is to survive as a united country, there is perhaps no more important measure that its collective governments need to take than to ensure a measure of constitutional recognition for the basic rights of the linguistic minorities in each of the provinces and territories to use English or French as a fundamental expression of their culture. The federal government is fully prepared to assure such constitutional guarantees within the limits of its competence, and we hope that the provinces will be willing to do likewise in their jurisdictions.³²¹

5.1 Position of the Quebec Government under René Lévesque

During the First Ministers Conference of 1978, the Government of Quebec submitted a document entitled *Les positions traditionnelles du Québec sur le partage des pouvoirs, 1900-1976*. The document was drafted by the Government of Quebec’s ministère des

³¹⁹ Canada, *Opening Statement by the Honorable Otto Lang, Minister of Justice and Attorney General of Canada on the Canadian Charter of Rights and Freedoms*, presented at the Federal-Provincial Conference, 20 October 1978, 1.

³²⁰ Canada, *Statement by Honorable O.E. Lang, Minister of Justice to the Special Joint Committee on the Constitution*, presented at the Special Joint Committee on the Constitution, 31 August 1978, 3-4.

³²¹ Canada, *Opening Statement by the Honorable Otto Lang, Minister of Justice and Attorney General of Canada on the Canadian Charter of Rights and Freedoms*, 2.

Affaires intergouvernementales³²² and was intended to provide an overview of the official position of Quebec with respect to the division of powers on the subjects of: justice, culture, natural resources, communications, etc., and the document's authors included excerpts of federal-provincial negotiations, official correspondences with Ottawa and public speeches.³²³

While the document contained only a limited amount of information with respect to the practice of judicial review, it did include a brief mention of a white pages document published in 1975 entitled *La justice contemporaine* which highlighted the inequalities with respect to jurisdiction over the final interpretations of the constitution: "Il est manifeste que le temps est venu de réviser la constitution en ce qui touche la justice. Les règles établies en 1867 n'étaient peut-être pas les meilleures; mais elles laissent entrevoir des préoccupations d'équilibre. Or, les tribunaux, qui ont le dernier mot en matière d'interprétation constitutionnelle, ne semblent pas avoir eu ce genre de préoccupations à l'esprit dans l'élaboration de leur jurisprudence relative à l'administration de la justice. Il convient en 1975 d'établir un équilibre."³²⁴

5.2 Constitutional Conference 1979

The constitutional conference of 1979 was imbued by a tension that remained unresolved from the 1978 conference. The provinces, most notably Quebec, continued to steadfastly perceive their function as "promoters of social welfare and protectors of regional and cultural interests, are sensitive about encroachment on their jurisdiction by Ottawa."³²⁵ By contrast, the federal government was "anxious to ensure a degree of uniformity and the existence of minimum standards in social and economic programs, has pursued an ambitious, at times, in provincial eyes, aggressive course in the use of its spending and other powers."³²⁶

³²² A foreword of the document notes that the researchers and authors included: Louis Lecours, Director of Institutional Affairs at the Directorate of Federal-Provincial Relations, Intergovernmental Affairs, Camille Horth, counselor of federal-provincial affairs, and Nicole Plamondon and Marie Gosselin.

³²³ Quebec, *Les positions traditionnelles du Québec sur le partage des pouvoirs, 1900-1976*, (Quebec: Quebec, 1978), 1-2.

³²⁴ Jérôme Choquette. "La Justice contemporaine," White paper presented by the Minister of Justice, context unknown, (Quebec: Quebec, 1975), 32. in Québec, *Les positions traditionnelles du Québec sur le partage des pouvoirs, 1900-1976*, 70.

³²⁵ Rosen, *Constitutional reform: federal institutions*, 1-2.

³²⁶ Rosen, *Constitutional reform: federal institutions*, 2.

Position of the Quebec Government under Lévesque

In a 1979 backgrounder to parliament providing a review of the recent constitutional negotiations, Rosen observes that the reform of central federal institutions was largely perceived by observers as a zero-sum game for the provinces regarding their autonomy:

The reform of the central federal institutions can be seen as complementary to the devolution of large areas of jurisdiction to the provinces. The federal system has been subjected to pressures from the larger and wealthier provinces for re-alignment of powers, with increased responsibility being granted to the provincial level....Reform of the federal institutions may represent one type of acceptable compromise, mitigating provincial concerns about excessive concentration of authority at the federal level, while avoiding the consequences of too much decentralization. Much more discussion and debate will have to take place before the contending points of view about institutional reform can be reconciled.³²⁷

Regarding the role of the Supreme Court, the 1979 parties to the constitutional conference remained at an impasse. Quebec, along with other provinces (notably British Columbia) expressed frustration with the limited progress that had been made with reforms specific to the Supreme Court. The province of Quebec agreed that the Supreme Court should be the court of final appeals.³²⁸ However, Quebec Minister of Justice, Hon. Marc-Andre Bédard reiterated that, from the perspective of Quebec, no progress had been made with respect to the proposals and requests of the Quebec government regarding the Supreme Court. In other words, the constitutional negotiations had failed to produce measures that would ensure the Supreme Court remain an impartial arbiter of federalism and the division of shared powers.³²⁹

Specifically, Quebec wanted the following criteria with respect to the entrenchment of the Supreme Court: first, that to a constitutional court, the majority of justices be nominated by the provinces. This represented a critical demand which Quebec was quick to point out had not been addressed in the negotiations. Second, that the Quebec Court of Appeal be the final court with respect to issues that deal exclusively with matters pertaining

³²⁷ Ibid., 2

³²⁸ Canada, Office of the Prime Minister, *Verbatim transcript (Open sessions only)*, presented at the Federal-Provincial Conference of First Ministers, Ottawa, 1 November 1979, 443.

³²⁹ Ibid., 443.

to the Code Civil. Not only were the provisions of the 1979 Conference unacceptable to Quebec, but moreover, they represented a regression from the Victoria Charter.³³⁰ And third, that matters regarding the Civil Code of Quebec be adjudicated by a court whose justices were trained in civil law.³³¹

In light of these impasses, the Quebec Liberal Party Constitutional Committee tabled a series of recommendations at the 1979 conference. Among these recommendations were provisions regarding the composition and appointment process of judges to the Supreme Court of Canada. Specifically, the Quebec Constitutional Committee proposed that the Court should “be composed of nine judges, three of whom would be from the Quebec Bar or judiciary.”³³² Regarding the appointment process, the Quebec Constitutional Committee agreed that the appointments to the bench continue to be made by the federal government, but that the appointment would be subject to ratification by the Federal Council.³³³ In an effort to further support the “court as umpire” model of judicial review (and to mitigate the centralist-bias of the judiciary), the Quebec Constitutional Committee recommended a mechanism that would allow provinces raising constitutional issues to request “a dualist bench” wherein the Chief Justice would preside “over an equal number of judges from Quebec and the other provinces. This would permit a constitutional bench to sit on occasions when it appeared important to take into account the duality of the Canadian federation.”³³⁴

In an effort to reaffirm the duality of Canadian federation, in his closing statements, Minister Bédard read to the audience summary comments from the PÉPIN-ROBARTS report:

Nous sommes convaincus également disent-ils – qu’il est important que le Québec soit aussi présent dans les institutions centrales que toutes les autres provinces. Nous attachons une importance toute particulière au rôle politique de la Cour Suprême en qualité de cour générale d’appel pour tous les canadiens, il est essentiel que la structure de la cour soit repensée de manière à refléter aussi bien la dualité juridique du pays que sur un plan plus global sa dualité politique.³³⁵

³³⁰ Ibid., 444.

³³¹ Rosen, *Constitutional reform: federal institutions*, 6.

³³² Ibid., 6.

³³³ Ibid., 6.

³³⁴ Ibid., 8.

³³⁵ Canada, Office of the Prime Minister, *Verbatim transcript (Open sessions only)*, presented at the Federal-Provincial Conference of First Ministers, Ottawa, 1 November 1979, 445.

In closing, Bédard called for greater progress on enhancing the federal dualism that had marked previous constitutional conferences: “je pense que c’est peut-être le temps de mettre de côté les grandes déclarations de principe et que c’est le temps de passer aux actes en faisant en sorte que cette dualité politique se retrouve au niveau d’une proposition qui serait mise sur la table.”³³⁶

Position of the Federal Government under Trudeau

To mitigate this impasse, the period between 1978-1979 conferences saw the revival of the failed Victoria Charter by the federal government. While the Victoria Charter had failed years earlier, the federal government felt that the Victoria Charter met many of the recommendations put forth by the provinces, and specifically Quebec:

The Victoria Charter proposed the entrenchment of the Supreme Court as a general court of appeal. There would continue to be nine justices, including a chief justice, of whom three would be members of the Quebec Bar. There would be an elaborate nominating process which would compel consultation with the appropriate provincial Attorney-General, and which would involve, in the event of unsuccessful consultation, the appointment of federal-provincial nominating Councils.³³⁷

In keeping with the desire to push ahead on the acceptance of the Victoria Charter, the federal government introduced the *Constitutional Amendment Bill, 1978* (Bill C-60). Bill C-60 proposed important changes in the area of federal institutions, most notably, it proposed “a Supreme Court of 11 justices of whom four would be from Quebec... [and] a nomination process which would require consultation between the federal and provincial Attorneys-General, with resort to a nominating Council, composed of both federal and provincial representation, in the event of unsuccessful consultation.”³³⁸

5.3 Constitutional Conferences: 1980 – 1982

³³⁶ Ibid., 446.

³³⁷ Rosen, *Constitutional Reform: federal institutions*, 7.

³³⁸ Ibid., 11.

The constitutional conferences of 1980 and 1981 culminated decades of constitutional negotiations with a rather dramatic, and in some respects unsatisfactory, repatriation and *Constitution Act, 1982*. From the perspective of Quebec, many of the items that it had negotiated with the federal government remained either unresolved, or insufficient with respect to compromise and progress. At the end of this period, the federal government succeeded to obtain three of the outcomes it had so ardently fought for: the elevation of the Supreme Court to a constitutionally defined institution, the entrenchment of the *Charter of Rights and Freedoms* and lastly, the inclusion of language rights in the *Charter*. While Quebec refused to sign the *Constitution Act, 1982*, it had nevertheless succeeded in negotiating the inclusion of the notwithstanding clause (section 33) of the Charter as “a last-ditch” effort to secure, in some measure, the principle of parliamentary sovereignty against what it perceived a growing judicial encroachment.

Position of the Federal Government under Trudeau

In his opening address to the First Ministers in 1980, Trudeau was firm in his desire to address the lingering provincial doubts regarding the entrenchment of the *Charter of the Rights and Freedoms*. The premiers were suspicious of how an entrenched charter could potentially centralize Canadian federalism, thereby conferring power onto federal institutions at the expense of the provinces.³³⁹ In an effort to quell these fears, Trudeau assured the Premiers this would not be the case:

[The *Charter of Rights and Freedoms*] doesn't give more power to the Canadian government or the provincial governments. The Charter of Rights is something, I believe all of us have in our provincial and federal constitutions and which is a way in which we governments say to the people 'we will respect you basic freedoms of speech, of religion, of thought and that of other freedoms, to speak one of the official languages and to send your children to school in one of the official languages wherever freedom of movement permits you to go or compels you to go within Canada...So once again, we are not asking for more power for ourselves and I realized that by adopting Charters of Rights in your own provinces you haven't asked for more powers for yourselves.³⁴⁰

³³⁹ See: Canada, *Briefing book – First Ministers' Conference on the Constitution*, November 2, 1981, National Library and Archives, Volume 406, File 18, R11344-20684-2-F.

³⁴⁰ Canada, *Transcript of the Prime Minister's Statement at the First Ministers' Conference*, presented at the First Minister's Conference, Ottawa, 8-12 September 1980, 3-4.

Despite Trudeau's assertions and guarantees, Quebec remained unconvinced of the federal government's motive. Much of the concern on the part of the provinces arose from the absence of substantive proof that the charter would specifically not be leveraged in favor of centralizing Canadian federalism. Through his insistence on constitutional entrenchment of the *Charter* (and the *Charter's* inclusion of language rights, especially section 23), Trudeau failed to provide much reassurance to Quebec and other provinces.

The entrenchment of the *Charter* also raised numerous questions regarding the jurisdiction and power of the Supreme Court. Following negotiations behind closed doors, Trudeau stated:

I am prepared to support the entrenchment in the Constitution of the Supreme Court and of its essential jurisdiction even though this constitutes a decrease in federal authority...I am prepared to accept the participation of the provinces in the appointment of the Supreme Court judges. The CCMC proposal goes much further in this regard than many proposals. The proposal would require the federal Minister of Justice to obtain consent of the appropriate provincial Attorney General before making an appointment. I am willing to accept this transfer of authority to the provinces providing a simple deadlock-breaking mechanism is included to provide for cases in which the two Ministers do not agree...This is acceptable to us. It reflects the fact that provinces have an important interest in the operation of the Court which is the highest court of appellate jurisdiction not only for constitutional but also for federal and provincial laws"³⁴¹

The President of the First Minister's meeting regarded the issue of the Supreme Court as an agenda item that could be resolved relatively quickly, indicating there was little resistance left on the part of the provinces regarding the topic of the Supreme Court. According to Trudeau, the outcome of the Continuing Committee of Ministers on the Constitution was sound and he anticipated little objections to their recommendations.³⁴²

In his closing remarks at the conference, Trudeau expressed sadness and dismay at the unwillingness of some provinces, including Quebec, to accept the merits of a federal and

³⁴¹ Canada, *Notes for a Statement by the Prime Minister of Canada on the Supreme Court of Canada*, presented at the Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8-12 September 1980, 2-3.

³⁴² These suggestions included that the SCC be entrenched in the Constitution, nine-member court, three justices appointed from either the bar or bench of Quebec, and a requirement that cases concerning civil law of Quebec be heard by a special panel of the court composed of a majority of Quebec judges. See: Canada, *Verbatim Transcript (open sessions only)*, presented at the Federal-Provincial Conference of First Ministers on the Constitution, Ottawa 5-6 February 1980, 441-443.

constitutionally entrenched charter.³⁴³ On the topic of language rights, Trudeau presented the argument that, without a federal guarantee for language, Canada would likely remain a country of Two Solitudes.³⁴⁴ By comparison, as a bilingual country, Canada would demonstrate its commitment to Anglophone and Francophone minorities through constitutionally entrenched rights as the “hallmark of a civilized country.”³⁴⁵ It was abundantly clear that bilingualism was still of paramount importance to the federal government, and Trudeau feared that the sovereignty movement in Quebec had essentially indicated that “the Government of Quebec today doesn’t think that bilingualism is a realistic solution for Canada.”³⁴⁶

In his direct address to Premier Lévesque and the people of Quebec, Trudeau assured that the language provisions of the Charter would have little impact on Quebec’s ‘visage linguistique’. Rather, than undermine the French culture of Quebec, the charter would assist the preservation of francophone minorities outside of Quebec:

On ne veut pas vous empêcher de privilégier, de la façon que vous voulez dans votre province, votre minorité. On voudrait votre appui pour nous aider, nous, au gouvernement fédéral, de privilégier un petit peu les minorités des autres provinces...Nous voudrions inclure dans la Charte des droits quelque chose qu’il faudrait justement établir ailleurs comme vous prétendez que vous voulez le laisser au Québec...nous avons confiance, mais simplement nous voulons donner les instrument légaux et constitutionnels aux minorités dans les autres provinces, et pour cela nous avons besoin de l’appui de la province de Québec.³⁴⁷

Position of Quebec Government under Lévesque

In his address to the First Ministers at the 1980 Constitutional Conference, Lévesque made it clear to his colleagues that the categories included in the *Charter* touched on fundamental issues for Quebec in the areas of culture and education.³⁴⁸ Despite Trudeau’s assertion that an entrenched charter would virtually “change little,” Levesque continued to

³⁴³ Canada, *Prime Minister’s Remarks at Closed Discussion on the Charter of Rights*, presented at the First Ministers Conference on the Constitution, 10 September 1980, 2.

³⁴⁴ *Ibid.*, 7.

³⁴⁵ *Ibid.*, 9.

³⁴⁶ *Ibid.*, 9.

³⁴⁷ *Ibid.*, 14.

³⁴⁸ Canada, *Transcript of Mr. René Lévesque’s Remarks on the Charter of Rights*, presented at the Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8-12 September 1980, 1.

argue against entrenchment, convinced that it would do little to protect rights in Canada: “Première chose, c’est que nous ne croyons pas, dans l’état actuel des choses, que les droits fondamentaux soient en danger au Canada. Est-ce qu’ils seraient plus en sécurité s’ils étaient – pour employer le terme à la mode – enchassés, ‘entrenched’, constitutionnellement, moi, je ne le crois pas.”³⁴⁹ As a rebuttal to Trudeau’s appeal that a federal charter presented little change in the status quo, as many provinces already possessed charters, Levesque expressed his skepticism of a federal charter with the argument that - if this was a sincere argument held by the federal government – then the federal charter presented no benefit to the people of Quebec, as the *Quebec Charter of Rights and Freedoms* surpassed the proposed federal charter with respect to the scope and guarantee of rights.³⁵⁰

In addition to his belief that fundamental rights were sufficiently protected through provincial charters and parliamentary oversight, Lévesque believed that a federal charter would only serve to complicate matters between levels of government.³⁵¹ Specifically, Lévesque anticipated the tension that a federal charter of rights, along with judicial review, would create with the parliamentary sovereignty of the provinces: “Monsieur le premier ministre de la Saskatchewan a souligné à juste titre à quel point ce droit nouveau quand on n’a pas un partage des droits convenables, un partage des droits satisfaisants, un partage des pouvoirs aussi c’est surtout ce que je voulais dire, à quel point ça peut être bousculé par des décisions judiciaires qui, littéralement, créent des morceaux complets de constitution au-delà de la démocratie parlementaire.”³⁵²

In light of its skepticism of the motives of the federal government, in the Federal-Provincial Conference of First Ministers in 1980, the Government of Quebec proposed the inclusion of a notwithstanding clause for the federal charter. The discussion paper, entitled *A Proposal for a Common Stand of the Provinces*, proposed the entrenchment of fundamental and democratic rights, while legal and non-discrimination rights would be subject to a notwithstanding provision.³⁵³

³⁴⁹ Ibid., 3

³⁵⁰ Ibid., 4.

³⁵¹ Ibid., 5-6

³⁵² Ibid., 6.

³⁵³ David Johansen and Philip Rosen, *The Notwithstanding Clause of the Charter*, (Ottawa: Library of Parliament, 2008), 2-3. <http://www.lop.parl.gc.ca/content/lop/researchpublications/bp194-e.htm>.

With respect to language, Lévesque was quick to note that the provisions of the *Charter of the French Language* made French the official language of Quebec while simultaneously acknowledging the rights of Anglophone minorities to instruction in their maternal language. Lévesque expressed doubt at the prospect of any other province to provide that level of linguistic accommodation, and rejected the need for a federal charter to provide further guarantee on this matter: “Et je vous pose la question et je vous la pose franchement: trouvez-moi un endroit ailleurs au Canada, même au Nouveau-Brunswick, ou existerait comme au Québec, un système complet d’écoles de la maternelle à l’université pour la minorité, un endroit où existerait une garantie de service d’enseignement en anglais à tout enfant de la minorité sans qu’il y ait de clauses “where numbers warrant”, là où le nombre justifie.”³⁵⁴ According to Lévesque, the *Charter of the French Language* fundamentally respects the rights of the Anglophone minority of Quebec through the guarantee of education and social services in English. Lévesque argued that because these rights were guaranteed in the *Charter of the French Language*, Quebec saw little need for a federal charter to guarantee official language rights.³⁵⁵ Lévesque concluded his remarks with the observation that with respect to the language rights of francophone minorities, their needs could be addressed through provincial legislative guarantees.³⁵⁶

5.4 Constitutional Conferences 1981-1982: Notwithstanding Clause and the Charter

Prior to the inclusion of the section 33 in the *Charter of Rights and Freedoms*, a number of provincial charters included similar provisions including that of Quebec’s *Charter of Rights and Freedoms*. As Rosen notes, “Since the recollection of both participants in and observer of the 1980-1982 constitutional patriation process differ on this issue, the origins of section 33 can be described only in general terms.”³⁵⁷ In spite of these limitations, a number of observations are relevant to the scope of this project. Quebec was responsible for the presentation and circulation of a discussion paper at the 1980

³⁵⁴ Canada, *Transcript of Mr. René Lévesque’s Remarks on the Charter of Rights*, presented at the Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, 8-12 September 1980, 20.

³⁵⁵ *Ibid.*, 21.

³⁵⁶ *Ibid.*, 22.

³⁵⁷ *Ibid.*, 2.

constitutional conference that proposed a notwithstanding clause for the federal charter. One year later, during the 1981 First Ministers' Conference, three other provinces (Alberta, British Columbia and Saskatchewan) joined Quebec in proposing variations of the inclusion of the notwithstanding clause.³⁵⁸

The inclusion of the notwithstanding clause into the *Charter* was the product of the much maligned November 1981 First Ministers' Conference. The text of the *Charter*, including the notwithstanding clause, was "ultimately drafted by officials, overnight and without Quebec's participation, included entrenchment of a *Charter* with a notwithstanding provision applicable to fundamental freedoms, legal rights and equality rights."³⁵⁹ In spite of Trudeau's disapproval of the notwithstanding clause, the federal government accepted its inclusion in the charter and agreed that the legal, equality rights³⁶⁰ and fundamental freedoms would be included in the provision.³⁶¹ However, there was a compromise in Trudeau's favor: the notwithstanding provision would contain a five-year sunset clause and re-enactment clause.³⁶²

The *Constitution Act, 1982* represented a significant transformation in the process of Canadian constitutional interpretation. Despite the rhetoric of the federal government, it was abundantly clear that an entrenched *Charter* coupled with a strengthened judiciary would alter the nature of Canadian federalism toward greater centralization. With respect to the process of judicial review in Canada, the *Charter* fundamentally changed the historic trajectory of Canada's Westminster principle of parliamentary supremacy: "In addition to providing entrenched constitutional status for basic rights, the adoption of the *Constitution Act, 1982* revolutionized the status of judicial review in Canada. By declaring a set of thirty acts and statutes as the supreme law of Canada (including the *British North America Act* and the *Constitution Act, 1982* itself), the *Constitution Act, 1982* marked a departure from a generally deferential, British-style model of restrained judicial review by Canadian courts in the pre-*Charter* era."³⁶³

³⁵⁸ Ibid., 3.

³⁵⁹ Ibid., 3.

³⁶⁰ With the eventual removal of equality rights from the list.

³⁶¹ Johansen and Rosen, *The Notwithstanding Clause of the Charter*, 3.

³⁶² Ibid., 3.

³⁶³ Ran Hirschel, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004), 19.

6. Judicial Review Post-1982

The Constitution Act, 1982 changed the nature of judicial review in Canada. Through the adoption of the *Constitution Act, 1982*, “Canadian courts faced the prospect of enforcing wide-ranging qualitative limitations on all legislative and administrative powers.”³⁶⁴ Section 52 of the *Constitution Act* entrenched the Supreme Court as a constitutionally defined institution: “it is no longer accurate to describe the judiciary as a subordinate branch of government; rather the judiciary is neither superior nor inferior to the other branches, but rather exists as an independent institution charged with reviewing actions taken by other branches.”³⁶⁵ Additionally, the *Constitution Act, 1982* included the *Charter of Rights and Freedoms*, which through entrenchment, bound “both levels of government and imposes limitations on them by guaranteeing certain fundamental and democratic rights, as well as rights of free movement, legal rights, egalitarian rights and linguistic rights... Also, by their nature some of the guaranteed rights impose restrictions on how administrative authority is exercised, and here again the courts have new and different supervisory powers unconnected to the traditional surveillance of the distribution of legislative powers.”³⁶⁶

Following the entrenchment of the *Charter*, Hirschl argues that the Supreme Court of Canada “has begun to liberalize the rules of standing (*locus standi*) and to expand intervener (for example, *amicus curiae*) status. In 1981, the Court declared that individuals could be granted standing to challenge legislation simply by showing they had a “genuine interest in the validity of the legislation and that there [was] no other reasonable and effective manner in which the issue [might] be brought before the Court.”³⁶⁷ In 1983, the Canadian Supreme Court formulated new rules that gave attorneys general the automatic right to intervene in constitutional cases. These changes helped legislatures, judges, and rights advocacy groups alike to pursue the *Charter*’s judicialization capacity to its fullest.”³⁶⁸ By 1984 the Supreme Court of Canada had made its first *Charter* ruling in *Law Society of Upper Canada v.*

³⁶⁴ Strayer, *The Canadian Constitution and the Courts*, 5.

³⁶⁵ Sossin. *Boundaries of Judicial Review*, 16.

³⁶⁶ Strayer, *The Canadian Constitution and the Courts*, 5.

³⁶⁷ Hirschel, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. 21.

³⁶⁸ *Ibid*, 21.

Skapinker. The Court ruled that its position on applying the Charter to judicial review was similar to the U.S. Supreme Court's groundbreaking endorsement of judicial review in *Marbury v. Madison* (1803).³⁶⁹ This landmark decision only served to confirm Quebec's suspicions and concerns that the entrenchment of the Supreme Court and the *Charter* had shifted Canada toward a stronger form of judicial review.

While scholars point to the *Charter* as a source of dramatic transformation in regards to the role of the Supreme Court of Canada, Trudeau maintained that this was by no means a "new" role for the Courts. On the contrary, he argued that a high court, whether it be the Supreme Court or Judicial Committee of the Privy Council, had "always been engaged in law making or in adjudicating power for Canada, its people, and its provinces since the first constitutional decision rendered after the adoption of the BNA Act."³⁷⁰ Further to the formal institutional changes ushered by the *Constitution Act 1982*, the *Charter* had also altered the rhetoric of political actors.³⁷¹ For example, on the topic of language rights, the *Charter* galvanized the efforts of Anglophone Quebecers in demanding modifications (and even the repeal) of the *Charter of the French Language*:

For opinion-leaders in English Canada the *Charter* had become an icon, its rights fundamental and absolute...English Canadians had never cared very much for the French-only sign policy which had been in place since 1977, but now that this policy could be impugned as a violation of a fundamental constitutional right, opposition to it could be mounted on a high moral plane. No longer was there any need to consider French Quebecers' beliefs about what was necessary to ensure the survival of a French-speaking community on a continent dominated by the English language. The individual's freedom to advertise in the language of choice was so fundamental that it should not make room for any other value or interest.³⁷²

7. Conclusion

Through an examination of judicial review within this historic context it becomes abundantly clear that Quebec has maintained a clear course on a trajectory of its Westminster Parliamentary heritage. Namely, Quebec has sought to ensure that human

³⁶⁹ *Ibid.*, 18.

³⁷⁰ Pierre E. Trudeau, "Convocation speech by the Right Honourable Pierre Elliot Trudeau, upon the occasion of his receiving the degree of Doctor of Laws, honoris causa (LL.D, h.c), presented at the University of Toronto 21 March, 1991, 296.

³⁷¹ Peter H. Russel, "Canadian Constraints on Judicialization from Without," *International Political Science Review*, 15, no. 2 (1994): 167.

³⁷² *Ibid.*, 167.

rights are respected through the legislature, and by extension through the principle of parliamentary sovereignty. Quebec's adherence to the principle of parliamentary sovereignty was due not only to a certain path-dependency, but also due to the fact that the political elite of Quebec recognized the advantages offered by the Judicial Committee of the Privy Council to provinces.

Until the latter half of the twentieth century, constitutional judicial review in Canada "was concerned almost exclusively with the division of powers between the provinces and the federal authorities. The courts refused to concern themselves with the wisdom or fairness of legislation, or even the possibility of abuse by legislative power, so as long as the impugned legislation was not being used as a means of invading a forbidden area under the guise of exercising a power given to the enacting Legislature. That is, provided that the federal authorities did not infringe on provincial powers, nor the provinces on the federal power, the courts would not interfere."³⁷³

In January of 1950, under the second government of Maurice Duplessis addressed the Federal-Provincial Conference with the following statement:

The province of Quebec is deeply convinced that we should have an essentially Canadian Constitution, made in Canada, by Canadians, for the Canadian people....The organization and maintenance of Courts of civil and criminal jurisdiction in each Province, the Judges of which would be appointed by each Province....Since, in our opinion, it is advisable to proclaim sovereignty, in their respective spheres, of the Federal Parliament and of the Provincial Legislatures, we believe that the powers of disallowance and of "reserve" referred to in the present Constitution, should be abolished...the immediate repeal of the recent amendments to the Canadian Constitution, namely the British North America Act (No. 2) 1949, is, in our view, appropriate and desirable. It is our considered opinion that in constitutional matters and in those relating to Canadian intergovernmental relations, the Supreme Court of Canada should meet all the conditions required of a third arbitrator.³⁷⁴

By contrast, the creation of the Supreme Court, and its incremental encroachment into areas long-dominated by provinces was interpreted by provinces as an attempt on the part of the federal government to centralize its control. As Strayer notes:

³⁷³ Strayer, *The Canadian Constitution and the Courts*, 4.

³⁷⁴ Quebec, *Memorandum regarding the Canadian Intergovernmental Conference*, presented at the Federal-Provincial Conference, Ottawa, 10 January 1950, 99-100.

It was only with the adoption of the Constitution Act, 1982 that Canadian courts faced the prospect of enforcing wide-ranging qualitative limitations on all legislative and administrative powers....The Charter binds both levels of government and imposes limitations on them by guaranteeing certain fundamental and democratic rights, as well as rights of free movement, legal rights, egalitarian rights, and linguistic rights. Thus it obliges the courts to apply the same limitations to both Parliaments and the Legislatures as to the manner in which they exercise legislative power that is otherwise within their respective jurisdictions.³⁷⁵

The desire of the federal government to transition away from the principle of parliamentary sovereignty to a stronger form of judicial review consisted of a series of incremental changes throughout the course of numerous constitutional negotiations. The following paragraphs highlight some of these significant incremental changes proposed by the federal government, as well as the opposition presented by the government of Quebec. While the federal government incrementally moved toward a stronger model of judicial review (while simultaneously espousing that “nothing would change”), Quebec remained suspicious of the federal government’s proposals, and repeatedly reasserted its support for the maintenance of parliamentary sovereignty.

Given the circumstances surrounding these constitutional negotiations, Quebec’s reception of the *Charter* was met with initial hesitation and suspicion.³⁷⁶ The suspicion was further exasperated by Duplessis’ observation that the Supreme Court was like the Tower of Pisa, always leaning in the same direction, favoring the federal government at the expense of the provinces.³⁷⁷ Consequently, from the perspective of Quebec sovereigntists and nationalists, the *Charter* was perceived as extension of a federal centralizing ideological project of which “Quebec elites were well aware of the political aim of the *Charter* to foster allegiance to the Canadian state through the application of a pan-Canadian standard.”³⁷⁸

The two case studies examined within Chapters Five and Six arise out of an on-going debate between Anglophones and the Quebec government regarding the legitimacy of *Charter of the French Language*, in light of the official language and minority education provisions of the *Charter*. As Larrivée notes, “Language laws and languages conflicts do

³⁷⁵ Strayer, *The Canadian Constitution and the Courts*, 5.

³⁷⁶ David Schneiderman, “Dual(ling) Charters: The Harmonics of Rights in Canada and Quebec,” *Ottawa Law Review* 24, no. 1 (1992).

³⁷⁷ Canada, *Parliament of Canada Debates*. 11 May 2010 (Mr. Claude Bachand, BQ).

<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4520162>.

³⁷⁸ Schneiderman, “Dual(ling) Charters,” 254.

not come out of the blue. They are shaped by history, that are influences by demographic, economic and political factors, and they reflect cultural values and concerns.”³⁷⁹ The nexus between law, French language and identity in Quebec is perhaps more evident in the preamble to the *Charter of the French Language*, in its declaration that “the French language, the distinctive language of a people that is in the majority French-speaking, is the instrument by which that people has articulated its identity.”³⁸⁰

Moreover, the responses of the National Assembly of Quebec on the topic of official languages presents an unusual trend in the subject matter of cases that result in legislative sequels. As Peter Russell notes, “with the exception of Quebec’s language policy, social and economic policies of central importance to elected governments have not been significantly affected by the *Charter*.”³⁸¹ In support of this claim, Kelly and Murphy add that, in terms of judicial review, the “Supreme Court has generally focused on legal rights and criminal procedures.”³⁸² The subject matter at the core of these cases -namely identity - is a politically and socially charged topic that has produced a wealth of debate and discussion within (and outside of) the legislative assembly. The wealth of information and documentation generated through legislative debates, committees, conference documents and legal consultations will provide a wide range of materials that will grant insight into how the National Assembly of Quebec strategizes legislative sequels to judicial nullifications, as well as insight into their nature of the institutional relationship between the legislature and the Supreme Court.

³⁷⁹ Pierre Larrivée, *Linguistic Conflict and Language Laws: Understanding the Quebec Question* (New York: Palgrave Macmillan 2003), ix.

³⁸⁰ *Charter of the French Language, Statutes of Quebec*, 1977.

³⁸¹ Russell quoted in James B. Kelly and Michael Murphy, “Shaping the Constitutional Dialogue on Federalism: The Canadian Supreme Court as Meta-Political Actor,” *Publius: The Journal of Federalism* 35, no. 4 (2005): 189.

³⁸² *Ibid.*, 189.

Chapter Five: The First ‘Legislative Response’

1. Introduction

The Government of Quebec has, throughout the years, remained steadfast to the principle of parliamentary sovereignty. This steadfastness is rooted in the failure of the constitutional negotiations of the 1970s to include provisions that – in the eyes of Quebec – would ensure the impartiality of the Court. Furthermore, the entrenchment of the *Charter* and its enforcement by the Supreme Court presented yet another transformation in the function of the judiciary that left Quebec uneasy; from Quebec’s perspective, the power of the Supreme Court had gone from the arbiter of federal-provincial disputes to becoming a quasi-political actor and virtually ubiquitous institution, exercising jurisdiction on all issues guaranteed by the *Charter*. Opinions regarding the new role and function of the judiciary ranged from a benign acceptance that “little had changed” to the perception that the Supreme Court had become a quasi-political actor in its own right, with a bias for serving federalist interests.

The new function of the judiciary as an interpreter of the *Canadian Charter of Rights and Freedoms* was perhaps most alarming to Quebec on the topic of official languages. Quebec’s rejection of the federal intrusion into the provincial jurisdiction of language and culture was most palpable in its omnibus application of the notwithstanding clause to maintain provincial legislation from 1982-1985 that was intended to preserve the French language and culture. In their analysis of the *Charter* dialogue model, Hogg and Bushell note that Quebec’s use of the notwithstanding clause was “not in response to any *Charter* case, but as a protest to the fact that the *Constitution Act, 1982*, including the *Charter*, had been enacted without the consent of Quebec. However, when the blanket override came to the end of its five-year life, no attempt was made to re-enact it for another five-year term.”³⁸³ Hogg and Bushell’s observation that the government of Quebec’s use of the notwithstanding clause was deeply political and highly symbolic is accurate when evaluated against federal and provincial archival documentation prior to 1988. As examined in Chapter Four, the

³⁸³ Peter Hogg and Allison Bushell, “The *Charter* Dialogue between Courts and Legislatures (Or Perhaps the *Charter* of Rights Isn’t Such a Bad Thing after All),” *Osgoode Hall Law Journal* 35, no. 1 (1997): 83.

government of Quebec publicly presented its invocation of the notwithstanding clause as a mechanism to assert the historical principle of parliamentary sovereignty. However, this political and symbolic gesture is somewhat diminished when placed within the context of ‘legislative response’ to judicial invalidation of the *Charter of the French Language* in *Ford* and *Devine*.

Hogg and Bushell argue that within the context of the dialogue model, section 33 has “become relatively unimportant, because of the development of a political climate of resistance to its use.”³⁸⁴ However, the one exception to this observation is in Quebec, where “the use of section 33 seems to be politically acceptable.”³⁸⁵ As Hogg and Bushell explain:

Quebec’s language-of-signs law, with its notwithstanding clause, was enacted in 1988, so that the effect of the notwithstanding clause expired in 1993. By that time, although there had been no change of government in the province (it was still the Liberal government of Premier Robert Bourassa), the passions that supported Quebec’s draconian French-language policies had died down enough that the government felt able to abandon the notwithstanding clause. In 1993, the Quebec National Assembly enacted a new law which permitted the use of languages other than French on all outdoor signs as long as French was also used and was “predominant.” The 1993 law did not contain a notwithstanding clause.³⁸⁶

In their article, Hogg and Bushell note that *Ford v. A.G. Quebec* (also referred to as *Chaussures Brown’s*) is an anomaly when compared to the majority of other legislative sequels. However, in spite of the uniqueness of *Ford*, Hogg and Bushell repeatedly use the case to illustrate legislative sequels that arise from both sections 1 and 33.³⁸⁷

Other than Hogg and Bushell’s *Charter* dialogue hypothesis, no other major model of judicial review has substantively engaged with either the *Ford* or *Devine* cases. However, a vast number of methodological critiques have been levied against Hogg *et al.* regarding their definition of judicial-legislative “dialogue” as well as a bias in the selection of cases to support their hypothesis.³⁸⁸ With respect to Hogg *et al.*’s use of the *Ford v. A.G. Quebec* as

³⁸⁴ Hogg and Bushell, “The *Charter* Dialogue between Courts and Legislatures,” 83.

³⁸⁵ *Ibid.*, 83.

³⁸⁶ *Ibid.*, 84.

³⁸⁷ *Ibid.*, 83-85.

³⁸⁸ See for example Mark Tushnet, “Judicial Activism or Restraint in a Section 33 World,” *University of Toronto Law Journal* 53 (2003); Christopher Manfredi and James Kelly, “Six Degrees of Dialogue,” *Osgoode Hall Law Journal* 37 (1999); Kent Roach, “A Dialogue About Principle and a Principle Dialogue,” *University of Toronto Law Journal* 57, no. 2 (2007). Roach provides a very concise summary of the criticism: “There have been two main forms of criticism. One is that actual dialogue does not, in fact, occur very often between courts and legislatures; instead, what courts and commentators call a dialogue is more often a monologue. A second

an example of *Charter* dialogue facilitated through section 33, the dialogical relationship between the SCC and the Quebec legislature appears to be fairly superficial, raising the question: how much of a “dialogue” occurs when the SCC issues a remedy and the Quebec legislature eventually implements it?

However, merely because the National Assembly implemented most of the Supreme Court’s remedies, it does not mean that a dialogue – defined broadly as an exchange among legislative and judicial branches – occurred following the *Devine* and *Ford* cases. To examine the outcome of a model of judicial review in terms of teleology (i.e. outcomes regarding ‘who has the final word’) excludes important information regarding the process and anatomy of how the legislative and judicial branches respond to one another within any model of judicial review (dialogical, coordinate or otherwise). In other words: *why* and *how* the National Assembly sought to amend the *Charter of the French Language* from 1977 to 1993 are important questions which Hogg *et al.* do not address in their analysis of judicial review; by contrast, these are the very questions which this chapter seeks to answer.

This chapter opens with a brief overview and analysis of court documents pertaining to the *Ford* and *Devine* cases. The conclusion drawn from these court documents is that the Attorney General of Quebec, Gil Rémillard,³⁸⁹ largely framed the province’s defence of the *Charter of the French Language* as a matter of parliamentary sovereignty and “language of commerce” as a matter well within the jurisdiction of the province. However, a closer examination of how the Bourassa government crafted its response to judicial invalidation reveals that the ‘legislative response’ to the Court had little to do with the National Assembly. In contrast to the rhetoric of parliamentary sovereignty advanced by province in earlier constitutional conferences and *facta* submitted to the SCC in *Ford* and *Devine*, the legislature had little involvement in the drafting of Bill 178 and the decision to invoke the notwithstanding clause. Rather, Bill 178 was crafted exclusively by the executive branch, in virtual secrecy among a handful of Bourassa’s cabinet members. This centralization of power for the creation of Bill 178 was to the exclusion of Bourassa’s own caucus members (including Members of the National Assembly that represented predominantly Anglophone

form of criticism is that the dialogue metaphor does not justify the role that courts play in the dialogue” (Roach, 450).

³⁸⁹ Gil Rémillard served as Justice Minister from June 23, 1988 to January 11, 1994 and was preceded by Herbet Marx who served from December 12, 1985 to June 23, 1988.

ridings), other members of the National Assembly of Quebec as well as civil society organizations.

Furthermore, archival evidence suggests that Bourassa was unlikely to have perceived the crafting of Bill 178 as a “dialogical” response to judicial nullification. This was due, in part, to pressure from the executive branch of the federal government to comply with the findings of the Supreme Court. Prior to the tabling of Bill 178, Mulroney requested that Bourassa comply with the Supreme Court decision and asked Bourassa not to pass legislation that would require use of the notwithstanding clause. Adding fuel to the fire, Bourassa was aware that Mulroney had every intention to remove section 33 from the *Charter*, thereby removing the institutional mechanism that Quebec had come to rely upon for asserting parliamentary sovereignty in a post-*Charter* era.

This chapter concludes that the most appropriate model of judicial review for understanding the institutional dynamics between the Supreme Court and the Government of Quebec with respect to the *Ford* and *Devine* cases is a version of coordinated interpretation, albeit with a number of modifications.

2. Le Visage linguistique du Québec: The Use of French within the “Common Sphere” and the development of the Charter of the French Language

Passed in 1977 by the Lévesque Government, the *Charter of the French Language* (CFL) was a legislative initiative that sought to preserve Quebec’s distinct cultural identity through the promotion of the French language, as well as remedy persistent social, economic and political inequalities within the province between Francophones and Anglophones.³⁹⁰ The following paragraphs provide a brief overview of the evolution of policy and legislation leading up to passing of *Charter of the French Language* (referred to also as Bill 101) and the court challenges of *Ford* and *Devine*.

³⁹⁰ Anxiety around the preservation of the French language, was due in part to the historic treatment of Francophone outside of Quebec and attempts to assimilate them to English, see: Linda Cardinal, “Language Planning and Policy-making in Quebec and Canada,” in *Quebec Questions*, eds. Dervais, Kirkey and Rudy (Don Mills: Oxford University Press, 2011), 194-195.; Martin Lubin, “The Politics of Language in Quebec,” *Quebec Questions*, eds. Dervais, Kirkey and Rudy (Don Mills: Oxford University Press, 2011), 170.

The origins of policy and legislation to promote French as the primary language of commerce takes root in the fact that, prior to the Quiet Revolution of the 1960s, anglophone groups maintained an advantage in educational and business affairs, resulting in a disproportionate control of economic and political affairs.³⁹¹ Factors such as the rise in nationalist sentiment, the involvement of civil society organizations on issues of language, and the emergence of a new francophone middle class produced societal pressure on political institutions to examine policies that ensured the prioritization of French as an official and primary language for the “common sphere” of Quebec.³⁹²

Over the next two decades the Government of Quebec responded with a multiple commissions, reports and legislation that, in part, examined the use of French as the “common language” of commerce, politics and public life. One of the most significant first steps to the establishment of French as the primary language of commerce in Quebec was the establishment of the Office de la langue française (OLF) in 1961.³⁹³ The mission of the OLF was to guide and formalize language policy with the purpose of ensuring that French is the everyday language of work, communications and commerce within Quebec.³⁹⁴

By 1969, the Union Nationale government, led by Jean-Jacques Bertrand, expanded the mandate of the OLF, through Bill 63 which, for the first time,³⁹⁵ included the objective of making French the language of business and also prioritizing French in advertisements and signage.³⁹⁶ Bill 63 ensured that the OLF would “advise the government on any legislative or administrative measures...to see to it that French is the working language in public and private undertakings in Quebec” and to “prepare programs to see to it that the French language is the working language” and advise the government on measures regarding “public posting to ensure the priority of the French language therein.”³⁹⁷ Furthermore, the role of the OLF was expanded to include a monitoring function by collecting complaints submitted by employees whose right to work in French was not respected. In circumstances

³⁹¹ Martin, “The Politics of Language in Quebec,” 170-171.

³⁹² Martin, “The Politics of Language in Quebec,” 172-173.

³⁹³ See: Quebec, *L’Office québécois de la langue française: son histoire, sa mission, ses services et outils, son rayonnement*, (Quebec: L’Office québécois de la langue française, 2010).

https://www.oqlf.gouv.qc.ca/ressources/bibliotheque/depliants/20100212_depliant1fr.pdf

³⁹⁴ *Ibid.*, 4.

³⁹⁵ Woehrling, “La Charte de la langue française: les ajustements juridiques,” 358.

³⁹⁶ See: Quebec, L’Office québécois de la langue française, *L’Office québécois de la langue française*.

³⁹⁷ Bill 63. *Loi pour promouvoir la lanague franciase au Quebec*, Quebec, 28 November 1969.

http://www.oqlf.gouv.qc.ca/charte/reperes/loi_63.pdf.

where the complaints were investigated and substantiated, the OLF provided recommendations to remediate non-compliance.

In 1972 the Commission of Inquiry on the Position of the French Language and on Language Rights in Quebec, 1972 (hereafter referred to as the Gendron Commission), presented their report entitled *The Position of the French Language in Quebec*. The report found that francophone consumers “faced problems with regard to the language of service in transactions with banks, department stores, hotels, telecommunications companies and restaurant chains doing business in Quebec” and expressed “difficulties with the language of billboard advertising, insurance contracts and instruction manuals pertaining to consumer durables.”³⁹⁸ Gendron also noted that the growing commitment to legal protection of the French language since 1965 was part of a broader political transformation within Quebec.³⁹⁹ In its conclusions, the Gendron Commission recommended “coercive legislation be introduced and warned against reliance on the goodwill of big business and assurances of co-operation therefrom.”⁴⁰⁰

With recommendations of the Gendron Commission in-hand, Bourassa tabled and passed the *Official Languages Act of Quebec, 1974* (referred to also as Bill 22). The purpose of the *Official Languages Act of Quebec* was to strike a compromise between bolstering the use of French as a language of “business and commerce” whilst attempting not to ostracise Anglophone communities in Quebec. Bourassa’s compromise entailed a limited acceptance of Gendron reports recommendations; far from the coercive legislation called for by the Commission, Bourassa’s compromise included the creation of the Office de la langue française (OLF) regulatory agency. The OLF was given the responsibility of enhancing collaboration across various ministries (e.g. Ministry of Education) and stakeholders (e.g. businesses) to implement programs for greater use of French in their operations.⁴⁰¹ The OLF also had a regulatory function, such as the capacity to investigate the implementation of the *Official Languages Act of Quebec* by businesses and award certificates of “francization” to business that “upgrade their use of French” and “improved the quality of the French

³⁹⁸ Edward Veitch, “Language, Culture and Freedom of Expression in Canada,” *International and Comparative Law Quarterly* 39, no. 1 (1990): 106.

³⁹⁹ *ibid.*

⁴⁰⁰ Veitch, “Language, Culture and Freedom of Expression in Canada,” 106.

⁴⁰¹ Lubin, “The Politics of Language in Quebec,” 174.

language itself by various measures, including steps to standardize vocabulary used in Quebec and to accept or reject new expressions.”⁴⁰²

The election of the Parti Québécois in 1976 marked a critical point in the evolution of French as the “visage linguistique” of Quebec. Whereas the Quebec Liberals accepted provisions of the Gendron Commission with trepidation, the Parti Québécois led by Lévesque sought to engage substantively with the recommendations put forth by the Commission five years earlier. With respect to the preservation of the French language, the primary reason for the Parti Québécois to table and pass the *Charter of the French Language* was rooted in the fear that “the French language, a minority language in North America and Canada, is too precarious to develop without state support.”^{403 404} In turn, state support for the French language would preserve the cultural identity of Quebec as well as remove linguistic and persistent socio-economic barriers to the equal participation of Francophones in their political, public and economic institutions.⁴⁰⁵

Re-engaging with the urgency articulated in the Gendron Commission’s findings, Lévesque’s majority government took additional legislative measures to ensure that French became the “language of Government and the Law, as well as the normal and everyday language of work, instruction, communication, commerce and business.”⁴⁰⁶ Consequently, the *Charter of the French Language* (1977), prescribed the exclusive use of French as the language of commerce and signage and the francisation of all businesses that employ fifty or more people.⁴⁰⁷

Bill 101 also included an enforcement capacity through the creation the Commission

⁴⁰² Ibid., 174.

⁴⁰³ Marc Chevrier, *Laws and Language in Quebec: the principles and means of Quebec’s language policy*, (Quebec: Ministère des Relations internationales, 1997), 4. <http://collections.banq.qc.ca/ark:/52327/bs43058>.

⁴⁰⁴ See also: Guy Rocher, “La Charte de la langue française ou Loi 101 (1977): La politique et la loi linguistique du Québec en 1977,” in *Le français au Québec: 400 ans d’histoire et de vie* (Quebec: Fides, 2008), 339-344.

⁴⁰⁵ *Charter of the French Language, Statutes of Quebec* 2016.

http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_11/C11_A.htm
1

⁴⁰⁶ See: *Preamble to the Charter of the French Language, Statutes of Quebec* 2016. website:

http://www2.publicationsduquebec.gouv.qc.ca/dynamicSearch/telecharge.php?type=2&file=/C_11/C11_A.htm
1

⁴⁰⁷ Beyond the preservation of the French language, the *Charter of the French Language* (CFL) also acknowledged the contribution of other minority communities. Among them, the *Charter of the French Language* sought to respect the preservation and development of indigenous languages as well as maintain a “spirit of fairness and open-mindedness” and respect for the institutions of the English-speaking community and ethnic minorities.

de la langue française that monitored compliance to the *Charter of the French Language* and reported violations directly to the office of the Attorney General of Quebec. As is evident in the facts submitted by the appellants in *Ford and Devine*, much of the anger and frustration arose from the notices submitted by the Commission to business that failed to comply with the language legislation. Indeed, many of the most bitter and public debates regarding the *Charter of the French Language* arose from provisions included in article 58, the requirement that public and commercial signage be written exclusively in French.⁴⁰⁸

The rationale behind the inclusion of article 58 in Bill 101 stemmed from a renewed commitment by the Lévesque government to the recommendations set forth by the Gendron commission. The purpose of Bill 101 was to reinforce French as the language of commerce through legislative “control the language of communication between vendor and consumer not only in face-to-face transactions but also in arm's-length communications through controls over the language of catalogues and instruction manuals.”⁴⁰⁹

Whereas Bourassa’s Bill 22 sought to provide incentives for businesses to adopt French as the official language of the workplace, Lévesque’s Bill 101 sought to institute punitive measures for non-compliance. For example, article 58 placed fixed timelines on businesses to obtain their certificates of francization and would level sanctions for companies that failed to comply with provisions of Bill 101. The implementation of sanctions for non-compliance to Bill 101 presented a major point of division among proponents and opponents of *Charter of the French Language*: “For those who favored the measures, they were critical to efforts to ensure that Quebec not only was, but was also perceived to be, a predominantly French society. For those who opposed Bill 101, these sections had simply gone too far: moving beyond a legitimate need to promote the French language, and infringing the liberty of members of Quebec's society.”⁴¹⁰

In the early years following its enactment, Bill 101 was regarded as a largely positive initiative with popular support in Quebec.⁴¹¹ In particular, Bill 101 received considerable support from unions and civil society organizations in favour of the francization of the

⁴⁰⁸ Robert Yalden, “Liberalism and Language in Quebec: Bill 101, the Courts and Bill 178,” *University of Toronto Faculty of Law Review* 47 (1989): 978.

⁴⁰⁹ Veitch, “Language, Culture and Freedom of Expression in Canada,” 106.

⁴¹⁰ Yalden, “Liberalism and Language in Quebec: Bill 101, the Courts and Bill 178,” 978.

⁴¹¹ André Bernard, “Les répercussions sociales et politiques de la Loi 101,” in *Le français au Québec: 400 ans d'histoire et de vie*, eds. Michel Plourde and Pierre Georgeault. (Quebec: Fides, 2008), 363.

workplace. For example, unions such as the Confédération des syndicats nationaux (CSN), La Fédération des travailleurs et travailleuses du Québec (FTQ) and Centrale des syndicats du Québec (CEQ) as well as civil society organizations like the Société Saint-Jean-Baptiste de Montréal, continued to advocate for the primacy of French in Quebec⁴¹² and public support for Bill 101 culminated with the popular campaign of “Ne touches pas à la Loi 101.”⁴¹³

While support for the *Charter of the French Language* persisted, it was not without its ardent critics, most of whom were Quebec anglophones. Frustrated and angered by the enactment of Bill 101, anglophone communities and civil society organizations initially looked beyond the province for political support from the federal government. Civil society organizations, such as Alliance Quebec, sought to leverage the contradiction between the *Canadian Charter of Rights and Freedom's* section 23 (guarantees for French and English languages in Canada) and provisions of Quebec's *Charter of the French Language*. In this respect the federal government proved to be an ally of the anglophone groups, providing financial support through initiatives such as the Court Challenges Program. In fact the Court Challenges Program was established by the Trudeau government in 1978 with the very purpose of providing financial support to private individuals that sought to challenge the constitutionality of the *Charter of the French Language*.⁴¹⁴ Among these *Charter* challenges to Bill 101 were the two landmark decisions of *Ford* and *Devine*.

3. The *Charter of the French Language* goes to the Supreme Court: The Cases of *Ford v. AG Quebec* and *Devine v. AG Quebec*

Both the *Ford* and *Devine* cases examined in this chapter grapple with the issue of French as the primary language of commerce in Quebec. Analysis of these cases provides an understanding of how the Attorney General of Quebec and the Supreme Court of Canada

⁴¹² Bernard, “Les répercussions sociales et politèques de la Loi 101,” 364.

⁴¹³ For a further discussion of the movement, see: Lise Gauvin, “La mobilisation des écrivains,” in *Le français au Québec: 400 ans d'histoire et de vie*, eds. Pierre Georgeault, Michel Plourde, (Quebec: Fides, 2008), 369.

⁴¹⁴ See: Ian Brodie, “The Court Challenges Program,” *Law Politics and the Judicial Process in Canada*, ed. Frederick Lee Morton (Calgary: University of Calgary Press, 2002), 326; Barry Cooper, “Some Implications or the Embedded State in Canada,” in *Insiders and Outsiders: Alan Cairns and the Reshaping of Canadian Citizenship*, eds. Kernerman Philip and PK Gerald (Vancouver: UBC Press, 2005), 104.

navigated the contradiction between the *Charter of the French Language* and the *Canadian Charter of Rights and Freedoms* as well as an overview of Quebec's rejection of stronger form judicial review in favour of parliamentary sovereignty.

3.1 The Case of Ford and Devine: An Overview of the Arguments and Positions of the Appellant, Respondent and Interveners

The cases of *Ford v. AG Quebec*⁴¹⁵ and *Devine v. AG Quebec*⁴¹⁶ were concerned with three major constitutional issues: the constitutionality of French-only commercial signage; the jurisdiction of the provincial legislature to levy sanctions for violations of the *Charter of the French Language* and the appropriate use of the notwithstanding clause. Regarding the matter of unilingual commercial signage, the respondents (*Ford et al.*) questioned the constitutionality of sections 58, 69, 205 and 208 of the *Charter of the French Language*. Section 58 required that “public signs and posters and commercial advertising shall be solely in French” and Section 69 required that “...only the French version of a firm name may be used in Quebec”⁴¹⁷ and sections 205 to 208 dealt with the offences, penalties and other sanctions for a contravention of any of the provisions of the *Charter of the French Language*. On this topic, the Supreme Court in *Ford* was to determine: “(1) whether ss. 58 and 69 infringe the freedom of expression guarantee by s. 2(b) of the *Charter of Rights and Freedoms*, R.S.Q., c C-12; and (2) whether ss. 58 and 69 infringe the guarantee against discrimination based on language in s. 10 of the *Quebec Charter*.”⁴¹⁸ With respect to the Supreme Court's guidance on the appropriate use of the notwithstanding mechanism, section 33 of the *Charter*, the technical questions raised by *Ford* were: can provincial legislation add standard override provision to all provincial statutes; and can override legislation have a retrospective effect? The following paragraphs provide an overview of the major points of debate between the facts submitted by the appellants (AG Quebec), respondents (*Ford et al.*) and interveners (AG Canada).

⁴¹⁵ *Ford v. Quebec (A. G)* [1988] 2 S.C.R. 712. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/384/index.do>

⁴¹⁶ *Devine v. Quebec (Attorney General)* [1988] 2 SCR 790 <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/386/index.do>

⁴¹⁷ *Ford v. Quebec (A. G)* [1988] 2 S.C.R. 712 SCC 1998 58. . <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/384/index.do>

⁴¹⁸ *Ibid.*, 6.

3.2.1 Section 58 and 69 and the Question of Commercial Expression and on how Language rights were conceptualized

The question examined by all parties regarding sections 58 and 69 of the *Charter of the French Language* is as follows: “Does the guarantee of freedom of expression in section 2 of the Canadian *Charter* and section 3 of the Quebec *Charter* include matters pertaining to commercial expression?”

Appellant, Attorney General Quebec

The government of Quebec argued that the *Charter of the French Language* and its provisions requiring French commercial signage, served a necessary function in the preserving collective identity and culture through the establishment of French as the “visage linguistique” of Quebec. In the factum, the Attorney General of Quebec once again underscore the jurisdiction of the Quebec legislature regarding language and culture: “Le principe de la souveraineté parlementaire est à ce point connu que nous nous permettrons de ne pas élaborer sur son contenu. Qu’il suffise de rappeler qu’il autorise la Législature et le Parlement à tout faire, dans les limites de leurs compétences respectives. C’est donc dire que les tribunaux n’ont pas à se préoccuper de la sagesse ou de l’opportunité des lois qu’adopte le législateur souverain.”⁴¹⁹ With respect to the constitutionality of unilingual French commercial signage, the AG Quebec argued that constitutional guarantees for the freedom of expression did not extend to both commercial signage and the freedom to express oneself in a specific language: “Il convient de souligner que c’est uniquement si la présente Cour estime que la liberté d’expression comprend À LA FOIS une composante linguistique ET une composante commerciale que l’article (b) de la Charte canadienne trouvera application en l’espèce.”⁴²⁰

Intervener, Attorney General of Canada

⁴¹⁹ Ford, *Factum of the Appellant (A.G. Quebec)*, supra 21.

⁴²⁰ *Ibid.*, 37.

By contrast, the AG Canada and the respondents (Ford *et al.*) firmly rooted their opposition to section 58 as an infringement on the individual right of freedom of expression. As an intervener in the *Ford* case, the Attorney General of Canada argued that section 58 of the *Charter of the French Language* violates the *Charter of Rights and Freedoms*, in so far as it violated the right of freedom of expression: “Dans la tradition juridique canadienne, les libertés fondamentales ne se définissaient pas en recourant aux restrictions que la législature pouvait éventuellement imposer aux libertés de l’individu, mais par les restrictions effectivement imposées.”⁴²¹ Framing section 58 of the CFL as a violation of the individual right, namely that of freedom of expression guaranteed by the *Charter*, proved to be a powerful strategy.

The Supreme Court ruled that the freedom of expression guarantees in the Canadian *Charter* (section 2) and Quebec *Charter* (section 3) included commercial expression. More specifically, the Supreme Court held 5-0 that the sections of the *Charter of the French Language* which prohibited the use of English in outdoor advertising violated section 2(b) of the *Charter of Rights and Freedoms*. In framing the question of commercial signage as a matter of freedom of expression (rather than fundamentally a question of language and cultural preservation), the Supreme Court noted: “Language is so intimately related to the form and content of expression that there cannot be true freedom of expression by means of language if one is prohibited from using the language of one's choice.”⁴²² With respect to the proportionality of *Charter of the French Language*, the Supreme Court believed that the government of Quebec had not exhausted all of its options to produce policies that minimally impaired the freedom of expression while promoting the French language.⁴²³ However, the Supreme Court remarked that Quebec could require “greater visibility” and “marked predominance” of the French language on exterior commercial signage, however, the Government of Quebec could not legislate the exclusive use of French.⁴²⁴

⁴²¹ Ford, *Factum of the Intervenor (AG Canada)*, supra 12.

⁴²² Ford, *Supreme Court of Canada*, supra 40.

⁴²³ *Ibid.*, supra 73.

⁴²⁴ *Ibid.*, supra 73.

3.2.2 Sanctions included in Section 58 of the *Charter of the French Language*

Intervenor, Attorney General of Canada

The question posed by the AG Canada framed Bill 178 as a provincial intrusion into a matter of federal jurisdiction. In essence, the question posed by AG Canada was: “Does the Government of Quebec have the legislative competence to prescribe the exclusive use of French as drafted within sections 58 and 69 of the *Charter of the French Language*?⁴²⁵ The AG Canada’s intervention was focused exclusively on the validity of section 58 of the *Charter of the French Language*, and the AG Canada “submits that the National Assembly of Quebec exceeded its jurisdiction in enacting section 58 of the *Charter of the French Language*,” and specifically with the punitive measures encapsulated in section 58.⁴²⁶ Of particular significance, the AG Canada took issue with the possibility of imprisonment for violation of the CFL and subsequently framed section 58 of the CFL as an infringement of the Quebec government into the federal jurisdiction over criminal law. Section 58 of the *Charter of the French Language* allowed the Government of Quebec to levy fines against businesses that contravened the law with “fines of up to \$5,000 or confiscation or by a maximum prison sentence of up to three months.”⁴²⁷ The AG Canada also argued that section 58 of the *Charter of the French Language* was unique in Canada, given that no other Canadian legislation “prohibits use of a language in this way.”⁴²⁸ Therefore, in the *Devine* case, the AG Canada contested the constitutionality of the sanctions included within section 58 and the absence of any clear indication that the sanction fell within the jurisdiction of the province.⁴²⁹

Appellant, Attorney General of Quebec

⁴²⁵ Devine, *Factum of the Intervenor (A.G. Canada)*, supra 10.

⁴²⁶ Ibid., supra 13.

⁴²⁷ Ibid., supra 11.

⁴²⁸ Ibid., supra 13.

⁴²⁹ Devine, *Factum of the Intervenor (AG Canada)*, supra 12.

As a rebuttal to the AG Canada, the AG Quebec argued that the sanctions included in section 58 of the *Charter of the French Language* did not encroach on the power of the federal government to legislate on criminal matters.⁴³⁰ Rather, the sanctions within Section 58 were within the province’s jurisdiction, and as a precedent, the courts have acknowledged the ability of provinces to legislate prohibitive measures.⁴³¹ Consequently, the sanctions encapsulated in the *Charter of the French Language* fell within the legislative jurisdiction of the province of Quebec and are valid for enforcing section 58.

3.3.3 The use of Section 1 and 33 (notwithstanding clause)

On the subject of the notwithstanding clause, the question that was brought forth to the Supreme Court of Canada entailed: Was the manner in which Quebec had invoked the notwithstanding clause constitutional? The inclusion of Section 58 of the CFL was accompanied by sections 52 and 214 which invoked the use of the notwithstanding clause. The wording of sections 52 and 214 of the Act to amend the *Charter of the French Language* read: “This Act shall operate notwithstanding the provisions of sections 2 and 7 to 15 of the Constitution Act, 1982 (Schedule B of the Canada Act, chapter 11 of the 1982 volume of the Acts of the Parliament of the United Kingdom).” Consequently, sections 52 and 214 of the *Amendment to the Charter of the French Language* were to shield the legislation from judicial review through the use of the notwithstanding mechanism. The following paragraphs outline the positions of the appellants, respondents and interveners on the topic of parliamentary sovereignty and the use of the override mechanism.

Consistent with the findings in Chapter Four, the arguments presented by the AG Quebec rested primarily on the issue of parliamentary sovereignty: first the very principle of parliamentary sovereignty is argued as the source of and origin of Bill 101; and second, should the SCC maintain that the majoritarian premise of Bill 101 violates the *Charter* rights of anglophones. The AG Quebec highlighted that under the Westminster parliamentary model, the rights of certain groups were better served and protected:

⁴³⁰ Ibid., supra 13.

⁴³¹ Ibid., supra 14.

Le poids de toute cette tradition a joué un rôle considérable lors de la rédaction du texte constitutionnel de 1982. Pour certains des acteurs dans le processus de révision constitutionnelle, la protection de droits était mieux assurée dans le cadre du système britannique traditionnel qui laisse au jeu démocratique et aux tribunaux le soin d'adapter les droits des individus aux circonstances nouvelles et changeantes des sociétés modernes; ils faisaient valoir que le système britannique de souveraineté parlementaire, tel qu'il est pratiqué au Royaume-Uni, en Australie, en Nouvelle-Zélande et au Canada, avait fourni jusqu'à maintenant une protection aux droits fondamentaux supérieure à bien d'autres systèmes où l'on retrouve des chartes constitutionnalisées.⁴³²

The AG Quebec concluded his arguments stating that, while others argued that an entrenched *Charter* would better serve the interests and needs of those historically disenfranchised from legal and political recourse, the *Constitution Act, 1982* represents a unique Canadian compromise: "Il en est résulté un compromis proprement canadien qui fait de la Charte un instrument singulier et exceptionnel."⁴³³ In citing the "unique" aspect of the *Charter* (and its inclusion of a notwithstanding clause) the AG Quebec underscored that there is little room for comparative jurisprudence (especially towards stronger forms of judicial review in the United States of America),⁴³⁴ combined with an urgent need for domestic consideration of the historical context in which the *Charter* was developed. As an aside, the AG Quebec's point was particularly valid considering that the SCC leveraged a significant amount of American jurisprudential literature in their *Ford* decision. For example, of the ten authors cited in the *Ford* decision, six were authors that wrote on specifically US case law (most of which examined issues pertaining to commercial freedom of speech).⁴³⁵

The AG Quebec proceeded to argue that section 33 of the *Canadian Charter of Rights and Freedoms* was included for the purpose of maintaining the principle of

⁴³² Ford, *Factum of the Appellant (A.G. Quebec)*, supra 5.

⁴³³ Ibid., supra 8.

⁴³⁴ This is a particularly valid point presented by the AG of Quebec considering that the SCC leveraged a surprising amount of American jurisprudential literature in their decision for *Ford*. For example, of the ten authors cited in the *Ford* decision, six were authors that wrote on specifically US case law (most of which examined issues pertaining to commercial freedom of speech).

⁴³⁵ The six US authors cited in the *Ford* decision include: Thomas I. Emerson, "Toward a General Theory of the First Amendment," *Yale Law Journal* 72 (1963): 877.; Thomas H. Jackson and John Calvin Jeffries, "Commercial Speech: Economic Due Process and the First Amendment," *Virginia Law Review* 65 (1979).; Philip B. Kurland, "Posadas de Puerto Rico v. Tourism Company: 'Twas Strange; 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful,'" *Supreme Court Review* (1986), 1.; Donald E. Lively, Philip B. Kurland, "The Supreme Court and Commercial Speech: New Words with an Old Message," *Minnesota Law Review* 72 (1987).; Philip B. Kurland, "The Supreme Court Leading Cases," *Harvard Law Review* 100 (1986).; Jonathan Weinberg, "Constitutional Protection of Commercial Speech," *Columbia Law Review* 82 (1982).

parliamentary sovereignty, and to exempt legislatures or Parliament from judicial control notwithstanding sections 2 and 7 to 15 of the *Charter*.⁴³⁶ Furthermore, the AG Quebec argued that the new protections to fundamental rights enshrined in the *Charter* were already articulated in a number of documents, among them: the *BNA Act of 1867* (in particular articles 93 and 133), the *Canadian Bill of Rights*, as well as the provincial *Charters* of rights (especially that of Quebec).⁴³⁷

In an interesting twist to the counter-majoritarian premise and institutional checks and balances, the AG Quebec argued that parliamentary sovereignty served the function of a guarantee against the judicial power, or the “tyranny of appointed judges” (a clear reference to the failed attempts of the nineteen seventies and eighties to alter the judicial appointment process). On the topic of a guarantee against a “government of judges,” or essentially the politicization of the judiciary, the AG Quebec asserted that, within a democracy, it is the elected representatives that are ultimately accountable to the public, not judges: “Dans un système de démocratie parlementaire comme le nôtre, c’est devant l’électorat et non devant les tribunaux que le Parlement doit répondre de ses actes. Il en va de même quand les Législatures ou le Parlement adoptent des lois qui dérogent aux articles 2 et 7 à 15 de la Charte: c’est devant l’électorat que les élus doivent répondre de la sagesse d’une décision de dérogation, qui cessera de toute façon d’avoir effet automatiquement au plus tard cinq ans après son entrée en vigueur.”⁴³⁸ Moreover, the AG of Québec once again underscored that this deference to legislative power was by no means exceptional within the Westminster parliamentary system, and that the *Charter of Rights and Freedoms* encapsulated this principle through the inclusion of section 33 (the notwithstanding clause).⁴³⁹

⁴³⁶ Sic: “...soustraire au contrôle des tribunaux les lois que les Législatures ou le Parlement décideront de rendre applicables malgré les articles 2 et 7 à 15 de la Charte canadienne.” See: Ford, *Factum of the Appellant (A.G. Quebec)*, supra 10.

⁴³⁷ Ford, *Factum of the Appellant (A.G. Quebec)*, supra 11. The AG of Quebec states: “En ce sens, il s’agit d’une contribution proprement canadienne au développement de la protection des droits fondamentaux et il faut croire que le constituant en était satisfait puisqu’il en a maintenu et consacré le mécanisme dans la L.C. de 1982. *D’ailleurs, il n’est pas exagéré d’affirmer que cette disposition constitue en quelque sorte la pierre angulaire de la Charte, sans laquelle cette dernière n’aurait sans doute jamais vu le jour, du moins sous une forme constitutionnalisée. Les négociations constitutionnelles qui ont débouché sur ce compromis sont de notoriété publiques et cette Cour peut en prendre connaissance judiciaire.*” Ford, *Factum of the Appellant (A.G. Quebec)*, supra 8. [Emphasis added]

⁴³⁸ Ford, *Factum of the Appellant (A.G. Quebec)*, supra 23.

⁴³⁹ *Ibid.*, 25.

In response to the AG Quebec's emphasis on the concept parliamentary sovereignty, the AG Canada attacked this premise in his factum: "the Canadian *Charter* fundamentally altered the relationship of the state to individual in this country. The powers of Parliament, provincial legislatures and federal and provincial governments became the subject to the limitation imposed by the guarantee in the *Charter of the Rights and Freedoms* protected therein."⁴⁴⁰ According to the respondent, the on April 17, 1982 the entrenchment of the Canadian *Charter* signaled a severe restriction on the principle of parliamentary sovereignty: "While not eradicated, [the principle of parliamentary sovereignty] was assigned a very different and less prominent role in the new scheme."⁴⁴¹ While the principle of parliamentary sovereignty is maintained in section 33, the respondents note that "it is equally true that the notion of parliamentary supremacy is basically inconsistent with the Canadian *Charter's* fundamental premise that the powers of the state are limited by the existence of certain individual rights and freedoms. It is the latter concept that defines a society in which the rights of the individual are constitutionally protected from abuse by governments and legislative majorities. This is the philosophy underlying the Canadian *Charter*."⁴⁴² Underscoring this point, the respondent noted that the arguments presented by the AG of Quebec precisely failed to recognize "the extent to which the principle of parliamentary supremacy has been diminished by that if the primacy of rights and freedoms entrenched in the constitution."⁴⁴³

The respondent further argued that any attempts to use a notwithstanding mechanism, must be done within the "framework of the fundamental rules governing a free and democratic society"⁴⁴⁴ and that these rules included "free and enlightened debate as to the merits of enacting the overriding legislation."⁴⁴⁵ As there was no debate identifying specific rights and freedoms which were to be overridden, it is for this reason that the "global override declaration in *An Act Respecting the Constitution Act, 1982*" is unconstitutional.⁴⁴⁶

⁴⁴⁰ Ford, *Factum of the Respondent (A.G. Canada)*, supra 9.

⁴⁴¹ *Ibid.*, supra 10.

⁴⁴² *Ibid.*, supra 11.

⁴⁴³ *Ibid.*, supra 11.

⁴⁴⁴ *Ibid.*, supra 21.

⁴⁴⁵ *Ibid.*, supra 21.

⁴⁴⁶ *Ibid.*, supra 22.

The AG Canada concurred with the arguments put forth by the respondents regarding the appropriate use of section 33. With respect to his arguments regarding the appropriate use of section 33 of the Canadian *Charter*, the AG Canada outlines the following points: 1) section 33 was entrenched as a special concession to Canada’s history of parliamentary sovereignty;⁴⁴⁷ and subsequently, 2) section 33 is “an exception to the fundamental principles set out in sections 1 and 52 of the *Constitution Act*, 1982. The rule of law demands respect of formal requirements so as to allow the particular purpose of section 33 to be met.”⁴⁴⁸ Therefore, the AG Canada maintained that the purpose of section 33 “can only be to suspend **temporarily** the application of certain provisions of the Canadian *Charter* to Act which otherwise would or could be considered inconsistent with the *Charter*.”⁴⁴⁹ Furthermore, the AG Canada underscored the temporary nature of section 33, citing the Canadian *Charter* framers’ intent.⁴⁵⁰

The AG Canada challenged the constitutionality of Quebec’s use of the notwithstanding mechanism because of the “special circumstances that surrounded the enactment of this section.”⁴⁵¹ Specifically, the AG Canada highlighted that section 33 was invoked without any parliamentary debate,⁴⁵² and that “the intention of the Quebec legislature in the case of section 52 of the Act to amend the *Charter of the French Language* can only be deduced from an interpretation of that section alone.”⁴⁵³ In light of these circumstances, the AG Canada took issue with the fact that section 33 has been invoked for a period of time in excess of five years without parliamentary review.

Additionally, the Attorney General of Canada argued that the use of section 1 of the Canadian *Charter* to shield Section 58 of the CFL was inappropriate due to the manner in which it was applied. The AG Canada argued that the Quebec legislature did not take the necessary steps to ensure that other options were considered prior to invoking section 1 (i.e. review of studies, policy alternatives, etc.). Rather, the AG Canada believed that rationale for the invocation of section 1 was limited to fear without broader legislative and policy

⁴⁴⁷ Ford, *Factum of the Intervener (AG Canada)*, supra 45.

⁴⁴⁸ *Ibid.*, supra 47.

⁴⁴⁹ *Ibid.*, supra 48.

⁴⁵⁰ *Ibid.*, supra 48.

⁴⁵¹ *Ibid.*, supra 43.

⁴⁵² The AG of Canada writes: “The National Assembly debates do not show any discussion of section 52 of the Act to amend the *Charter of the French Language*.” See: *Ibid.*, supra 43.

⁴⁵³ Ford, *Factum of the Intervenor (A.G. Canada)*, supra 44.

consideration. According to the arguments of the AG Canada, the Quebec government invoked section 1 because the Quebec government “considered the French language to be in peril and that the provincial legislature had constitutional jurisdiction to rectify this, the conclusions drawn by the appellant cannot establish reasonable limit within the meaning of section 1 of the *Charter*.”⁴⁵⁴ The AG Canada argued that the Quebec government’s justification for the use of section 1 failed to meet the requirements of the *Oaks* test insofar as it failed to “demonstrate some rationality in the pursuit of government a government objective or take refuge behind the presumption of constitutionality.”⁴⁵⁵

Lastly, the AG Canada accused the Quebec government of using section 33 for merely maintaining its own power: “What was the intention of the Quebec National Assembly in enacting the Act respecting the *Constitution Act, 1982*? The National Assembly’s only aim was to preserve its rights and powers.”⁴⁵⁶ However, according to the AG of Canada, the attempt of the Quebec government to “preserve the legislative rights and powers” of the National Assembly “bears no relation to the content” of the Canadian *Charter*. The Court held that use of the notwithstanding clause by Quebec was constitutional, however the section 33 could not be applied retroactively. The decision was significant insofar as it affirmed the jurisdiction of the provinces to invoke section 33.⁴⁵⁷

4. The Legislative Response – Bill 178 or “Ce compromis mi-chair, mi-poisson”

English Canada and anglophone civil society members were generally pleased with the outcome of the Supreme Court decision in *Ford*. However their enthusiasm was short lived with the enactment of Bill 178. While sections of the CFL were deemed unconstitutional by the Supreme Court of Canada, the CFL continued to receive considerable public support in Quebec. For example, three days after the SCC’s decision,

⁴⁵⁴ Ford, Factum of the Intervenor (AG Canada), supra 33.

⁴⁵⁵ Ibid., supra 34.

⁴⁵⁶ Ibid., supra 56.

⁴⁵⁷ Ford, *Supreme Court of Canada*, supra 83.; See also: James B. Kelly, “Dialogue as Non-Compliance: Quebec and the Charter of the French Language,” paper present at the International Political Science Association, Madrid, Spain, July 8-12, 2012, 3. http://paperroom.ipsa.org/papers/paper_13398.pdf.

twenty thousand people gathered in the Paul-Sauvé centre to demonstrate their support of Bill 101 and disagreement with the Supreme Court's decision in *Ford*.⁴⁵⁸

The Supreme Court of Canada rendered its judgement of the *Ford* case on December 15, 1988. Less than one week later, in response to judicial nullification,⁴⁵⁹ on December 21, 1988 the National Assembly of Quebec adopted Bill 178, which amended the *Charter of the French Language*. Public scrutiny of the adoption of Bill 178 focused on the use of the notwithstanding clause, the resignation of anglophone cabinet members, and the haste with which the response was produced by the Bourassa government. As one Anglophone legal commentator noted:

Could the contrast have been any more startling? On the one hand, a decision of the Supreme Court of Canada that took over a year to craft and that provides a subtle and rich analysis of weaknesses in the methods used for over a decade to promote French in Quebec. On the other hand, a hastily drafted piece of legislation that came into force a week after the Court had released its decision, and that showed little sign that its authors had given much consideration to principles spelt out not only by the Supreme Court of Canada, but also by Quebec's Superior Court and by Quebec's Court of Appeal.⁴⁶⁰

While the merits of Bill 178 were debated, the Bourassa government felt pressured to provide an expedient response; the Bill was met with considerable scrutiny from all sides.

On the one side, members of the Parti Québécois, serving as the official opposition, criticized the Quebec Liberals for kowtowing to the Supreme Court by producing a compromise that watered-down the *Charter of the French Language*.⁴⁶¹ Furthermore, Francophone activists were frustrated with what they perceived to an overstepping of boundaries by the Supreme Court. As Daniel Turp, a law professor at the University of Montreal and noted constitutional expert and Bloc Québécois MP from 1997 to 2000, observed:

When I re-read the decision, what still strikes me is how significant a weight the Supreme Court had... In the end the court practically determined the content of the legislation ... It indicated to legislators that the law would be compatible with

⁴⁵⁸ Bernard, "Les répercussions sociales et politesques de la Loi 101," 367.

⁴⁵⁹ Claude Ryan. *Mémoire au Conseil des Ministres: Règlement facilitant la mise en oeuvre du second alinea de l'article 58.1 de la Charte de la langue française*, (Québec: Québec, 1989), 1.

⁴⁶⁰ Yalden, "Liberalism and Language in Quebec: Bill 101, the Courts and Bill 178," 973.

⁴⁶¹ Jean Marcel, "Quebec n'a pas pris les moyens pour gagner sa cause en Cour suprême sur l'affichage," *La Presse*, 10 February 1989.

the *Charter of Rights* if there were a predominance (of French on signs). We saw how, under the *Charter*, the court took on a quasi-legislative role.⁴⁶²

On the other side of the debate, Bourassa heard the grumblings and encouragement to bring Section 58 of the CFL into compliance with the *Canadian Charter of Rights and Freedoms* by a number of actors, including: members of his own party, constituents, civil society actors such as Alliance Quebec, members of the Senate⁴⁶³ and even pressure from Prime Minister Brian Mulroney.⁴⁶⁴ In light of these tensions, in a very rudimentary terms, Bourassa had the choice between complying with decision of the Supreme Court and endure the anger of both the PQ and citizens in favor of unilingual signs, or he could invoke the notwithstanding clause infuriating Anglophones and being perceived by the rest of Canada as sacrificing individual guarantees to freedom of expression for the preservation of Quebec's "visage linguistique."

Wary of the circumstances, the solution offered by the Bourassa government was a compromise: Bill 178 amended the *Charter of the French Language* in such a way that, while the law of uni-lingualism prevailed, other languages could be permitted as long as French was prominent. Bill 178, kept French as the only language on outdoor public signs, posters and commercial advertising, as well as inside shopping centres and the public transit system. The only exceptions remained advertisements carried in non-French media and "ethnic" or "foreign-language" signs indoors. These expectations would remain subject to the approval of Office québécois de la langue française. The catch, however, was that in light of Bill 178's partial compliance with the *Ford* decision, the Quebec government invoked the notwithstanding clauses of the Canada and Quebec *Charters*, which shielded the new legislation from court challenges for a period of five years. In doing so, Bourassa only

⁴⁶² Excerpt of interview with Daniel Turp published in: Jeff Heinrich, "25 years later, parties remember Supreme Court battle over Bill 101," *The Gazette*, 14 December 2013.

⁴⁶³ Canada. Office of the Prime Minister. "Letter from Senator Lowell Murray to the Prime Minister requesting a standard response Bill 178," 8 March 1989.

⁴⁶⁴ Canada. Office of the Prime Minister. "Letter from PM Brian Mulroney to a Representative of Alliance Quebec on the topics of Meech Lake Accord and Bill 178," Ottawa, 6 March 1989. An excerpt of the letter from PM Brian Mulroney states: "As you know, the Government of Canada believes that Quebec, in responding to the unanimous decision of the Supreme Court, should have sought to promote the French language in Quebec in a manner that respected the freedom of expression of all citizens, without recourse to the notwithstanding clauses. I have conveyed this view to Premier Bourassa before he arrived at his decision which resulted in the passage of Bill 178. I have since made clear my view – and that of the Government of Canada – that the decision of the Government of Quebec was both disappointing and unsatisfactory."

partially implemented the remedies provided by the SCC in *Ford*.

As with most political compromises, Bourassa's Bill 178 raised the ire of virtually all major actors involved in the debate. The federal government responded to the passing of Bill 178 with a resounding gesture; two days after Bill 178 was passed, the Department of the Secretary of State announced that the "federal government is to contribute \$1.2 billion over the next five years to minority and second-language education across the country."⁴⁶⁵ According to the press release, the money was intended "to help develop education programs for minority languages and for English and French second languages."⁴⁶⁶ However, the gesture of the federal government was not enough; civil society actors felt that if their rights would not be guaranteed by Quebec or the federal government then they would have to go to the United Nations.

4.1 The Tabling of Bill 178 and Dissecting a Response to Judicial invalidation

An analysis of the National Assembly's response to judicial invalidation reveals two significant observations about the drafting of Bill 178: first, the response was tremendously swift; and second, the strategy and response to judicial invalidation was overwhelming driven by the executive branch, with little consultation of the legislature.⁴⁶⁷

4.1.1 A Swift Response, with Virtually No Consultation

The response of the Bourassa government was swift and immediate. Bourassa was abundantly clear that the tabling of Bill 178 was in direct response to the Supreme Court's decision in *Ford*. In his address to the National Assembly on December 21, 1988, Bourassa stated: "Ce que je dis, c'est que, **en vertu du jugement de la Cour suprême du 15 décembre** qui découle de votre décision de ne pas donner la priorité à la Charte de la langue

⁴⁶⁵ Canada, Office of the Prime Minister, "Letter from PM Brian Mulroney to a Representative of Alliance Quebec on the topics of Meech Lake Accord and Bill 178," Ottawa, 6 March 1989.

⁴⁶⁶ Ronald L. Watts, *Canada: The State of the Federation, 1989* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1989), 269.

⁴⁶⁷ Although an access to information request for the cabinet documents and minutes pertaining to discussions of Bill 178 in 1988 was declined, debates from the National Assembly reveal some relevant information regarding the manner in which the Bourassa government responded to judicial invalidation of Bill 101.

française, il y avait un vide juridique qu'il fallait combler.”⁴⁶⁸ Furthermore, Bourassa framed his government’s hasty response in passing Bill 178 as a requirement in addressing a legal “loophole” or “*un vide juridique*” to the *Charter of the French Language*:

...il fallait combler ce vide juridique parce que autrement il y aurait eu l'unilinguisme anglais partout au Québec et que la clause dérogatoire n'était pas rétroactive...il y a des règlements, dans une loi comme celle-là, qui n'est pas facile d'application parce qu'elle se trouve à réglementer des droits individuels, ça suppose un certain temps pour les préparer...tant que cette préparation ne sera pas complétée, il y aura un statu quo dans la plupart des cas, maintenant, l'unilinguisme français partout au Québec, sauf l'exception qui existe déjà et dans un certain autre groupe où la nette prédominance sera établie pour le français par rapport à l'anglais.⁴⁶⁹

However, Members of the National Assembly were not pleased with the swift response of the provincial Liberals. The Leader of the Opposition, and member of the Parti Québécois, Guy Chevrette⁴⁷⁰ accused Bourassa of producing an amendment that required little effort and failed to take serious consideration of the issues pertaining to the language policies in Quebec:

...mais il y a du monde qui attend des réponses sérieuses aux questions qu'on pose. Ma question est la suivante. Le premier ministre a-t-il voulu sauver du temps pour passer une dure semaine en proposant ce compromis qui fait fi des valeurs, autant du côté individuel que du côté collectif? Ce compromis mi- chair, mi- poisson, est-ce que le premier ministre du Québec a la volonté ferme de présenter aux Québécois une réglementation qui indique véritablement ses couleurs et que ce n'est pas là un simple jeu pour sauver la face dans une semaine difficile?⁴⁷¹

Bourassa replied with:

Ce n'est pas la première semaine difficile qu'un chef du gouvernement du Québec doit assumer. Je dis au chef de l'Opposition que je suis d'accord avec lui sur un point...Je suis d'accord avec lui que c'est un dossier qui n'est facile pour aucun gouvernement. Je ne dis pas toutefois que cette crédibilité dans les questions linguistiques ne sortira pas considérablement renforcée par les décisions qu'on a prises dans la loi 178. C'est le premier chef de gouvernement, le premier gouvernement dans l'histoire du Québec qui arbitre d'une façon aussi claire en

⁴⁶⁸ Quebec. *National Assembly of Quebec Debates*, 21 December 1988 (Mr. Bourassa, QL). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>) [Emphasis added]

⁴⁶⁹ Quebec. *National Assembly of Quebec Debates*, 21 December 1988 (Mr. Guy Chevrette, PQ). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>)

⁴⁷⁰ Guy Chevrette was Leader of the Opposition from November 12, 1987 to August 9, 1989.

⁴⁷¹ Ibid.

faveur des droits collectifs. Ce que vous n'avez pas osé faire - et je ne vous blâme pas - nous l'avons fait. J'ai confiance que lorsque la perception rattrapera la réalité, notre crédibilité dans la défense de la culture française auprès des Québécois sera aussi bonne que dans les autres secteurs.⁴⁷²

The swiftness of the response would haunt Bourrassa in the coming weeks as scholars, journalists and politicians from all sides of the debate expressed dissatisfaction with the perceived haste of Bill 178 would come to imply the anti-democratic and opaque legislative response. Given the secrecy of Bourrassa surrounding the drafting of Bill 178, it was difficult for the Quebec Liberals to refute the criticisms and provide evidence to the contrary.

4.1.2 A Secretive and Executive-Directed Response to Judicial invalidation

Further to the haste with which the provincial Liberal government tabled Bill 178, members of National Assembly, in particular members of the Parti Québécois, were outraged by the cloud of secrecy that surrounded the drafting of Bill 178. In spite of the fact the Bourrassa's government anticipated judicial invalidation to sections of the *Charter of the French Language* in the *Ford* and *Devine* cases, the Liberal government of Quebec did not share any of the responsive scenarios with members of the legislative assembly. For example, member of the Parti Québécois, MLA Filion likened the secrecy of the Bourrassa government to that of the "Secret of Fatima":⁴⁷³

Tantôt, j'ai présenté la motion. M. le Président, pour qu'on se comprenne un peu, le jugement de la Cour suprême n'est pas tombé des nues. Le jugement de première instance est arrivé en décembre 1984, alors qu'il y avait déjà eu un premier jugement de la Cour supérieure et que cette fois-là il était favorable à la Charte de la langue française. En décembre 1986, il y a eu le jugement de la Cour d'appel. Depuis que le premier ministre actuel et le gouvernement libéral ont pris le pouvoir, ils ont dit: Ne vous inquiétez pas là, en ce qui concerne la décision de la Cour suprême sur l'affichage commercial, nous, on a le secret de Fatima, on sait exactement ce qu'on va faire. Ils nous ont même suppliés d'arrêter de les interroger là-dessus. Mais l'Opposition a continué son travail.

⁴⁷² Quebec. *National Assembly of Quebec Debates*, 21 December 1988 (Mr. Bourrassa, QL). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>)

⁴⁷³ The Secret of Fatima is colloquial phrase in reference to three prophetic and apocalyptic visions by three shepherdesses in Portugal. Although the Holy See made the first two visions public knowledge, it chose to keep the third prophesy a secret to be reveal over eighty years later. The secrecy surrounding the third prophesy lead to massive speculation and intrigue regarding its content.

Le jugement est connu de la part de la Cour suprême, les tribunaux ont fait leur travail. Maintenant, c'est aux hommes et aux femmes politiques de faire le leur. Le gouvernement dépose un projet de loi qui contient, dans son ventre, un pouvoir réglementaire extrêmement important. **Ce que le ministre nous dit, ce matin, c'est qu'il n'a pas - on est forcés de constater que sa réponse équivaut à nous dire ça - les projets de règlement susceptibles de mettre en œuvre la loi 178 qu'il nous demande d'étudier.** Il nous réfère à un amendement qu'il veut déposer à l'article 1. M. le ministre, arrêtez de jouer à la cachette avec les élus du peuple, avec la population du Québec. Déjà, vous voyez les résultats du jeu de cache-cache qu'a joué le premier ministre avec l'ensemble de la population du Québec, alors qu'il aurait dû exercer son leadership pour convaincre la population que sa position et que sa solution étaient les bonnes. **Le premier ministre a travaillé à des scénarios alambiqués avec le personnel du "bunker."**⁴⁷⁴

Moreover, members of the legislative assembly were disappointed and suspicious of the fact that the Bourassa government did not invite broader discussion and debate, as was with the case of the drafting of Bill 101. For example, in the plenary session Jacques Rochefort⁴⁷⁵, sitting as an independent, raised the issue that the haste and secrecy of Bill 178 was unprecedented with respect to the discussion of amendments to the *Charter of the French Language*:

Je dis aux membres du gouvernement et au ministre que, s'ils étaient vraiment sincères en nous disant que leur hâte d'agir avait pour objectif premier et unique - je le répète, nous ont-ils dit à chaque étape - de fermer un trou ouvert dans notre législation à partir d'un jugement rendu public par la Cour suprême jeudi dernier, il y avait, oui, une solution simple, facile, efficace, mur à mur qui aurait été celle d'adopter une loi qui aurait, comme le fait en partie le projet de loi 178, utilisé les clauses dérogatoires pour que la loi 101, telle que nous la connaissions jusqu'à jeudi dernier, continue de s'appliquer au Québec pendant un certain nombre de semaines encore.

Par la suite, les autres dispositions du projet de loi 178 qui, selon ce que je comprends, sont les orientations légitimes du gouvernement, même si je ne les partage pas, auraient pu suivre un processus normal, démocratique, transparent et ouvert sur le plan parlementaire, comme toute autre loi qui est débattue, discutée et adoptée ici, à l'Assemblée nationale, et aussi particulièrement, comme toutes les autres grandes lois linguistiques qu'a connues le Québec, que ce soit le projet de loi 101 devenu loi, la loi 22, la loi 63 ou la loi 57 qui a amendé le projet de loi 101 en 1982 ou 1983.

⁴⁷⁴ Quebec, *National Assembly of Quebec Debates*, 21 December 1988 (Mr. Filion, PQ.). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>)

⁴⁷⁵ Former member of the Parti Québécois, but chose to sit as an independent on November 18, 1987. See: <http://www.assnat.qc.ca/en/deputes/rochefort-jacques-5151/biographie.html>.

Chaque fois que nous avons traité de ces questions ici, à l'Assemblée nationale du Québec, indépendamment des formations politiques qui occupaient les banquettes gouvernementales, **nous avons toujours fait en sorte que ce débat soit ouvert et facilite la participation et la transparence, donc un débat démocratique. Cette fois-ci, non seulement on refuse cet état de fait, cette façon de procéder démocratique, mais on utilise un subterfuge en nous disant qu'il faut procéder rapidement pour combler un trou créé par un jugement de la Cour suprême.**⁴⁷⁶

Members of the legislative assembly felt they were cornered into passing Bill 178 as a “pig in a poke”; in a manner that lacked transparency, clarity and decisiveness. Whereas Bill 101 was the product of a long and thorough parliamentary commission as well as the subject of numerous legislative debates, by contrast members of the National Assembly had three days to review Bill 178.⁴⁷⁷ Moreover, as Bill 178 was tabled just prior to the Christmas holidays, members of the National Assembly had very limited time to review and discuss the proposed legislation.⁴⁷⁸

The haste and timing of Bill 178 fueled suspicion among members of the Parti Québécois, who suspected the Bourassa government would use judicial invalidation as an opportunity to pass an amendment to the *Charter of the French Language* that would ultimately temper the hard-won efforts of the Parti Québécois in establishing French as the official provincial language. In his defence, the Premier offered the following response to his critics:

Il n'est pas question d'affaiblir la loi 101. Il s'agit simplement de quelques cas très limités et, sur le plan réaliste, d'examiner s'il n'y aurait pas une possibilité - ce n'est pas une décision, ce n'est pas un engagement - de rendre la loi plus conforme à la réalité. Est-ce que le député de Lac-Saint-Jean est contre le fait qu'on regarde la situation? Est-ce qu'il est contre le fait qu'on voie s'il n'y a pas une possibilité, tout en respectant les objectifs de la loi 101? Est-ce qu'il est contre le fait qu'on étudie pour voir s'il n'y a pas cette possibilité? Je le lui demande parce que je suis ici et que c'est moi qui en ai parlé et je n'ai pas l'intention de le laisser dire n'importe quoi.⁴⁷⁹ [Emphases added]

⁴⁷⁶ Quebec, *National Assembly of Quebec Debates*, 21 December 1988 (Mr. Rochefort, Ind.). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>)

⁴⁷⁷ See the comments of Rochefort in the plenary session: Quebec, *National Assembly of Quebec Debates*, 21 December 1988 (Mr. Rochefort, Ind.). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>)

⁴⁷⁸ Quebec, *National Assembly of Quebec Debates*, 21 December 1988. <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>)

⁴⁷⁹ Quebec. *National Assembly of Quebec Debates*, 21 December 1988 (Mr. Bourassa, QL). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>)

Le ministre a répondu à plusieurs reprises - et je viens de le mentionner - *qu'il n'était pas question de bilinguiser Montréal... Il s'agit d'adapter la loi à la réalité - c'est la même chose pour le cas de Pontiac-Témiscamingue - en n'affectant d'aucune façon...les objectifs de la loi 101 - la loi à la réalité d'un Québec français mais d'un Québec ouvert. Alors, dans les régions comme celles que représente le député de Lac-Saint-Jean, comme on va le voir il y aura un ajustement apporté aux règlements, et c'est ce à quoi référerait le député. Les règlements vont permettre de tenir compte des régions où presque toute la population est francophone.*⁴⁸⁰

An interview with Richard French, former Cabinet Member and Minister of Communications, confirmed that virtually no consultation was done within the Quebec Liberal party.⁴⁸¹ As the representative of Westmount, a predominantly anglophone constituency, French could not recall any attempts on the part of Bourassa to solicit the “buy-in” or advice from MLAs representing ridings with significant Anglophone populations. Furthermore, Richard French indicated that the entire process of drafting Bill 178 was limited to “a handful” of MLAs and experts. Among these select few was Gil Rémillard, the Justice Minister and Attorney General of Quebec.⁴⁸²

3.1.3 Use of the Notwithstanding Clause and Federal Executive Pressure

The decision of Bourassa to use the notwithstanding clause was not only a cause of furor among members of the opposition, but it also proved to be internally divisive to the Quebec Liberals; just prior to the tabling of Bill 178, on December 20, 1988, Bourassa lost three Anglophone cabinet ministers,⁴⁸³ all of whom resigned from cabinet over the invocation of section 33 for Bill 178, and chose to either leave politics altogether to sit as backbenchers in the provincial Liberal party.⁴⁸⁴ For example, Clifford Lincoln, Bourassa’s Minister of the Environment articulated that the spirit of the *Charter* was in support of strong-form rights

⁴⁸⁰ Quebec. *National Assembly of Quebec Debates*, 21 December 1988 (Mr. Bourassa, QL). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html> [Emphasis added]

⁴⁸¹ Dr. Richard French in discussion with the author, 4 June 2015.

⁴⁸² Dr. Richard French in discussion with the author, 4 June 2015.

⁴⁸³ The three Cabinet Ministers were: Herbert Marx, Public Security Minister and Clifford Lincoln, Minister of Environment, and Richard French, Minister of Communications

⁴⁸⁴ There was also a fourth Minister that objected – Energy Minister John Ciaccia, however he remained within cabinet, aspiring that he could bring about greater change ‘from within’. See Watts, *Canada: State of the Federation*, 269.

regime: “In my belief, rights are rights are rights. There is no such thing as inside rights and out- side rights. No such thing as rights for the tall and rights for the short. No such thing as rights for the front and rights for the back, or rights for the East or rights for the West. Rights are rights and will always be rights. There are no partial rights. Rights are fundamental rights.”⁴⁸⁵ As one of the other ministers that resigned in the wake of Bill 178, Richard French indicated that the Quebec Liberals did not have a consensus on the matter of Bill 178, nor with respect to the use of the notwithstanding mechanism.⁴⁸⁶ Bourassa had not sought broad consultation of the use of section 33 from within his own cabinet, let alone from the Quebec Liberal party.⁴⁸⁷ Consequently, Bill 178 and the use of the notwithstanding clause was a fairly unilateral decision on the part of Bourassa.⁴⁸⁸

By contrast, the legislative debates of December 21, 1988 contained no objections to the use of the notwithstanding clause. Neither members of Bourassa’s own government, nor members of the opposition vocalized any opposition to the use of the notwithstanding clause for Bill 178. This was likely due to the fact that: a) the disapproval of four cabinet members likely required that Liberal party present a unified front at the parliamentary debate; and b) under the Parti Québécois, invocations of section 33 were fairly regular. For example, following the 1981 constitutional accord, the Quebec government expressed “strong opposition to those terms by including a notwithstanding clause in every piece of legislation put before the National Assembly between 1982 and 1985. It also caused every Quebec law in place at the time the *Charter* came into force to be amended with like effect.”⁴⁸⁹ Moreover, members of the Parti Québécois argued that, given that the provincial Liberals were willing to invoke section 33, they should have just kept the invalidated legislation as it was. In fact, Bourassa even reiterated the legitimacy and right of Quebec to use the notwithstanding clause: “Nous nous sommes donné les pouvoirs, avec la clause "nonobstant", avec la clause dérogatoire, de moduler ou de contrôler l'utilisation du

⁴⁸⁵ Thomas Axworthy, “The Notwithstanding Clause: Sword of Damocles or Paper Tiger?,” *Policy Options* (2007). <http://policyoptions.irpp.org/issues/equalization-and-the-federal-spending-power/the-notwithstanding-clause-sword-of-damocles-or-paper-tiger/>.

⁴⁸⁶ Dr. Richard French in discussion with the author, 4 June 2015.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ Gilbert Lavoie, “Richard French n’écarter pas un retour au Conseil des ministres,” *La Presse*, 7 February 1989. http://collections.banq.qc.ca:8008/lapresse/src/cahiers/1989/02/07/02/82812_1989020702.pdf

⁴⁸⁹ Canada, Law and Government Division, *The Notwithstanding Clause of the Charter*, (Ottawa: Library of Parliament, 2008). <http://www.parl.gc.ca/content/lop/researchpublications/bp194-e.htm>

bilinguisme ou d'autres langues en tenant compte de la réalité existante. C'est évident que, dans des régions où la population est francophone à 99 %, les règlements vont permettre d'en tenir compte.”⁴⁹⁰

While relatively little was said about use of section 33 within the National Assembly, Bourassa received considerable pressure from Prime Minister Brian Mulroney to bring Bill 178 into full compliance with the *Charter of Rights and Freedoms*. Archival documents reveal that shortly before tabling Bill 178, Bourassa received a phone call from Prime Minister Mulroney expressing that the Bill 178 should not invoke section 33:

Following the Supreme Court decisions, the Government expressed the wish that the Government of Quebec find a solution that would reconcile the two fundamental values recognized by the Court, namely respect for the French dimension of Quebec and freedom of expression as guaranteed by both the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter of Human Rights and Freedoms*.

Indeed this is the message the Prime Minister conveyed to Premier Bourassa, before the Premier arrived at his decision. The Prime Minister added that any policy which was at variance with the principles established by the Supreme Court would run counter to the rights set forth in the both the Quebec and the Canadian Charters, and that such a decision would be disappointing to the Federal Government.

Quebec's reaction, Bill 178, clearly does not meet the tests set out by the Supreme Court and offends the freedom of expression guaranteed by the *Charter*. As the Prime Minister has indicated, it is therefore unsatisfactory. The Government of Canada thus regrets that Quebec has not been able to reconcile the promotion of its French character and respect for freedom of expression.⁴⁹¹

Furthermore, Prime Minister Mulroney was intent on removing section 33 from the *Charter*: “To Canadians, the Quebec language issue has acted as a reminder of the existence of an override or notwithstanding clause within the Canadian *Charter of Rights and Freedoms*,”⁴⁹² a clause that the Prime Minister described as a “fundamental flaw in the Constitution Act of 1982. He also indicated that in his view, the notwithstanding clause is inconsistent with a *Charter*, and he was opposed to its use.”⁴⁹³ At the time, Mulroney was still waiting on the

⁴⁹⁰ Quebec, *National Assembly of Quebec Debates*, 21 December 1988 (Premier Bourassa). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>) [Emphasis added]

⁴⁹¹ Canada, Department of Justice Canada, *Memorandum: Correspondence against Quebec's Bill 178*, 22 February 1989, 3. [Emphasis added]

⁴⁹² *Ibid.*, 3. [Emphasis added]

⁴⁹³ *Ibid.*, 2-3.

acceptance of the Meech Lake Accord,⁴⁹⁴ and indicated that the removal section 33 could be negotiated at a future constitutional conference.⁴⁹⁵ Archival documentation also confirms that Bourassa was aware of Mulroney's intentions regarding the removal of the notwithstanding clause from the *Charter*.⁴⁹⁶ The removal of section 33 would have dealt a considerable blow to principle of parliamentary sovereignty (by extricating one of the two override mechanisms), and in doing so, significantly strengthen judicial review.

Like Trudeau, Mulroney perceived the notwithstanding clause as a “fundamental flaw” from the 1982 Constitution Act. For example, on December 19, 1988, the Prime Minister told the House of Commons that he always believed the notwithstanding clause to be inconsistent with a *Charter*:

Hon. Jean Lapierre (Shefford): Mr. Speakers, in answer to my colleague the Prime Minister said that last night he conveyed the position of his Government to Premier Bourassa. I want to be clear. The Prime Minister said that he expects the Quebec Government to abide by the provisions of the Supreme Court ruling. In his conclusion, did the Prime Minister recommend resorting to the notwithstanding clause, or did he ask that only public signs and primacy of the French language be considered?

Right Hon, Brian Mulroney (Prime Minister): Personally, Mr. Speaker, I have always thought that the notwithstanding clause is inconsistent with a *Charter* of rights. This is why I am adamantly opposed when the previously Government included that clause in the 1981-82 Canadian Constitution. It matters little at whose request this was done. The fact is that the clause was made part of the Canadian Constitution. Personally, as a citizen, I think the two are incompatible and I did not urge Mr. Bourassa or any other Premier to use it. I was expressing the hope that, despite his difficulties, Mr. Bourassa might come up with a formula which would respect the two basic options of the Supreme Court ruling.”⁴⁹⁷

From this evidence it is clear that the provincial executive branch is an important institutional player in establishing the dynamics between the appointed Justices of the

⁴⁹⁴ Ibid., 3. An editorial comment in the margin of the document states: “To engage in a debate on the repeal of the notwithstanding clause in s. 33 of the *Charter* or other constitutional change except for the Accord itself, would now undermine the effectiveness of putting into place the Meech Lake Accord as a constitutional amendment.”

⁴⁹⁵ Ibid., 3. The text reads: “As the government has indicated earlier, the primary goal is the adoption of the Meech Lake Accord, so that Quebec can be bought back into the constitutional family. The notwithstanding clause is an important matter which can be addressed at future institutional conferences, which are provided for by the Meech Lake Accord.”

⁴⁹⁶ Ibid., 4. The relevant passage reads: “Before the Quebec Government decided on the response adopted in Bill 178, the Prime Minister spoke to Premier Bourassa and expressed his views on the notwithstanding clause...the Prime Minister has been clear on in the view that the notwithstanding clause is inconsistent with a *Charter* of rights.”

⁴⁹⁷ Canada, *House of Commons Debate*, 19 December 1988, (Brian Mulroney, Lib.), 299.

Supreme Court and elected members of the Quebec National Assembly. Perhaps more surprisingly, the evidence also suggests that the federal executive branch is yet another, albeit less influential, intervener in the crafting of a ‘legislative’ sequel to judicial nullification.

5. A re-evaluation of the dialogue hypothesis regarding the legislative sequel of Bill 178

A contextual analysis of Quebec’s legislative response to the nullification provides evidence contrary to the hypothesis advanced in Hogg and Bushell’s *Charter* dialogue model; namely that, in its descriptive use, the Charter dialogue model articulates how “institutional interactions surrounding rights operate in practice or how particular features of a bill of rights can serve as mechanisms to facilitate responses from one branch of government to the actions of the other.”⁴⁹⁸ For Hogg and Bushell, Charter dialogue ought also to be understood as articulated procedural interactions through which a judicial decision is open to legislative reversal, modification, or avoidance by a legislative body.⁴⁹⁹ Further to sequential characteristics, the procedural nature of dialogue also outlines the actors engaged in inter-institutional exchanges. Within Hogg and Bushell’s definition of dialogue, the actors are restricted to the Supreme Court of Canada and the legislative branch.

Hogg and Bushell are keen to note that legislative responses are imbued with the idea of deliberative engagement with the judicially invalidated legislation. Therefore the notion of legislative deliberation is also bolstered by the tradition of parliamentary sovereignty, wherein the elected branches of government, representing the majoritarian premise, are capable of protecting human rights. For example, the decision of Bourassa to invoke section 33 for Bill 178 was hardly extraordinary given the fact that the National Assembly of Quebec, under the Parti Québécois, had routinely used section 33 in a sweeping manner. Moreover, the intent of the Parti Québécois had not been to use section 33 as means of facilitating any kind of dialogue; on the contrary, it had used section 33 to express opposition to the constitutional accord of 1981. While the Parti Québécois remained in

⁴⁹⁸ Emmett Macfarlane. 2012. “Conceptual Precision and Parliamentary Systems of Rights: Disambiguating “Dialogue”. *Review of Constitutional Studies/Revue d’études constitutionnelles*. Volume 17, Issue 2, p. 73-100

⁴⁹⁹ *Ibid.*, 79.

power, there was little reason to believe that the National Assembly of Quebec was willing to participate in any form of “dialogue” with the Supreme Court.

Moreover, when one considers the historical path-dependency of Quebec’s assertion of the principle of parliamentary sovereignty (discussed in Chapter Three) it comes as little surprise that it was the primary argument advanced by the Attorney General of Quebec in the *Ford* and *Devine* facts. Further to a historically entrenched commitment to the principle of parliamentary sovereignty, by 1982, the Parti Québécois had abandoned all acceptance of the Supreme Court as a mere arbiter of federal-provincial disputes.

Given the staunch opposition of the Parti Québécois to the *Charter* and other centralization efforts of the federal government, one could reasonably argue that the Quebec Liberal Party may have comparatively have *appeared* willing to engage with the Supreme Court more constructively. For example, one might argue that the speed with which the Bourassa government tabled Bill 178 suggests that the government was keen on remedying – to a certain extent – the non-compliant sections of the *Charter of the French Language*. However, the remedy Bourassa had implemented, was only partial. Whereas Hogg *et al.* might have characterized this as an example of dialogue; the discourse used by Bourassa to describe the nature of Bill 178 suggests that he was careful not to present the tabling of Bill 178 as a reaction, or ‘legislative sequel’ to the Supreme Court decision in *Ford* and *Devine*. Rather, during the debate regarding Bill 178, Bourassa repeatedly referred to Bill 178 as necessary to address a “loophole” in the present legislation and made virtually no reference to terms such as “judicial nullification” or the remedies included in the Supreme Court’s decision of *Ford* and *Devine*. Moreover, Bourassa perceived the use of the notwithstanding clause as legitimate mechanism for the protection of the French language, given that the provincial government was awaiting the ratification of the Meech Lake Accord.⁵⁰⁰

As discussed in the subsequent paragraphs, it is difficult to attribute dialogical characteristics to the strategy of the National Assembly of Quebec. Rather, this thesis argues that the most appropriate model for understanding the dynamics of judicial review within this case study is a modified version of coordinate interpretation. Furthermore, the parties that appear to carry the majority of power in this coordinate interpretation are the Supreme

⁵⁰⁰ Watts, *Canada: The State of the Federation*, 268.

Court, the executive branch of the government of Quebec, and the executive branch of the federal government.

The chapter concludes with a proposal for a more appropriate model of constitutional interpretation, namely coordinate interpretation for understanding the first of two ‘legislative’ sequels’. Within the context of this case study, coordinate interpretation is expanded to account for the unique dynamics between federal and provincial institutions. Lastly, this section highlights that the acute number of actors and overall lack of broad democratic participation in judicial review eventually set the stage for the second legislative sequel, which takes a remarkable turn in terms of the involvement of civil society actors and international human rights norms and institutions.

5.1 Executive Power and the Veneer of Parliamentary Sovereignty

Within the context of Bill 178, the political scientist is left beguiled by the question: Where’s the ‘parliament’ in parliamentary sovereignty and where’s the legislature in ‘legislative sequel’? There is little question that the Bourassa government made no effort to engage with members of the National Assembly. This concentration of power unto the executive branch is demonstrative that, while the Quebec government was keen to present its use of the notwithstanding clause as a matter of asserting parliamentary sovereignty, parliament factored little into any substantive act of sovereignty. The evidence examined within the context of this case study firmly supports Kelly’s argument that focus on the exchange between the Supreme Court and the legislature is a merely a veneer:

The legislative response to the *Charter* contains judicial power, which Peter Hogg and Allison Bushell referred to as *Charter* dialogue. Their approach to dialogue focuses on the relationship between courts and legislatures. This relationship, however, exists on the most superficial level as the most significant relationship is between the Supreme Court and the cabinet when legislation is subjected to judicial scrutiny.⁵⁰¹

⁵⁰¹ James B. Kelly, “Parliament and the Charter of Rights: an unfinished constitutional revolution,” *Policy Options*, 1 February 2007. <http://policyoptions.irpp.org/issues/the-Charter-25/parliament-and-the-Charter-of-rights-an-unfinished-constitutional-revolution/>.

In actuality, the provincial executive branch played the primary role in responding to the Supreme Court's invalidation of sections of the *Charter of the French Language*. While Kelly's examination of the executive branch points to a criticism of dialogue theory, this thesis makes a number of differentiations from the arguments advanced in *Governing with the Charter*. Notably, this thesis differentiates itself from Kelly's characterization of the relationship between the judiciary and executive branch on a number of points.

The first point of differentiation is rather banal, but bears mentioning: whereas Kelly's analysis in *Governing with the Charter* is focused at the federal level, this case study focuses primarily on the provincial level of government responding to the Supreme Court. Moreover, given the informal exchange between Mulroney and Bourassa preceding the tabling of Bill 178, the case study also involves a federal executive to provincial executive exchange.

The second point of differentiation lies in Kelly's analysis of the 'power of the cabinet.' According to Kelly, one of the major transformations ushered by the *Charter* is an expansion in the power of the cabinet to govern. More specifically, through the function of *Charter*-vetting, the cabinet extends its reach by directly engaging with bureaucratic actors. As an example of this expansion, Kelly points to "the requirement that all memoranda to cabinet be scrutinized by the [Department of Justice] for *Charter* compliance."⁵⁰² This, Kelly argues, has allowed "cabinet to govern with the *Charter*, it has occurred outside the parliamentary arena and within the machinery of government that directly supports the cabinet and its legislative agenda."⁵⁰³

However, in the context of Bill 178 we see that, from an institutional perspective, the Quebec government's *Charter* vetting process was not nearly as intricate as that of the federal government. Whereas Kelly points to an elaborate network of experts undertaking *Charter* vetting within the federal bureaucracy, this case study concludes that Bill 178 was crafted in virtual secrecy with minimal input from conventional stakeholders. From archival material, legislative debates and interviews, we know that Bourassa's drafting of Bill 178 was very unilateral in nature; it did not engage members of the provincial bureaucracy, and excluded many members from the cabinet. The conference of power within the context of

⁵⁰² Kelly, *Governing with the Charter*, 8.

⁵⁰³ Kelly, *Governing with the Charter*, 8.

this case is far more pronounced and more exceptional than what is advanced in Kelly's analysis of how the federal executive body leverages the *Charter* as a mechanism for governing.

The concentration of power on a small faction of the cabinet points to yet another important point of differentiation; namely, in the context of Bill 178, there was no broader 'institutional mechanism' to in support *Charter*-vetting. For example, members from opposition parties were excluded from the drafting of Bill 178 which represented a significant departure from the institutional norms of the National Assembly on matters pertaining to language and cultural policy.⁵⁰⁴ Furthermore, the exclusion of the provincial government bureaucracy points to yet another absence of a broader institutional mechanism for *Charter* vetting. As Kelly notes: "The paramount status of democratic activism is clearly evident in its relationship with bureaucratic activism, as the cabinet has ensured that the machinery of government has responded to the rights culture introduced by the *Charter*."⁵⁰⁵ Consequently, the bureaucratic activism within the scope of Kelly's analysis does not extend to the case examined within this chapter.

While this case study points to the Supreme Court and the executive as the primary actors of constitutional interpretation, the sources of power of that dynamic are different from Kelly in the sense that there was an absence of overwhelming support for the *Canadian Charter of Rights and Freedoms*. Within the context of this chapter, not only was there no broader institutional mechanism to support *Charter* vetting, but outside groups, such as civil society actors, were also excluded from consultation. In conclusion, while this thesis agrees with Kelly's observation that judicial review ought to focus on the dynamics between the Supreme Court and the executive, within this case study, the dynamics of that relationship are dramatically different.

5.2 How are we to understand parliamentary sovereignty in the context of this case?

⁵⁰⁴ However, one can hypothesize that, even if the Parti Quebecois had have been consulted, it is highly unlikely that in within context they would have advocated for greater *Charter* compliance

⁵⁰⁵ Kelly, *Governing with the Charter*, 10.

As explored in Chapter Four, the province of Quebec has historically argued in favour of the historical principle of parliamentary sovereignty as mechanism to resist what it *perceived* as centralizing efforts of the federal government.⁵⁰⁶ In Chapter Four, the principle was continually re-invoked during constitutional conference as an argument in favour of a weak Canadian *Charter*. As examined within this chapter, parliamentary sovereignty was repeatedly invoked in the facts of the AG of Quebec in *Ford* and *Devine*, however when it came to drafting Bill 178, it was done in virtual secrecy which meant that led to a lack of any interaction with “parliament” at the provincial level. Subsequently, what does it mean for the government of Quebec to utilize the term “Parliamentary supremacy,” when in fact, it is all executive led? How are we to understand not only judicial review, but parliamentary sovereignty as well in light of this evidence?

By contrast, authors such as Cairns and Smiley have advanced a more politically descriptive argument of how parliamentary sovereignty functions in a post-*Charter* era. For these two authors parliamentary sovereignty is firmly rooted in provincial empowerment as the antithesis to federal centralization efforts through the *Charter*. For example, Cairns states “the language of parliamentary supremacy [is] a rhetorical device to protect province-building against the nationalizing philosophy of the *Charter*”⁵⁰⁷

While Cairns and Smiley’s account of parliamentary sovereignty is accurate for this case study, the principle of parliamentary sovereignty could also be conceptualized as what Hiebert refers to as a “relational approach.” Hiebert presents a contemporary model of parliamentary sovereignty, where one “assumes that both parliament and courts have valid insights into how legislative objectives should reflect and respect the *Charter*’s normative

⁵⁰⁶ For scholarly works that debate the merits of the effect of the *Charter* on federal power and centralization see: Jeremy A. Clarke, “Beyond the Democratic Dialogue, and Towards a Federalist One: Provincial Arguments and Supreme Court Responses in *Charter* Litigation,” *Canadian Journal of Political Science* 39, no. 2 (2006).; James B Kelly, “Reconciling Rights and Federalism during Review of the *Charter* of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982-1999,” *Canadian Journal of Political Science* 34 (2001).; Katherine E. Swinton, *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years* (Toronto: Carswell, 1990).; Katherine E. Swinton, “Federalism, the *Charter*, and the Courts: Rethinking Constitutional Dialogue in Canada,” in *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World* eds. Karen Knop, Sylvia Ostry, Richard Simeon, Katherine Swinton (Vancouver: University of British Columbia Press, 1995).

⁵⁰⁷ Alan C. Cairns, “The Politics of Constitutional Conservatism,” in *And No One Cheered: Federalism, Democracy and the Constitution Act*, eds. Keith Banting and Richard Simeon, (Toronto: Methuen, 1983) 42; see also: Donald V. Smiley, *The Federal Condition in Canada*. (Toronto: McGraw-Hill Ryerson, 1987), 192-93.

values.”⁵⁰⁸ In her work, Hiebert advances a more nuanced version of interpretive conflict between the judicial and legislative branches, wherein legislatures can differ with judicial opinion in a respectful manner and the source of dispute is not the rights themselves, but rather the priority and weight attributed to these rights through the application of section 1 or 33 of the *Charter*.⁵⁰⁹

Applied to the context of this study, a relational approach would likely argue that Quebec’s use of section 33 and advancement of the concept parliamentary sovereignty to justify the legitimacy of Bill 178 was a mechanism that essentially allowed Quebec to expressly prioritize the preservation of the French language. In this case, preserving and promoting French as the language of commerce and the ‘public sphere’ was a greater priority than guaranteed freedom of expression (a conclusion that is consistent with the arguments advanced by the Supreme Court and AG Canada).

While Hiebert’s analysis provides a normative account contributing toward a more substantive exchange between the concepts of parliamentary sovereignty and the *Charter*, we are once again confronted with the absence of the substantive participation of the legislative branch in this case study. As a step further in the analysis of coordinate interpretation, in an article entitled “Parliamentary Bills of Rights: An Alternative Model?” Hiebert has advanced the notion of a “parliamentary rights model” that resists judicial-centric approaches to rights interpretation through the inclusion of “legitimate political dissent” from judicial decisions, coupled with the evaluation of proposed legislation from a rights perspective.⁵¹⁰ Hiebert argues that this allows “the possibility of a broader range of perspectives on the appropriate interpretation of rights or the resolution of disagreements involving claims of rights than those arising from more judicial-centric bills of rights.”⁵¹¹ In this respect, Hiebert’s observations apply remarkably well to the case study discussed in Chapter Five and Six, while underscoring the plausibility of a coordinate interpretation style of judicial review.

⁵⁰⁸ Janet L Hiebert, *Charter Conflicts: What is Parliament’s Role?* (Montreal: McGill-Queen’s University Press, 2002), 50.

⁵⁰⁹ *Ibid.*, 54.

⁵¹⁰ Janet L Hiebert, “Parliamentary Bills of Rights: An Alternative Model?” *The Modern Law Review* 69, no. 1 (2006): 7–28.

⁵¹¹ *Ibid.*, 7–28.

5.3 A Case for Coordinate Interpretation: the need for descriptive and normative forms of coordinate interpretation

Authors such as Baier maintain the Supreme Court of Canada has retained a balanced and impartial function in reviewing both federal and provincial legislation.⁵¹² On the other end of the spectrum, authors such as Bzdera vehemently maintain that the courts are fundamentally an instrument of federal centralization.⁵¹³ In answering this question, many authors seek to examine large-scale trends in SCC decisions. However, in the circumstances of this study, I seek to do the contrary by examining the particulars of the *Ford* and *Devine* cases. What emerges from the parameters of this study is an image of the judiciary as a political actor, albeit a secondary actor caught between a tug-of-war two executive forces.

The previous paragraphs have noted the deficiencies of the *Charter* dialogue hypothesis' applicability to the case study of Bill 178. Bearing in mind these important differences, this thesis proposes that, for this case study, coordinate interpretation offers a more accurate representation of constitutional interpretation. As a model of constitutional interpretation, coordinate interpretation accounts for the involvement of multiple branches of government.

Coordinate interpretation regards the judiciary as one political actor among others within the Westminster parliamentary system. Moreover, a similar conceptualization emerges when one considers the role the Supreme Court within Canadian federalism. As Baier explains: "Students of Canadian federalism are perhaps too quick to forget that federalism is a legal and constitutional structure as much as it is a political one."⁵¹⁴ Consequently, "Courts continue to be a significant, albeit almost unacknowledged actor in intergovernmental relations...Judicial review continues to play an important role in Canadian federalism, and our account of the federal system is weaker for not recognizing its contribution."⁵¹⁵

⁵¹² See: Gerald Baier, "The Law of Federalism: Judicial Review and the Division of Powers"; James B. Kelly, "Reconciling Rights and Federalism during Review of the Charter of Rights and Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982-1999," *Canadian Journal of Political Science* 34 (2001).

⁵¹³ André Bzdera, "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review," *Canadian Journal of Political Science* 26, no. 1 (1993).

⁵¹⁴ Gerald Baier, "The Law of Federalism: Judicial Review and the Division of Powers," in *New Trends in Canadian Federalism*, eds. Francois Rocher and Miriam Smith (Peterborough: Broadview Press, 2008), 111.

⁵¹⁵ *Ibid.*, 111.

Of all the metaphors examined, coordinate interpretation describes the weakest form of judicial review, but it also accounts for “considerable inter-institutional participation in the exercise of any power but only within the limits of formal assignment of power.”⁵¹⁶ In terms of judicial power, the model of coordinate interpretation suggests that “(1) the legislature may exert partial agency over the judicial power to interpret, and (2) the judicial interpretive power may not exceed partial agency over the assigned powers of other branches.”⁵¹⁷ Rejecting the orthodoxy of a need for institutional check-and-balances within the Westminster parliamentary model, Baker advances a theory of judicial review in which “the relationships between [branches of government] are structured upon the notion *that each institution contributes to the operation of the rule of law in a functionally distinct manner.*”⁵¹⁸

Baker’s metaphor of coordinate interpretation rejects the notion that responsible government has fused together the executive and legislative branches of government.⁵¹⁹ For scholars that sought to reinforce the judicial branch as a counterbalance to fused branches of the executive and legislature, the entrenchment of the *Canadian Charter of Rights and Freedoms* was an opportunity to augment the power of the judiciary against the other branches.⁵²⁰ Beyond Baker’s use of the model, coordinate interpretation is imbued with both a descriptive and normative quality that ought to be differentiated when applied to case studies. Within the context of this dissertation, Baker’s emphasis on the differentiation between the power of the executive and legislative branches highlights the appropriateness of a *descriptive* form of coordinate interpretation while simultaneously demonstrating that Bill 178 was a failure of a *normative* form of coordinate interpretation.

Closer examination of how the Quebec government produced its “legislative” response to judicial invalidation of sections of the CFL reveals that the executive branch drafted the Bill 178 in virtual secrecy and with no substantive consultation with the legislature. In this sense, the case study of Bill 178 fully supports the descriptive value of the model for coordinate interpretation because it underscores the importance of examining

⁵¹⁶ Denis Baker, *Not Quite Supreme: The courts and coordinate constitutional interpretation*, (Montreal: McGill-Queen’s University Press, 2010), 13.

⁵¹⁷ *Ibid.*, 13.

⁵¹⁸ *Ibid.*, 14. [emphasis added]

⁵¹⁹ *Ibid.*, 9.

⁵²⁰ *Ibid.*, 9.

the strategic and unique participation of branches of government in constitutional interpretation. Failure to analyse the distinct involvement of the executive and legislative branches in judicial review results in an oversimplification of how elected branches of government respond to judicial power. Subsequently, terms such as “legislative response” commonly used within the *Charter* dialogue model considerably overstates the involvement of the legislature and the deliberative democratic counterweight to judicial power.

This case study also highlights a clear failure of normative coordinated interpretation. Normative coordinate interpretation emphasizes the distinct role of each branch as it contributes to the constitutional coordination within its respective jurisdiction. However, while each branch of government plays a distinct function in constitutional interpretation, Baker and other scholars note that there is an absence of a clear delineation of powers between branches of federal government.⁵²¹ Within the context of a parliamentary democracy, authors such as Kelly and Baker are keen to note that “the judiciary has generally been viewed as a complementary actor.”⁵²² The absence of this clear delineation of powers makes the prospect of coordinate interpretation between branches of government at the federal level makes all the more probable – and appropriate - within Canadian discussions about the function and scope of judicial review.

Yet, the case study of Bill 178 demonstrates that branches (and levels) of government that the blurred boundaries of these jurisdictions leads to the considerable overstepping of jurisdictional boundaries. As examined in Chapters Four and Five, the Canadian *Charter* created a pretext for federal intervention via the Supreme Court into matters of language and culture, a conventional matter of provincial jurisdiction. At the provincial level, the executive branch controlled the drafting of Bill 178 to the exclusion of the legislative branch. As seen in the facts submitted to the AG Quebec in the *Ford* and *Devine* cases, the power of the executive branch (and legislative branch) was to limit judicial power from the historical principle of parliamentary sovereignty. In the context of Bill 178, this was realized through the invocation of the notwithstanding clauses in the Canadian and Quebec *Charters*.

⁵²¹ Barry L. Strayer, *The Canadian Constitution and the Courts: The Function and Scope of Judicial Review*. 3rd ed. (Toronto: Butterworths, 1988), 49-50.

⁵²² James B. Kelly, *Governing with the Charter Legislative and Judicial Activism and Framers' Intent*, (Vancouver: UBC Press, 2005), 11.

6. Conclusion

When examined from a historical institutionalist perspective, the National Assembly of Quebec appears to have strategized its response through an assertion of parliamentary sovereignty, rather than the desire to engage in a “dialogue” with the Supreme Court of Canada. This chapter opens with a brief overview and analysis of court documents pertaining to the *Ford* and *Devine* cases. The conclusion drawn from these court documents is that the Attorney General of Quebec, Gil Rémillard,⁵²³ largely framed the province’s defence of the *Charter of the French Languages* a matter of parliamentary sovereignty, as well as a matter well within the jurisdiction of the province.

However, a closer examination of how the Bourassa government crafted its response to judicial invalidation reveals that the ‘legislative response’ to the Court had little to do with the National Assembly. In contrast to the rhetoric of parliamentary sovereignty advanced by province in earlier constitutional conferences and *facta* submitted to the Supreme Court of Canada in *Ford* and *Devine*, the National Assembly of Quebec had little involvement in the drafting of Bill 178 and the decision to invoke the notwithstanding clause. Rather, Bill 178 was crafted exclusively by the executive branch, in virtual secrecy among a handful of Bourassa’s cabinet members. This conference of power for the creation of Bill 178 was to the exclusion of Bourassa’s own caucus members (including Members of the National Assembly that represented predominantly anglophone ridings), other members of the National Assembly of Quebec as well as civil society organizations.

Furthermore, archival evidence suggests that Bourassa was unlikely to have perceived the crafting of Bill 178 as a “dialogical” response to judicial nullification. This was due, in part, to pressure from the executive branch of the federal government to comply with the findings of the Supreme Court. Prior to the tabling of Bill 178, Mulroney requested that Bourassa comply with the Supreme Court decision and asked Bourassa not to pass legislation that would require use of the notwithstanding clause (section 33). Adding fuel to the fire, Bourassa was aware that Mulroney had every intention to remove section 33 from

⁵²³ Gil Rémillard served as Justice Minister from June 23, 1988 to January 11, 1994 and was preceded by Herbet Marx who served from December 12, 1985 to June 23, 1988.

the *Charter*, thereby removing the institutional mechanism that Quebec had come to rely upon for asserting ‘parliamentary sovereignty’ in a post-*Charter* era.

This chapter concludes that the model of coordinate interpretation is the most appropriate model of judicial given its capacity to account for the nuanced and ambiguous participation of various branches of government. What will emerge in the next section is a further “opening up” of the actors involved in this coordinate interpretation. Notably, the role that civil society actors play and the influence waged by the UN Human Rights Commission on Bill 178. Coordinate interpretation, in this case, takes a curious turn to include two parties that would – by all normal accounts – fall well beyond consideration in other models of judicial review.

Chapter Six: The Second ‘Legislative Response’

1. Introduction

In 1988, the Bourassa government had passed the legislation in response to the judicial invalidation of section 58 of the *Charter of the French Language*. Bill 178 was steeped in controversy because the legislation failed to comply with the Supreme Court’s decisions, and furthermore its unconstitutionality was shielded from further judicial review by the inclusion of the notwithstanding mechanism. Chapter Five examined the first of two ‘legislative responses’ to judicial invalidation of sections of the *Charter of the French Language*. Whereas the first legislative response, Bill 178, consisted of a small group of conventional political actors (e.g. members of the provincial executive and executive federal government), the second legislative response (Bill 86), the subject of examination in this chapter, involved a broader swath of less conventional actors, including civil society actors and international institutions.

The passing of *Bill 178: an amendment to the Charter of the French Language* left both sides feeling dissatisfied. Few, if any, Anglophones wished to acknowledge the compromise (albeit limited) by the Bourassa government. A federal cabinet document entitled “Divided by Their Convictions: Language, Language Policy, and “Bilingualism” in Canada” effectively summarized the political fallout of Bill 178:

To the Anglophone majority outside Quebec, Bill 178 represented a new Quebec agenda of ‘uni-lingualism’ – meaning to some a betrayal of the ‘bilingualism bargain’ and to others, who always opposed ‘bilingualism’, a vindication of their suspicion that ‘catering to the French’ (i.e. Quebec) through the ‘bilingualism’ policy would simply lead to new demands, with the threat of separatism as blackmail...in addition, the impression that Anglophones have formed (with no discouragement from federal government) that ‘language rights are on equal footing or identical with human rights, and the linkage of Bill 178 with freedom of expression, may serve to explain the exaggerated outrages and revulsion evoked in English-speaking Canada about the Bill: if the Quebec government was prepared to override one area of human rights (i.e., “language rights”), what other rights might not be at risk?⁵²⁴

Accordingly, to francophone Québécois(es), the Anglophone reaction to Meech Lake and Bill 178 confirms suspicion about Anglophone hypocrisy. From the Québécois(es) perspective, Quebec’s priorities have been clear for at least twenty

⁵²⁴ Canada, Privy Council Office, *Divided by Their Convictions: Language, Language Policy, and “Bilingualism” in Canada*, Ottawa, 25 May 1990, 19.

years. For them, Bill 178 is no sudden departure or new agenda, but a minimalist step to maintain the (in their view threatened) status quo, is focused primarily on an “affirmation” of Quebec’s identity and is not a suppression of “rights”. Thus, English Canada’s protests about the suppression of “rights” appears to be not only a pious mask used to disguise an assimilation agenda, but also in the accusations that Quebec intends to suppress human rights) an insult to the whole francophone society.⁵²⁵

The enforcement of Bill 178, in spite of the political controversy, proved to be fairly effective. Between April 1989 and March 1989, the commission sent only 65 warnings for non-compliance to businesses, a decrease compared to the 382 warnings the year prior.⁵²⁶ Furthermore, prosecution of businesses that violated the *Charter of the French Language* also decreased: “The commission asked the Justice Department to prosecute only 12 stores in the same period, compared with 104 stores the previous year. And only four stores have been prosecuted in court, one third the 1988-89 number.”⁵²⁷ In an academic address Minister of Education, Claude Ryan, firmly stated that the government of Quebec disagreed with the Supreme Court’s characterization of commercial signage as matter of civil liberties: “Québec is aware, on the other hand, of the negative effect which its policies regarding commercial signs and admissibility to English schools have had on public opinion in English Canada. On commercial signs, we do not share the opinion according to which the decisions taken by the National Assembly of Québec are a negation of fundamental individual liberties; rather, we believe that these decisions are related to public order and stem from the policy which seeks to publicly express the French character of Québec.”⁵²⁸

Anglophone civil society actors, feeling disenfranchised and disempowered with the passage of Bill 178, immediately resorted to transnational activism whereby they engaged other state actors and international institutions. This transnational activism culminated from a small group of Anglophones who submitted a complaint to the United Nations Human Rights Committee, accusing the Canadian and Quebec governments of

⁵²⁵ Canada, *Divided by Their Convictions*, 19.

⁵²⁶ Sarah Scott, “Quebec’s Controversial French-only Sign Law, Bill 178,” *Montreal Gazette*, March 17, 1990, 1.

⁵²⁷ *Ibid.*, 1.

⁵²⁸ Claude Ryan, “Reconciliation: A Québec View,” Presented at seminar on language rights and policies, Kingston, Ontario, December 8, 1989, 11-21. Quoted *Quebec’s Positions on Constitutional and Intergovernmental Issues: from 1926 to March 2001*, (Quebec: Quebec), 167. https://www.saic.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part2/ClaudeRyan1989_en.pdf

contravening provisions of the *Optional Protocol to the International Covenant on Civil and Political Rights*. This submission represented a deep embarrassment to the Canadian and Quebec governments, and while the decision of the UNHRC was not legally binding, the decision produced a significant pressure on the Quebec government to replace Bill 178 with Bill 86 and bring the *Charter of the French Language* (CFL) into greater compliance with the *Charter of Rights and Freedoms* as per the recommendations of the Supreme Court of Canada expressed in *Ford* and *Devine* five years earlier.

As the second ‘legislative response’ to the Supreme Court’s invalidation of the *Charter of the French Language*, Bill 86 raises important questions regarding the types of actors and institutions involved in constitutional interpretation. Consistent with the arguments presented in Chapter Five, this chapter concludes that the accuracy of the dialogue hypothesis is further diminished, and challenges the assumption that Bill 86 was drafted with the intention of bringing the CFL into greater compliance with the *Charter of Rights and Freedoms*. Rather, this step toward compliance was more so a product of international pressure and human rights norms rather than a dialogical response to the Supreme Court of Canada.

Each section of this chapter examines the position of the Quebec and federal governments through a review of archival documents, scholarly publications and news articles. The themes extracted from these documents include: a) the role of civil society actors engaging international institutions; b) the influence of international human rights norms on Quebec; and c) the political pressure exerted by international institutions on Quebec and the effect this had on the second ‘legislative sequel’ of Bill 86. Through an analysis of these themes, the chapter concludes that an accurate model of judicial review, with respect to the question of the constitutional compliance of the *Charter of the French Language*, must be a modified version of coordinate interpretation that goes beyond domestic actors (i.e. the Supreme Court of Canada, the federal government and the National Assembly of Quebec), to include civil society actors and international institutions (in this case the UNHRC and the *Optional Protocol to the International Covenant on Civil and Political Rights*).

2. “To Get a Little Justice”: Civil Society Actors Go to the UNHRC

Immediately following the enactment of Bill 178, Quebec Anglophone civil society actors pressed foreign governments for support and condemnation of Bourassa’s response to judicial nullification. For example, l’association des gens d’expression anglaise de la vallée de Chateauguay, petitioned US governors from neighbouring states,⁵²⁹ asking that New England governors provide political support for the protection of individual human rights, in particular that of freedom of expression. The petition urged the New England Governors to pressure Bourassa, or at the very least make a public statement about their thoughts on the matter.⁵³⁰ Additionally, local chapters of international organizations such as Amnesty International, threatened to mobilize in the event a Quebec resident was jailed for contravening Bill 178.⁵³¹

Having failed to consult with key stakeholders in the drafting of Bill 178, Bourassa had effectively alienated Anglophone civil society activists. Furthermore the use of the notwithstanding clause shielded Bill 178 from further judicial challenge for the ensuing five years only added fuel to the fire. However, Bourassa’s government was not the only actor to raise the ire of Anglophones; for all of its posturing and public support for linguistic minorities, the federal government had failed to win the trust of Quebec Anglophones.⁵³² In 1990, a study widely circulated within the Privy Council Office effectively summarized the sentiments of Anglophone civil society actors in Quebec as: “Official language minorities have felt increasingly like pawns in a longer federal-provincial (and primarily Ottawa-Quebec) political dynamic: uncertain of what the federal commitment to their “revendications” really is...”⁵³³ Feeling disappointed at the lack of support of the federal government, civil society actors sought to elevate their status from pawn to key player.

With this sentiment in mind, on April 11, 1991, three complaints were filed by four Anglophone Quebec residents (McIntyre, Singer, Ballantyne and Davidson) to the United

⁵²⁹ These states included: Maine, Vermont, Massachusetts, New York and New Hampshire.

⁵³⁰ Gilbert Lavoie, “Loi 178: des Anglophones demandent l’aide des Américains,” *La Presse*, Tuesday 7 February, 1989, B1.

⁵³¹ Canadian Press, “Amnesty International Might Act If Anyone Is Jailed under Bill 178,” *The Gazette (Index-only)*, December 31, 1988.

⁵³² Canada, *Divided by Their Convictions*, 21.

⁵³³ *Ibid.*, 21.

National Human Rights Committee.⁵³⁴ The complaints submitted to the UN Human Rights Committee alleged that Quebec's Bill 178 violated Canada's obligations under the *Optional Protocol to the International Covenant on Civil and Political Rights* (one of the same covenants which Quebec had enthusiastically sought to ratify in the 1970's),⁵³⁵ and specifically violated Article 19 of the Covenant.⁵³⁶ The complaints were not limited to Quebec's Bill 178; complaints were also filed against the *Canadian Charter of Rights and Freedoms* and the *Quebec Charter of Human Rights and Freedoms*, alleging that the use of the 'override clause' (section 33) for the enactment of Bill 178 was a violation of the International Covenant's article 2 (provision of effective remedies).⁵³⁷

While three communications were brought to the United Nations Human Rights Committee, the Committee opted to separate the communications into two sets: Ballantyne/Davidson and McIntyre as one, and Singer as the other.⁵³⁸ The Communication submitted by McIntyre, Ballantyne and Davidson argued that Bill 178 placed them at a competitive disadvantaged "*vis-à-vis* French speaking competitors who are allowed to use their mother tongue without restriction."⁵³⁹ Given that McIntyre's business catered to an English-speaking clientele, Bill 178 prevented him from advertising that English was his company's language of service. Consequently, McIntyre alleged that Bill 178 caused "a loss

⁵³⁴ For a comprehensive overview of the function and history of the UNHRC, see: Thomas Buergenthal, "The U.N. Human Rights Committee," *Max Plank yearbook of United National Law*, 5 (2001).

⁵³⁵ See Chapter 3 for more contextual information.

⁵³⁶ Article 19 states: 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regard less of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; (b) For the protection of national security or of public order, or of public health or morals. For complete document, consult: United Nations, General Assembly of the United Nations, *International Covenant on Civil and Political Rights*, December 19, 1966. <https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>

⁵³⁷ Article 2 of the Covenant states: "Subject to the provisions of article 1, individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration." See: United Nations, Office of the High Commissioner, *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December, 1966. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>.

⁵³⁸ Although Canada had requested that the three communications be considered together, instead the UNHRC Committee declared Mr. Singer's communication admissible on May 13, 1993. Comments on the merits were requested for November 10, 1993. See: Canada, Prime Minister's Office, *Aide Memoire: Bill 178 Communications Before the United Nations*, 21 April 1994, 7.

⁵³⁹ United Nations, United Nations Human Rights Committee, 47th Session, *Communications Nos. 359/1989 and 385/1989*, 5 April 1993. <http://www1.umn.edu/humanrts/undocs/html/v359385.htm>.

of business and a reduced impact on passersby, who were unable identify his services by an external sign.”⁵⁴⁰ Mr. McIntyre also claimed that his opposition to the provincial legislation had resulted in bad press and intimidation, thereby further alienating clientele from his business: “since he has ‘taken on the Government’ a certain "fear factor" discourages potential clients. His challenge of Bill 178 had resulted in “hate calls, threats and ridicule in the press by suggestions that he is a ‘racist’.”⁵⁴¹

Ballantyne *et al.* raised three central complaints against Quebec and the Government of Canada. The first complaint claimed that, as Anglophones residing in Quebec, Ballantyne *et al.* were adversely affected by the application of Bill 178 because the bill required exclusive use of the French in public billposting, commercial advertising outdoors, public transportation and certain establishments such as shopping malls.⁵⁴² Second, Ballantyne *et al.* claimed that the inclusion of the override clauses in the Canadian (section 33) and Quebec (section 52) *Human Rights Charters* facilitated the violation of human rights by suspending the obligations of government to honour entrenched rights and denied citizens the legal remedies to challenge the violation of their human rights.⁵⁴³ Third, the inclusion of the override provisions in the Canadian and Quebec *Charters*, as well as the inclusion of section 33 in Bill 178, violated Canada and Quebec’s obligation under the *Covenant* (in particular, section 2 of the *Covenant*).⁵⁴⁴

As the State Party, Canada was obligated to represent itself (and the Quebec government) at the 41st session of the United Nations Human Rights Committee (April 1991). The government of Canada argued that the submission made by Ballantyne *et al.* was inadmissible because the applicants had not yet exhausted all of their domestic mechanisms for resolution, a provision clearly articulated in section 2 of the *Covenant*. For example, Ballantyne *et al.* had not yet used mechanisms such as the Federal Court Challenges Program, which would have provided funding “for the purpose of contesting the restrictions imposed by the provincial law.”⁵⁴⁵

⁵⁴⁰ United Nations, United Nations Human Rights Committee, 47th Session, *Communications Nos. 359/1989 and 385/1989*, 5 April 1993. <http://www1.umn.edu/humanrts/undocs/html/v359385.htm>

⁵⁴¹ *Ibid.*

⁵⁴² *Ibid.*

⁵⁴³ *Ibid.*

⁵⁴⁴ *Ibid.*

⁵⁴⁵ Court Challenges Program, *Who We Are*, 2015. <http://www.ccppcj.ca/en/about.php>

However, the UNHRC disagreed with the arguments presented by the Canadian government and declared that the communications submitted by McIntyre, Ballantyne/Davidson were admissible based on Quebec's invocation of the notwithstanding clause. The first argument for admission of the complaint to the UNHCR was that the notwithstanding clause had effectively undercut the power of the judiciary. The decision of the UNHRC noted, "despite the fact that some of the relevant statutory provisions had been declared unconstitutional successively by the Superior, Appeal and Supreme Courts, the only effect of this had been the replacement of these provisions by ones that are the same in substance as those they replaced, but reinforced by the "notwithstanding" clause of Section 10 of Bill 178."⁵⁴⁶ Furthermore the UNHCR also took issue with the inability of complainants to seek further remedies. Once again the UNHRC was critical of the notwithstanding clause's ability to shield the legislation from further legal challenges: "The Committee further noted that the "notwithstanding" clause, which is not applicable to the provision(s) at issue in the proceedings referred to by the State party, remained applicable to Section 58 of Bill 178, the provision at issue in the communications before the Committee. It therefore concluded that no effective remedy was available to the authors in respect of their claim."⁵⁴⁷

In submitting their complaints to the UNHRC, the three complainants' principle motivation was to embarrass the Canadian, and especially Quebec, governments on the international stage.⁵⁴⁸ In a statement to the media, McIntyre threatened: "We're probably going to go to a lot of big papers in the United States and let them know [about the case]. I don't care what they do here in Quebec, I can put up with it another couple of years and (then) get out."⁵⁴⁹ In another interview with the Canadian Press, McIntyre added: "I used to be a fairly strong Canadian, but I'm not a Canadian now very much - when I have to go to the United Nations over my country to get a little justice."⁵⁵⁰ The decision of civil society actors to file a complaint with the UNHRC was strategic and relied on the path dependency

⁵⁴⁶ United Nations, United Nations Human Rights Committee, 47th Session, *Communications Nos. 359/1989 and 385/1989*, April 5, 1993. <http://www1.umn.edu/humanrts/undocs/html/v359385.htm>

⁵⁴⁷ *Ibid.*

⁵⁴⁸ Canada, External Affairs and International Trade Canada, *Facsimile communication regarding newspaper articles on Bill 178*, April 13, 1993, 5. N.B.: This consists of newspaper articles by Canadian Press, April 8, 1993 and are untitled.

⁵⁴⁹ *Ibid.*, 5.

⁵⁵⁰ Canada, *Facsimile communication regarding newspaper articles on Bill 178*, 5.

of other transnational human rights advocacy campaigns. By the 1990s, civil society actors in Quebec were well versed in pressuring domestic government through transnational activism; for example, in 1982 Montreal's Ligue des droits de l'homme invited Amnesty International, Human Rights Watch, and the Fédération internationale des droits de l'homme to successfully leverage international human right norms so as to draw attention to the inhumane treatment of prisoners in Quebec which, at the time, had the highest suicide rate of inmates in the country.⁵⁵¹ The report and awareness raised by the civil society actors subsequently “embarrassed the federal and Quebec governments and provoked a national debate on prisoners' rights.”⁵⁵²

A similar strategy of international ‘naming and shaming’ was used by a number of civil society actors opposing Bill 178. In 1976 Canada, with the agreement of the provinces, ratified the *International Covenant on Civil and Political Rights*. The ratification of this covenant marked an important moment in Quebec’s para-diplomacy,⁵⁵³ as it had successfully negotiated that the province would be responsible for implementing provisions that fell within its jurisdiction. Quebec and Canada’s ratification of the *Covenant* guaranteed individual and group rights, and guaranteed fundamental freedoms such as: freedom of expression, equal protection, and non-discrimination, of persons belonging to linguistic minorities.⁵⁵⁴ While the *Covenant* permits the suspension of certain rights, a signatory party may only do so in the event of a national emergency. Given this narrow exception and the staunch commitment of the UNHRC toward a strong rights model, the governments of Quebec and Canada anticipated that the conclusion of the Committee would not be in their favor and deeply embarrassing to the governments of Canada and Quebec.

Even following the UNHRC’s decision and passage of Bill 86, Anglophone civil society members continued to conduct transnational activist campaigns and petition international institutions on matters of language policy in Quebec. For example, Gordon McIntyre (the same involved in the UNHRC submission), filed a complaint to the

⁵⁵¹ Dominique Clément, “Human Rights in Canadian Domestic and Foreign Politics: From “Niggardly Acceptance” to Enthusiastic Embrace,” *Human Rights Quarterly* 34 (2012), 767.

⁵⁵² *Ibid.*, 767.

⁵⁵³ This was a domestically significant negotiation, given that the Quebec government under the PQ leadership suspected that the federal government was pursuing international covenants as part of a broader national unity project. See: Clément, “Human Rights in Canadian Domestic and Foreign Politics,” 761.

⁵⁵⁴ Buergenthal, “The U.N. Human Rights Committee,” 344.

Committee of the UN Human Rights in Geneva claiming that Bill 86 violates Canada's obligations under the *International Covenant on Civil and Political Rights*.⁵⁵⁵ Furthermore, these transnational activist efforts were complemented with domestic activism: “Certains anglophones à Montréal ont tenté de faire entendre leurs revendications linguistiques au plan national à travers la contrepartie fédérale au Parti Égalité (Federal Equality Association) qui avait présenté cinq candidats indépendants aux élections fédérales. Aucun de ces candidats n’a eu des résultats électoraux significatifs. L’électorat anglophone du Québec a voté plutôt massivement pour le PLC.”⁵⁵⁶

As members of civil society organizations, McIntyre, Singer, Ballantyne and Davidson’s strategy to challenge legislative supremacy and the limitations placed on Canadian judicial power (in the form of the notwithstanding clause) represent an important catalyst for Quebec’s amendment to the *Charter of the French Language*. Subsequently, the very deliberate strategy of Anglophone civil society actors to leverage international human rights norms and institutions in order to challenge domestic legislation and constitutional order is demonstrative of the need for a model of judicial review that accounts for the inclusion of non-state actors in judicial, executive and legislative deliberations of human rights issues.

3. UNHRC Reviews Bill 178

Two years later, on May 7, 1993, the UN Human Rights Committee ruled that Bill 178 violated the “freedom of expression guarantees” provided by the Covenant, and requested Canada to “report within six months on the measure taken to correct the situation. It also rule[d] the communication on Bill 101 admissible and asked that a submission on Bill 101 be presented.”⁵⁵⁷ Specifically, the Committee’s decision on Ballantyne/Davidson and McIntyre stated:

⁵⁵⁵ Canada, Privy Council Office, *Analyse post-électorale du dossier linguistique*. 29 October 1993, 8.

⁵⁵⁶ *Ibid.*, 8.

⁵⁵⁷ Canada, Privy Council Office, *Memorandum for Jocelyn Bourgon: Quebec’s Signage Legislation – U.N. Decision*, 30 August 1994, 1.

Article 19: Bill 178 violates guarantees of free expression. The law cannot be justified by the need to protect the rights of others (in this case, the francophone community), nor is the law necessary for public order.

Article 26: Bill 178 does not violate the guarantee of equality. The restrictions on advertising apply to all persons engaged in trade, regardless of the language they speak.

Article 27: For the purposes of the Covenant, the rights of “minorities” applies to a minority within the ratifying state (i.e., Canada) and not within a province. Therefore, article 27 did not apply to Anglophone complainants.⁵⁵⁸

The subsequent sections examine the responses of the federal and Quebec governments to the decision of the UNHCR on the validity of Bill 178. Both governments were sensitive to the decision of the UNHRC, with a particular concern regarding the embarrassment of non-compliance to international human rights norms. The federal government sought to distance itself from *Ballantyne et al.* case altogether and the Quebec government sought to diminish the significance of the case in every public statement. However, regardless of their attempts to dodge the UNHRC decision, neither government, especially that of Quebec, could escape the political pressure exerted by the UNHRC and international human rights norms.

3.1 Strategy of the Federal Government

Archival documents reveal that the federal government was particularly sensitive to the domestic and political fallout of the *Ballantyne et al.* case. While the United Nations Human Rights Committee’s decisions were not legally binding, the political impact of the Committee’s decision had the power to “attract considerable publicity at both the domestic and international levels.”⁵⁵⁹ Canada’s communication regarding the *Ballantyne, Davidson* and *McIntyre v. Canada* cases (Communications Nos. 359/1989 and 385/1989) was clear to note that Bill 178 was Quebec’s legislation (in spite of the fact the *Ballantyne* case also raised questions about the legitimacy of the notwithstanding clause).⁵⁶⁰ In an effort to distract from the attention drawn to the notwithstanding clause of the *Charter*, and distance itself from the controversy surrounding Bill 178, the federal government transmitted the

⁵⁵⁸ *Ibid.*, 1.

⁵⁵⁹ Canada, Privy Council Office, *Aide Memoire: Bill 178 Communications before the United Nations*, 21 April 1994, 3.

⁵⁶⁰ Canada, Justice Canada Public Law Branch, Human Rights Law Section, *Bill 178 Communications Before the United Nations*, 11 April 1993, 2.

communications on behalf of Quebec, with Quebec specifically addressing the alleged violation presented by Bill 178.⁵⁶¹ Furthermore, cabinet documents also reveal that the federal government was aware of the political implications of merely forwarding Quebec's documents to the UNHRC:

Quebec's documents will be forwarded to the UN with simply a short note of transmission from the federal government. This may, as it has in the past, raise criticism from some groups (e.g., the Equality Party) who perceive this as federal government condonation of Quebec's language laws. However, this procedure is consistent with the federal-provincial guidelines discussed above, as well as the precedent set during the admissibility and merits stages of these communications.⁵⁶²

Keenly aware that its actions might attract criticism from civil society groups, the federal government tried to remain one step ahead with a comprehensive communications strategy: "The submissions of the parties to a communication are confidential. However, in the past McIntyre and the Equality Party have made these documents public. Therefore, a communications plan has been prepared in the event the federal government is required to respond to questions on this matter."⁵⁶³

3.2 Strategy of the Province of Quebec

The decision from the UNHRC was particularly influential to the political atmosphere of Quebec. Prior to the release of the decision, the Bourassa government held fast to the position that, through Bill 178 and the invocation of the notwithstanding clause, Quebec had conserved "its complete responsibility in matters of linguistic arrangements in its territory" and that "the role of the courts within this perspective should be approached with prudence. Linguistic rights are rarely absolute rights. As the Supreme Court has already indicated, they are more often than not, the fruit of political and historical compromises."⁵⁶⁴ Therefore in the immediate reaction to the UNHRC's release of its decision, the Bourassa

⁵⁶¹ According to stated federal-provincial-territorial procedures, the provinces are assured an opportunity to explain and justify any provincial law which is challenged before the Committee. See: Canada, Justice Canada Public Law Branch, Human Rights Law Section, *Bill 178 Communications Before the United Nations*, 11 April 1993, 2.

⁵⁶² Canada, *Bill 178 Communications Before the United Nations*, 7-9.

⁵⁶³ *Ibid.*, 9.

⁵⁶⁴ Quebec, *Quebec's Positions on Constitutional and Intergovernmental Issues*, 169.

government was quick to publicly diminish the significance of the UNHRC's influence. In Quebec City, deputy premier Lise Bacon noted that the Quebec government was already looking into changing Bill 178, and maintained, "The [UNHRC] ruling isn't embarrassing."⁵⁶⁵ In her response to the press, Bacon added: "We're already discussing the language issue and I don't think we have to change the course of the discussions because of that...It's surprising... We make our own laws and we can do it by ourselves. And we are a tolerant and open society and I don't think we should feel diminished by such a statement."⁵⁶⁶ Furthermore, in his address to the National Assembly, Claude Ryan, the minister responsible for Quebec's language laws, had "no comment" on the UNHRC ruling.⁵⁶⁷

The UNHRC decision coincided with a period during which Quebec was in the process of reforming elements of its language regime and laws; between 1992-1993, the Bourassa government was in the process of considering options to reorganize and consolidate the agencies charged with the implementation of the *Charter of the French Language*, including the Conseil de la langue française, the Commission de toponymie du Québec, the Office de la langue française and the Commission de surveillance (de protection) de la langue française.⁵⁶⁸ While the public message of the Bourassa government was dismissive of the impact of *Ballantyne*, scholars argue that it was quite the contrary behind closed doors. For example, MacMillan's interview with Gagnon revealed that the *Ballantyne* decision strongly reinforced the Liberal party's plans for reform and dealt a devastating blow to the sovereigntists' plans to oppose the legislation: "Sovereigntists are even more sensitive than the average Quebec to external condemnation, especially from a respected body like the UN, because they are acutely conscious that Quebec would need the support of the international community if it ever become an independent state."⁵⁶⁹

⁵⁶⁵ Canada. Facsimile communication regarding newspaper articles on Bill 178, 5.

⁵⁶⁶ *Ibid.*, 5.

⁵⁶⁷ *Ibid.*, 5.

⁵⁶⁸ Marc Chevrier, *Laws and Language in Québec: The principles and means of Québec's language policy*, (Québec: Ministère des Relations internationales, 1997), 14. <http://collections.banq.qc.ca/ark:/52327/bs43058>.

⁵⁶⁹ Michael C. MacMillan, "Rights in Conflict: Contemporary Disputes over Language Policy in Quebec. Contemporary Quebec: Selected Readings and Commentaries," eds. M.D. Behiels and Matthew Hayday. Montreal: McGill-Queen's Press, 2011), 407-408.

Consequently, the Bourassa government felt compelled to acknowledge, at least begrudgingly, “the powerful impact of the UN Committee decision.”⁵⁷⁰

3.3 The Follow-up from Quebec and Canada

The UNHRC requested an update from Canada and Quebec regarding the *Ballantyne/Davidson* and *McIntyre* communication by November 7, 1993. In an effort to demonstrate compliance to the UNHRC’s recommendations, Quebec requested an extension, until after Bill 86 (the successor to Bill 178) had entered into force.⁵⁷¹ In March 1994, Quebec submitted its final response to the United Nations Human Rights Committee regarding both the *Ballantyne et al.* and the *Singer* communications. Quebec’s transmission, via the federal government, offered information regarding its passing of Bill 86 as a remedy to Bill 178 on December 22, 1993. Furthermore, Quebec noted that Bill 86 made the following modifications: “(1) the general rule that commercial advertising may now be in French exclusively or in French and another language, provided that in the latter case French is predominant; and (2) an exception (contained in accompanying regulation) which requires commercial billboards on public means of transportation or on public transport routes to be in French exclusively.”⁵⁷² Additionally, in its follow-up response, Quebec also noted that for Bill 86, it had not invoked section 33 of the *Charter of Rights and Freedoms* and therefore Bill 86 could be challenged before Canadian courts.⁵⁷³ Although Quebec was eager to demonstrate compliance in the *Ballantyne* communications to the UNHRC, it was resistant to extending the same in the *Singer* case, given that *Singer Limited* was a corporation, and therefore not entitled to the rights guaranteed by the *Optional Protocol*.⁵⁷⁴

Following Quebec’s submission on Bill 86, the UNHRC released its final opinion on August 18, 1994.⁵⁷⁵ The UNHRC found that the “contested provisions of the Quebec *Charter of the French Language* contravened the freedom of expression guarantees of the

⁵⁷⁰ *Ibid.*, 408.

⁵⁷¹ Canada, *Aide Memiore: Bill 178 Communications before the United Nations*, 7.

⁵⁷² *Ibid.*, 7.

⁵⁷³ *Ibid.*, 7.

⁵⁷⁴ *Ibid.*, 7.

⁵⁷⁵ Canada, *Memorandum for Jocelyne Bourgon: Quebec’s Signage Legislation – U.N. Decision*, 1.

Covenant but that the situation has been effectively remedied by Bill 86.⁵⁷⁶ The allowance of commercial signage in English satisfied the requirements of the Covenant. Whereas the challenge of Bill 178 at the UNHRC attracted considerable media attention, by contrast the UNHRC's observations that Bill 86 effectively remedied the contravening portions of Bill 86 did not garner many headlines.⁵⁷⁷

4. Government of Quebec and Bill 86

Through Bill 86 the Quebec Government defied the Supreme Court's recommendation expressed in *Ford* and retained in its exclusive ability to regulate bilingual commercial signage. The Bourassa government succeeded in preserving this provision of non-compliance, despite opposition from groups such as the Members of the Coalition for Freedom of Expression.⁵⁷⁸ When Claude Ryan presented the amendments to the National Assembly, he noted the important social, educational and economic achievements of the *Charter of the French Language* over the past fifteen years.⁵⁷⁹ However, in light of these achievements, Ryan argued that the primary objectives of the CFL had been realized and it was now time to amend the CFL so that it had a "mixed approach" to language promotion appropriate for the contemporary society.⁵⁸⁰ The appropriateness, it appeared, stemmed from a need to address the language rights of Anglophones, and the decisions of the Supreme Court and UNHRC.

At the time, there was popular support within the province for the protection of the French language within North America⁵⁸¹ coupled with the popular belief within Quebec that the French language required government intervention for its continued existence: "La

⁵⁷⁶ Ibid., 2.

⁵⁷⁷ Ibid., 2.

⁵⁷⁸ Canada, *Analyse post-électorale du dossier linguistique*, 6.

⁵⁷⁹ Quebec, *National Assembly of Quebec Debates*, 7 June 1993 (Mr. Claude Ryan, QL).

<http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/34-2/journal-debats/19930607/63721.html>

⁵⁸⁰ Ibid.

⁵⁸¹ "Même si les projets de règlements seront soumis à une consultation populaire, il est peu probable que des changements majeurs seront apportés. D'ailleurs, M. Ryan a indiqué qu'il était illusoire de croire que le Gouvernement de Québec consentira à reprendre le débat linguistique. Sur le maintien de la règle de l'unilinguisme français sur les panneaux-réclame, M. Ryan a déclaré que cette règle était indispensable considérant la situation du Québec en Amérique du Nord."⁵⁸¹ See: Jane Billings, Canada, Privacy Council Office, *Memorandum for the Prime Minister: Signage Regulations in Quebec*, October 15, 1993, 2.

majorité francophone se sent toujours vulnérable et demeure convaincue de la nécessité de protéger la langue française. Elle craint que la Loi n'apporte une trop grande ouverture à la langue anglaise."⁵⁸² However, in 1993, Claude Ryan presented Bill 86 as a critical juncture in the evolution of Quebec's language policies as well as a symbolic response to Quebec's position vis-à-vis the Supreme Court and the UNHRC: "Comme cette clause «nonobstant» ne peut être invoquée que pour une période de 5 ans, laquelle expire, en l'occurrence, à la fin de la présente année, une décision majeure devait, en toute hypothèse, être prise cette année. Cette décision devait être prise en tenant compte à la fois de l'objectif fondamental de la Charte et des jugements sévères dont ont été l'objet les dispositions traitant de la langue de l'affichage."⁵⁸³

4.1 The Legislative Process and Bill 86: Two steps forward, one step back

Whereas Bill 178 was drafted in virtual secrecy, the Bourassa government took a slightly more consultative approach with the drafting and tabling of Bill 86. Archival documents from the federal government suggest that in the drafting and consultation of Bill 86, the Bourassa government took measures to ensure that it would "happen quietly" given that the "government is not interested in reopening the debate."⁵⁸⁴ But much to the surprise of the federal government, in the spring of 1992, the Bourassa government undertook public consultations for the drafting of Bill 86⁵⁸⁵ and established a parliamentary committee in May 1992. There is little doubt that domestic and international pressures had underscored the need for greater transparency regarding the creation of language policy in the wake of the *Ford* and *Devine* cases. The consultation came in stark contrast to the previous strategy employed in the drafting of Bill 178. To reinforce this different approach, Claude Ryan, in his address to the parliamentary committee, underscored the Quebec Liberal government's commitment to consult both the National Assembly and the public.

⁵⁸² Canada. *Analyse post-électorale du dossier linguistique*, 4.

⁵⁸³ Quebec. *National Assembly of Quebec Debates*, 7 June 1993 (Mr. Claude Ryan, QL). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/34-2/journal-debats/19930607/63721.html>

⁵⁸⁴ Canada. *Analyse post-électorale du dossier linguistique*, 10.

⁵⁸⁵ *Ibid.*, 10.

However, the committee was not entirely executed in the spirit of openness and broad parliamentary engagement; after all, Minister Ryan had agreed to holding a parliamentary committee to examine the draft of Bill 86 on the condition that no new arguments be presented during the debate while the Bill was tabled.⁵⁸⁶ The parliamentary committee held consultations with approximately twenty three groups over a span of two weeks.⁵⁸⁷ Among these groups were stakeholders such as: the Catholic schools of Montreal, the Chamber of Commerce from Montreal's China Town, Town-shippers' Association and the Mouvement national des Québécois.⁵⁸⁸ Furthermore, these consultations did not meet with the approval of the Parti Québécois, which accused the government of soliciting feedback from too narrow a selection of stakeholders.⁵⁸⁹ In addition to criticism regarding the limitations of the consultative process, members of the opposition also took issue with the relatively short period of parliamentary review. As one opposition member noted in the parliamentary committee hearing, six weeks was simply too little time for substantive review of amendments to the *Charter of the French Language*: “Le projet de loi qui a été déposé le 6 mai dernier par le gouvernement sera adopté dans les six semaines. Pour un projet de loi de cette importance, vous admettez avec moi que c'est un délai relativement court. C'est un projet de loi majeur qui modifie les fondements mêmes de la Charte de la langue française qui faisait du français la langue commune nécessaire du travail, de l'enseignement et de l'administration.”⁵⁹⁰ The relatively short duration for public consultations also presented yet another obstacle to opponents of Bill 86; members of the umbrella organization Mouvement Québec français (which consisted of labour unions, public sector unions and other civil society actors including the Société Saint-Jean Baptiste de Montréal) found it difficult to mobilize opposition to Bill 86 in such a short period of time.⁵⁹¹

⁵⁸⁶ Canada. *Analyse post-électorale du dossier linguistique*, 10.

⁵⁸⁷ Quebec. *National Assembly of Quebec Debates*, 9 June 1993. <http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cc-34-2/journal-debats/CC-930609.html>

⁵⁸⁸ Quebec. *National Assembly of Quebec Debates*, 9 June 1993 (Mr. Doyon, QL).

<http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cc-34-2/journal-debats/CC-930609.html>

⁵⁸⁹ Regarding the limited samples of groups invited for consultation, see the testimony of MNA Blackburn (PQ): Quebec. *National Assembly of Quebec Debates*, 9 June 1993 (Mrs. Blackburn, PQ).

<http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cc-34-2/journal-debats/CC-930609.html>

⁵⁹⁰ Quebec. *National Assembly of Quebec Debates*, 9 June 1993 (Mrs. Blackburn, PQ).

<http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cc-34-2/journal-debats/CC-930609.html>

⁵⁹¹ Canada. *Analyse post-électorale du dossier linguistique*, 2.

The parliamentary committee may have been a significant stride forward in facilitating legislative and public consultations, especially when compared to the secrecy surrounding the drafting of Bill 178. Yet, these consultations did little to demonstrate a meaningful legislative engagement and deliberative democracy on such a significant policy issue; and once again, as with Bill 178, the Bourassa government's level of legislative engagement was comparatively inadequate to the level of legislative engagement implied by the AG Quebec's defense of the principle of parliamentary sovereignty in *Ford* and *Devine*.

4.2 A Legislative Response to the Supreme Court: Resisting the centralization of *Charter* federalism and the role of the judiciary

Parliamentary scrutiny of Bill 86 raised the spectre of suspicion that the *Charter* was an extension of a federal centralizing project, the political aim of which was the erosion of provincial power and the application of a pan-Canadian standard, especially with respect to matters of language and culture.⁵⁹² As explored in Chapter Four, Quebec's reception of the *Charter* was met with initial hesitation and suspicion.⁵⁹³ The suspicion of the *Charter* and the newfound power of the Supreme Court was influenced by previous experiences wherein "the courts had been little help to Quebec since the abolition of constitutional appeals to the Judicial Committee of the Privy Council in 1949."⁵⁹⁴

Critics of Bill 86 pointed to the loosening and enhanced compliance of the *Charter of the French Language* as a surrender to the Canadian *Charter's* power, and by extension, the Supreme Court and federal government: "Les plus nationalistes accusent le gouvernement Bourassa d'une approche "À la pièce" de la question linguistique, ainsi que de "trahison de l'État-nation Québécois" en faveur de la classe politique fédéraliste."⁵⁹⁵ The concern over the erosion of Quebec to exercise sovereignty over language and cultural affairs was a sentiment

⁵⁹² David Schneiderman, "Dual(ing) Charters: the harmonics of rights in Canada and Quebec," *Ottawa Law Review* 24, no.1 (1992): 254.

⁵⁹³ *Ibid.*, 254.

⁵⁹⁴ Garth Stevenson, "Canadian Federalism and the Search for Accommodation of Quebec Nationalism," eds. Stéphan Gervais, Christopher John Kirkey, Jarrett, Rudy, *Quebec Questions: Quebec Studies for the Twenty-first Century* (Don Mills, Ont. : Oxford University Press) 2011 : 53

⁵⁹⁵ Canada. *Analyse post-électorale du dossier linguistique*, 4.

shared by 350 notable Quebec academics, constitutional experts and judges,⁵⁹⁶ who warned that Bill 86 represented a serious blow to the legislative capacity of the province and the principle of parliamentary sovereignty:

Le projet de loi, ça représente un rejet de la primauté de l'ordre juridique québécois qui s'impose, en acceptant la clause Canada, une nouvelle limite dans ses compétences législatives en matière linguistique. C'est la Cour suprême qui joue le rôle d'arbitre final. Ce sont des constitutionnalistes juristes. Accepter l'ordre constitutionnel de 1982, c'est accepter d'aller au-delà et par-dessus la tête des Québécois et des Québécoises, qui ont pourtant rejeté l'entente de Charlottetown.⁵⁹⁷

In its enhanced compliance with the *Charter*, the province of Quebec was relinquishing some of its hard-fought jurisdiction in the areas of language and culture. Subsequently, opponents of Bill 86 feared that the increased compliance of the CFL to the Canadian *Charter* equated to the diminished sovereignty of Quebec and enhanced centrifugal federalism.

Furthermore, in the days preceding the tabling of Bill 86, Members of the National Assembly raised questions regarding the inclusion of the “Canada Clause” in Bill 86. What members of the opposition feared was that the Quebec government was bowing to the centralist pressures of the Canadian *Charter*; Member of the National Assembly Brassard, raised the question: “Pourquoi le gouvernement a-t-il décidé, en acceptant que, dans le projet de loi 86, soit introduit intégralement l'article 23 de la Charte qui avait suscité l'opposition formelle de l'Assemblée nationale... Pourquoi avoir accepté et donné ainsi son adhésion formelle à l'Acte constitutionnel de 1982? Parce que c'est ça que vous avez fait, en faisant ainsi. Vous, vous êtes président du Comité de législation.”⁵⁹⁸

In its response to critics, members of the Quebec Liberal government made only scarce mention of the Supreme Court’s decision in *Ford and Devine*.⁵⁹⁹ In fact, Libman was the only Member of the National Assembly to raise the issue of *Charter* compliance and the

⁵⁹⁶ Among these were persons such as: Claude Bariteau, Guy Laforêt, Gary Caldwell, Yolande Cohen, Alain-G. Gagnon, Daniel Latouche, Alain Noël, Pierre-Paul Proulx, Daniel Turp, François Rocher, Daniel Salée see: Quebec, *National Assembly of Quebec Debates*, 9 June 1993 (Mrs. Blackburn, PQ). <http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cc-34-2/journal-debats/CC-930609.html>

⁵⁹⁷ Quebec, *National Assembly of Quebec Debates*, 9 June 1993 (Mrs. Blackburn, PQ). <http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cc-34-2/journal-debats/CC-930609.html>

⁵⁹⁸ Ibid.

⁵⁹⁹ The Supreme Court (or “Court”), is only mentioned 11 times during the course of the legislative debates. See: Quebec, *National Assembly of Quebec Debates*, 9 June 1993. <http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cc-34-2/journal-debats/CC-930609.html>.

Supreme Court's decision in *Ford*. In response to the Parti Québécois member's concerns regarding the 'leniency' of Bill 86, Libman defended the provisions, notably those regarding signage, by emphasizing the need to ensure that the provisions align with the SSC's decision that privileged freedom of expression:

Premièrement, dans l'article 17, on établit le principe en réponse aux tribunaux qu'on va lever l'interdiction d'autres langues sur les affiches... Alors, nous trouvons inacceptable, et on va essayer de convaincre le ministre d'enlever cette exception, d'enlever la capacité, par voie réglementaire, d'exiger où les affiches commerciales doivent se faire uniquement en français, parce que nous croyons que ça va dépasser les décisions des tribunaux, ça va continuer une interdiction, par voie de règlement, contre l'usage d'autres langues sur les affiches, si un gouvernement le veut.⁶⁰⁰

With respect to the centralization hypothesis, Ryan and Rémillard simply rejected the PQ's resistance to *Charter* compliance.⁶⁰¹ For example, Rémillard argued that that status quo of *Charter* non-compliance was never really intended as an option, even by René Lévesque:

Alors, quand on parle de l'article 23, on parle de la clause Canada. Dans ce contexte, M. le Président, qu'est-ce qu'il y a de surprenant? C'est la même chose, c'est dans la continuité de ce que nous avons fait lorsque nous sommes arrivés au gouvernement: on a mis fin à cette clause «nonobstant» utilisée systématiquement dans toute loi québécoise. On utilisait la population en otage d'un débat constitutionnel. C'est ça que vous avez fait. Alors, pour notre part, on s'est refusé à ce genre d'action. Et on se dit qu'il y a un document qui est à compléter. C'est ce qu'on a essayé de faire, qu'on va continuer à essayer de faire. Mais, dans ce contexte-là, M. le Président, la clause Canada, dans le contexte où elle peut être située en respect des juridictions québécoises, tel qu'on le comprend de ce côté-ci de la Chambre, je ne vois pas de problème à ce niveau-là.⁶⁰²

While the Bourassa government tried to diminish the influence of the Canadian *Charter* on the Bill 86, it was not the only factor in converging the *Charter of the French Language* with the remedies of the Supreme Court. Further the Supreme Court remedies, international human rights norms articulated through the UNHRC should be regarded as a factor of equal influence in the composition of Bill 86.

⁶⁰⁰ Quebec, *National Assembly of Quebec Debates*, 9 June 1993 (Mr. Robert Libman, QL). <http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cc-34-2/journal-debats/CC-930609.html>

⁶⁰¹ Quebec, *National Assembly of Quebec Debates*, 7 June 1993 (Mr. Claude Ryan, QL). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/34-2/journal-debats/19930607/63721.html>.

⁶⁰² Quebec, *National Assembly of Quebec Debates*, 7 June 1993 (Mr. Gil Rémillard, QL). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/34-2/journal-debats/19930607/63721.html>.

4.3 Response to International Pressure

One of the important contextual factors in Bourassa's second "legislative response" arises from the historic participation of the Quebec government in foreign affairs.⁶⁰³ Since the 1960s, through the Gérin-Lajoie doctrine,⁶⁰⁴ Quebec established its jurisdictional right to autonomously represent and negotiate its interests internationally.⁶⁰⁵ The Gérin-Lajoie doctrine, in turn has served as the foundation for decades of Quebec's "paradiplomacy" thereby allowing the province to undertake "distinct diplomatic activity," for the purpose of leveraging its international power for "political leverage inside the federation."⁶⁰⁶ For example in 1994, Quebec had consistently spent "more and [had] a larger international staff than all 50 US states combined."⁶⁰⁷ These international efforts were also leveraged by the Bourassa government when the Quebec Liberal government undertook transformations to the Department of International Relations which was established by the Parti Québécois in 1985.⁶⁰⁸

In the parliamentary debates preceding the tabling of Bill 86, members of the National Assembly debated the merits of the amendments and raised questions regarding the connection between amendments to the *Charter of the French Language* and the UNHRC decision. With respect to the question of constitutional interpretation, what is of interest is how prominently Quebec's defense of the *Charter of the French Language* during the UNHRC proceedings factored into the creation of Bill 86. Whereas the mention of Supreme Court's decision in *Ford* appeared only sparingly in the Parliamentary Committee minutes and legislative debates by either the government or the opposition, there was an unquestionable emphasis on the connection between Bill 86 and the UNHRC's review of

⁶⁰³ Louise Bélanger, "The Domestic Politics of Quebec's Quest for External Distinctiveness," *Quebec on the World Stage, Contemporary Quebec: Selected readings and commentaries* eds. Michael D. Behiels and Matthew Hayday (Montreal: McGill-Queen's University Press, 2011): 755.

⁶⁰⁴ Education Minister Paul, a constitutional expert, elaborated a constitutional doctrine that continues to govern Quebec's approach to foreign relations. Essentially, the doctrine reasons that with respect to matters of provincial jurisdiction, Quebec should be able to represent itself. See: Bélanger, "The Domestic Politics of Quebec's Quest for External Distinctiveness," 755.

⁶⁰⁵ *Ibid.*, 755.

⁶⁰⁶ *Ibid.*, 761.

⁶⁰⁷ *Ibid.*, 763.

⁶⁰⁸ *Ibid.*, 772.

Ballantyne et al. and *Singer*. For example, in one of the debates preceding the tabling of Bill 86, Member of the National Assembly Blackburn (Parti Québécois) asked the Minister of International Affairs about the rapid change of policy vis-à-vis *Charter* compliance following years of defending Bill 178, in addition to the employment of the notwithstanding clause both domestically and at the United Nations Human Rights Committee:

Après avoir maintenu la position officielle du Québec en cette matière devant le comité de l'ONU, pourquoi le gouvernement a-t-il décidé soudainement de donner son adhésion formelle à l'Acte constitutionnel de 1982 et, ainsi, rompre avec la position officielle défendue jusque devant le comité de l'ONU, il y a moins d'un an, alors qu'aucun gouvernement du Québec digne de ce nom n'a le droit, sans se déshonorer, de se soumettre de cette façon?⁶⁰⁹

In his response, Claude Ryan made the connection between Bill 86 and the UNHRC decision abundantly clear: in a succession of contradictory decisions from various courts (i.e. the Superior Court of Quebec, the Quebec Court of Appeals and the Supreme Court of Canada) the UNHRC committee's decision represented the final commentary on the legitimacy of the *Charter of the French Language's* commercial signage provisions.⁶¹⁰ The UNHRC's interpretation of the individual right to freedom of expression as inclusive of advertising and commercial activities supported the findings of the Supreme Court of Canada. According to Ryan's address in the National Assembly, the convergence of the UNHCR and the Supreme Court's opinion regarding the importance of 'freedom of expression' represented an important turning point for the legitimacy of Bill 178. Further amendments to the *Charter of the French Language* were not only required so that they become *Charter* complaint, but they were also necessary for Quebec to be complaint with the *Internal Protocol for the Protection of Civil and Political Rights*.⁶¹¹ While Ryan noted that neither the Supreme Court nor the UNHRC judgements represent "infallible or immutable truths"⁶¹² the decisions of these bodies nevertheless represented a significant

⁶⁰⁹ Quebec. *National Assembly of Quebec Debates*. 7 June 1993 (Mr. Brassard, PQ). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/34-2/journal-debats/19930607/63721.html>

⁶¹⁰ Quebec. *National Assembly of Quebec Debates*. 7 June 1993 (Mr. Claude Ryan, QL): <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/34-2/journal-debats/19930607/63721.html>

⁶¹¹ *Ibid.*

⁶¹² *Ibid.*

authority in broader (and more international) understanding of democracy and human rights regimes:

Pour le moment, les jugements rendus par les tribunaux, ainsi que le rapport du Comité des droits de l'homme de l'ONU, par delà toutes les restrictions particulières qu'on peut essayer d'inscrire, définissent néanmoins avec autorité et clarté le stade actuel d'évolution de la pensée juridique officielle sur les questions abordées. Autant cette sagesse largement reçue ne saurait mettre en cause la liberté intellectuelle de chacun, autant elle commande l'attention et le respect de la part des gouvernements qui se veulent responsables et démocratiques, et qui veulent agir en solidarité avec les autres gouvernements qui partagent avec eux l'attachement aux mêmes valeurs de libertés fondamentales garanties dans les chartes de droits.⁶¹³

In the wake of the UNHRC decision, it was difficult for the Parti Québécois to challenge the Quebec Liberal government's framing of Bill 86 as a response to render the *Charter of the French Language* compliant with the *International Protocol on Civil and Political Rights*. The international pressure from an institution such as the UNHRC was significant for the Parti Québécois; the trepidation of the Parti Québécois towards international compliance with a product of decades of careful paradiplomacy advanced by separatists. Federal documents reveal that the Mulroney government was monitoring the situation closely: the federal government feared that, in the event of a Parti Québécois victory, they did "not anticipate that the election of the PQ will bring a return to Bill 101 type legislation (i.e. Limits on the use or status of English in the National Assembly, the courts, on commercial signs, French language testing for professionals, etc.). The PQ will no doubt wish to maintain international credibility with a view towards eventual recognition, as a result they will probably tread carefully in areas touching minority rights."⁶¹⁴

The ability for opponents of Bill 86 to mobilize was further diminished by a combination of additional factors, such as internal divisions regarding the importance of unilingual French signage. For example, archival documents reveal that even the Parti Québécois was internally divided on the question and there was also some desire to correct the projected "intolerance" produced by the contentious sections of the CFL; the Bloc Québécois was also willing to take more flexible approach to signage laws.⁶¹⁵

⁶¹³ Ibid.

⁶¹⁴ Michael O'Keefe, Official Languages Support Programs Branch, *Quebec and Minority Communities*. (Ottawa: Department of Canadian Heritage), 21 September 1994, i.

⁶¹⁵ Canada. *Analyse post-électorale du dossier linguistique*. 2.

While the Parti Québécois provided little criticism of the UNHRC decision in 1994, three years later, as part of a position paper, the Parti Québécois distanced itself from the conclusions of the UNHRC. In a public document intended to clarify the history of Quebec language laws, the Minister of International Relations reflected on the UNHRC's findings with an air of dismissal:

The committee recognized that it is legitimate for a state to choose one or several official languages, especially to protect a minority in a vulnerable situation such as Francophones in Canada. However, it saw the rules of Bill 101 prescribing unilingual signs, even amended by Bill 178, as an infringement on the freedom of expression the Covenant sanctioned. None of these rules created discrimination based on language nor did they infringe on the rights of minorities the Covenant recognized. Anglophone Canadian citizens cannot, in fact, be considered a language minority, since they are a majority in Canada.”⁶¹⁶

Following the passage of Bill 86 into law, the Quebec government issued a press release wherein it explicitly stated that the government had “taken into account the UN Committee decision which condemned the prohibition on the use of English on signs.”⁶¹⁷

4.4 The Outcome of Bill 86: Charter Compliance

Bill 86 brought the *Charter of the French Language* into compliance with the Supreme Court's decisions in *Ford* and the modifications were nevertheless well received by citizens within Quebec as well as the rest of Canada.⁶¹⁸ Bourassa's response to international pressure and loosening of the restrictions in the *Charter of the French Language* was perceived as an attempt to correct the perception of Quebec as an “intolerant society,” while promoting the preservation of the French language maintained respect for the right of citizens to express themselves in other languages.⁶¹⁹ Bill 86 amended section 58 and 68 of the *Charter of the French Language* through an implicit implementation of the recommendations set forth in *Ford*; that French be predominant, but not the exclusive language. However, contrary to the recommendations of linguistic equality set forth by the

⁶¹⁶ Chevrier, *Laws and Language in Québec: The principles and means of Québec's language policy*, 14.

⁶¹⁷ Marcel Massé, “Note à l'intention du Sénateur Murray: Projet de loi 86: Calendrier,” (Ottawa: Canada. Federal-Provincial Relations, 12 May 1993), 3.

⁶¹⁸ Canada. *Analyse post-électorale du dossier linguistique*, 4.

⁶¹⁹ *Ibid.*, 4.

Supreme Court, the Bourassa government ensured that French remained the predominant language on signage. Furthermore, in an act of defiance to the Supreme Court, and to underscore its provincial jurisdiction over language and culture, Bill 86 allocated discretionary rights to the Government of Quebec enabling it to decide the circumstances where unilingual signage is acceptable.⁶²⁰

Following the passage of Bill 86 and the UNHRC's findings, the federal government continued to monitor the implementation and potential changes to the *Charter of the French Language*. Much of the federal government's monitoring of Bill 86 was out of a fear that Parti Québécois and Bloc Québécois would "attempt to embarrass the federal government on issues related to the treatment of Francophone minorities. The Bloc Québécois had portrayed federal language policy as an example of the failure of federalism – failure to prevent the assimilation of Francophone minorities or to ensure their rights are protected."⁶²¹ For example, in an Information Memorandum for Prime Minister Joe Clark, the memo indicated that "further analysis of the Bill will be conducted by the Department of Justice and we will keep you informed of significant developments."⁶²² Furthermore, the federal government continued to monitor public perception of Bill 86, noting that "it will probably be perceived outside of Quebec as a step in the right direction, and calls for the federal government to take a strong or interventionist stance are not expected."⁶²³ Moreover, the federal government intended to organize a parliamentary commission to study Bill 86 and hold public consultations "before a publically televised audience from May 18 to June 2, 1993."⁶²⁴

In response to these political pressures, the federal government sought to "demonstrate moral leadership" on the issue of national linguistic duality through the initiatives such as the *Official Languages Act*⁶²⁵ and the *Canadian Charter of Rights and*

⁶²⁰ Kelly characterizes this partial compliance as "legislative defiance," see: James. B. Kelly, "Dialogue as Non-Compliance: Quebec and the Charter of the French Language," paper present at the International Political Science Association, Madrid, Spain, July 8-12, 2012, 3. http://paperroom.ipsa.org/papers/paper_13398.pdf.

⁶²¹ O'Keefe, Michael, *Language, Quebec and Minority Communities*, i.

⁶²² Canada. Privacy Council Office. "Memo to Marcel Massé, Secretary to the Cabinet for Federal-Provincial Relations," 6 May 1993, 3.

⁶²³ *Ibid.*, 3.

⁶²⁴ Massé, "Note à l'intention du Sénateur Murray: Projet de loi 86: Calendrier," 1.

⁶²⁵ The *Official Languages Act, 1988* ensures that federal institutions respect the rights guaranteed by the *Canadian Charter of Rights and Freedoms* and the commitment of the Government of Canada to enhancing the vitality and supporting the development of the English-speaking and French-speaking linguistic minority communities, as an integral part of the two official language communities within Canadian society.

Freedoms for the purpose of “supporting the development of linguistic minority communities.”⁶²⁶ In the wake of Bill 86, the federal government also established a “new inter-departmental strategy to support the development of minority-language communities.”⁶²⁷ Lastly, the federal government, closely monitoring the situation was also keenly aware of the pressure the UNHRC would place on the Quebec government: “Le gouvernement du Québec (et du Canada) pourraient être mis sur la défensive si les Nations Unis annonçaient une décision défavorable à la Loi 86. Une pareille déclaration de l’ONU pourrait forcer M. Ryan à tester la constitutionnalité des panneaux unilingues français en cours.”⁶²⁸

5. Conclusion

Whereas Chapter Five concluded that coordinate interpretation is an appropriate model of constitutional interpretation, the analysis of Quebec’s ‘second legislative sequel’ produced through Bill 86 demonstrates that this model must be extended to include international human right norms and civil society actors. A wealth of scholars have examined the strategies and involvement of civil society actors in constitutional interpretation.⁶²⁹ However, little academic research has examined the involvement of these actors within a coordinate model of interpretation. Pickle is one of the few scholars that has examined the role of civil society actors *within* the context of a specific model of judicial review (namely the *Charter* dialogue model). Her socio-legal analysis of same-sex marriage litigation concludes that civil society actors are a significant “third actor” which ought to be accounted for in dialogical conceptualizations of constitutional interpretation. While this thesis advances a different model of judicial review, namely that of coordinate

⁶²⁶ O’Keefe, *Language, Quebec and Minority Communities*, i.

⁶²⁷ *Ibid.*, i.

⁶²⁸ Canada, *Analyse post-électorale du dossier linguistique*, 10.

⁶²⁹ See: Frederick Lee Morton and Rainer Knopff, *The Charter Revolution and the Court Party*, (University of Michigan: Broadview Press, 2000).; Miriam Smith, “Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada,” *Politics and Society* 33, no. 2 (2005): 329.; and Jo-Anne Pickel, “Reframing Dialogues: toward a multidimensional approach to Charter dialogue.” (J.S.D. Thesis, University of Toronto, Toronto, 2004): 116. Charles Epp, *The Rights Revolution: Lawyers, Activist and Supreme Courts in Comparative Perspective* (Chicago: University of Chicago Press, 1998).

interpretation, this chapter has underscored Pickel's argument for the inclusion of civil society actors.⁶³⁰

Much like the actors in Pickel's study, the involvement of civil society actors in judicial review arises out of a rights-based discourse. The denial of the equal status of the English language by the *Charter of the French Language* spurred *Charter*-based challenges in the *Ford* and *Devine* cases. Following the decision of the Supreme Court, with the passage of Bill 178 the Bourassa government once again frustrated the efforts of civil society actors through the invocation of the notwithstanding clause, thereby suspending the ability of these actors to challenge provincial legislations through litigation strategies.

In the wake of this setback, the civil society actors adopted a strategy wherein they challenged the majoritarian premise and the "will of the National Assembly" by turning to transnational activism, with a fixation on international human rights norms (specifically those encapsulated in the voluntary *International Protocol on Civil and Political Rights*). Through the protocol and the UNHRC the civil society actors were able force the government of Quebec to re-examine its position on Bill 178 through the passage of Bill 86.

From this case study, it is clear that Bill 86 was not primarily a "legislative sequel" in response to judicial nullification; rather it was primarily a response to comply to international human rights norms. One way of understanding the extent to which adherence to international human rights norms motivated the Bourassa government would be to ask the hypothetical question: *Would the Bourassa government have brought Bill 86 into greater compliance with the Charter had it not been for the UNHRC decision?* The answer to this hypothetical questions is: likely not. As demonstrated in Chapter Five, the Bourassa government was committed to participating in a form of decentralised Canadian federalism wherein Quebec maintained its jurisdiction to legislate on matters pertaining to language and culture. The evidence in this chapter suggests that *Charter* compliance was an almost secondary effect caused by the primary objective of Quebec's adherence to international human rights norms for the purpose of continued participation in international affairs.

While international human rights norms and civil society actors exert pressure on the provincial executive and legislative branches, these factors invariably exact some influence on the significance, or power, of parliamentary sovereignty. Kelly and Murphy note that, in

⁶³⁰ Pickel, "Reframing Dialogues," 116.

spite of judicial invalidation by the Supreme Court, over the past thirty years the *Charter of the French Language* (and its amendments) has succeeded in preserving “the continued sovereignty of the National Assembly of Quebec in language and education policy despite judicial invalidation of key provisions of Bill 101.”⁶³¹ While Kelly and Murphy are correct to note that Quebec has succeeded in retaining jurisdictional control of language policy, this chapter would caution to conclude that it is due to a substantive version of “parliamentary sovereignty.” Within the scope of this study the principle of parliamentary sovereignty is more instrumental, rather than of intrinsic value. While Bill 86 represented a step toward greater legislative deliberation through initiatives such a Parliamentary Committee to vet Bill 86, these consultations were limited in terms of time, stakeholder engagement and impact.

In this case, the “legislative sequel” of Bill 86 is less of a response to the Supreme Court’s nullification, and should be regarded as a reaction to international pressure, civil society actors and an effort of legislative inclusion for conventional political actors on matters of language policy. In terms of a descriptive version of coordinate interpretation, the model must be modified to include transnational civil society activists and the power exerted by international human rights norms through formal institutions such as the UNHRC.

While the inclusion of civil society actors and international human rights norms fall beyond conventional definitions of coordinate interpretation, the addition of these two factors and their influence on the creation of Bill 86 represent an important facet of constitutional interpretation. Moreover, this case study further supports Baker’s observation that with respect to complex human rights issues it is unhelpful to reduce judicial review to a matter of “simple trumps” and analyzing which branch has the “final say.”⁶³² The ambiguity of the human rights issues, such as language rights (and the issue of freedom of expression) is demonstrative of Baker’s conceptualization of coordinated interpretation as a model wherein the direction of power is not unidirectional; rather, judicial power is coordinate with parliamentary power,⁶³³ and in this case also with international institutions, international human rights norms and civil society actors.

⁶³¹ James B. Kelly and Michael Murphy, “Shaping the Constitutional Dialogue on Federalism: The Canadian Supreme Court as Meta-Political Actor,” *Publius: The Journal of Federalism* 35 no. 4 (2005): 220.

⁶³² Baker Denis, *Not Quite Supreme: The courts and coordinate judicial review* (Montreal: McGill-Queen’s University Press 2010): 145.

⁶³³ Baker, *Not Quite Supreme*, 145.

Chapter Seven: Conclusion

1. Introduction

Grounding its approach in historical and discursive institutionalist frameworks, this thesis has sought to examine Quebec's legislative responses to the judicial invalidation of the *Charter of the French Language* sections. The research questions that have guided this dissertation focused on how the province of Quebec's conceptualization of its role and function in constitutional interpretation, namely: how have judicial nullifications of Bill 101 sections have been interpreted by actors within the Quebec government and the Supreme Court? What model of judicial review characterises Quebec actors' reaction to the Supreme Court's nullifications? How did Quebec actors perceive the Court's decision?

The thesis has sought to answer these research questions through an evaluation of Hogg's Charter dialogue hypothesis as it pertains to judicial invalidation and legislative sequels to the *Charter of the French Language*, Bills 178 and 86. The rationale for selecting language rights stems largely from the fact that the province of Quebec has entered into substantive challenges with the Supreme Court on cases such as: *Ford v. Quebec (AG)* [1988] and *Devine v. Quebec (AG)* [1988], which resulted in a partial amendment to the *Charter of the French Language* through the passage of Bill 178. For the sections of the *Charter of the French Language* that remained constitutionally invalid, Bill 178 invoked the notwithstanding clause thereby shielding the controversial sections of the Bill from further court challenges for the following five years.

2. Evaluating the Charter dialogue hypothesis

When examined from an historical institutionalist perspective, the National Assembly of Quebec appears to have strategized its response through an assertion of parliamentary sovereignty, rather than the desire to engage in a "dialogue" with the Supreme Court of Canada. A closer examination of the Bourassa government's formulation of a response to judicial invalidation reveals that the 'legislative response' to the Court (and the decision to invoke the notwithstanding clause) was crafted exclusively by the executive

branch, in virtual secrecy among a handful of Bourassa's cabinet members. This centralization of power for the creation of Bill 178 was to the exclusion of Bourassa's own caucus members (including Members of the National Assembly that represented predominantly Anglophone ridings), other members of the National Assembly of Quebec as well as civil society organizations.

In response to the passage of Bill 178, Anglophone civil society actors challenged the legitimacy of the *Charter of the French Language* and the use of the notwithstanding clause at an international level. In the wake of this setback, the civil society actors adopted a strategy wherein they challenged the "will of the National Assembly" by turning to transnational activism, with a fixation on international human rights norms (specifically those encapsulated in the voluntary *International Protocol on Civil and Political Rights*). Both the protocol and the United Nations Human Rights Committee (UNHRC) enabled civil society actors to coerce the government of Quebec to re-examine its position on Bill 178.

The UNHRC reviewed the *Ballantyne, Davidson, McIntyre v. Canada*, and in 1993 ruled that Canada (and Quebec) were in violation of the *International Covenant on Civil and Political Rights*. Archival documents examined in Chapter 5 revealed that Bill 86 was not a "legislative sequel" in response to judicial nullification; rather it was primarily a response to comply to international human rights norms. The ability of international human rights norms to exert pressure on the Quebec Government arose from the historic participation of the Quebec government in foreign affairs⁶³⁴ in order to establish its jurisdictional right to autonomously represent and negotiate its interests internationally.⁶³⁵

The UNHRC's decision eventually pressured the National Assembly of Quebec to amend Bill 178 with the passage of Bill 86, and consequently brought the Supreme Court's remedies into partial effect. Whereas the first legislative response, Bill 178, consisted of a small group of conventional political actors (e.g. members of the provincial executive and executive federal government), the second legislative response (Bill 86) encompassed a marginally broader consultation of both National Assembly members and a limited number of civil society actors.

⁶³⁴ Louise Bélanger, "The Domestic Politics of Quebec's Quest for External Distinctiveness," *Quebec on the World Stage, Contemporary Quebec: Selected readings and commentaries* eds. Michael D. Behiels and Matthew Hayday (Montréal: McGill-Queen's University Press, 2011): 755.

⁶³⁵ *Ibid.*, 755.

Bill 86 amended section 58 and 68 of the *Charter of the French Language*, but contrary to the recommendations of linguistic equality set forth by the Supreme Court, the Bourrassa government ensured that French remained the predominant language on signage in Quebec. Furthermore, in an act of defiance to the Supreme Court, and to underscore its provincial jurisdiction over language and culture, Bill 86 also allocated discretionary rights to the Government of Quebec to decide the circumstances where unilingual signage is acceptable.⁶³⁶

From the case studies, it is clear that Bill 86 was not a “legislative sequel” in response to judicial nullification; rather it was primarily a response to comply to international human rights norms, which, in turn, had the secondary effect of aligning the *Charter of the French Language* into greater compliance with the remedies provided by the Supreme Court of Canada in *Ford* and *Devine*. The evidence examined in Chapter Three captures the steadfastness of Quebec, over thirty years and throughout various governments, to predominantly participate in a form of decentralized federalism. This commitment to decentralized federalism was rhetorically encapsulated through the principle of parliamentary sovereignty and re-invoked in the *Ford* and *Devine* cases, as well as through Bills 178 and 86.

While the Bourrassa government’s actions for Bill 86 appear to have brought the *Charter of the French Language* into greater convergence with the Canadian *Charter*, this thesis cautions that the pressures exerted by the Supreme Court of Canada should not be over-stated for Quebec’s second ‘legislative response.’ Furthermore, the path-dependency of parliamentary sovereignty (and perhaps more importantly the commitment to decentralized federalism encapsulated within this principle) was challenged by another manifestation of path-dependency; namely, that of Quebec’s political legacy of international para-diplomacy. Consequently, this thesis concludes that the outcome of Quebec’s ‘legislative responses’ to judicial invalidation can be understood as a matter of competing path-dependencies, whereby international human rights norms and para-diplomacy contributed to a further erosion of the principle parliamentary sovereignty. Subsequent

⁶³⁶ James. B. Kelly. “Dialogue as Non-Compliance: Quebec and the Charter of the French Language.” Paper present at the International Political Science Association, Madrid, Spain, 8-12 July 2012, 3. http://paperroom.ipsa.org/papers/paper_13398.pdf.

implementation of these norms forced Quebec to abdicate elements of its sovereignty over cultural affairs.

3. Coordinate Interpretation and Moving beyond the question of: ‘Who has the final word’?

Perhaps one of the greatest theoretical strengths of Baker’s coordinate interpretation model (as well as the dialogical model advanced by US theorists) is the rejection of the question: ‘Who has the final word?’ This approach accurately captures not only the legislative sequels to *Ford* and *Devine*, but also the preceding constitutional negotiations. The second strength from Baker’s coordinate interpretation is the notion that multiple institutions participate in the interpretation of constitutional documents, with each institution contributing in a distinct manner. The subsequent paragraphs critically evaluate the suitability of Baker’s model of coordinate interpretation to the case studies examined within this thesis.

The analysis of archival materials in Chapter Three reveals the tension between federal and provincial governments with respect to the judiciary’s role as a federal institution of equal significance to the other branches. On the surface, the federal government’s promise that the new-found significance and power of the Supreme Court would “change nothing” appears entirely consistent with the notion of coordinate interpretation. However federal promises made in earlier constitutional negotiations, such as regional representation and provincial engagement in the appointment of justices to the Supreme Court bench, were reneged only a couple years later.

Throughout the course of constitutional negotiations from 1960 to 1985, evidence clearly demonstrates that the federal government steadfastly advanced an agenda for constitutional change that transitioned away from the principle of parliamentary sovereignty towards a stronger form of judicial review. While the federal government incrementally moved toward a stronger model of judicial review, Quebec remained suspicious of the federal government’s proposals, and repeatedly reasserted its support for the maintenance of parliamentary sovereignty. From Quebec’s perspective, within two decades the role of the Supreme Court had transformed from an arbiter of federal-provincial disputes to a quasi-

political actor and a virtually ubiquitous institution, exercising jurisdiction on all issues guaranteed by the *Charter*.

Consequently, it would be erroneous to characterize this phase of Canadian judicial review as demonstrative of a model of coordinate interpretation. Evidence from this thesis underscores that this period of change in Canadian judicial review was marked with the fear that, in granting the judicial branch enhanced status, it would inevitably come at the cost of other institutional bodies, most notably those of the provincial level. For this reason, the historical analysis of Chapter Three underscores that, throughout the course of constitutional negotiations, the topics of discussion did not concern the division of roles and responsibilities between the federal judicial and federal legislative branches; rather it was a discussion regarding the division of powers between the federal judicial branch and the *provincial* legislative branches.

Within the final efforts to draft a *Charter* that would be acceptable to the provinces, the federal government reluctantly agreed to the inclusion of the notwithstanding clause. Through the inclusion of section 33, parliamentary sovereignty was not entirely eroded by the introduction of a stronger form of judicial review. However, there is no question that in the eyes of both the federal and the provincial governments, the role of the judiciary was undoubtedly enhanced by the entrenchment of the Canadian *Charter*. These conclusions drawn from archival documents are entirely in agreement with Baker's assertion that the *Constitution Act, 1982* created the institutional *possibility* of coordinate interpretation: "From this perspective, the Constitution Act, 1982 is best understood as elevating the judiciary from a subordinate constitutional branch...to a co-equal branch, capable of asserting itself independently, without the additional step of judicial superiority."⁶³⁷ The elevation of the judiciary as an equal to the branches of federal government inevitably contributed to the ambiguity of human rights interpretation in Canada, as demonstrated by Quebec's resistance to the Supreme Court's decision in *Ford and Devine*.⁶³⁸

While Baker's coordinate interpretation is helpful for providing a model of judicial review that includes all three branches of government, it fails to account for dynamics between federal and provincial levels of government. The federal bias of Baker's coordinate

⁶³⁷ Denis Baker, *Not Quite Supreme: The courts and coordinate constitutional interpretation*, (Montreal: McGill-Queen's University Press 2010): 151.

⁶³⁸ *Ibid.*, 145.

interpretation is highlighted not only by the case studies of Bill 178 and 86, but also through an analysis of provincial-federal constitutional negotiations. Whereas other models of coordinate interpretation⁶³⁹ address federalism, few have obtained popularity akin to those of *Charter* dialogue, coordinate interpretation, or Court Party.⁶⁴⁰ Furthermore, in spite of the body of scholarly literature that has explored the influence of the *Charter* on Canadian federalism over the past decade,⁶⁴¹ a popular model of judicial review that substantively addresses Canadian federalism remains elusive. In this sense, the absence of a contemporary model of judicial review that is sensitive to federalism reinforces observations by Fafard and Rocher where, in failing to examine the “more enduring questions” of Canadian federalism,⁶⁴² scholars and students of judicial review are “simply reflecting and reinforcing both what they see in their respective disciplines as well as the dominant public and media framing of contemporary Canadian politics and government.”⁶⁴³

In addition to challenging the federal bias of Baker’s coordinate interpretation, this thesis has also sought to demystify the role of the National Assembly in the production of legislative responses to judicial nullification. Throughout the course of the constitutional negotiations of the 1960s-1980s, as well as in the facts submitted in the *Devine* and *Ford* cases, Quebec advanced the notion of parliamentary sovereignty as a check-and-balance to the federal judicial power. However, closer examination reveals that the National Assembly had virtually no involvement in the drafting of Bill 178, and minimal involvement in the drafting of Bill 86. The two case studies raise important questions about the nature of

⁶³⁹ Examples include the ‘Court as Umpire Model’ advanced by MacDonald (1961) and Greschner (2000)

⁶⁴⁰ See also: Patrick J. Monahan, *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada*. (Agincourt: Carswell, 1987).; Peter Russel, *Federalism and the Charter: Leading constitutional decisions*, (Montreal: McGill-Queen’s Press, 1989).; Samuel Victor LaSelva, *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood*, (Montreal: McGill-Queen's Press, 1996).

⁶⁴¹ For more contemporary discussions regarding the role of federalism in judicial review see: Jeremy A. Clarke, “In the Case of Federalism v. Charter: The Processes and Outcomes of a Federalist Dialogue” *International Journal of Canadian Studies*, 36 (2007).; Ivan Jankovic, “Judicial Review, Charter Politics, and Federalism in Canada -- The American Influences,” Presented at the American Political Science Association 2013 Annual Meeting (2103). <http://ssrn.com/abstract=2301540>.

⁶⁴² Within the context of this thesis, these questions would include: What are the reasonable divisions of federal and provincial power with respect to language and culture? How has judicial reform and the entrenchment of the charter altered provincial sovereignty? What, if any, outstanding reforms to the judicial appointment process should be re-examined from the constitutional conferences of the 1960s-1980s in order to enhance the provincial participation? Which government bodies serve to adjudicate provincial and federal disputes and to what extent is the Supreme required as an ‘arbiter’?

⁶⁴³ Patrick Fafard and Francois Rocher, “The Evolution of Federalism Studies in Canada from Centre to Periphery,” *Canadian Public Administration* 52, no. 2 (2009).

parliamentary sovereignty in Canada and the extent to which this concept can be equated to a notion of broader rights-based deliberation by elected members of provincial government. Within the context of coordinate interpretation, the case studies of Bill 178 and Bill 86 ought to be conceptualized as a drama involving the Supreme Court of Canada and the provincial executive branch of Quebec as the primary actors, and a supporting cast consisting of the federal executive, Anglophone civil society, and the UNHRC.

Given the importance of international human rights norms, this thesis has also sought to challenge the assumption of Canadian judicial review and human rights disputes as a primarily domestic undertaking. In this sense, Chapter Five further exemplifies the ambiguity of human rights interpretation explored in Baker's coordinate interpretation.⁶⁴⁴ For Baker, in coordinate interpretation "all institutions are 'not quite supreme,'" and in Chapter Five the influence of international human rights norms and institutions further asserts the extent to which the notion of institutional supremacy is challenged in Canada (provided the political climate is conducive to it). Had Quebec, and in particular the Parti Québécois, not had the institutional legacy of para-diplomacy, it is doubtful that the UNHRC's decision would have held such gravitas, or been so influential, in the drafting of Bill 86. However, regardless of the power of international human rights norms, *Ballantyne et al.* and *Singer* underscore the strategic significance of international institutions for civil society actors, as well as the surprising influence of international human rights norms on the gradual adoption judicial remedies through Bill 86.

Altogether, Baker's model of coordinate interpretation is helpful insofar as it argues for the distinct role and responsibilities of all branches of government in constitutional interpretation. Further to its suitability for the case studies examined in this thesis, the model of coordinate interpretation is particularly attractive to political scientists because it inherently accounts for the flexibility, dynamism, and political manoeuvring of various actors in constitutional and human rights matters. For example, a considerably modified version of coordinate interpretation might argue that, within the scope of this thesis, the Supreme Court, the Quebec executive branch, civil society actors and the UNHRC contributed distinctly to the amendments of the *Charter of the French Language*, Bills 178 and 86. Although this modified version of coordinate interpretation provides little insight

⁶⁴⁴ Baker, *Not Quite Supreme*, 39-41.

into “who has the final word” on constitutional matters, it compensates for its indecisiveness by providing a nuanced understanding of the unique actors and circumstances that contribute to the negotiation of human rights norms and constitutional order.

4. Key Contributions to the advancement of literature and future research

This thesis has made a modest contribution to the study of *Charter* politics and judicial review, primarily through its methodological approach; while the use of historical and discursive institutionalism is hardly unique in this field, the use of a substantively historical context is less common. Through analytic techniques such as examining slow incremental changes to institutional dynamics, such as the role of the Supreme Court through decades of constitutional negotiations (Chapter Three), the thesis appreciates the motivations, concerns and experiences of the government of Quebec in its efforts to retain control and jurisdiction over matters such as language and culture.

Against an historical background, the thesis is able to examine provincial strategies to judicial invalidation in greater detail. In this regard, a wealth of archival material obtained through formal and informal access to information requests reveals that ‘legislative’ responses to judicial invalidation were drafted in virtual secrecy by the executive branch with little involvement of the National Assembly.

Altogether, this thesis contributes to the advancement of knowledge by dispelling the popular conception of *Charter* dialogue as an appropriate model for understanding the relationship of the Quebec government to the Supreme Court. More importantly, this thesis uncouples the pairing of the notwithstanding clause to the concept of parliamentary sovereignty (Chapters Four and Five), and raises critical questions regarding the very definition of parliamentary sovereignty within the context of constitutional interpretation; this is especially true with respect to the need to both delineate and critically assess the roles and responsibilities between the executive and legislative branches encapsulated within the concept of “parliamentary sovereignty.”

Perhaps the most substantive contribution of this thesis lies in its emphatic use of descriptive analysis in order to examine the interpretive process of Canadian constitutional interpretation. While the case studies examined in the breadth of this research project are

admittedly narrow, this focused approach permits greater contextual analysis of the variables that influence the process of constitutional interpretation. A number of scholars have examined the *Ford* and *Devine* cases,⁶⁴⁵ but absent from their analysis is the historical context of judicial transformation coupled with a closer examination of how the National Assembly produces legislative responses. For example, Hogg and Bushnell examined only the Supreme Court decision of *Ford* and *Devine* without undertaking an analysis of legislative debates or other archival materials pertaining to the National Assembly of Quebec. A similar critique can be applied to Kelly's analysis of the National Assembly's response to the cases of *Ford*, *Devine*, *Protestant School Board* and *Solski*. While Kelly employs case studies limited by province (i.e. Quebec) and theme (i.e. language and education), he argues that by "partially complying with *Ford*, the Government of Quebec has largely preserved the policy status quo that existed before 1988."⁶⁴⁶ Furthermore, Kelly concludes that Quebec has succeeded in maintaining control of the "constitutional parameters" of the *Charter of the French Language*, in spite of the Supreme Court and the *Charter of Rights and Freedoms*.⁶⁴⁷ In light of the evidence examined in this thesis, it is argued that the reason for which Kelly's conclusions differ so considerably from those presented in Chapters Four and Five is a result of Kelly's reliance on secondary literature.

There is a rich body of secondary literature on judicial review and judicial review in Canada, but studies deeply-rooted in historical context and evidence are crucial for elucidating the accuracy of our models and constitutional theories. That is not to say that normative research is without its merits; quite the contrary. As examined in Chapter One, there are many competing theories of the practice of judicial review in Canada. These have been seminal in forming a preliminary understanding of how this relatively "new" practice of judicial review has evolved since the entrenchment of the Charter and the "rights revolution." However, there is also a need to understand the suitability and accuracy of these models when applied to landmark cases, such as those of *Ford* and *Devine*.

The predominant aspiration of this thesis is to serve as a catalyst for greater contextual analysis of how elected branches of government formulate their responses to

⁶⁴⁵ Hogg and Bushnell, "Charter dialogue between courts and legislatures"; Kelly, *Governing with the Charter Legislative and Judicial Activism and Framers' Intent*.

⁶⁴⁶ Kelly, "Dialogue as Non-Compliance: Quebec and the Charter of the French Language," 9-10.

⁶⁴⁷ *Ibid.*

judicial nullification. Broader contextual analysis reveals the nuances and discrepancies between the political rhetoric (i.e. Quebec's campaign for the preservation of parliamentary sovereignty) and the political reality (i.e. the unilateral and secretive drafting of legislation by a select few of Bourassa's cabinet). The methodological approach employed in this thesis makes it abundantly clear that researchers and readers will not be rewarded with a singular model of constitutional interpretation. Yet, in spite of this frustration, the methodological approach employed in this study offers an opportunity to understand the process of judicial review as an inherently political activity that involves the participation of all branches of government at both the federal and provincial level.⁶⁴⁸

There is little question that the field of judicial review and judicial review will be rife with interesting (and perhaps even exciting) developments in the coming years. Within one year of his electoral victory, Prime Minister Justin Trudeau has announced the reinstatement of the Court Challenges Program⁶⁴⁹ and establishment of a seven-member Independent Advisory Board for Supreme Court of Canada Judicial Appointments to provide recommendations for a position that will become vacant upon the retirement of the Honourable Justice Cromwell.⁶⁵⁰ It will be fascinating to observe which civil society actors will capitalize upon the reinstatement of the Court Challenges Program, how these civil society actors will challenge the constitutionality of legislation, and how all branches – and levels of government – will respond. Additionally, it will be interesting to see if the Independent Advisory Board of the Supreme Court of Canada Judicial Appointments will summon the specters of the constitutional negotiations from the 1960s -1980s, and the extent to which federalism will be a consideration in the final recommendation.

⁶⁴⁸ See also: Emmett MacFarlane, "What we're talking about when we talk about judicial activism: Has the Supreme Court gone too far?" *Macleans*, 23 February 2015. <http://www.macleans.ca/politics/what-were-talking-about-when-we-talk-about-judicial-activism/>.

⁶⁴⁹ Canada, Office of the Prime Minister, "Minister of Canadian Heritage Mandate Letter," 12 February 2016. <http://pm.gc.ca/eng/minister-canadian-heritage-mandate-letter>.

⁶⁵⁰ Canada, Office of the Prime Minister, "New Process for Judicial Appointments to the Supreme Court of Canada," 2 August 2016. <http://pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada>

Bibliography

- Arbour, Lousie. "How the Charter helped define Canada." *Globe and Mail* (April 16, 2012). <http://www.theglobeandmail.com/opinion/how-the-charter-helped-define-canada/article4239318/>.
- Axworthy, Thomas. "The Notwithstanding Clause: Sword of Damocles or Paper Tiger?." *Policy Options*, (2007). <http://policyoptions.irpp.org/issues/equalization-and-the-federal-spending-power/the-notwithstanding-clause-sword-of-damocles-or-paper-tiger/>.
- Baker, Denis. *Not Quite Supreme: The courts and coordinate constitutional interpretation*. Kingston and Montreal: McGill-Queen's University Press, 2010.
- Baier, Gerald. "Judicial Review and Canadian Federalism." *Canadian Federalism, Effectiveness and Legitimacy*, eds. Herman Backvis and Grace Skogstad, (2002): 24-39.
- Baier, Gerald. "The Law of Federalism: Judicial Review and the Division of Powers." In *New Trends in Canadian Federalism*, eds. Francois Rocher and Miriam Smith. 111-133. Peterborough: Broadview Press, 2008.
- Béland, Daniel. "Ideas, Institutions, and Policy Change." *Journal of European Public Policy* 16, no. 5 (2009): 701-178.
- Bélangier, Louise. "The Domestic Politics of Quebec's Quest for External Distinctiveness." *Quebec on the World Stage, Contemporary Quebec: Selected readings and commentaries* eds. Michael D. Behiels and Matthew Hayday. 761-777. Montréal: McGill-Queen's University Press, 2011.
- Bernard, André. "Les répercussions sociales et politiques de la Loi 101." *Le français au Québec: 400 ans d'histoire et de vie*, eds. Michel Plourde et Pierre Georgeault. 360-368. Quebec: Fides, 2008.
- Billings, Jane. *Memorandum for the Prime Minister: Signage Regulations in Quebec*. Ottawa: Privacy Council Office, October 1993.
- British Columbia. "British Columbia's Constitutional Proposals Paper No. 4: Reform of the Supreme Court." Presented at the 18th Annual Premiers' Conference, St. Andrews, New Brunswick, August 1978.
- Brodie, Ian. *Friends of the Court: The Privileging of Interest Group Litigants in Canada*. Albany: State University New York Press, 2002.
- Brodie, Ian. "Interest Group Litigation and the Embedded State: Canada's Court Challenges Program." *Canadian Journal of Political Science* 24, no. 2 (2001): 357-376.

- Brodie, Ian. "The Court Challenges Program." in *Law Politics and the Judicial Process in Canada*, ed. Frederick Lee Morton. 326. Calgary: University of Calgary Press, 2002.
- Broschek, Jörg. "Conceptualizing and theorizing constitutional change in federal systems: Insights from historical institutionalism." *Regional & Federal Studies* 21, no. 4/5 (2011): 539-559.
- Buergenthal, Thomas. "The U.N. Human Rights Committee." *Max Plank Yearbook of United National Law* 5, (2001): 341-398.
- Bzdera, André. "Comparative Analysis of Federal High Courts: A Political Theory of Judicial Review." *Canadian Journal of Political Science* 26, no.1 (1993): 3-29.
- Cairns, Alain. "Citizen (outsiders) and governments (insiders) in Constitution making: The Case of Meech Lake." *Canadian Public Policy* 14, (1988): 121-145.
- Cairns, Alan C. "The past and Future of the Canadian Administrative State." *University of Toronto Law Journal* 40, no.3 (1990): 319-361.
- Cairns, Alan C. "The Politics of Constitutional Conservatism." In *And No one Cheered: Federalism, Democracy and the Constitution Act*, eds. Keith Banting and Richard Simeon. 28-58. Toronto: Metheun, 1983.
- Campbell, John L. and Pedersen, Ove Kaj. *The Rise of Neoliberalism and Institutional Analysis*. Princeton, N.J.: Princeton University Press, 2001.
- Canada. *Aide Memoire: Bill 178 Communications before the United Nations*. Ottawa: Privy Council Office, April 1994. [ATIP: A-2014-00228/GC]
- Canada. *Aide Memoire: Bill 178 Communications Before the United Nations*, Ottawa: Office of the Prime Minister, 21 April 1994. [ATIP: A-2014-00228/GC]
- Canada. *Analyse post-électorale du dossier linguistique*. Ottawa: Privy Council Office, October 1993. [ATIP-2014-00083]
- Canada. *Bill 178 Communications Before the United Nations*. Ottawa: Justice Canada Public Law Branch, April 1993. [ATIP: A-2014-00228/GC]
- Canada, *Briefing book – First Ministers' Conference on the Constitution*, November 2, 2981, National Library and Archives, Volume 406, File 18, R11344-20684-2-F.
- Canada. Canadian Constitutional Conferences Secretariat. "Draft Canadian Constitutional Charter." Presented at the Intergovernmental Affairs Conference, Ottawa, ON, May – June 1971. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]

Canada. Department of Justice Canada. *Memorandum: Correspondence against Quebec's Bill 178*. 22 February 1989, 3. [ATIP: A-2014-00033]

Canada. *Facsimile communication regarding newspaper articles on Bill 178*. Ottawa: External Affairs and International Trade Canada, April 1993. [ATIP: A-2014-00033]

Canada. "Federalism for the Future: A statement of policy by the Government of Canada. *Presented at the Opening Address at the Constitutional Conference*, Ottawa, ON, February 1968. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]

Canada. *House of Commons Debate*, 19 December 1988, (Brian Mulroney, Lib.).

Canada. Intergovernmental Affairs, Canadian Constitutional Conferences Secretariat. "Notes To Section V, Articles 25 and 26 in the Draft Canadian Constitutional Charter." Presented at the Intergovernmental Affairs Conference, Ottawa ON, May – June 1971. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]

Canada. Law and Government Division. *The Notwithstanding Clause of the Charter*. Ottawa: Library of Parliament, 2008.
<http://www.parl.gc.ca/content/lop/researchpublications/bp194-e.html>

Canada. *Memorandum for Jocelyn Bourgon: Quebec's Signage Legislation – U.N. Decision*. Ottawa: Privy Council Office, August 1994. [ATIP: A-2014-00033/JM]

Canada. "Notes for a Statement by the Prime Minister of Canada on the Supreme Court of Canada." Presented at the Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, September 1980. [ATIP: A-2013-00469/LS]

Canada. Office of the Prime Minister. "Letter from PM Brian Mulroney to a Representative of Alliance Quebec on the topics of Meech Lake Accord and Bill 178." Ottawa, 6 March 1989. [ATIP: A-2014-00315/CT]

Canada. Office of the Prime Minister. "Letter from Senator Lowell Murray to the Prime Minister requesting a standard response Bill 178." 8 March 1989. [ATIP: A-2014-00315/CT]

Canada. Office of the Prime Minister. "Minister of Canadian Heritage Mandate Letter." Ottawa, ON, February 2016. <http://pm.gc.ca/eng/minister-canadian-heritage-mandate-letter>.

Canada. Office of the Prime Minister. "New Process for Judicial Appointments to the Supreme Court of Canada." Ottawa, ON, August 2016.
<http://pm.gc.ca/eng/news/2016/08/02/new-process-judicial-appointments-supreme-court-canada>.

- Canada. Office of the Prime Minister. “Prime Minister’s Opening Statement: Opening of the Victoria Conference.” Presented at the Victoria Conference, Victoria, B.C., June 1971. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]
- Canada. Office of the Prime Minister. “Statement by the Prime Minister of Canada at the Opening of the Constitutional Conference.” *Presented at the Constitution Conference* Ottawa, ON, February 5 1968. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]
- Canada. Office of the Prime Minister. “Verbatim transcript (Open sessions only).” Presented at the Federal-Provincial Conference of First Ministers, Ottawa, ON, November 1979. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]
- Canada. “Opening Statement by the Honorable Otto Lang, Minister of Justice and Attorney General of Canada on the Canadian Charter of Rights and Freedoms.” Presented at the Federal-Provincial Conference, Ottawa, ON, October 1978. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, January 14, 2014]
- Canada. *Parliament of Canada Debates*. 11 May 2010 (Mr. Claude Bachand, BQ). <http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=4520162>.
- Canada. “Prime Minister’s Remarks at Closed Discussion on the Charter of Rights.” Presented at the First Ministers Conference on the Constitution, Ottawa, ON, September 1980. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, January 14, 2014]
- Canada. Privy Council Office. *Divided by Their Convictions: Language, Language Policy, And “Bilingualism” in Canada*. Ottawa: Government of Canada. May 25, 1990 [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 5, 2013].
- Canada. Privacy Council Office. “Memo to Marcel Massé, Secretary to the Cabinet for Federal Provincial Relations.” May 1993 [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 5, 2013].
- Canada. Secretariat of the Constitutional Conference. “Statement of Conclusions.” Presented at the Victoria Conference, Victoria, B.C., June 1971. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]
- Canada. “Statement by Honorable O.E. Lang, Minister of Justice to the Special Joint Committee on the Constitution.” Presented at the Special Joint Committee on the

- Constitution, Ottawa, ON, August 1978. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, January 14, 2014]
- Canada. "Statement by the Honourable Pierre Elliott Trudeau Minister of Justice and Attorney General of Canada on a Constitutional Charter of Human Rights." Presented at the Constitutional Conference, Ottawa, ON, February 1968. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]
- Canada. "Transcript of the Prime Minister's Statement at the First Ministers' Conference." Presented at the First Ministers' Conference, Ottawa, ON, September 1980. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, October 5, 2013]
- Canada. "Transcript of Mr. René Lévesque's Remarks on the Charter of Rights." Presented at the Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, ON, September 1980. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, October 5, 2013]
- Canada. "Verbatim Transcript (open sessions only)." Presented at the Federal-Provincial Conference of First Ministers on the Constitution, Ottawa, ON, February 1980. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, October 5, 2013]
- Canadian Press. "Amnesty International Might Act If Anyone Is Jailed under Bill 178." *The Gazette (Index-only)*, December 31, 1988.
- Cardinal, Linda. "Language Planning and Policy-making in Quebec and Canada." *Quebec Questions*, eds. Dervais, Kirkey and Rudy. 184-201. Don Mills, ON: Oxford University Press, 2011.
- Cardinal, Linda. "Le pouvoir exécutif et la judiciarisation de la politique au Canada. Une étude du programme de contestation judiciaire." *Politique et sociétés* 19, (2000): 43-64.
- Carstensen, Martin B. "Ideas Are Not as Stable as Political Scientists Want Them to Be: A Theory of Incremental Ideational Change." *Political Studies* 59, no.3 (2011): 596-615.
- Cavalluzzo, Paul. "Judicial Review and the Bill of Rights: Drybones and Its Aftermath." *Osgoode Hall Law Journal* 9, no.3 (1971): 511-551.
- Chevrier, Marc. *Laws and Language in Quebec: the principles and means of Quebec's Language policy*. Quebec: Ministère des Relations internationales, 1997.
<http://collections.banq.qc.ca/ark:/52327/bs43058>
- Choquette, Jérôme. "La Justice contemporaine." White paper presented by the Minister of Justice, context unknown. Quebec: Government of Quebec, 1975. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, October 4, 2013]

- Clarke, Jeremy A. "Beyond the Democratic Dialogue, and Towards a Federalist One: Provincial Arguments and Supreme Court Responses in *Charter* Litigation." *Canadian Journal of Political Science* 39, no. 2 (2006): 293-314.
- Clarke, Jeremy A. "In the Case of Federalism v. Charter: The Processes and Outcomes of a Federalist Dialogue." *International Journal of Canadian Studies/Revue internationale d'études canadiennes* 36, (2007): 41-71.
- Clément, Dominique. *Canada's Rights, Revolution, Social Movements and Social Change, 1937-82*. Vancouver: UBC Press, 2008.
- Clément, Dominique. "Human Rights in Canadian Domestic and Foreign Politics: From "Niggardly Acceptance" to Enthusiastic Embrace." *Human Rights Quarterly* 34 (2012), 751-778.
- Clinton, Robert N. "The Rights of Indigenous People as Collective Group Rights." *Ariz L. Rev* 32, (1990): 739-747.
- Cooper, Barry. "Some Implications of the Embedded State in Canada." In *Insiders and Outsiders: Alan Cairns and the Reshaping of Canadian Citizenship*, eds. Kernerman Philip and PK Gerald. 104-116. Vancouver: UBC Press, 2005.
- Court Challenges Program. "Who We Are." Accessed April 25, 2016.
<http://www.ccppcj.ca/en/about.php>
- Dahl, R.A. "Decision-making in a democracy: The Supreme Court as a national policy-maker." *Journal of Public Law* 6, no.2 (1957): 279-295.
- Dicey, A.V. *Introduction to the Study of Law of the Constitution*. London: MacMillan Papermac, 1961.
- Dutil, Patrice A., and Ryan, Peter M. "The Bonds of Institutional Language: A Discursive Institutional Approach to the Clerk of the Privy Council's Annual Report." *Canadian Public Administration* 56, no.1 (2013): 26-46.
- Dworkin, Ronald M. *A Matter of Principle*. Cambridge: Harvard University Press, 1985.
- Ely, John Hart. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge: Harvard University Press, 1980.
- Emerson, Thomas I. "Toward a General Theory of the First Amendment." *Yale Law Journal* 72 (1963): 877-956.
- Epp, Charles. *The Rights Revolution: Lawyers, Activist and Supreme Courts in Comparative Perspective*. Chicago: University of Chicago Press, 1998.
- Fafard, P., and Rocher, F. "*The Evolution of Federalism Studies in Canada From Centre to*

- Periphery.” *Canadian Public Administration* 52, no. 2 (2009): 291-311.
- Ford. *Factum of the Appellant (A.G. Quebec)*.1988.
- Ford. *Factum of the Intervenor (A.G. Canada)*. 1988.
- Foucault, Michel. *The Archaeology of Knowledge*. New York: Harper & Row, 1976.
- French, Richard. Discussion with the author. Ottawa, ON, 4 June 2015.
- Friedman, B.K. “An intent-based approach to the acceptance of benefits doctrine in the Federal courts.” *Michigan Law Review* 92, no.3 (1993): 742-773.
- Gauvin, Lise. “La mobilisation des écrivains.” *Le français au Québec: 400 ans d'histoire et de vie*, eds. Pierre Georgeault and Michel Plourde. 301-306. Quebec: Fides, 2008.
- Gendron, Jean-Denis. “La situation du français comme langue d'usage au Québec. In *Langue française: le français au Québec*. Eds. Jean-Claude Corbeil et Louis Guilbert. Quebec: Quebec, 1976.
- Gerson, Jen. “Judge Dread: Recent rulings only reawakening Tories’ long-held hostility Toward the top court.” *National Post* (May 9, 2014).
<http://news.nationalpost.com/news/canada/canadian-politics/na0510-harper>
- Greschner, Donna. “The Supreme Court, Federalism and Metaphors of Moderation.” *The Canadian Bar Review* 79, (2000): 47-76.
- Haigh, Richard and Sobkin, Michael. “Does the Observer have an Effect?: An Analysis of The Use of the Dialogue Metaphor in Canada’s Courts.” *Osgoode Hall Law Journal* 45, no.1 (2007): 67-90.
- Hartney, Michael. “Some confusions concerning collective rights.” *Can JL & Jurisprudence* 4, (1991): 293-314.
- Harvie, Robert A and Foster, Hamar. “Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law under the Charter.” *Ottawa Law Review* 24, no.1 (1992): 39-115.
- Hay, Colin and Gofas, Andreas. *The Role of Ideas in Political Analysis: A Portrait of Contemporary Debates*. New York: Routledge, 2010.
- Heinrich, Jeff. “25 years later, parties remember Supreme Court battle over Bill 101.” *The Gazette*, 14 December 2013.
- Hiebert, Janet. *Charter Conflicts What is Parliament’s Role?*. Montreal: McGill-Queen’s University Press, 2002.

- Hiebert, Janet. "Interpreting a bill of rights: The importance of legislative rights review." *British Journal of Political Science* 35, (2005): 235-255.
- Hiebert, Janet. "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance When Interpreting Rights." *Texas Law Review* 82, (2004): 1963-1987.
- Hiebert, Janet. "Parliamentary Bills of Rights: An Alternative Model?" *The Modern Law Review* 69, no. 1 (2006): 7-28.
- Hiebert, Janet. "Parliamentary Engagement with the *Charter*." *Supreme Court Law Review* 58, (2012): 93.
- Hiebert, Janet. "The Canadian *Charter* of Rights and Freedoms." *Oxford Handbook of Canadian Politics* eds. John C Courtney and David E. Smith, (2010): 54-71.
- Hirschel, Ran. *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*. Cambridge, Mass.: Harvard University Press, 2004.
- Hogg, Peter and Bushell, Allison. "Charter dialogue between courts and legislatures." *Osgoode Hall Law Journal* 35, no.1 (1997): 75-124.
- Hogg, Peter, Thornton, Allison and Wright, W.K. "Charter dialogue revisited – or 'Much Ado about Metaphors.'" *Osgoode Hall Law Journal* 45, no.1 (2007): 1-65.
- Hogg, Peter W. *Constitutional Law of Canada: 10th Student Edition*. Scarborough: Carswell, 2010.
- Holmes, Stephen. "Gag Rules and the Politics of Omission." *Constitutionalism and Democracy*, ed. Jon Elster and Rune Slagstad, (1988): 19-58.
- Howlett, Michael and Ramesh, M. *Studying Public Policy: Policy Cycles and Policy Subsystems*. Don Mills, Ontario: Oxford University Press, 2003.
- Hudon, Marie-Ève. *Official Languages Act: Understanding Its Principles and Implementation*. Ottawa: Library of Parliament (Legal and Social Affairs Division), 2011.
- Huscroft, Grant and Brodie, Ian. "Introduction." In *Constitutionalism in the Charter era*, eds. Grant Huscroft and Ian Brodie. Toronto: LexisNexis Butterworths, 2004.
- Huscroft, Grant. "Rationalizing judicial power: The mischief of dialogue theory." In *Contested Constitutionalism*, eds. James B Kelly and Christopher P. Manfredi, 50-63. Vancouver: UBC Press, 2009.
- Jackson, Thomas H. and Jeffries, John Calvin. "Commercial Speech: Economic Due Process and the First Amendment." *Virginia Law Review* 65 (1979): 1-42.

- Jankovic, Ivan. "Judicial Review, Charter Politics, and Federalism in Canada – The American Influences." Presented at the American Political Science Association 2013 Annual Meeting, Chicago, 2013. <http://ssrn.com/abstract=2301540>
- Johansen, David and Philip Rosen. "The Notwithstanding Clause of the Charter," Ottawa. ON: Library of Parliament, 2008. <http://www.lop.parl.gc.ca/content/lop/researchpublications/bp194-e.htm>.
- Kavanagh, A. *Constitutional review under the UK Human Rights Act*. Cambridge: Cambridge University Press, 2009.
- Kelly, James. B. "Dialogue as Non-Compliance: Quebec and the Charter of the French Language." Paper presented at the International Political Science Association, Madrid, Spain, July 2012. http://paperroom.ipsa.org/papers/paper_13398.pdf.
- Kelly, James B. *Governing with the Charter Legislative and Judicial Activism and Framers' Intent*. Vancouver: UBC Press, 2005.
- Kelly, James B. "Parliament and the Charter of Rights: an unfinished constitutional revolution." *Policy Options*, 1 February 2007. <http://policyoptions.irpp.org/issues/the-Charter-25/parliament-and-the-Charter-of-rights-an-unfinished-constitutional-revolution/>.
- Kelly, James B. "Reconciling Rights and Federalism during Review of the Charter of Rights And Freedoms: The Supreme Court of Canada and the Centralization Thesis, 1982 1999." *Canadian Journal of Political Science* 34, (2001): 321-355.
- Kelly, James and Murphy, Michael. "Shaping the Constitutional dialogue on federalism: Canada's Supreme Court as meta-political actor." *Publius: The Journal of Federalism* 35, no.4 (2005): 217-243.
- Khana, Tsyi. "The notwithstanding mechanism and public discussion: Lessons from the Ignored practice of section 33 of the Charter." *Canadian Public Administration* 44, no.3 (2001): 255-291.
- Kingdom, John W. *Agendas, Alternatives and Public Policies*. New York: HarperCollins College Publishers, 2003.
- Kurland, Philip B. "Posadas de Puerto Rico v. Tourism Company: 'Twas Strange; 'Twas Passing Strange; 'Twas Pitiful, 'Twas Wondrous Pitiful.'" *Supreme Court Review* (1986).
- Kurland, Philip B. "The Supreme Court Leading Cases." *Harvard Law Review* 100 (1986).
- Larrivée, Pierre. *Linguistic Conflict and Language Laws: Understanding the Québec Question*. New York: Palgrave Macmillan, 2003.

- LaSelva, Samuel Victor. *The Moral Foundations of Canadian Federalism: Paradoxes, Achievements, and Tragedies of Nationhood*. Montreal: McGill-Queen's Press, 1996.
- Lavoie, Gilbert. "Loi 178: des Anglophones demandent l'aide des Américains." *La Presse*, February, 1989.
- Lavoie, Gilbert. "Richard French n'écarter pas un retour au Conseil des ministres." *La Presse*, 7 February 1989.
http://collections.banq.qc.ca:8008/lapresse/src/cahiers/1989/02/07/02/82812_1989020702.pdf
- Lecours, André. *New Institutionalism Theory and Analysis: Studies in Comparative Political Economy and Public Policy*. Toronto: University of Toronto Press, 2005.
- Lipset, Seymour Martin. *Continental Divide: The Values and Institutions of the United States and Canada*. New York: Routledge, 1991.
- Lively, Donald E. and Kurland, Philip B. "The Supreme Court and Commercial Speech: New Words with an Old Message." *Minnesota Law Review* 72 (1987).
- Lubin, Martin. "The Politics of Language in Quebec." *Quebec Questions*, eds. Dervais, Kirkey and Rudy. 168-183. Don Mills, ON: Oxford University Press, 2011.
- MacDonald, V.C. *Legislative power and the Supreme Court in the fifties*. Toronto: Butterworth, 1961.
- MacFarlane, Emmett. "Administration at the Supreme Court of Canada: Challenges and Change in the Charter Era." *Canadian Public Administration* 52, no. 1 (2009): 1-21.
- MacFarlane, Emmett. "Conceptual Precision and Parliamentary Systems of Rights: Disambiguating "Dialogue" *Review of Constitutional Studies / Revue d'études constitutionnelles*. 17, no. 2 (2012): 73-100.
- MacFarlane, Emmet. "Dialogue or compliance? Measuring legislatures' policy responses to court rulings on rights." *International Political Science Review* 34, no. 1 (2013): 39-56.
- MacFarlane, Emmett. "The Supreme Court of Canada and the Judicial Role: An historical institutionalist account." PhD thesis, Queen's University, 2009.
https://qspace.library.queensu.ca/bitstream/1974/5313/1/Macfarlane_Emmett_200911_PhD.pdf.
- MacFarlane, Emmett. "What we're talking about when we talk about judicial activism: Has the Supreme Court gone too far?" *Macleans* 23, (2015).
<http://www.macleans.ca/politics/what-were-talking-about-when-we-talk-about-judicial-activism/>

- MacKay, A.W. "The Supreme Court of Canada and Federalism: Does/Should Anyone Care Anymore?" *Canadian Bar Review* 80, (2001): 241-280.
- Manfredi, Christopher. *Feminist Activism in the Supreme Court Legal Mobilization and the Women's Legal Education and Action Fund*. Vancouver: UBC Press, 2004.
- Manfredi, Christopher. *Judicial Power and the Charter: Canada and the paradox of liberal constitutionalism*. Toronto: McClelland & Stewart, 1993.
- Manfredi, Christopher. "The day the dialogue died." *Osgoode Hall Law Journal* 45, no.1 (2007): 105-123.
- Manfredi, Christopher and James B. Kelly. "Six degrees of dialogue: A response to Hogg And Bushell." *Osgoode Hall Law Journal* 37, no.3 (1999): 513-527.
- Manfredi, Christopher and Maoini, Antonia. "Judicializing health policy: unexpected lessons and an inconvenient truth." *Contested constitutionalism reflections on the Canadian Charter of Rights and Freedoms* eds. Christopher Manfred and James B. Kelly, (2009): 129-144.
- Marcel, Jean. "Quebec n'a pas pris les moyens pour gagner sa cause en Cour suprême sur l'affichage." *La Presse*, 10 February 1989.
- Massé, Marcel. *Note à l'intention du Sénateur Murray: Projet de loi 86: Calendrier*. Federal Provincial Relations, 1993 [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 5, 2013].
- McCormick, Peter. "American Citations and the McLachlin Court: An Empirical Study." *Osgoode Hall Law Journal* 47, (2009): 83-129.
- McLachlin, Beverly. "Courts, Legislatures, and Executives in the Post-Charter Era." In *Judicial Power and Canadian Democracy* eds. Paul Howe and Peter H. Russell. 63-72. Montreal and Kingston: Queen's University Press, 2000.
- McLachlin, Beverly. "Keynote Address." Presented at the 2006 Law & Parliament Conference, Carleton University, Ottawa, ON, November 2006.
- McRoberts, Kenneth. *Misconceiving Canada the Struggle for National Unity*. Toronto: Oxford University Press, 1997.
- MacMillan, Michael C. "Rights in Conflict: Contemporary Disputes Over Language Policy in Quebec." In *Contemporary Quebec: Selected Readings and Commentaries*, edited by M.D. Behiels and Matthew Hayday, 393-417. Montreal: McGill-Queen's Press, 2011.
- Monahan, Patrick J. *Politics and the Constitution: The Charter, Federalism, and the Supreme Court of Canada*. Agincourt, ON: Carswell, 1987.

- Monahan, Patrick J. "The Supreme Court of Canada in the 21st Century." *Canadian Bar Review* 80, no.1 (2001): 374-398.
- Morton, F.L. *Law Politics and the Judicial Process in Canada* Calgary: University of Calgary Press, 2002.
- Morton, F.L. "The Charter Revolution and the Court Party." *Osgoode Hall Law Journal* 30, no.3 (1992): 627-652.
- Morton, F.L. and Knopff, Rainer. "Judges, the Court Party and Charter Revolution." *Policy Options* 21, no.3 (2000).
- Morton, F.L. and Knopff, Rainer. *The Charter Revolution and the Court Party*. Michigan: Broadview Press, 2000.
- O'Keefe, Michael. *Quebec and Minority Communities*. Ottawa: Department of Canadian Heritage, Official Languages Support Programs Branch (Language), 1994.
- Petter, Andrew. "Taking dialogue theory much too seriously (or perhaps dialogue isn't such a good thing after all)." *Osgoode Hall Law Journal* 45, no.1 (2007): 147-167.
- Peters, Guy B., Pierre, Jon, and King, Desmond S. "The Politics of Path Dependency: Political Conflict in Historical Institutionalism." *Journal of Politics* 67, no.4 (2005): 1275-1300.
- Pickel, Jo-Anne. "Reframing Dialogues: toward a multidimensional approach to Charter dialogue." (J.S.D. Thesis), Toronto: University of Toronto, 2004.
- Pierson, Paul. "Increasing Returns, Path Dependence, and the Study of Politics." *The American Political Science Review* 94, no.2 (2000): 251-267.
- Puddister, Kate. "The Most Radical Amendment of All: the Power to Secede the *Secession Reference*." In *Constitutional Amendment in Canada* ed. Emmett MacFarlane. 271 London, ON: University of Toronto Press, 2016.
- Quebec. *Bill 63: Loi pour promouvoir la langue française au Québec*. Quebec, November, 1969. http://www.oqlf.gouv.qc.ca/charte/reperes/loi_63.pdf.
- Quebec. "L'Office Québécois de la langue française: son histoire, sa mission, ses services et outils, son rayonnement." Québec, 2010. https://www.oqlf.gouv.qc.ca/ressources/bibliotheque/depliant/20100212_depliant1fr.pdf
- Quebec. "Les positions traditionnelles du Québec sur le partage des pouvoirs, 1900-1976." Quebec: Government of Quebec, 1978. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]

- Quebec. “Mémoire sur la question constitutionnelle,” Presented at the Conférence intergouvernementale canadienne, Ottawa, ON, February 1968. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]
- Quebec. “Memorandum regarding the Canadian Intergovernmental Conference.” Presented at the Federal-Provincial Conference, Ottawa, ON, January 1950. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]
- Quebec. *National Assembly of Quebec Debates*. 21 December 1988 (Mr. Bourassa, QL). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>
- Quebec. *National Assembly of Quebec Debates*. 21 December 1988 (Mr. Chevrette, PQ). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>
- Quebec, *National Assembly of Quebec Debates*. 21 December 1988 (Mr. Filion, PQ). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>
- Quebec, *National Assembly of Quebec Debates*. 21 December 1988 (Mr. Rochefort, Ind.). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/33-2/journal-debats/19881221/123227.html>
- Quebec. *National Assembly of Quebec Debates*. 7 June 1993 (Mr. Brassard, PQ). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/34-2/journal-debats/19930607/63721.html>
- Quebec. *National Assembly of Quebec Debates*, 7 June 1993 (Mr. Claude Ryan, QL). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/34-2/journal-debats/19930607/63721.html>
- Quebec. *National Assembly of Quebec Debates*, 9 June 1993 (Mr. Doyon, QL). <http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cc-34-2/journal-debats/CC-930609.html>
- Quebec. *National Assembly of Quebec Debates*, 7 June 1993 (Mr. Gil Rémillard, QL). <http://www.assnat.qc.ca/en/travaux-parlementaires/assemblee-nationale/34-2/journal-debats/19930607/63721.html>
- Quebec. *National Assembly of Quebec Debates*, 9 June 1993 (Mrs. Blackburn, PQ). <http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cc-34-2/journal-debats/CC-930609.html>
- Quebec. *National Assembly of Quebec Debates*, 9 June 1993 (Mr. Robert Libman, QL).

<http://www.assnat.qc.ca/en/travaux-parlementaires/commissions/cc-34-2/journal-debats/CC-930609.html>

Quebec. "Opening Address by the Honourable Daniel Johnson, Prime Minister of Quebec to The Canadian Intergovernmental Conference." Presented at the Canadian Intergovernmental Conference, Ottawa, ON, February 1968. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]

Quebec. *Quebec's Positions on Constitutional and Intergovernmental Issues: from 1926 to March 2001*. Quebec: Government of Quebec, 1989.

https://www.saic.gouv.qc.ca/documents/positions-historiques/positions-du-qc/part2/ClaudeRyan1989_en.pdf.

Quebec. "Victoria Conference Notes for the Opening Statement by Mr. Robert Bourassa." Presented at the Victoria Conference, Victoria B.C., June 1971. [Informal ATIP to Canadian Intergovernmental Conference Secretariat, December 3, 2013]

Rawls, John. *Political Liberalism*. Cambridge: Harvard University Press, 1993.

Roach, Kent. "A Dialogue About Principle and a Principle Dialogue." *University of Toronto Law Journal* 57, no.2 (2007): 449-477.

Roach, Kent. "Constitutional and Common Law Dialogues Between the Supreme Court and Canadian Legislatures." *La Revue du Barreau Canadien* 80, (2001): 481-533.

Roach, Kent. "Sharpening the dialogue debate: The next decade of scholarship." *Osgoode Hall Law Journal* 45, no.1 (2007): 169-191.

Rocher, Guy. "La Charte de la langue française ou Loi 101 (1977): La politique et la loi linguistique du Québec en 1977." *Le français au Québec: 400 ans d'histoire et de vie* (2008): 339-344.

Rosen, Philip. Library of Parliament. Research Branch Constitutional Reform. *Federal Institutions Current Issues*. Ottawa ON: Government of Canada, November 1981.

Russell, Peter. "Canadian Constraints on Judicialization from Without." *International Political Science Review* 15, no. 2 (1994): 165-176.

Russel, Peter. *Federalism and the Charter: Leading constitutional decisions*. Montreal: McGill-Queen's Press, 1989.

Russell, Peter. *The Court and the Constitution: Leading Cases*. Toronto: Edmond Montgomery Publications, 2008.

Ryan, Claude. *Mémoire au Conseil des Ministres: Règlement facilitant la mise en oeuvre du second alinea de l'article 58.1 de la Charte de la langue française*. Québec: Québec, 1989. [ATIP: No number provided, October 3, 2014, Quebec]

- Ryan, Claude. "Reconciliation: A Québec View." Presented at a seminar on language rights and policies, Kingston, ON, December 1989.
- Saywell, John T. *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*. Toronto: University of Toronto Press, 2004.
- Schmidt, Vivien. "Discursive Institutionalism: The Explanatory Power of Ideas and Discourse." *Annual Review of Political Science* 11, (2008): 303-326.
- Schmidt, Vivien. "Reconciling Ideas and Institutions through Discursive Institutionalism." In *Ideas and Politics in Social Science Research* eds. Daniel Beland and Robert Henry Cox. 47-64. New York: Oxford University Press, 2010.
- Schneiderman, David. "Dual(ling) Charters: The Harmonics of Rights in Canada and Quebec." *Ottawa Law Review* 24, no.1 (1992): 235-263.
- Scott, Sarah. "Quebec's Controversial French-only Sign Law, Bill 178." *Montreal Gazette*, (March 17 1990).
- Sheppard, Robert and Valpy, Michael. *The National Deal: The Fight for a Canadian Constitution*. Toronto: Fleet Books, 1982.
- Simpson, Jeffrey. "The Court of No Resort." *Globe and Mail* (22 November 2002).
<http://www.theglobeandmail.com/news/politics/the-court-of-no-resort/article758096/>
- Sinclair, J. Grant. "The Queen v Drybones: the Supreme Court of Canada and the Canadian Bill of Rights." *Osgoode Hall Law Journal* 8, no.3 (1970): 599-619
- Smiley, Donald V. *The Federal Condition in Canada*. Toronto: McGraw-Hill Ryerson, 1987.
- Smith, Miriam. "Social Movements and Judicial Empowerment: Courts, Public Policy, and Lesbian and Gay Organizing in Canada." *Politics and Society* 33, no.2 (2005): 327-353.
- Smith, Miriam. *Political Institutions and Lesbian and Gay Rights in the United States and Canada*. New York: Routledge, 2008.
- Sossin, Lorne. *Boundaries of Judicial Review: The Law of Justiciability in Canada*. Scarborough, Ontario: Carswell, 1999.
- Stevenson, Garth. "Canadian Federalism and the Search for Accommodation of Quebec Nationalism." In *Quebec Questions: Quebec Studies for the Twenty-first Century* eds. Stephan Gervais, Christopher John Kirkey, Jarrett, Rudy. Chapt. 4. Don Mills, ON: Oxford University Press, 2011.
- Strayer, Barry L. *The Canadian Constitution and the Courts: The Function and Scope of*

- Judicial Review*. Toronto: Butterworths, 1998.
- Supreme Court of Canada. "Creation and Beginnings of the Court." *Supreme Court of Canada Website* (11 April 2016). <http://www.scc-csc.gc.ca/court-cour/creation-eng.aspx>.
- Swinton, Katherine E. "Federalism, the *Charter*, and the Courts: Rethinking Constitutional Dialogue in Canada." In *Rethinking Federalism: Citizens, Markets, and Governments in a Changing World* eds. Karen Knop, Sylvia Ostry, Richard Simeon, Katherine Swinton. Vancouver: University of British Columbia Press, 1995.
- Swinton, Katherine E. *The Supreme Court and Canadian Federalism: The Laskin-Dickson Years*. Toronto: Carswell, 1990.
- Tarrow, Sidney. *The New Transnational Activism*. New York: Cambridge University Press, 2005.
- Thibodeau, Paul H. and Boroditsky, Lera. "Metaphors We Think With: The Role of Metaphors in Reasoning." *Plos ONE* 6, no.2 (2011): e16782.
- Tully, James. "The struggles of indigenous peoples for and of freedom." *Political theory and The rights of Indigenous peoples*, (2000):36-59.
- Tushnet, Mark. "Judicial Activism or Restraint in a Section 33 World." *University of Toronto Law Journal* 53, (2003): 89-100.
- Tushnet, Mark. *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*. Princeton: Princeton University Press, 2009.
- Trudeau, Pierre E. "Convocation speech by the Right Honourable Pierre Elliot Trudeau, upon the occasion of his receiving the degree of Doctor of Laws, honoris causa (LL.D, h.c)." Presented at the University of Toronto, Toronto, ON March 1991.
- United Nations. General Assembly of the United Nations. *International Covenant on Civil And Political Rights*. December 19, 1966.
<https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf>.
- United Nations. Office of the High Commissioner, *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December, 1966.
<http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPCCPR1.aspx>.
- United Nations. United Nations Human Rights Committee, 47th Session, *Communications Nos. 359/1989 and 385/1989*, April 5, 1993.
<http://www1.umn.edu/humanrts/undocs/html/v359385.htm>.
- Veitch, Edward. "Language, Culture and Freedom of Expression in Canada." *International and Comparative Law Quarterly* 39, no. 1 (1990): 101-119.

Waldron, Jeremy. "A Right-Based Critique of Constitutional Rights." *Oxford Journal Legal Studies* 13, (1993): 18-51.

Walter, J.M. and Van Der Meer, Frans-Bauke. "Small, Slow, and Gradual Reform: What can Historical Institutionalism Teach Us?" *International Journal of Public Administration* 34, no.8 (2011): 43-64.

Waluchow, W.J. *A Common Law Theory of Judicial Review: The Living Tree*. Cambridge: Cambridge University Press, 2007.

Watts, Ronald L. *Canada: The State of the Federation, 1989*. Kingston: Institute of Intergovernmental Relations, Queen's University, 1989.

Weinberg, Jonathan. "Constitutional Protection of Commercial Speech." *Columbia Law Review* 82 (1982): 720-750.

Woehrling, José. "La Charte de la langue française: les ajustements juridiques." *Le français au Québec: 400 ans d'histoire et de vie*. eds. Pierre Georgeault and Michel Plourde. 354-374. Quebec: Fides, 2008.

Yalden, Robert. "Liberalism and Language in Quebec: Bill 101, the Courts and Bill 178." *University of Toronto Faculty of Law Review* 47, (1989): 973-994.

Legislation

Charter of the French Language. Statutes of Quebec. 1977.

Charter of Rights and Freedoms. Constitution Act. Statutes of Canada. 1982.

Official Languages Act. Statutes of Canada. 1972.

Court Cases

Devine v. Quebec (Attorney General) [1988] 2 S.C.R. 790 <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/386/index.do>

Ford v. Quebec (A. G) [1988] 2 S.C.R. 712. <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/384/index.do>

R v. Drybones [1970] S.C.R. 282

Annex A: Ethics Approval Notice

File Number: 02-12-02

Date (mm/dd/yyyy): 05/09/2014



Université d'Ottawa
Bureau d'éthique et d'intégrité de la recherche

University of Ottawa
Office of Research Ethics and Integrity

Ethics Approval Notice

Social Science and Humanities REB

Principal Investigator / Supervisor / Co-investigator(s) / Student(s)

<u>First Name</u>	<u>Last Name</u>	<u>Affiliation</u>	<u>Role</u>
Linda	Cardinal	Social Sciences / Political Science	Supervisor
Sophia	Muller	Social Sciences / Political Science	Student Researcher

File Number: 02-12-02

Type of Project: PhD Thesis

Title: Talking Back: The Reception of the Charter Dialogue Metaphor by the Government of Quebec and the Supreme Court of Canada

<u>Renewal Date (mm/dd/yyyy)</u>	<u>Expiry Date (mm/dd/yyyy)</u>	<u>Approval Type</u>
04/17/2014	04/16/2015	Ia

(Ia: Approval, Ib: Approval for initial stage only)

Special Conditions / Comments:

N/A



Université d'Ottawa **University of Ottawa**
Bureau d'éthique et d'intégrité de la recherche Office of Research Ethics and Integrity

This is to confirm that the University of Ottawa Research Ethics Board identified above, which operates in accordance with the Tri-Council Policy Statement (2010) and other applicable laws and regulations in Ontario, has examined and approved the ethics application for the above named research project. Ethics approval is valid for the period indicated above and subject to the conditions listed in the section entitled "Special Conditions / Comments".

During the course of the project, the protocol may not be modified without prior written approval from the REB except when necessary to remove participants from immediate endangerment or when the modification(s) pertain to only administrative or logistical components of the project (e.g., change of telephone number). Investigators must also promptly alert the REB of any changes which increase the risk to participant(s), any changes which considerably affect the conduct of the project, all unanticipated and harmful events that occur, and new information that may negatively affect the conduct of the project and safety of the participant(s). Modifications to the project, including consent and recruitment documentation, should be submitted to the Ethics Office for approval using the "Modification to research project" form available at: <http://www.research.uottawa.ca/ethics/forms.html>.

Please submit an annual report to the Ethics Office four weeks before the above-referenced expiry date to request a renewal of this ethics approval. To close the file, a final report must be submitted. These documents can be found at: <http://www.research.uottawa.ca/ethics/forms.html>.

If you have any questions, please do not hesitate to contact the Ethics Office at extension 5387 or by e-mail at: ethics@uOttawa.ca.

Signature:

Annex B: Sample Interview Questions

1. In a broad sense, what were the reactions within the Quebec Liberal party to the Supreme Court's decision in *Ford* and *Devine*? Do you recall the reactions of any other parties?
2. Consultation and the drafting of Bill 178
 - a. Knowing that the decision from the *Ford* and *Devine* cases was forthcoming, how early did the Quebec Liberal party begin working on drafting Bill 178?
 - b. Were you consulted at any point during the drafting Bill 178?
 - c. Were you given any opportunities to consult member of your riding for input to Bill 178?
 - d. Hansard records reveal that members of other parties were disappointed that Bourassa did not approve a sufficient amount of time to scrutinize Bill 178 by members of the National Assembly. Was there any attempt to solicit feedback on Bill 178 from within the Quebec Liberal party? Was there an attempt to solicit feedback from other parties?
3. Opposition to Bill 178
 - a. What were the factors that you took into consideration when you expressed your opposition to Bill 178?
 - b. To what extent was your opinion and position representative of other members of the Quebec Liberal party?
4. The Supreme Court and judicial review
 - a. In general terms, how did Members of the National Assembly perceive the role and function of the Supreme Court?
 - b. Did members of the National Assembly feel that the decision in *Ford* or *Devine* were prescriptive?
 - c. How concerned were Members of the National Assembly with upholding the principle of parliamentary sovereignty?
 - d. Did Members of the National Assembly understand the use of section 33 as an assertion of parliamentary sovereignty?
5. Civil Society Actors
 - a. To what extent were any civil society actors (such as Alliance Quebec) consulted on the contents of Bill 178?
 - b. From 1985-1994, what was the attitude of the government of Quebec vis-à-vis Anglophone civil society organizations?
6. International Organizations
 - a. Prior to 1989, did the government of Quebec express any concern with respect to inconsistencies between the Charter of the French Language and international protocols?

- b. Between 1991-93, to what extent was the government of Quebec concerned about the UNHRC ruling on Bill 178?