The Charter's Influence on Legislation: Political Strategizing about Risk

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Introduction

Most assessments of bills of rights analyze jurisprudence. This judicial focus is helpful to account for how courts interpret rights when determining constraints on state actors, to identify which legislative objectives have been overturned, and to ascertain if judicial review facilitates or undermines particular groups' abilities to use litigation as a strategy for reform.

However, my research on Canada (and other Westminster systems that have adopted a bill of rights) has a decidedly legislative focus (Hiebert, 2017; Hiebert and Kelly, 2015; Hiebert, 2002). A court orientation does not explain *whether, how* or *why* a bill of rights influences legislative behaviour or political strategizing. Yet only a fraction of the legislation enacted will ever be litigated, and consequently, as a practical matter, Parliament and provincial legislatures have the final say on the validity of much of the legislation they pass, regardless of whether Charter rights are engaged (assuming that the legislation is consistent with federalism's division of powers). Thus, to ignore the relationship between the Charter and legislative behaviour risks exaggerating the Charter's impact and can also encourage the misleading impression that if legislation violates rights, it will necessarily be litigated or remedied. Normative reasons also justify

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knowing how political actors engage with the Charter. If government adopts a cavalier attitude about the legitimacy of Charter constraints and Parliament does not push back by insisting on rights-friendly amendments, this offloads responsibility to citizens to protect their rights and undermines the moral importance of governing in a manner that respects constitutional norms. Thus, what should never be forgotten is that no bill of rights is self-enforcing. For this reason, Alexander Hamilton's prescient observation in *Federalist* No. 78 is as relevant today as when made more than 200 years ago: that because the judiciary has "no influence over either the sword or the purse", it has "merely judgment" and thus must depend upon the aid of the executive arm for the efficacy of its ruling (Hamilton, 1788).

This brings me to the subject of this year's presidential address: the relationship between the Charter and legislative decision making in the federal parliament. Little is known about how or why the Charter affects how government conceives or pursues its legislative agenda. The metaphor "Charter proofing" has been used in public and scholarly discourses (Dance, 2017; Roach 2001, 2007) and gives the impression that legislative decision makers consciously and deliberately incorporate judicial norms into the design and drafting of legislation because they believe legislation should respect judicial interpretations of constitutional norms and/or because they act out of self-interest by engaging in risk-averse behaviour to minimize the likelihood that legislation could subsequently be challenged and declared unconstitutional. But is this impression accurate?

In this address, I ask the following questions: *Does apprehension of Charter litigation drive legislative choices? How does the prospect of judicial review influence government's political strategies? What form do these strategies take (for example, do they prioritize compliance with judicial Charter rulings, and if not, why not)?*

My research relies on interviews over a 16-year period with government lawyers who evaluate proposed legislation and advise on ways to reduce the risk of judicial invalidation. I conducted interviews with several lawyers in the Human Rights Centre at the Department of Justice between 1999 and 2000 (on the basis of anonymity); had multiple conversations about the vetting process with former deputy ministers of justice John Tait in 1994 and 1995 and George Thomson in 1998 and 1999 (with attribution granted); interviewed on several occasions in 2014 and 2015 (with attribution granted) Edgar Schmidt, who had responsibility for certifying Charter compliance before being fired for launching a legal review of the standards being utilized; interviewed in 2015 (with attribution granted) former minister of justice Irwin Cotler, who had expressed concerns in Parliament about how Charter consistency was being evaluated for Conservative government legislation; and interviewed former justice officials in 2014 and 2015 (on the basis of anonymity). All are referred to subsequently as "Interviews". The analysis also utilizes

Abstract. Commentators and critics often invoke the metaphor "Charter proofing" to emphasize how much the Charter and judicial review have influenced legislation. This metaphor implies that proposed legislation is evaluated carefully for its consistency with Charter rulings as a condition of passage because decision makers believe legislation should respect judicial interpretations of constitutional norms and/or because they engage in risk-averse behaviour out of self-interest to minimize the likelihood that legislation could subsequently be challenged and declared unconstitutional. However, it is not clear that the federal government is as worried about having legislation declared invalid as many assume. If this is so, federal government responses to the Charter raise an interesting puzzle. The government has both the resources and the institutional capacity to anticipate judicial concerns and integrate judicial norms into legislation to minimize the likelihood of having legislation declared unconstitutional. So why does it not act in a more risk-averse manner at the outset, in order to protect legislation from the possibility of judicial invalidation? This address offers a five-part explanation to this puzzle that emphasizes the significance of political strategizing about risk.

Résumé. Les commentateurs et les critiques invoquent souvent la métaphore de la « vérification de conformité » pour souligner à quel point la Charte et le contrôle judiciaire ont influencé la législation. Cette métaphore implique que la conformité de la législation proposée avec les décisions de la Charte est évaluée avec soin comme condition d'adoption, parce que les décideurs croient que la législation devrait respecter les interprétations judiciaires des normes constitutionnelles et/ou adopter des comportements à risque par intérêt personnel afin de minimiser la probabilité que la législation puisse être contestée et déclarée inconstitutionnelle par la suite. Cependant, il n'est pas clair si le gouvernement fédéral soit à ce point préoccupé de voir une loi déclarée invalide comme beaucoup le supposent. Si tel est le cas, les réponses du gouvernement fédéral à la Charte soulèvent un casse-tête intéressant. Le gouvernement dispose à la fois des ressources et de la capacité institutionnelle nécessaires pour anticiper les préoccupations judiciaires et intégrer les normes judiciaires dans la législation afin de réduire au minimum la probabilité que la législation soit déclarée inconstitutionnelle. Alors pourquoi n'agit-il pas d'emblée avec une plus grande aversion au risque afin de protéger la législation contre la possibilité d'invalidation judiciaire ? Ce discours offre une explication en cinq parties de ce casse-tête qui met l'accent sur l'importance de l'élaboration de stratégies politiques en matière de risque.

Department of Justice guidelines for evaluating the Charter implications of proposed legislation, government documents and legislative proceedings. However, before addressing these questions I want to discuss briefly the political path forged for adopting the Charter in 1982, because two measures taken to appease provincial objections to the idea of adopting a constitutional bill of rights have had a significant influence on legislative behaviour.

Use of Constitutional Design to Appease Provincial Concerns

Canada, like other Westminster systems, long rejected adopting a bill of rights. Apart from the belief that a bill of rights was neither necessary nor prudent, a significant reason for this rejection was the assumption that a

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bill of rights contradicts the principle of parliamentary supremacy that Canada inherited from Britain. The expectation was that a bill of rights requires a judicial power to declare that inconsistent legislation is invalid. Although Canada has had judicial review on federalism grounds since the 1880s, the question historically for judges was not whether the subject matter was constitutionally valid but whether it fell under federal or provincial legislative competence. However, a new authorization to declare that certain legislative enactments are beyond any parliament's constitutional capacity raised the following challenge: *How can Parliament or a provincial legislature have final legal authority for legislation under their jurisdiction (as assumed by the principle of parliamentary supremacy) if courts effectively have the power to veto legislation they deem to be inconsistent with protected rights?*

Although the principle of parliamentary or legislative supremacy was never absolute in Canada, owing initially to Canada's colonial status and also to federalism's division of powers, Canada's constitutional principles lacked an expectation and formal authorization for courts to review legislation for its consistency with rights or provide remedies if rights were infringed. Although the statutory Canadian Bill of Rights was introduced in 1960, the ambiguous wording about how to interpret and determine remedies, the limited reach of the Bill of Rights (which applied only to the federal level of government), and a pervasive conservative judicial culture combined to discourage the Supreme Court both from interpreting rights in a robust manner and from questioning the legality of legislation from the perspective of its impact on rights.

In 1967, Pierre Trudeau initiated what would become a 15-year campaign for a constitutional bill of rights giving courts clear authority to review legislation for its consistency with rights and also to set aside inconsistent legislation and, by implication, replace the principle of parliamentary supremacy with that of constitutional supremacy. The proposed bill of rights would differ from the existing 1960 Canadian Bill of Rights in three significant ways: it would be a constitutional rather than statutory bill of rights, it would apply to provincial as well as federal levels of government, and judges would have strong and clearer remedial powers to declare inconsistent legislation invalid.

Trudeau's primary intent was to promote a pan-Canadian identity that emphasizes individual rights that transcend provincial and, in particular, Québécois identities. However, the provincial premiers responded with deep scepticism about the desirability of a constitutional bill of rights and were particularly opposed to the idea of relinquishing the principle of parliamentary or legislative supremacy, as it had evolved in Canada.

At the time, no strong public demand existed to treat rights in a peremptory manner and give courts authority to displace the legality of Parliament's judgment. Thus, the provincial premiers were not subject to

strong pressure to accept what would be a radical change to constitutional principles. For the most part, mainstream political and public attitudes reflected confidence in the Westminster-based parliamentary system Canada had inherited, which placed more emphasis on democratic principles of representative government than on concern for the rights of minorities. This confidence was indifferent to rights violations that occurred with alarming regularity, directed at Indigenous peoples, persons of colour, ethnic and religious minorities, and gays, lesbians and trans-gendered persons—in short, anyone affected by state-sanctioned and societal-based prejudice. Canadians were also uncritical of the role racism played in policing or in the interpretation and exercise of coercive powers by public authorities acting on behalf of the state.

Federal participants involved in constitutional discussions with the provinces considered two options to try to convince the provincial premiers to accept Trudeau's proposed constitutional bill of rights. One option intended to appease provincial concerns was to include a general limitation clause that referred to limits on rights that are generally accepted in a parliamentary system of government. The reference to a parliamentary system of government was intentional: to remind judges that the principle of parliamentary supremacy underlying Canada's Westminster heritage does not envisage judicial authority to question the legality of otherwise duly enacted legislation or provide remedies if rights are infringed. Thus, the expectation was that this clause would undermine judicial willingness to interpret rights robustly or to strike down rights-offending legislation. Moreover, it would help address provincial concerns that absent either a broadly constructed limitation clause or explicit and generous references to limits on rights within the specific provisions of a bill of rights, courts might consider limits on rights only in emergency situations. The second option was to include a notwithstanding clause that would allow legislatures to insulate legislation from judicial review or remedies. In short, both clauses were attempts to use constitutional design in a strategic manner to appease provincial objections to a constitutional bill of rights, and both clauses were expected to function to ensure that rights would not be interpreted with the peremptory character normally associated with a bill of rights (Hiebert, 1996: 13–31).

As it turned out, federal proponents of the Charter favoured the limitation clause. However, in the late stages of constitutional deliberations and in response to strong criticism from legal scholars and interest groups, the wording of this clause was subsequently changed to place the onus on Parliament or a provincial legislature to justify legislative limitations on rights. After years of attempting to appease the provinces by promoting a limitation clause conceived so as to encourage judicial willingness to uphold legislation that restricts rights, the federal government was now prepared to support a more narrowly constructed limitation clause. The

dynamics of the constitutional process changed after the election of the Liberal government in 1980, and the provinces were now on the defensive when opposing the Charter of Rights and Freedoms. The federal government's strategy was redirected from trying to appease the provinces to trying to "sell" the idea of the Charter directly to the public, an objective reinforced by strong public support for the Charter, as expressed in public testimony during hearings of the Special Joint Committee of the Senate and the House of Commons on the constitution in 1980–1981 (Hiebert, 1996: 24–31).

This change in the wording of the limitation clause reinforced provincial reticence about adopting the Charter. As then Saskatchewan premier Allan Blakeney viewed the issue, he could only support a constitutional bill of rights that included some form of notwithstanding or non obstante clause (and was still reluctant to do so, even under this condition), and he characterized the previous version of the limitation clause as operating as a non obstante clause in advance (Blakeney, 1980). Nevertheless, in the fall of 1981, a late-stage resolution was reached between the federal government and seven of the eight premiers (all but René Lévesque from Quebec), following a meeting of a few key participants that excluded Lévesque. Ottawa accepted the provinces' preferred amending formula but without fiscal compensation for opting out, and the provincial premiers agreed to the Charter but with a notwithstanding clause that would apply to fundamental freedoms, legal rights and equality rights (Romanow, Whyte and Leeson, 1984: 208–9). The notwithstanding clause allows legislatures to pre-empt judicial review or set aside the effects of a judicial ruling for most sections of the Charter on a temporary but renewable basis. I will return later to the significance of the Charter's inclusion of the limitation and notwithstanding clauses from the perspective of their influence on legislative behaviour.

Expectations about the Relationship between a Bill of Rights and Legislative Behaviour

Constitutional scholars have noted the overwhelming reliance on juridical forms of constitutionalism. As of 2011, more than three-quarters of the world's constitutions had authorized constitutional review (Ginsburg and Versteeg, 2013). However, remarkably little attention has been paid to whether and how a bill of rights influences legislative decision making, and what work that has been done suggests considerable variance in this relationship.

In the United States, a focus on constitutional compliance in Congress is not a central characteristic of congressional behaviour. That said, scholars have identified a variety of ways constitutional ideas impact congressional practices and processes: assistance provided by certain staff agencies to

congressional members when assessing the relevance of constitutional norms for specific issues (Fisher, 2005); references to constitutional issues in hearings of House and Senate committees (Whittington, 2005); use of the confirmation power in order for Congress to impose its constitutional views on courts, the presidency and government agencies (Gerhardt, 2005: 126); reliance on constitutional norms by congressional lawyers when providing legal advice and drafting legislation (Yoo, 2005: 145–47); and passing quasi-constitutional statutes or "super-statutes"—such as the Sherman Act and the Civil Rights Act of 1964—to shape the "transcendent values" that define the nation (Eskridge Jr., 2005: 199–202). Nevertheless, constitutional issues are not generally treated as priority concerns for Congress, where decision making is dominated by other political and policy considerations (Pickerill, 2004: 133–53). That pre-emptive attempts by Congress to comply with judicial interpretations of the Constitution are not more prominent is not particularly surprising. A separated system undermines both institutional capacity and political incentives to emphasize rights compliance and presents multiple opportunities to amend or abandon proposed legislation.

In sharp contrast to the apparent limited effects that judicial review of a bill of rights is said to have on American congressional behaviour, Alec Stone Sweet portrays legislative behaviour in France, Germany, Italy, Spain and the European Union as keenly sensitive to constitutional norms as articulated by courts. He argues that legislation will be placed in the "shadow" of constitutional review under two conditions: (1) potential litigators must believe that initiating constitutional law review is beneficial, and consequently, this provides a steady case load for courts, and (2) litigators must believe that constitutional court decisions provide authoritative and therefore precedential value. Stone Sweet indicates these conditions have been met. Fear of constitutional censure by the courts encourages legislators to anticipate the possibility of judicial constraints and also "ratchets up the political stakes of constitutional development" because judicial interpretations can privilege some policy routes and close off others (Stone Sweet, 2000: 197). Thus, established case law has resulted in behavioural adjustments within the bureaucracy and amongst legislative decision makers who have adopted discursive tools and modes of reasoning that adopt judicial norms about the content of rights and rules of proportionality, in an effort to reduce the likelihood of judicial censure (Stone Sweet, 2000: 194–204). Stone Sweet's observation that governing with judges is tantamount to "governing like judges" captures the incentives he believes exist for legislative decision makers to anticipate and replicate judicial norms, to avoid future judicial and political obstructions to legislative agendas (2000: 204).

In addition to apprehension of judicial censure, another significant contributing factor for why judicial rulings exert such substantial influence

on European legislation is the existence of abstract review, which allows legislation to be reviewed for its consistency with rights in the absence of litigation and before legislation comes into force (a possibility that does not exist in the United States and Westminster-based parliaments; Canadian governments can submit hypothetical or reference questions to the Supreme Court, but this option does not extend to opposition parties). This capacity to seek judicial review as part of the legislative decision-making process affords European opposition parties the opportunity to challenge proposed legislation to constrain the government's capacity to pass legislation that they oppose (Stone Sweet, 2000: 44–45, 50–52, 74–75). As Stone Sweet argues: "Other things being equal, systems that contain abstract review ought to experience more judicialization than systems that do not. Abstract review harnesses the (virtually continuous) struggle between parliamentary majority and opposition over policy outcomes" (2000: 51).

Elsewhere, my research with James Kelly on Westminster systems with bills of rights (New Zealand and the United Kingdom) reveals that government domination of the legislative process operates as a disincentive for government to restrain or alter its legislative agenda to comply with judicial norms (as interpreted by legal advisers), despite the existence of a statutory bill of rights (Hiebert and Kelly, 2015: 401–10). However, unlike the Charter, neither of these bills of rights allows courts to declare inconsistent legislation invalid. So what about Canada? Do stronger judicial remedial powers than in New Zealand and the United Kingdom make a difference? More to the point, does apprehension of having legislation declared unconstitutional affect legislative behaviour? If so, does the notwithstanding clause mitigate these concerns?

The Charter's Influence on Legislation

The Charter has certainly influenced how proposed legislation is assessed. Government lawyers evaluate legislative proposals and advise departments and ministers about the risk of a successful Charter challenge and the potential consequences should government lose, as well as provide advice about how to reduce that risk (Kelly, 2005: 229–38). These evaluations are based on legal assessments of relevant case law and serve two purposes. The first purpose is to ensure government is aware of whether proposed legislation is vulnerable to judicial censure and thus has the option to redress possible problems before a bill is introduced to Parliament. The other purpose is to serve a little-known statutory obligation (in s. 4.1 of the Department of Justice Act) that the minister of justice informs Parliament if government is introducing a legislative bill that is inconsistent with the Charter (Hiebert, 2018: 88–89). No statement of Charter inconsistency has ever been made,

and many of those interviewed emphasize there is an overriding presumption against ever making a statement about Charter inconsistency (Interviews).

Some might be tempted to equate this presumption against reporting that a bill is inconsistent with the Charter with robust Charter screening, as implied in the analogy referred to earlier as "Charter proofing". The idea conveyed is that because of the reluctance to have to report Charter inconsistencies to Parliament, potential Charter problems will have been identified and resolved by the time a bill is introduced to Parliament, thus negating the need for any statement of Charter inconsistency. If this were an accurate characterization of the Charter's impact on legislation, it would indeed suggest that courts exert a high degree of influence on the government's legislative agenda in a way similar to what Stone Sweet says takes place in Europe. It would also indicate that a government's legislative strategy places a premium on risk aversion, in the sense of avoiding or minimizing the possibility of losing a Charter challenge.

However, my research does not support these inferences. It is not clear that government prioritizes Charter compliance when pursuing its legislative agenda, at least not as much as some assume and certainly not as much as implied by the metaphor of Charter proofing. Government lawyers indicate that advice on how to lower the risk of judicial invalidation is not always accepted and that it would be entirely inappropriate to equate the absence of a statement of Charter inconsistency with confidence that legislation will be defended successfully if there is a Charter challenge. Government lawyers indicate that decisions about whether departments and ministers accept Charter advice boil down to a government's tolerance for risk (Interviews). Internal justice documents confirm this: that the lack of a statement to Parliament of Charter inconsistency is a poor indicator of Charter compliance. These documents include the guidance for determining whether this statutory reporting obligation is engaged (and made public only because of Edgar Schmidt's legal challenge to how the department and minister of justice have interpreted the s. 4.1 statutory obligation to alert Parliament if a legislative bill is inconsistent with the Charter) (Canada. Department of Justice 2006a, 2006b, 2007, 2012, 1985). The Federal Court ruled against Schmidt's claim that the statutory reporting obligation was being interpreted unlawfully, and the decision was upheld by the Federal Court of Appeal (*Schmidt v. The Attorney General of Canada*, 2016). A significant reason he was unsuccessful was judicial acceptance of the minister's reliance on a low standard for evaluating Charter consistency when determining if the statutorily obligation is engaged to report to Parliament that a bill is inconsistent with the Charter. Schmidt has sought leave to appeal to the Supreme Court.

The guidelines the Department of Justice utilize when determining if the statutory obligation is engaged to alert Parliament about Charter inconsistency indicate that even if a bill is identified as having a relatively slim

chance of surviving a Charter challenge, it is not deemed necessary to inform Parliament about the Charter inconsistency. When deciding if this reporting obligation is engaged, Charter consistency is equated with the idea of being "not inconsistent" and/or being "not manifestly unconstitutional". However, to characterize a legislative bill in this manner requires only that a credible argument can be presented when defending legislation. Yet this credible argument need not require confidence that it will be a winning argument (Hiebert, 2018: 91–94).

Some senior justice officials dispute the idea that there is any relationship between whether legislation complies with the Charter and the use of a low standard for determining if this reporting obligation is engaged to alert Parliament of Charter inconsistency. Their explanation is that serious rights problems will likely be rectified before the bill is introduced; thus it does not really matter that a low standard is used for this statutory reporting purposes (Interviews).

However, the suggestion that Charter problems will be fixed before a bill is introduced (and hence it does not matter that a weak standard is used for determining if the statutory obligation is engaged to report Charter inconsistency to Parliament) cannot account for what lawyers confirm in interviews: that the absence of a report of Charter inconsistency should not be mistaken for confidence that the legislation will actually survive a Charter challenge (Interviews). This explanation also raises the following question: *If government behaviour is characterized by a good faith intent to comply with the Charter, why is it necessary to have such a low standard for Charter consistency for statutory reporting purposes?* In any event, government claims of Charter consistency (as either inferred from the absence of a statement of inconsistency or asserted by justice officials in testimony before parliamentary committees) are challenged frequently by constitutional scholars and members of the Canadian Bar Association. These claims of Charter consistency are also rejected by the Supreme Court more often than one would expect if, in fact, legislative processes emphasized good faith attempts to ensure that legislation complies with Charter norms, at least as interpreted by the Court. The federal government has failed to defend legislation for Charter breaches before the Supreme Court on more than 50 occasions (Manfredi, 2015: 956). However, the number of losses almost certainly underestimates the frequency of legislative inconsistency because, as mentioned earlier, only a fraction of the legislation passed is actually subject to litigation and an even smaller amount will be reviewed by the Court.

The assumption that a robust approach to Charter consistency characterizes legislative decision making, despite the reliance on weak standards when determining if the statutory obligation is engaged to report Charter inconsistency, also requires extremely strong faith that decisions about how to proceed with the government's legislative agenda necessarily

prioritize Charter compliance at the expense of other more politically oriented considerations that may, in fact, be inconsistent with the Charter. In addition, it presumes that the minister of justice is both willing to separate political and partisan considerations from principled interpretations of the Charter and is also prepared to challenge the prime minister or cabinet if the government is intent on proceeding with non-compliant or highly risky legislation without declaring this intent to Parliament. Yet as James Kelly and Matthew Hennigar argue, there are strong reasons to doubt whether a justice minister's interpretations of Charter compliance will necessarily escape political and partisan interests, and for this reason, it is desirable to separate the offices of justice from attorney general and to make the attorney general responsible for making statements of Charter inconsistency (2012: 49–50). Although one former deputy minister of justice has indicated that the minister of justice should resign if government decides to proceed with inconsistent legislation, particularly if there is pressure not to report Charter inconsistency as statutorily required (Interviews), no minister of justice has ever resigned for this reason.

Addressing the Puzzle of Why Government Does Not Place More Emphasis on Risk Aversion

Government responses to the Charter raise the following puzzle. The government has both the resources (Kelly, 2005: 228) and the institutional capacity to anticipate judicial concerns and integrate judicial norms into legislation to minimize the likelihood of having legislation declared unconstitutional (Hiebert, 2011: 53). So why is there not more emphasis placed on risk aversion as the government's preferred legislative strategy? Below, I offer a five-part explanation in response to this puzzle.

1. Westminster factors

The Charter has not undermined the basic dynamics of how a Westminster-based parliamentary system operates. Government continues to dominate legislative proceedings, introduces legislation at an advanced stage of development, and relies on party discipline to overcome opposition attempts to amend bills or defeat the government's agenda, particularly in those frequent situations where government has an electoral majority (the likelihood of which is greatly enhanced by Canada's reliance on the single member plurality or first-past-the-post electoral system). Moreover, opposition political leaders have shown little interest in focusing on Charter compliance in their regular attempts to demonstrate why their party should be considered the best alternative to government. The fact that Parliament has not played a prominent role addressing perceived

Charter problems further undermines the government's incentive to emphasize Charter compliance if so doing distorts its preferred legislative agenda.

2. Political objectives

The Charter has not fundamentally altered the prime political objective of the party in government, which is to pass its preferred legislative agenda with minimal change.

Substantial amendments are generally unwelcome for government leaders because they can undermine political agreements that often are the result of compromises achieved within and beyond caucus, delay passage of legislation and distort the timetable of an already crowded parliamentary calendar. Reinforcing government resistance to amendments is the tendency to portray forced concessions as a loss for government, both within Parliament and in the media. For any student of political parties and Parliament, it should not come as a surprise that government leaders will resist altering their preferred legislative agenda if they believe the legislation serves the public interest and will promote their party's political and electoral fortunes, and if government has the power to pass legislation—as it so frequently does in Canada.

3. Short-term vs. long-term considerations

Passing the government's preferred legislative agenda involves relatively short-term objectives that garner far more political interest than longer-term concerns of how legislation will fare if litigated. Charter litigation is expensive, and there is no guarantee that legislation will be challenged, even if it violates rights. In any event, the fact that government can outspend its challengers and exhaust appeal options means that it could be several years before the Supreme Court has ruled on the issue. This gives the party in government a long time, in political terms, to exploit its legislative accomplishments. Even if the legislation is ultimately declared unconstitutional, and assuming the party in government that introduced the legislation is still in office, political strategists can spin the loss to blame the Court for changing Parliament's intent. In short, if government loses, the need to consider legislative remedies is a very distant concern—which usually means not until after the next election has occurred.

4. The political significance of the general limitation clause of s. 1 and the notwithstanding clause in s. 33

As discussed earlier, both the limitation and notwithstanding clauses were conceived as a strategic way to overcome provincial objections to the Charter. Both have functioned to discourage giving priority to pre-

emptive attempts to ensure that legislation complies with relevant jurisprudence.

The notwithstanding clause was first used in an omnibus fashion by Quebec to protest the constitutional changes agreed to in 1982 and has subsequently been used on 17 other occasions by Quebec, Alberta, Saskatchewan and the Yukon. All but one use of the notwithstanding clause has been in a pre-emptive manner—to insulate legislation from being subject to judicial review. Only the 2017 use of the notwithstanding clause by Saskatchewan (discussed below) was a reactive use: to set aside the effects of a specific judicial ruling (although Quebec's use of s. 33 to protect sign law legislation is sometimes wrongly portrayed as a reactive response to the Supreme Court's *Ford* ruling) (Hiebert, 2017: 701). Most of these pre-emptive uses were acts of risk aversion: to protect legislation, given uncertainty about how the Court would rule, either in terms of the scope of equality rights or freedom of association, or on the question of reasonableness under s. 1 (Hiebert, 2017: 698–701).

It is generally assumed that anticipated controversy associated with using the notwithstanding clause (either in a pre-emptive or reactive manner) is responsible for reluctance to invoke this power. However, after not being used for 17 years, the notwithstanding clause was invoked by Brad Wall's government in Saskatchewan in 2017, in order to set aside the effects of a judicial decision that prevents the province from allowing non-Catholic students to attend Catholic schools (Saskatchewan, Bill 89, 2017). The Court of Queen's Bench ruled that the province had violated the principle of religious neutrality and equality rights by providing funding for non-minority faith students to attend separate schools (*Good Spirit School Division v. Christ the Teacher*, 2017). The case arose after non-Catholic parents decided to send their children to a local Catholic school rather than bus their children to a more distant public school, following a decision to close their previous public school for declining enrollments. Rather than appeal the ruling, Wall's government invoked s. 33 and defended this use of the notwithstanding clause to allow parental choice (*Global News*, 2017). This decision generated little controversy.

What proved far more controversial was Ontario premier Doug Ford's proposed use of the notwithstanding clause in 2018 to set aside the effects of an Ontario Superior Court ruling that the Better Government Act was unconstitutional (*City of Toronto et al v. Ontario*, 2018). The legislation reduced the number of wards for Toronto municipal elections from 47 to 25 and did so during an ongoing campaign, after more than 500 candidates had already been certified and had decided to contest the election under the assumption that the earlier ward boundaries were in effect. Presiding judge Edward Belobaba ruled the legislation was an unjustifiable violation of freedom of expression, although the interpretation of expression was heavily influenced by his view that the legislation violated principles

relating to the s. 3 right to vote (*City of Toronto et al v. Ontario*, 2018, paras 10, 40). Ford criticized the court ruling as "unacceptable" for its interference with the democratic will of the legislature. He indicated that he was not only prepared to invoke the notwithstanding clause to set aside the effects of the ruling, rather than wait until the decision is appealed, but also not afraid to invoke the clause again if courts rule against his government (Warren, 2018). However, the government also sought an urgent hearing before the Ontario Court of Appeal to request an immediate stay of the effects of the lower court ruling and indicated that, if successful, it would not proceed with its revised legislative bill (that included the notwithstanding clause) (Gray, 2018). The stay was granted the day before the legislation was expected to pass, which meant that the initial legislation to reduce the number of wards to 25 would prevail for the October 22 election.

Ford's intent to invoke the notwithstanding clause was extremely controversial. In addition to loud protests within and outside the legislative assembly, several key participants in the 1981 constitutional negotiations that led to the adoption of the notwithstanding clause indicated they did not believe Ford's use of s. 33 was appropriate or consistent with the intent of the clause. Roy McMurtry, Roy Romanow and Jean Chretien were instrumental in the political deal that led to provincial consent for the Charter upon its inclusion of the notwithstanding clause, and all condemned Ford's use of the clause. They urged the Ontario legislature to oppose use of the notwithstanding clause and stated that s. 33 "was designed to be invoked by legislatures in exceptional situations, and only as a last result after careful consideration" and not "to be used by governments as a convenience or as a means to circumvent proper process" (Canadian Press, 2018). Former Ontario Conservative premier Bill Davis (who was in power during the 1981 constitutional negotiations) also stated that he did not believe Ford should use the notwithstanding clause in this manner (Paikin, 2018). In addition to these statements by prominent former politicians, more than 400 legal academics signed a letter to Ontario attorney general Caroline Mulroney asking her not to support use of the notwithstanding clause (Rizza, 2018).

Ford's proposed use of the notwithstanding clause suggests that if a premier is extremely determined to pass legislation, apprehension of political controversy associated with relying on s. 33 (which, in this context, resulted in allegations that his government was not respectful of the Charter—even though this clause is part of the Charter) is almost certainly tempered by consideration for the perceived political benefits associated with passing the legislation that necessitated its use.

It is too soon to speculate on whether the recent use of this power by Saskatchewan and Ford's proposed use signal the start of greater willingness to invoke the notwithstanding clause as a way to avoid or react to judicial

review. However, even if the notwithstanding clause is not used with any great regularity in the future, it is not safe to assume that its lack of use ensures a strong emphasis is placed on pre-emptive attempts to ensure compliance with judicial interpretations of the Charter. Governments have generally altered their political strategies and now rely exclusively on s. 1 arguments to try to convince the court that the impugned legislation is a reasonable limit on a right, even if aware the chances of succeeding are slim. In other words, they have changed their strategy from pre-emptive risk aversion (by invoking s. 33) to a greater willingness to engage in risk-taking behaviour (by relying on arguments under s. 1).

The Supreme Court's interpretation of the limitation clause in s. 1 facilitates this kind of risk-taking behaviour. The Court rarely rules that legislative objectives themselves are invalid and focuses most of its attention on whether the way rights are restricted is reasonable. For example, is the intrusion minimal and is the legislative scheme rational in terms of how it purports to achieve its objective? Consequently, the Court has not defined a no-go area to clarify that certain legislative objectives are constitutionally out of bounds. This judicial approach makes it easier for government to plausibly argue that legislation represents a valid or reasonable limit on a right.

The form Supreme Court remedies take also discourages a focus on pre-emptive compliance with relevant jurisprudence. When ruling against government, the Court often suspends the declaration of invalidity for a year, instead of immediately declaring the legislation invalid (although both shorter and longer suspension periods have occurred). This adds considerable time for government before it becomes imperative to either pass remedial legislation or to accept the consequences of having legislation struck down.

5. *Judicial proportionality assessments*

The s. 1 exercise almost always entails a proportionality assessment, which arguably constitutes the most imprecise and subjective aspect of judicial review. This often involves judges speculating on whether a hypothetical option exists that is less restrictive and/or more rational than the legislation that has been challenged. Although the questions are predictable, the conclusions are not.

In light of uncertainty forecasting judicial outcomes on this critical element of Charter review, and since politicians are fixated on short-term consequences, it is hardly a surprise that government leaders may be reluctant to abandon a strongly held policy preference. Why strive for pre-emptive compliance with the Court's interpretation of the Charter, if so doing alters the government's preferred legislative approach and there is yet uncertainty about whether a revised position will actually satisfy the court?

How Should Political Strategizing Be Characterized?

Despite the significance of these five factors in explaining why apprehension of judicial censure has not had more influence on legislative behaviour, it is not accurate to suggest there is a singular political response to the Charter. Government willingness to risk judicial censure generally falls into one of the following three categories: *low risk taking*, *calculated risk taking*, and *high risk taking*. All of these involve strategizing, but not all place the same emphasis on insulating legislation from the likelihood or consequences of losing a Charter challenge. Below is a brief discussion and examples of these three different positions.

1. Low risk taking

Low risk taking is where legislative decisions are heavily influenced by attempts to anticipate and redress potential judicial concerns, so as to minimize the likelihood of judicial censure. A good example of this was when the Liberal government responded to the 1995 judicial ruling that restrictions on tobacco advertising were unconstitutional. The legislative response to this ruling was characterized by those engaged in it as involving painstaking efforts and a line-by-line interpretation of the Court's ruling to ensure the legislation would survive any subsequent challenge (Hiebert, 2002: 85). The extent to which a government pursues a low-risk strategy is almost certainly influenced by how the justice minister interprets his or her obligation to comply with judicial interpretations of the Charter, and also by the extent to which he or she is able to exert influence on cabinet colleagues.

It seems probable that government will place more emphasis on this strategy when responding to a negative judicial ruling, as distinct from the initial passage of legislation. However, Kelly and Hennigar are not convinced that priority is necessarily given to redressing judicial concerns in the legislative response to a negative ruling—a quietly defiant position they characterize as "notwithstanding by stealth" (2012: 38–39).

2. Calculated risk taking

Under this strategy of calculated risk taking, a minister of justice might have a good faith belief that proposed legislation complies with Charter norms and yet not be entirely confident that legislation will survive a Charter challenge. Nevertheless, political leaders are willing to take a chance that if challenged, government lawyers have a reasonable chance of being able to convince the Court that the legislation is constitutionally valid. This is most likely to occur where the government has a strong policy preference that is inconsistent with a low-risk strategy. A recent example of measured

risk taking was the Liberal government's approach to medically assisted suicide, following the Supreme Court ruling in *Carter v. Canada* (2014). The Court ruled that the prohibition on assisted dying is unconstitutional where it denies consenting adults the opportunity to terminate their life if they have a grievous condition that causes enduring and intolerable suffering. The government's legislative reply was more restrictive and allows assistance in dying only for those with a medical condition resulting in foreseeable death. The government's response reveals interesting insights into its strategic considerations:

— The government took the position that Parliament has a legitimate role to play in resolving this moral issue, even if its position differs from the Court's;
— The government had a strong policy preference for a more limited scope for assisted suicide than indicated by the Court;
— The contested nature of public opinion reinforced the government's willingness to deviate from the Court's position;
— A significant factor contributing to this willingness to differ from the court's position was the Court's indication it would be deferential when reviewing Parliament's legislative response.

Earlier examples of measured risk taking occurred in the context of legislative challenges to how a majority of the Court had interpreted the rules of evidence in sexual assault trials. Both Progressive Conservative and Liberal ministers of justice have promoted legislation that challenged key judicial norms evident in split judicial rulings and relied on legislative preambles to explain Parliament's belief with respect to how the relevant Charter considerations should be interpreted. In both instances, the legislation drew heavily from the earlier minority ruling (either in terms of how the dissenting judges had characterized the dangers of earlier judicial assumptions on this issue or with respect to the relevant considerations that should guide judicial consideration in future sexual assault trials). These legislative responses were influenced both by heavy lobbying by feminist scholars and activists and by sympathetic justice ministers who had fundamental disagreements with how the majority had interpreted and reconciled conflicting Charter principles (Hiebert, 2002: 92–114). The decisions to engage in measured risk taking revealed a hope or expectation that if challenged, the attorney general would be able to convince the majority of the merits of Parliament's judgment (and its reasons for siding with the minority judges) on how the Charter should be interpreted in the context of sexual assault trials.

3. High risk taking

The third category of strategizing can be characterized as high risk taking—where government is intent on proceeding with legislation despite almost certainly having been forewarned that the legislation is extremely vulnerable to a successful Charter challenge. Significant elements of the Harper Conservative government's tough-on-crime legislation fall within this category, such as a number of new mandatory minimum sentences that reduced judicial discretion, as well as the "three strikes, you're out" policy, where anyone convicted a third time for a designated offence would have the burden of proof to demonstrate he or she is not a dangerous offender (Macfarlane, Hiebert and Drake, forthcoming).

It is difficult to imagine that government lawyers did not make it clear that these measures were highly vulnerable to judicial invalidation. In any event, once before Parliament, the Canadian Bar Association and other legal experts argued forcefully that many aspects of the legislation would not likely survive judicial review. As it turned out, key elements of the government's criminal law policies were declared unconstitutional, including mandatory minimum sentences for drug offences (*R. v. Lloyd*, 2016) and the government's decision to limit the credit that convicted criminals receive for time served in pretrial detention (*R. v. Safarzadeh-Markhali*, 2016).

The following factors contributed to the willingness to knowingly pass high-risk legislation:

- The subject matter was a core commitment of the Conservative party;
- Public opinion was not on the side of potential Charter claimants;
- Opposition parties' willingness to forcefully pursue amendments was undermined by their reluctance to be portrayed as "soft on crime" or to trigger an election following the government's threat to make this a confidence issue;
- Any consequences arising from a negative judicial ruling would not occur for several years;
- Even if ultimately unsuccessful defending the legislation, the Conservative party could blame the court and frame the issue as courts putting the rights of criminals ahead of public safety;
- The Conservative party's base is not enthusiastic about the Charter, particularly the procedural protections of those accused of breaking the law, where these constrain the coercive powers of the state.

Conclusions

When studying how the introduction of a constitutional bill of rights impacts on a mature parliamentary system such as Canada, it is tempting to frame the research question as: *How does the Charter change legislative decision*

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making? However, given the dynamics of Canadian legislative decision making, the more appropriate question is: *How does a Westminster system impact on legislative behaviour under the Charter?* James Kelly and I earlier concluded this was the most appropriate framework for explaining the relationship between legislative behaviour and bills of rights in New Zealand and the United Kingdom (Hiebert and Kelly, 2015: 10).

Notwithstanding a judicial power to declare rights-offending legislation invalid, the Charter has not fundamentally altered the basic dynamics or power relationships of how Canada's Westminster system functions, where government continues to dominate Parliament and incurs relatively weak pressures to amend legislation. Thus it should hardly come as a surprise that government is reluctant to abandon or alter its preferred legislative agenda so as to emphasize compliance with judicial Charter norms, particularly if it has the political power to enact legislation and does not have to address the consequences of losing for several years. This does not mean that the Charter does not encourage political strategizing. However, rather than emphasize a longer-term outlook that engages in risk-averse behaviour to protect legislation from judicial censure, strategizing instead emphasizes shorter-term political interests to pass the government's preferred legislative agenda.

I encourage future research projects to account for why government has taken the specific approach it has across its entire legislative agenda. This requires examining the interplay of partisan, ideological and strategic factors, as well as the salience of Charter compliance in public opinion and how this varies depending on the issue. Also on the research agenda should be whether a fundamental difference exists between parties on similar issues, or between a government's position when developing legislation as distinct from responding to a prior negative judicial ruling.

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