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The Canadian Override: Constitutional Model or *Bête Noire* of Constitutional Politics?[†]

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*Israeli proponents of the enactment of a legislative override often invoke Canada as a model that Israel should follow. Their proposals would allow the Knesset to 'override' a decision of the Supreme Court of Israel that strikes down a law on the ground that it violates a Basic Law. Proponents of an Israeli override seek recourse to various types of argument to support their position. This article focuses on one such argument: the use of Canada as a model to support the Israeli argument for enacting an override. It argues that in order to evaluate both the value of adopting the Canadian override and the likelihood of its transplantation to Israel being successful, one needs to acquire a deep understanding of its operation in Canada. The article contains four sections in addition to the introduction. Section 2 briefly explains what 'the Canadian override' is and how it came to be. Section 3 analyses the positive attraction of the Canadian override as a constitutional model, and identifies three different models of the Canadian override. Section 4 focuses on the Canadian experience with its override. It explains why Canadians have come to view it in negative terms – the '*bête noire *of Canadian constitutional politics'– because of the manner in which it was adopted and the circumstances in which it was first used. Section 5 concludes with some thoughts on legal transplants, legitimacy and lessons for Israel from the Canadian experience.*

Keywords: Constitution, override, judicial review, Canada, rights

1. Introduction

In the fall of 2014, Member of Knesset (MK) Ayelet Shaked of Israel's Habayit Hayehudi (Jewish Home) party proposed a bill to amend the Basic Law: Human Dignity and Liberty by inserting a provision that would allow the Knesset to 'override' a decision of the Supreme Court of Israel that strikes down a law on the ground that it violates that Basic Law.[1] Previously, proposals to create a new Basic Law: Legislation included a provision that would have enabled the Knesset to override any Basic Law. Israel does not have a single document

[†] This article is part of a symposium collection of contributions relating to the constitutional override clauses in Israeli and Canadian constitutional law. The other articles in this issue making up this symposium are Lorraine E Weinrib, 'The Canadian Charter's Override Clause', and Rivka Weill, 'Juxtaposing Constitution-Making and Constitutional-Infringement Mechanisms in Israel and Canada'.

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[1] Moran Azoulay, 'Ministers Approve Bill to Override High Court', *ynetnews.com*, 26 October 2014, http://www.ynetnews.com/articles/0,7340,L-4584500,00.html.

identified as its Constitution. Instead, it has eleven Basic Laws which deal with the structure of the executive, legislative and judicial branches of government, among other subjects.[2] In 1992, the Knesset enacted the Basic Law: Human Dignity and Freedom, and the Basic Law: Freedom of Occupation. In the 1995 *Bank Mizrahi* decision, the Supreme Court of Israel declared that Israel had a Constitution, that the Constitution was contained largely in Israel's Basic Laws, and that the Supreme Court had the power of judicial review over legislation and could strike down laws that are inconsistent with a Basic Law.[3] None of the Basic Laws as originally enacted contained an override.

Overrides are about who should have the final word in constitutional adjudication – the Supreme Court of Israel or the Knesset. These proposals originate within a particular political context; they are part of a reaction to perceptions that the Supreme Court of Israel is too activist, intervening too frequently to thwart the will of the majority as expressed through its democratically elected representatives in the Knesset.

Proponents of an Israeli override seek recourse to various arguments in support of their cause, including those of a principled and populist nature. That is not my particular interest here. Rather, as a Canadian public law scholar familiar with the Israeli legal and political system, my interest lies in the Israeli invocation of 'the Canadian override' as a model. This is particularly noteworthy in Israeli debates in recent years because Israeli constitutional law already has an override provision that was itself inspired by the Canadian override[4] – the Basic Law: Freedom of Occupation was re-enacted in 1994 to include an override provision to enable the Knesset to respond to the Israeli Supreme Court's 1993 *Meatrael* decision, which suggested that the prohibition on importing non-kosher meat violated the right to freedom of occupation protected in the Basic Law of that name.[5]

Time and again, MK Shaked has cited Canada (as well as the United Kingdom) as having similar legislation.[6] For example, on 21 October 2014 she wrote in *Yediot Ahronot*:[7]

> A democracy needs a strong and independent court. But just as the court expects our respect for its actions, we, too, are entitled to expect its respect for the decisions of the government and the

[2] https://www.knesset.gov.il/description/eng/eng_mimshal_yesod1.htm.
[3] CA 6821/93 *United Mizrahi Bank Ltd. v Migdal Co-operative Village* (1995) 49 (4) PD 221, http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf.
[4] Zeev Segal, 'Israel Ushers in a Constitutional Revolution: the Israeli Experience, the Canadian Impact' (1994) 6 *Constitutional Forum* 44, 45–46 (writing that shortly before the enactment of the Basic Law: Freedom of Occupation which would include the override, Israeli Supreme Court Justice Aharon Barak wrote a letter to the Chair of the Knesset Committee which was preparing the bill for final reading. Barak referred to the Canadian 'override clause' as a possible clause for adoption by the Knesset. According to Segal, in public discussions about the Israeli override, it was mentioned that the Canadian override was very rarely used in Canada: ibid 46).
[5] HCJ 3872/93 *Meatrael v Prime Minister* 47(5) PD 485.
[6] Lahav Herkov, 'Bayit Yehudi Bill Would Allow Knesset to Reverse High Court Cancellation of Bills', *The Jerusalem Post*, 21 October 2014, http://www.jpost.com/Israel-News/Politics-And-Diplomacy/Bayit-Yehudi-bill-would-allow-Knesset-to-reverse-High-Court-cancellation-of-bills-379394; Ayelet Shaked, 'Saving Democracy', *ynetnews.com*, 21 October 2014, http://www.ynetnews.com/articles/0,7340,L-4583129,00.html.
[7] Shaked, ibid.

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> Knesset, and thus the positions of the majority of the public. Such is the way in other countries like Canada and Britain, and such should be the way here too.

Then, on 26 October 2014, she wrote on her Facebook page: 'In Canada, for example, there is an override clause. It causes the court to respect the Canadian Parliament on the one hand and the Parliament to respect the court on the other'.[8]

As I discuss in more detail below, I question the accuracy of this statement. At this point, it is necessary only to identify that time and again Canada is invoked as a model for the override. Reference is made to Canada in order to bolster the case for the override.[9]

As Frederick Schauer has written, the transfer of legal concepts from one jurisdiction to another is often dependent on political and symbolic factors rather than on the intrinsic value of those ideas.[10] In this, the transfer of legal concepts differs from the transfer of scientific, technical and economic ideas. Schauer offered five hypotheses to explain legal transplantation. In one, which may be termed 'donor prestige', Schauer posited that the source country for a legal concept may be chosen because of the general respect in which it is held by the adopting country.[11] Ms Shaked's frequent invocation of Canada reflects a variation of Schauer's theme; Israeli proponents of the override are leveraging Canada's 'donor prestige' to support their position.

Whether proponents of the Israeli override will succeed will eventually be determined in the political sphere. Whether 'the Canadian override' is adaptable to the Israeli constitutional and political environment is another matter.[12] In order to evaluate both the value of adopting the Canadian override and the likelihood that its transplantation to Israel will be successful, one needs to acquire a deep understanding of its operation in Canada. As Oliver Wendell Holmes famously quipped,[13] 'the life of the law has not been logic: it has been experience'. My contribution to the Israeli constitutional debate is therefore to share the Canadian experience of its

[8] https://www.facebook.com/ayelet.benshaul.shaked/posts/659011677550595 (translation by author).

[9] This article does not address the application of the so-called 'UK override', which I take to be a reference to a 'designated derogation' under the Human Rights Act 1998 (UK) (HRA1998). I would simply note that the operation of the HRA 1998 differs significantly from the application of the Canadian Charter of Rights and Freedoms in Canada and from the Basic Laws in Israel. Most notably, courts in the UK do not have the power of judicial review to strike down legislation as they do in Canada and in Israel. UK courts may issue a 'declaration of incompatibility' with a Convention right, but they cannot strike down legislation: HRA 1998, s 4. However, I believe that the reference to the UK in the debate over the Israeli override is made for similar purposes as invoking Canada – to bolster the case for the legitimacy of the override.

[10] Frederick Schauer, 'The Politics and Incentives of Legal Transplantation' in Joseph S Nye and John D Donahue (eds), *Governance in a Globalizing World* (Visions of Governance for the 21st Century 2000) 253, 254.

[11] ibid 258. Schauer's hypothesis is as follows: 'The political reputation of the donor country, both internationally and in the recipient country, is a causal factor in determining the degree of reception in the recipient country of the donor country's legal ideas, norms, and institutions, even holding constant the host country's evaluation of the intrinsic legal worth of those ideas, norms, and institutions, and even holding constant the actual legal worth of those ideas, norms, and institutions'. Watson had suggested this idea earlier: Alan Watson, *Society and Legal Change* (Scottish Academic Press 1977) 98; Alan Watson, *Legal Transplants: An Approach to Comparative Law* (Scottish Academic Press 1974) 88–90.

[12] cf Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 *The Modern Law Review* 1, 27.

[13] Oliver Wendell Holmes, *The Common Law* (Harvard University Press, 2009) 3.

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override in the hope that it will provide a fuller picture.[14] I do not attempt to compare the Israeli context with the Canadian, but rather to provide an analysis of the latter so that others may evaluate the suitability of an 'Israeli override'.

There are four parts to this article in addition to this introduction. Section 2 explains briefly what 'the Canadian override' is and how it came to be. Section 3 analyses the positive attraction of the Canadian override as a constitutional model and explains how there are actually three different models of the override. Section 4 focuses on the Canadian experience with its override and explains why Canadians have come to view it in such negative terms – what I have called the *bête noire* of Canadian constitutional politics. *Bête noire* is French for 'black beast' but in English it has come to mean 'a person or thing that one particularly dislikes or dreads'.[15] Section 5 ends with some concluding thoughts on legal transplants, legitimacy and lessons for Israel from the Canadian experience.

2. THE CANADIAN OVERRIDE AND ITS ORIGINS

2.1. WHAT IS THE CANADIAN OVERRIDE?

What is known in Israel as 'the Canadian override' goes by many names in Canada: the override, the non-obstante clause, the notwithstanding clause, and the notwithstanding mechanism.[16] One name that is not used for the override is the 'express declaration', which is the title given to the relevant section in the Canadian Charter of Rights and Freedoms (the Charter).[17]

[14] My purpose here is neither to defend nor denigrate the Canadian override. Others have done that far more effectively than I could. For proponents of the override see Peter H Russell, 'Standing Up for Notwithstanding' (1991) 29 *Alberta Law Review* 293; Peter H Russell, 'The Notwithstanding Clause: The Charter's Homage to Parliamentary Democracy' (2007) 28 *Policy Options* 65; Allan E Blakeney, 'The Notwithstanding Clause, the Charter and Canada's Patriated Constitution: What I Thought We Were Doing' (2010–11) 19 *Constitutional Forum* 1; Paul C Weiler, 'Rights and Judges in a Democracy: A New Canadian Version' (1984) 18 *University of Michigan Journal of Law Reform* 51; Paul C Weiler, 'Of Judges and Rights, or Should Canada Have a Constitutional Bill of Rights?' (1980) 60 *Dalhousie Review* 205; Lorraine Eisenstat Weinrib, 'Learning to Live with the Override' (1990) 35 *McGill Law Journal* 541; Peter W Hogg and Allison A Bushell, 'The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights Isn't Such a Bad Thing After All)' (1997) 35 *Osgoode Hall Law Journal* 75; Janet L Hiebert, 'Is It Too Late to Rehabilitate Canada's Notwithstanding Clause?' in Grant Huscroft and Ian Brodie (eds), *Constitutionalism in the Charter Era* (LexisNexis 2004) 169; Christopher P Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism* (2nd edn, Oxford University Press 2001) 194–96. For opponents see John D Whyte, 'On Not Standing Up for Notwithstanding' (1989–90) 28 *Alberta Law Review* 347; John D Whyte, 'Sometimes Constitutions are Made in the Streets: The Future of the Charter's Notwithstanding Clause' (2007) 16 *Constitutional Forum* 79; Stephen A Scott, 'Entrenchment by Executive Action: a Partial Solution to 'Legislative Override' (1982) 4 *Supreme Court Law Review* 287; Samuel L LaSelva, 'Only in Canada: Reflections on the Charter's Notwithstanding Clause' (1983) 63 *Dalhousie Review* 387; Patrick J Monahan, *Meech Lake: The Inside Story* (University of Toronto Press 1991) 169.

[15] http://dictionary.reference.com/browse/bete+noire.

[16] Tsvi Kahana, 'The Notwithstanding Mechanism' (2002) 52 *University of Toronto Law Journal* 221, 221–22, nn 6, 7. Reflecting its status as the *bête noire* of Canadian constitutional politics, two proponents of the use of the override cleverly dubbed it 'the N—clause': Mike Harris and Preston Manning, *Vision for a Canada Strong and Free* (The Fraser Institute 2007) 235.

[17] Pt I of the Constitution Act, 1982, being Sch B to the Canada Act 1982 (UK) (the Charter).

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The Charter contains protections for various groups of rights: fundamental freedoms, democratic rights, mobility rights, legal rights, official language rights, minority language educational rights. The Charter applies to all government action: legislation and all measures taking by state officials. An infringement of a right protected under the Charter will be held to be unconstitutional unless the government is able to demonstrate that the infringement is a 'reasonable limit' in a free and democratic society.[18] The Canadian Constitution explicitly provides that the Constitution is 'the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of its inconsistency, of no force and effect'.[19] Section 33 of the Charter provides:

> **Exception where express declaration**
> **33.** (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
> **Operation of exception**
> (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
> **Five year limitation**
> (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
> **Re-enactment**
> (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).
> **Five year limitation**
> (5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

There are five key elements to the Canadian override. First, it operates as an exception to the rights in the Charter where the legislature enacts 'an express declaration'. Second, it applies only to certain rights in the Charter, specifically sections 2 and 7 to 15, which many Canadians would consider to be some of the most important rights in the Charter. Section 2 protects fundamental freedoms (freedoms of religion and conscience, expression including the press, peaceful assembly, and association). Sections 7 to 14 protect legal rights largely triggered in criminal proceedings, including the right to life, liberty and security of the person, the right to be protected against unreasonable search and seizure, the right not to be arbitrarily detained or imprisoned, the right not to be subject to cruel or unusual punishment or treatment, and similar. Section 15 protects equality rights. The override does not apply to democratic rights (such as the right to vote and run for office), mobility rights, language rights or education rights. The sections of the Charter to which the override does apply are the most litigated Charter provisions and are

[18] ibid s 1. See generally *R v Oakes* [1986] 1 SCR 103.
[19] Constitution Act, 1982 (n 17) s 52(1).

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those that have most transformed the legal and constitutional landscape in Canada since the Charter was adopted in 1982.[20]

The third element of the Canadian override is that it contains a 'sunset clause'. The override (but not the law which contains it) is valid only for five years; it may be re-enacted for a subsequent five years (without limitation on the number of times it may be re-enacted). Fourth, the override may only be used prospectively; it may not be used retroactively to make unconstitutional laws constitutional. Finally, the use of the Canadian override provision requires no special majority. To Israeli readers, the Canadian provision will look quite similar to paragraph 8 of Basic Law: Freedom of Occupation.[21] According to Professor Zeev Segal, the Canadian override served as the direct inspiration and model for this clause.[22]

The Canadian override has been called 'perhaps the most fundamental distinguishing feature of the Canadian Charter'[23] and a 'uniquely Canadian invention'.[24] How did it come about?

2.2. The Creation of the Canadian Override

Canada did not have its own domestic constitution until 1982. Canada was created in 1867 through an act of the British Parliament, the British North America Act 1867 (BNA Act). This statute united three colonies into a 'confederation' of four provinces, made provision for the eventual admission of others, promised Canada 'a constitution similar in principle to that of the United Kingdom'[25] and operated functionally as Canada's Constitution until 1982. The BNA Act set out the basic structures of government in Canada – the executive, legislative and judicial branches – and divided legislative powers between a new federal government and provincial governments. From 1867 until 1982, when the constitution was 'patriated' ('Canadianized'), Canada had only a limited ability to amend its own constitution;[26] on many matters it had to make a request to Great Britain to amend the BNA Act. Because Canadians were to have a Constitution 'similar in principle to that of the United Kingdom', there was no desire in 1867 for a written bill of rights along the American model. In 1867, Canadians were still British subjects.

[20] See generally Peter J McCormick, *The End of the Charter Revolution* (University of Toronto Press 2014); Jamie Cameron and James Stribopoulos (eds), *The Charter and Criminal Justice – Twenty-Five Years Later* (LexisNexis 2008); Benjamin Berger and James Stribopoulos (eds), *Unsettled Legacy: Thirty Years of Criminal Justice under the Charter* (LexisNexis 2012).

[21] para 8 provides: 'A provision of a law that violates freedom of occupation shall be of effect, even though not in accordance with section 4, if it has been included in a law passed by a majority of the members of the Knesset, which expressly states that it shall be of effect, notwithstanding the provisions of this Basic Law; such law shall expire four years from its commencement unless a shorter duration has been stated therein'.

[22] Segal (n 4) 45–46.

[23] Brian Slattery, 'A Theory of the Charter' (1987) 25 *Osgoode Hall Law Journal* 701, 703.

[24] Peter W Hogg, *Constitutional Law of Canada* (5th edn supp, Carswell 2007) s 39.8.

[25] Constitution Act 1867 (UK), Preamble.

[26] British North America (No 2) Act 1949 (UK), repealed by the Canada Act 1982 (UK).

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Canadian interest in a constitutional bill of rights was a decidedly post-Second World War phenomenon.[27] In 1960, the federal government enacted a statutory bill of rights, known as the Canadian Bill of Rights.[28] Its aspirations were not matched by its application. The 'Bill', as it became known, was very limited in the scope of the rights included and it applied only to the federal government. Importantly, it contained an override clause which was in fact used once in controversial circumstances.[29] However, the override provision in the Bill never attracted much attention because the Bill itself (or the judicial interpretation thereof) had little impact on Canadian law. Between 1960 and 1982, the Supreme Court of Canada found that only one federal statute violated the Bill of Rights.[30] Therefore, there was hardly any opportunity to invoke the Bill's override in response to court decisions and next to no need to use it pre-emptively to insulate potentially rights-infringing laws because of the exceedingly narrow judicial interpretation given to the provisions in the Bill. During the 1950s and 1960s, provincial legislatures enacted human rights codes which generally provided protection against discrimination in both the public and the private spheres.[31] These human rights codes fuelled the drive by rights proponents for stronger protection of rights at the national level in terms of a constitutionally entrenched bill of rights. Some of these provincial human rights codes also contained legislative override provisions.[32]

Canadian interest in patriation – the process of converting the Canadian Constitution from a British statute into a wholly Canadian Constitution – and a constitutionally entrenched bill of rights took off when Pierre Trudeau became Minister of Justice in 1967 and Prime Minister of Canada in 1968. As Minister of Justice, Trudeau issued a policy paper entitled 'A Canadian Charter of Human Rights', which had discussed the possibility of an override similar to that in the Canadian Bill of Rights.[33] While the idea of a constitutionally entrenched bill of rights took off, the notion of an override lay dormant for more than a decade.

The 1970s were a decade of continual constitutional discussions. For much of the time, patriation of the Constitution and amending the Constitution were the top items on the agenda at First Ministers Meetings (meetings of the provincial premiers and the Prime Minister). The federal government tabled many proposed 'Charters', as the proposed constitutionally entrenched bill of rights for Canada would become known. Not a single one contained an override

[27] See, eg, Lorraine E Weinrib, 'The Postwar Paradigm and American Exceptionalism' in Sujit Choudhry (ed), *Migration of Constitutional Ideas* (Cambridge University Press 2007) 83.
[28] Canadian Bill of Rights, SC 1960, c 44.
[29] In 1970, the government of Canada invoked the War Measures Act 1970 in response to separatist terrorist actions in Quebec. The Act gave great powers to the police and infringed many civil liberties, including those protected by the Canadian Bill of Rights. The government of Canada used the override in the Bill: Public Order (Temporary Measures) Act, SC 1970-71-72, c 2, s 12; see Peter W Hogg, *Canada Act 1982 Annotated* (Carswell 1982).
[30] *R v Drybones* [1970] SCR 282. For discussion of the Canadian Bill of Rights see Walter S Tarnopolsky, *The Canadian Bill of Rights* (2nd edn, McClelland and Stewart 1975) and Hogg (n 24).
[31] See generally Christopher MacLennan, *Towards the Charter: Canadians and the Demand for a National Bill of Rights, 1929–1960* (McGill-Queen's University Press 2003).
[32] Alberta Human Rights Act, RSA 2000, c A-25.5, s 1(1); Saskatchewan Human Rights Code, SS 1979, c S-24.1, s 44; Charter of Human Rights and Freedoms, RSQ, c C-12, s 52 (Quebec).
[33] Pierre E Trudeau, *A Canadian Charter of Human Rights* (Queen's Printer 1968).

clause,[34] because the whole idea of an override was anathema to Trudeau and the federal government's plan.[35] They wanted to entrench certain rights and freedoms and put them out of reach of government curtailment, and they wanted those rights to apply equally to all Canadians, regardless of their province of residence. An override would allow individual provincial governments to have the final say and also potentially threaten the rights protection aspect of the Charter.[36]

As best as can be determined, the idea of including an override in the Charter was first raised by the Premier of Alberta during a First Ministers' Meeting in February 1979.[37] The idea did not catch on.[38] It was raised only sporadically over the next two years,[39] and never as part of any formal proposal by the provinces. Most importantly, it was not part of the April Accord in 1981, which would become the template for an eventual agreement between the federal government and the provinces.[40]

When the federal government unveiled its plan for patriation with a constitutionally entrenched bill of rights in the fall of 1980, it smartly dubbed its plan 'The People's Package'.[41] The name stuck. The federal government tabled a draft Charter in Parliament and referred it, along with its entire package of constitutional reforms, to a Special Joint Committee of the Senate and the House of Commons for hearings.[42] This committee held public hearings over several months between 1980 and 1981, hearing from nearly a hundred witnesses and receiving submissions from over a thousand other Canadians.[43] It was the first time that such proceedings were televised. The idea of a Charter had already gained popularity across Canada; the publicity attached to these proceedings helped to make the Charter even more popular.[44]

At the conclusion of the hearings, an amended Charter was referred back to Parliament for debate and eventual passage, while the Supreme Court of Canada opined on the legality of

[34] Barry L Strayer, *Canada's Constitutional Revolution* (University of Alberta Press 2013) 125 (noting that between 1968 and 1980 – over the course of more than a decade of discussions, documents and meetings – the provinces never produced a draft Charter as an alternative to the federal proposals. They did so for the first time in the summer of 1980 in advance of the September 1980 First Ministers' Meeting).
[35] ibid 267, 269.
[36] ibid 270 (expressing the opinion that the very existence of the override 'was an enduring source of regret for Pierre Trudeau').
[37] ibid 267 (noting that Premier Peter Lougheed of Alberta 'referred to a notwithstanding clause as one of the possible means of making the Charter less unpalatable to some provinces. The matter was not pursued at that time by First Ministers'). It is also notable that Alberta's Bill of Rights contains an override power similar to that in the Canadian Bill of Rights: Alberta Bill of Rights, SA 1972, c 1, s 2, referred to in Hogg (n 29) 80.
[38] Strayer (n 34).
[39] Most notably by Premier Allen Blakeney of Saskatchewan at the September 1980 First Ministers' Meeting: Strayer (n 34) 269 (noting that again '[t]he matter received no further attention at that time and the First Ministers' Meeting failed to reach any agreement').
[40] For the text of the April Accord, see Anne F Bayefsky, *Canada's Constitution Act 1982 and Amendments: A Documentary History,* vol II (McGraw-Hill Ryerson 1989) 804–13.
[41] David Milne, *The New Canadian Constitution* (Lorimer 1982) 46–47.
[42] ibid 86
[43] Government of Canada, *The Charter of Rights and Freedoms: A Guide for Canadians* (Ministry of Supply and Services 1982) 41–43.
[44] One popular account of the patriation stage refers to 'the Candy-Colored Charter': Robert Sheppard and Michael Valpy, *The National Deal: The Fight for a Canadian Constitution* (Fleet Books 1982) 135.

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the federal government's attempt to proceed unilaterally with its constitutional reforms.[45] Importantly, the idea of an override was never part of the public discourse on the Charter and constitutional reform during the public parts of the constitutional reform process. It was unveiled to a surprised Canadian public in November 1981 as a critical part of an agreement reached by the Prime Minister and nine of the ten provincial premiers, which cleared the way for patriation and the enactment of the Charter.

The override was 'a vital element in the compromise among 10 of the 11 First Ministers that made possible the Accord they signed on 5 November 1981'.[46] This accord was reached between the federal government and the premiers of every province except Quebec, and provided the substantial provincial support for patriation and constitutional amendment that the Supreme Court of Canada had said was required, not as a matter of law but as a matter of constitutional convention.[47]

The federal government granted several concessions to attempt to reduce the impact of the override: it would apply only to selected sections of the Charter and, at Trudeau's insistence, each use was limited in its application to five years.[48] Ontario had attempted earlier to have the fundamental freedoms (section 2) removed from the application of the override, but the other provinces would not agree. For whatever reason, the federal government did not follow up on the Ontario initiative.[49]

Thus, the Canadian override was not a product of grand constitutional design: '[i]t was the product, pure and simple, of a political deal, a trade-off in order to have any sort of a charter'.[50] As we shall see in the next section, the override is considered to be an important part of a distinct Canadian constitutional model. However, in actuality, it provides an example of 'pragmatic, as opposed to ideological, constitution making'.[51]

3. THE OVERRIDE AS A CONSTITUTIONAL MODEL

The Canadian override has been considered a critical part of the Canadian constitutional model,[52] which in turn has been deemed part of a new constitutional model labelled variously as 'the new

[45] *Re Resolution to Amend the Constitution* [1981] 1 SCR 753 (*Patriation Reference*).
[46] Strayer (n 34) 266. For the text of the 5 November 1981 Accord see Howard Leeson, *The Patriation Minutes* (Centre for Constitutional Studies, Faculty of Law, University of Alberta 2011) 101–03. On the November Accord see Roy Romanow, Howard Leeson and John Whyte, *Canada … Notwithstanding* (Carswell/Methuen 1984); Ron Graham, *The Last Act: Pierre Trudeau, the Gang of Eight and the Fight for Canada* (Allen Lane 2011); Edward McWhinney, *Canada and the Constitution 1979–1982* (University of Toronto Press 1982) 90–101; Milne (n 41) 135–64; Stephen Clarkson and Christina McCall, *Trudeau and Our Times, Vol I: The Magnificent Obsession* (McClelland and Stewart 1997) 357–87.
[47] *Patriation Reference* (n 45).
[48] Strayer (n 34) 269–70.
[49] Leeson (n 46) 66, 69.
[50] Strayer (n 34) 267.
[51] ibid 266.
[52] Adam M Dodek, 'Canada as Constitutional Exporter: The Rise of the "Canadian Model" of Constitutionalism' (2007) 36 *Supreme Court Law Review* (2d) 309.

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Commonwealth model of constitutionalism',[53] 'parliamentary bill of rights model'[54] and 'weak-form judicial review'.[55] I have discussed the components and the attraction of the 'Canadian model' elsewhere;[56] here I focus squarely on the override.

The override is a critical aspect of the Canadian 'dialogue' theory of judicial review. It was popularised by Canadians Peter Hogg and Allison Bushell in a 1997 article,[57] although it had been raised a number of years earlier by Lorraine Weinrib[58] and developed in depth by Kent Roach.[59] The concept of dialogue posits a dynamic relationship between courts and legislatures over the meaning of rights guarantees.[60] The crux of dialogue is that courts do not have the last word; thus, the override becomes a critical feature of dialogue theory.[61]

The Canadian constitutional model influenced bills of rights in New Zealand, Australia, the United Kingdom and South Africa; and it strongly influenced the structure of the Basic Law: Human Dignity and Liberty and the Basic Law: Freedom of Occupation in Israel.[62] Moreover, after the *Meatrael* decision in 1993, the Knesset turned to the Canadian override to solve its political problem, repealed the former existing Basic Law: Freedom of Occupation and enacted a new Basic Law containing an override – the Israeli override. Israel remains the only country to have adopted the override. It has, however, attracted admirers in the United States, most notably the late Judge Robert Bork;[63] the idea of an override has breathed new life into the old idea of empowering Congress to override US Supreme Court decisions.[64]

The Canadian override can, conceptually, be designed in three alternative ways. These different interpretations are possible because, as will be seen in Section 4 below, the override was never part of any proposed draft Charter and was not publicly debated. In discussing the instructions to add an override to the Charter at the eleventh hour, the most senior federal official on the constitutional file stated:[65]

> We had never had a draft of a notwithstanding clause – what became section 33 of the Charter. … When a draft of the override was presented to the First Ministers, they required some time to [absorb] it because they had never seen a draft of a 'notwithstanding' clause.

[53] Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism' (2001) 49 *American Journal of Comparative Law* 707.
[54] Janet Hiebert, 'Parliamentary Bills of Rights: An Alternative Model' (2006) 69 *The Modern Law Review* 7.
[55] Mark Tushnet, 'Alternative Forms of Judicial Review' (2003) 101 *Michigan Law Review* 2781.
[56] Dodek (n 52).
[57] Hogg and Bushell (n 14).
[58] Weinrib (n 14) 564–65 (arguing that the override could 'reflect something positive about Canada's commitment to rights protection: not rule by supercourts at the expense of legislatures, but a complex partnership through institutional dialogue between supercourts and superlegislatures').
[59] Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Irwin Law 2001).
[60] Weinrib (n 14) 564–65.
[61] Hogg and Bushell (n 14) 79–80.
[62] Lorraine Weinrib, 'The Canadian Charter as a Model for Israel's Basic Laws' (1993) 4 *Constitutional Forum* 85; Segal (n 4).
[63] Robert H Bork, *Coercing Virtue: The Worldwide Rule of Judges* (AEI Press 2003) 91–92.
[64] See generally Jeff Sheshol, *Supreme Power: Franklin Roosevelt vs. The Supreme Court* (WW Norton 2010) 205, 223 (discussing proposals for constitutional amendment by Progressive presidential candidate, Robert La Follette, in 1924).
[65] Strayer (n 34) 199–200.

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This is a remarkable statement when placed in the context of more than a decade of constitutional debates, but it explains how the override is susceptible to different interpretations.

Model I is a narrow reactive model. This is how the override is popularly considered in Canada and is the focus of this article, unless otherwise stated. Model I is how MK Shaked has presented the Canadian override in Israel,[66] and is also how the Canadian override was first presented to the Canadian people. In explaining the override in Canada's Parliament in November 1981, Minister of Justice (and future Prime Minister) Jean Chrétien described it as 'a safety valve' which would be unlikely to be used except in 'non-controversial circumstances'. It may be fair to ask how the override could ever be used in 'non-controversial circumstances'. Mr Chrétien explained that the purpose of the override was 'to provide the flexibility that is required to ensure that legislatures rather than judges have the final say on important matters of public policy'.[67] Premier Allan Blakeney of Saskatchewan, one of the leading proponents of the override, explained that the override would allow Parliament and provincial legislatures to override a court decision.[68] Similar statements were made by Ontario's Attorney General, Roy McMurtry, who was one of the architects of the compromise deal that included the override.[69]

Under Model I, the legislature enacts a law; it is challenged in court and the court strikes it down as unconstitutional. The legislature then re-enacts the law, including the override, and the law is valid for a limited amount of time (five years in the case of Canada; four years in the case of Israel).[70] This model most accords with dialogical theories of constitutional interpretation: the legislature enacts a law, the courts interpret the law and the legislature responds by re-enacting the law with an override. In enacting the override, legislators have the benefit of the court's decision and will articulate arguments as to why the law should be re-enacted notwithstanding the court's finding that it was unconstitutional.

Model II is a broader model which permits the government to act pre-emptively. Under this model, the legislature may include an override clause in a law in order to insulate the law from being struck down as unconstitutional on certain bases. This would not prevent judicial review but rather would proactively deal with a potential finding of unconstitutionality (at least for the limited duration of the override). At first glance, this model does not accord as well with Canadian dialogue theories of judicial review because the legislature does not have the benefit of the court's interpretation of the law. The legislature might believe that its law will be struck down as unconstitutional, or it may act out of an abundance of caution. The use of the override may turn out to be unnecessary if the court ultimately finds the law to be constitutional.[71]

[66] Azoulay (n 1).
[67] House of Commons Debates, 32nd Parliament, 1st session, 20 November 1981, 13042 (Jean Chrétien).
[68] Canadian Inter-Governmental Conference Secretariat, Federal-Provincial Conference of First Ministers on the Constitution, verbatim transcript, 5 November 1981, 125.
[69] Roy McMurtry, 'The Search for a Constitutional Accord – A Personal Memoir' (1982) 8 *Queen's Law Journal* 65.
[70] cf Canadian Charter of Rights and Freedoms (n 17) s 33(3) and Basic Law: Freedom of Occupation, s 8.
[71] This was the case with Saskatchewan's use of the override in 1986, discussed below.

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Finally, in Model III the override is used both prospectively and comprehensively, to apply to a whole host of laws rather than to protect a particular statute or provision. Using the override in such a fashion changes the nature of the override. Instead of overriding a particular court decision, the override is used to override provisions of the Constitution itself. Employed in such a fashion, the override essentially becomes an 'opt-out clause' which can be used by legislatures in an omnibus fashion to insulate a host of laws from a finding of unconstitutionality. Model III differs substantially from Model I and it is difficult to substantiate in terms of a constructive relationship between the legislature and the courts. Under this model, the legislature not only has the last word, but it has the first and the middle as well, and there is little left for the courts to say.

The Canadian override was conceived as Model I but has been used as Model II and Model III. As stated above, the Canadian Minister of Justice at the time explained to the Canadian people that the override was something that would be used as 'a safety valve' to respond to court decisions[72] (Model I). However, it was notably used pre-emptively by the government of Saskatchewan to insulate its legislation from a finding of unconstitutionality (Model II). In that case, the Supreme Court of Canada upheld the constitutionality of the legislation that contained the override,[73] thus rendering the inclusion of the override unnecessary and rendering the debate over its use largely academic. In contrast, the Model III use of the override by the government of Quebec started as symbolic and became highly controversial, as discussed in more detail below. After the government of Quebec refused to agree to the November Accord, the government of Canada proceeded with patriation and the enactment of the Charter despite Quebec's absence. As a form of political protest against the federally imposed Constitution, Quebec's National Assembly re-enacted every law to incorporate an override and included an override in every new law that was passed.

The Supreme Court of Canada sanctioned these Model II and Model III uses of the override.[74] A number of prominent Canadian critics have been strongly critical of the Supreme Court in allowing the override to be used in this manner.[75] Canadian academics have been far more supportive of the override in theory than Canadians have in practice – in fact, most Canadians would probably be surprised to hear that Israel is considering using the Canadian override as a model.[76] The reasons for this will become clear in the next section.

[72] House of Commons Debates (n 67).
[73] *RWDSU v Sask* [1987] 1 SCR 460, discussed in Hogg (n 24) s 39.2
[74] *Ford v Quebec* [1988] 2 SCR 712. For criticism of the Supreme Court's decision on this issue see Weinrib (n 14).
[75] eg, Weinrib (n 14); Manfredi (n 14) 192–93.
[76] A 2007 poll indicated that almost half of Canadians were unaware of the existence of the override. Of those who were aware of it, nearly one third thought that neither the federal government nor the provinces should be able to use it; 30 per cent thought they both should be able to use it; 13.5 per cent thought only the provinces and 12 per cent only the federal government: Nik Nanos, 'Charter Values Don't Equal Canadian Values: Strong Support for Same-sex and Property Rights' (2007) *Policy Options* 50.

4. THE *BÊTE NOIRE* OF CANADIAN CONSTITUTIONAL POLITICS?

The override is the *bête noire* of Canadian constitutional politics for two reasons. First, the process by which it was adopted lacked democratic legitimacy. Second, its uses have contributed to its non-legitimate status.

The Canadian override may have been enacted through the democratic process, but the context surrounding its enactment lacked democratic legitimacy and has cast the override in a negative light in Canada ever since. Rivka Weill was surely correct in asserting that 'there is a strong connection between the process of constitution-making and the resulting democratic legitimacy of the constitution'.[77] Weill's assertions may be extended to specific provisions of a constitution and they may also apply to how those provisions are used. Thus, the due process clause of the American Constitution became seen as illegitimate because of how it was used during the *Lochner* era.[78]

The process by which the Canadian override was adopted has strongly affected its democratic legitimacy. There is a stark contrast between the inclusive and democratic process that produced the Charter and the closed and elitist process of the November Accord. During this time, Canada was changing as a country. The Charter contributed to those changes and became an important part of Canadian political culture,[79] but it was also a product of these changes. Canadians – quintessentially polite and deferential – were no longer willing to simply sit back and defer to their elected leaders.[80] The Charter had become 'the People's Package' and the people were not willing to simply sit back and let politicians take from them what they viewed as their new birthright: the Canadian Charter of Rights and Freedoms. The Charter was enacted through a process of unparallelled public participation through the parliamentary committee process of 1980–81, which gave Canadians a stake in their Charter. The Special Joint Committee on the Constitution received letters, telegrams and briefs from over 1,200 Canadians and heard from 100 witnesses, 95 of whom represented groups from across Canada.[81] It was the first parliamentary committee to be televised, and Canadians watched the proceedings.

In contrast to the open and inclusive proceedings of the Joint Committee which produced the Charter, the override appeared months after this process from behind a closed-door accord agreed upon by political elites.[82] This created problems for the override in terms of process, content, context and aftermath. As Manfredi has written, the circumstances under which the override was

[77] Rivka Weill, 'The New Commonwealth Model of Constitutionalism Notwithstanding: On Judicial Review and Constitution Making' (2014) 62 *American Journal of Comparative Law* 127, 130.
[78] eg, Sujit Choudhry, 'The Lochner Era and Comparative Constitutionalism' (2004) 2 *International Journal of Constitutional Law* 1.
[79] Nelson Wiseman, *In Search of Canadian Political Culture* (UBC Press 2007) 62–64, 74.
[80] Neil Nevitte, *The Decline of Deference* (University of Toronto Press 1996).
[81] Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, 32nd Parliament, 1st Session, 1980–81, Report to Parliament, 57:5.
[82] See generally Romanow, Whyte and Leeson (n 46).

enacted 'inhibited public development of a coherent theoretical justification for the legislative override'.[83] As Peter Russell has written:[84]

> The fact that the override was adopted in a closed-door deal among the political elites meant that the public was not exposed to this debate. Given the popularity of the Charter and growing distrust of politicians, the circumstances of the override's adoption could only lower its legitimacy.
> In fact, the process created an almost immediate backlash against the override.

When the 5 November 1981 Accord was revealed, it was announced that it would apply also to section 28 of the Charter, which provided that '[n]otwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons'.[85] Section 28 was added to the Charter after pressure from women's groups during the parliamentary hearings on the draft charter to strengthen gender equality under the Charter. The opposition to the application of the override to section 28 'was quick and articulate'.[86] Women's groups re-mobilised and re-engaged, organised demonstrations in the nation's capital and across the country.[87] Within a week of the agreement, federal officials began to contact their provincial counterparts about removing the application of the override to section 28. After a flurry of activity during an intense two-week period, all the provinces agreed[88] and the Minister of Justice publicly announced in the House of Commons that section 28 would not be subject to the override.[89]

The women had won; they had bested the First Ministers of Canada – at the time all men; and they appeared to have bested the override, in this battle at least. Despite all the hard struggles of women's groups to include section 28 in the Charter, the override would still apply to the general equality provisions of the Charter (section 15). That section would turn out to have a much greater impact on the rights of women than section 28 for which women fought so hard to have enacted in the Charter and protected from the application of the override. In the end, the strength and immediacy of the attack by women's groups on the application of the override to section 28 would have repercussions far beyond that particular incident. It demonstrated the new strength not only of organised women's groups in Canada[90] but also of a new breed of political actors which would come to be known as 'Charter Canadians' – those Canadians with a

[83] Manfredi (n 14) 184.
[84] Russell (n 14).
[85] Strayer (n 34) 201–02; Romanow, Whyte and Leeson (n 46) 213.
[86] Strayer (n 34) 203.
[87] Leeson (n 46) 77; Penney Kome, *The Taking of Twenty-Eight: Women Challenge the Constitution* (The Women's Press of Canada 1983) 83–95; Marilou McPhedran, 'A Truer Story: Constitutional Trialogue' in Graeme Mitchell and others (eds), *A Living Tree: The Legacy of 1982 in Canada's Political Evolution* (LexisNexis 2007) 101, 121–22; Peter H Russell, *Constitutional Odyssey: Can Canadians Become a Sovereign People?* (3rd edn, University of Toronto Press 2004) 122; and Chaviva Hošek, 'Women and the Constitutional Process' in Keith Banting and Richard Simeon (eds), *And No One Cheered: Federalism, Democracy & The Constitution Act* (Methuen 1983) 280, 291–95.
[88] Strayer (n 34) 203–04; Leeson (n 46).
[89] House of Commons Debates 12:13013, 20 November 1981, 13042, discussed in McPhedran (n 87) 121.
[90] Kome (n 87) 95.

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vested interest in 'their Charter'.[91] The Charter had created nothing short of a new constitutional culture in Canada.[92] As one leading Canadian political scientist has written:[93]

> The public opinion aroused following the 5 November accord presaged significant changes in constitutional decision-making in Canada. The vigorous interest groups and pressure groups swept away the reluctant premiers in their path. Something has now changed. Constitutional law is being recognized as a continuing interaction of different, sometimes directly competing social interests.

It is interesting to speculate whether the new political actors – the Charter Canadians – born through the process could have effectively risen up to force the First Ministers to abandon the override altogether, as women's groups had successfully done with its application to section 28. In the end, we will never know.

We do know, however, that the override represented 'the old Canada' in terms of both process and substance: it was enacted through a closed and highly elitist process and it focused on the powers of governments. It may appear that the override was destined to fail; however, that is not necessarily the case.

The uses of the override have also contributed to its illegitimacy. Its very first uses in Canada did not attract significant public attention, despite the high-profile nature of their employment. The Canadian override was born of political compromise and it was soon put to use by the government of Quebec, which had refused to agree to that deal. In an act of constitutional symbolism, the Quebec National Assembly 'embarked on a policy of blanket override of constitutional rights', attempting to use the override as an opt-out clause from the new Canadian Charter of Rights and Freedoms.[94] The National Assembly passed an omnibus bill which repealed and re-enacted with an override clause all legislation passed prior to the Charter.[95] Reaction at the time to Quebec's 'omnibus override' was muted; it was widely seen as an act of political spite responding to Quebec's perceived exclusion from the patriation pact,[96] rather than an attempt to restrict constitutionally protected rights and freedoms.[97]

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[91] Alan C Cairns, *Charter versus Federalism: The Dilemmas of Constitutional Reform* (McGill-Queen's University Press 1992).

[92] ibid 108–09.

[93] McWhinney (n 46) 112. See also the comments of Russell (n 87) 121 ('For some, the override even with these restrictions contradicts the basic purpose of a constitutional bill of rights – of placing certain fundamental rights and freedoms beyond legislative encroachment. For others with less faith in the judiciary's wisdom in striking the right balance between competing rights and social interests, the override is a prudence democratic fail-safe device. However, the fact that the override was adopted in a closed-door deal among the political elites meant that the public was not exposed to this debate. Given the popularity of the Charter and growing distrust of politicians, the circumstances of the override's adoption could only lower its legitimacy').

[94] Weinrib (n 14) 544.

[95] An Act Respecting the Constitution Act, 1982, SQ 1982, c 21, discussed in Weinrib (n 14).

[96] The constitutionality of the omnibus override was largely upheld by the Supreme Court of Canada in *Ford v Quebec* (n 74). The Supreme Court found that the attempt by the government of Quebec to apply the override retroactively (to the time period between 17 April 1982 when the Charter came into effect and June 1982 when the legislation was passed) was invalid.

[97] Weinrib (n 14) 560.

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Other initial uses of the override also failed to attract much attention.[98] In 1986, the government of Saskatchewan pre-emptively used the override (Model II) to insulate legislation that prohibited dairy workers from striking and their employers from locking them out. This legislation was ultimately upheld as constitutional by the Supreme Court of Canada in 1987.[99] The override's use in such circumstances was not anticipated by many of its creators in 1981.[100] However, the use of the override in such instances did not attract much attention precisely because it did not actually 'override' a court decision.

The override would have certainly catapulted to national attention in 1988 had the federal government listened to the pleas of anti-abortion activists who urged it to invoke the clause. In January of that year, the Supreme Court of Canada struck down the Criminal Code prohibitions on abortion.[101] Supporters of the continued criminalisation of abortion pressed Parliamentarians to use the override, but they refused.[102]

The override quickly became caught up in the constitutional battles between English and French Canada in the late 1980s. In 1987, all of the premiers had agreed with the Prime Minister on a package of constitutional reforms which would have resulted in Quebec doing what it had not done in 1981: providing its political assent to patriation and the Charter. While the Supreme Court of Canada had ruled that legally Quebec's consent was not required,[103] politically the failure of Quebec to agree to that deal had caused tensions within Canada.[104] The deadline for each province to approve the proposed constitutional reforms was 23 June 1990.[105] On 15 December 1988, the Supreme Court of Canada struck down a provision of Quebec's Charter of the French Language which prohibited the use of any other language but French on commercial signs. The Supreme Court held that this restriction violated the Charter's guarantee of freedom of expression.[106] The government of Quebec immediately announced that it would invoke the override to protect the impugned law.[107] Just six days later, on 21 December 1988, the Quebec legislature enacted new legislation confirming the provisions of the law that had been struck down and including the override to insulate the provisions from further judicial review.[108] The response from the rest of Canada outside Quebec (known as ROC) was immediate and overwhelmingly negative.[109]

[98] The Yukon government included an override in a statute that never came into force: Land Planning and Development Act, SY 1982, c 22, s 39(1), discussed in Hogg (n 24) s 39.2. For a comprehensive review and analysis of all uses of the override see Kahana (n 16).
[99] *RWDSU v Sask* (n 73), discussed in Hogg (n 24) s 39.2.
[100] Manfredi (n 14) 185.
[101] *R v Morgentaler* [1988] 1 SCR 30.
[102] Peter H Russell, 'Canadian Constraints on Judicialization from Without' (1994) 15 *International Political Science Review* 165, 171.
[103] *Re Objection by Quebec to a Resolution to Amend the Constitution* [1982] 2 SCR 793.
[104] The agreement was reached at Meech Lake just outside Ottawa and was known as the Meech Lake Accord: see generally Monahan (n 14).
[105] The three-year deadline was set by virtue of the deadline for constitutional amendments set out in the Constitution Act, 1982, s 39(2).
[106] *Ford v Quebec* (n 74).
[107] Christopher P Manfredi, 'Same Sex and the Notwithstanding Clause' (2003) (October) *Policy Options* 21, 22.
[108] Bill 178, An Act to Amend the Charter of the French Language, SQ 1988, c 54.
[109] Milne (n 41) 230–32.

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The use of the override was seen as the majority trampling on the rights of minorities – precisely the sort of thing that a constitutionally entrenched bill of rights was supposed to prevent. The reaction in English Canada to the use of the override was described by one of Canada's leading political scientists as 'tribal',[110] reflecting the visceral rejection of the use of the override.[111] Quebec's use of the override was an important contributing factor to the demise of the Meech Lake Accord,[112] which would have brought Quebec formally into the constitutional deal that it rejected (or was excluded from in 1981). In English Canada, the visceral rejection of Quebec's use of the override quickly transformed into a visceral rejection of the override itself.[113]

The Canadian Prime Minister at the time, Brian Mulroney, castigated the override as 'that major fatal flaw of 1981, which reduces your individual rights and mine', and said it made the Charter 'not worth the paper it is written on'.[114] These were strong words indeed from the highest elected official in the land. However, it is possible that the Prime Minister's negative reaction stemmed from the fact that he had orchestrated the Meech Lake Accord and probably lost it because of Quebec's use of the override.

As McGill political scientist and defender of the override, Christopher Manfredi, has suggested, it could have been different. Manfredi notes that the Canadian experience of the use of the override was prior to any Supreme Court decision that was widely considered to be illegitimate and which could have attracted the use of the override with significant popular support.[115]

Manfredi gives two instructive examples of how the use of the override could have potentially received popular support. He cites the 1991 *Seaboyer* decision[116] in which the Supreme Court struck down the 'rape shield' provision of the Criminal Code which prohibited rape victims from being cross-examined about their sexual history. In this case, feminist Attorney General of Canada and future Prime Minister, Kim Campbell, would have enjoyed broad public support had her government decided to use the override to preserve the prohibition and defend a vulnerable group (victims of rape) despite the court ruling that doing so constituted an unconstitutional infringement of defendants' rights. Manfredi's second example is probably even stronger than his first: the 1990 *Askov* decision[117] involving the issue of trial within a reasonable time. This notorious decision – which the Supreme Court quickly 'clarified' two years later[118] – led to an

[110] Russell (n 87) 146.
[111] David Snow, 'Notwithstanding the Override: Path Dependence, Section 33, and the Charter' (2008–09) 8 *Innovations: A Journal of Politics* 1.
[112] Russell (n 87) 145; Monahan (n 14) 164 (stating that after the Quebec government used the override 'there was virtually no chance that the Meech Lake Accord would be ratified'). Thomas Axworthy has called Quebec's use of the override 'perhaps the single most important act in eroding support for the proposed Meech Lake package of amendments to the Constitution': Thomas S Axworthy, 'The Notwithstanding Clause: Sword of Damocles or Paper Tiger?' (2007) (March) *Policy Options* 58. See also Milne (n 41) 234 (calling Quebec's Bill 178 a 'disastrous blow for the Meech Lake Accord and the ratification process').
[113] Milne (n 41) 233–34.
[114] Axworthy (n 112) 58.
[115] Manfredi (n 14) 204, 205, 210.
[116] *R v Seaboyer* [1991] 2 SCR 577.
[117] *R v Askov* [1990] 2 SCR 1199.
[118] *R v Morin* [1992] 1 SCR 771.

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estimated 50,000 criminal charges being dropped in the province of Ontario alone. At the time of the decision, Ontario was led by a left-wing government. It would have been particularly well positioned to use the override to prevent perceived 'criminals' walking free; it is unlikely that it would have faced serious challenge from the right if it had taken such a decision. However, the Ontario government did not seriously consider using the override because it had become so unpopular in that province after Quebec's use of it two years earlier.

Since the Quebec government's use of the override in 1988, no other Canadian federal or provincial government has successfully invoked it. That does not mean that the override has disappeared from constitutional and political discourse – far from it. In practice, however, the override is no longer used as part of a 'dialogue' between courts and the legislatures as the constitutional modelling would have it. Instead, as demonstrated below, the override has been politicised and demonised.

In 1998, the government of Alberta introduced a bill to limit compensation to victims of forced sterilisation. The Alberta bill included a notwithstanding clause to insulate the government against a Charter challenge.[119] Wielding the override against a vulnerable group in this manner 'smacked of mean-spiritedness'.[120] Public outcry was so strong that the government withdrew the bill the next day and apologised.[121] Premier Ralph Klein – not known for his political correctness – lamented his lack of political acuity in this instance. He stated that[122]

> [i]t became abundantly clear that to individuals in this country the Charter of Rights and Freedoms is paramount and the use of any tool … to undermine [it] is something that should be used in very, very rare circumstances.

Several weeks later, the government of Alberta declined to use the notwithstanding clause in response to an unpopular Supreme Court of Canada decision that read 'sexual orientation' as a protected ground under that province's human rights legislation.[123] Polls showed that two-thirds of Albertans supported the government's decision not to use the override.[124]

The government of Alberta did include the override in 2000 in a law in which it purported to restrict marriage to heterosexual couples (Model II).[125] However, several years later the Supreme Court of Canada ruled that only the federal government and not the provinces could define marriage,[126] thus making the Alberta law in effect ultra vires and its use of the override redundant.

[119] Bill 26, Institutional Confinement and Sexual Sterilization Compensation Act, s 3, Alberta, 24th Legislature, 2nd Session, 47 Elizabeth II, 1998.
[120] Manfredi (n 14) 187.
[121] Sandra Martin, 'Ralph Klein, 70: The Man Who Ruled Alberta', *The Globe and Mail*, 29 March 2013, http://www.theglobeandmail.com/news/national/ralph-klein-70-the-man-who-ruled-alberta/article10569210/?page=all.
[122] *Edmonton Journal*, 12 March 1998, quoted in Manfredi (n 14) 187–88.
[123] *Vriend v Alberta* [1998] 1 SCR 493.
[124] Roach (n 59) 196.
[125] Marriage Amendment Act, SA 2000, c 3, s 5.
[126] *Reference re Same Sex Marriage* [2004] 3 SCR 698.

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In 2004, the prospect that Conservative Party leader, Stephen Harper, might use the override was successfully employed by a weakened governing Liberal Party to hold onto power.[127] This anti-judiciary theme was a strong current of the populist Reform Party, which merged with the Progressive Conservative Party in 2003. Because Stephen Harper came from that Reform Party wing, the Liberals in 2004 were able to successfully paint him as having a 'secret agenda' to undermine Charter rights by using, inter alia, the override.[128]

A similar attempt to use the override to scare the Canadian voters was employed again in the federal election less than two years later. In the run-up to the 2006 election, the campaign of the incumbent Liberal Prime Minister, Paul Martin, was in free fall. During the only English-language leaders' debate,[129] he made what was generally viewed as a desperate move by promising to remove the federal government's power to use the override.[130] The federal government had never used the dreaded override, but the Prime Minister treated it as a zombie awakened from the dead and promised to drive a stake through its heart. He called the override 'a hammer that can only be used to pound away at the Charter and claw back any one of a number of individual rights'.[131]

As one leading Canadian political scientist has written,[132]

> [s]o powerful is political repudiation of the notwithstanding clause that Paul Martin thought he could salvage a faltering election campaign by pledging, during a televised political leaders' debate, that if elected his government would remove the constitutional power of a federal government to invoke the notwithstanding clause.

The strategy did not work, but this was not because Canadians did not support the idea. Rather, it was too far removed from reality precisely because the override had so fallen into disuse in Canadian constitutional politics.

Paul Martin lost that election and Stephen Harper became Prime Minister of a Conservative government. Prime Minister Harper and his party are certainly no fan of the courts or of the Charter: they can barely bring themselves to acknowledge the Charter's existence[133] and, while in opposition, they rallied against the power of the courts. In 2007, two of the Prime Minister's mentors and supporters published a study with a right-wing think tank that

[127] Snow (n 111) 10.
[128] ibid; Campbell Clark, 'Liberals Highlight Left-Right Fault Line', *Globe and Mail,* 4 June 2004, A8.
[129] In recent Canadian federal elections, there has typically been one English-language leaders' debate and one French-language debate.
[130] 'Liberal Platform Doesn't Include Notwithstanding Clause Ban', *CBC News*, 11 January 2006, http://www.cbc.ca/news/canada/liberal-platform-doesn-t-include-notwithstanding-clause-ban-1.585843. For a more sympathetic account see Axworthy (n 112) 58.
[131] Axworthy (n 112) 58.
[132] Janet L Hiebert, 'Compromise and the Notwithstanding Clause: Why the Dominant Narrative Distorts Our Understanding' in James B Kelly and Christopher P Manfredi (eds), *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms* (UBC Press 2009) 107, 119.
[133] On the occasion of the Charter's 30th anniversary in 2012, senior public servants wanted to celebrate the event but the Minister vetoed the idea and all the government could do was issue a press release: Mark Bourrie, *Kill the Messengers: Stephen Harper's Assault on Your Right to Know* (HarperCollins 2015) 157.

recommended reviving the override through the use of provincial referendums.[134] So far, the Prime Minister and his government have not been swayed.

Between 2006 and 2014, the government of Prime Minister Harper watched as some key pieces of legislation were struck down by the Supreme Court of Canada; in particular, in 2014 the Court dealt the government a number of serious blows.[135] In a bizarre and unfortunate turn of events, the Prime Minister and the Attorney General lashed out at the Chief Justice and accused her of acting unethically in connection with an appointment to the Court.[136] There is certainly no love lost between the Harper government and the Supreme Court of Canada. Yet, through all of this, the government has never once publicly stated that it was considering the use of the override.

The final vignette returns us to where we began: in Quebec. In 2013, the separatist government of Quebec introduced a very controversial Quebec Charter of Values, also known as the Quebec Charter of Secular Values.[137] It prohibited the display by public servants of religious symbols such as religious head coverings, like the Muslim hijab or the Jewish yarmulka.[138] In Canada, this prohibition would extend to all teachers, doctors, nurses, health care workers, day care workers and similar. It was clearly aimed at Muslims, but it swept in Jews and some Christians too. Many scholars saw the measures as a clear violation of freedom of religion which could not be justified as a reasonable limitation under the Canadian Charter's limitation clause.[139] Of course, they could be upheld with an override. Remarkably, the separatist government did not include an override in its legislation and insisted that it would not need to use the override because its legislation was constitutional. After months of acrimonious debate, the Premier finally stated during an election campaign that she was willing to use the override if the courts struck down the law.[140] The legislation was abandoned after the separatist government lost the election.

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[134] Mike Harris and Preston Manning, *Vison for a Canada Strong and Free* (The Fraser Institute 2007) 12, 235–37, referred to in Axworthy (n 112) 58.

[135] See generally Sean Fine and Chris Hannay, 'Harper v The Supreme Court: Five Recent Losses for the PM', *The [Toronto] Globe and Mail*, 25 April 2014, http://www.theglobeandmail.com/news/politics/harper-v-the-supreme-court-five-recent-losses-for-the-pm/article18206422/?page=all.

[136] See generally Lorne Sossin, 'Court Dismissed', *The Walrus*, January–February 2015, http://thewalrus.ca/court-dismissed.

[137] Bill 60, Charter Affirming the Values of State Secularism and Religious Neutrality and of Equality between Men and Women and Providing a Framework for Accommodation Requests, National Assembly of Quebec, 40th Legislature, 1st Session.

[138] ibid s 5 (Restriction on Wearing Religious Symbols).

[139] See, eg, Sean Fine, 'Is Quebec's Secular Charter Constitutional? Nine Legal Experts Weigh In', *The [Toronto] Globe and Mail*, 14 September 2014, http://www.theglobeandmail.com/news/politics/is-quebecs-secular-charter-constitutional-nine-legal-experts-weigh-in/article14324825/?page=all; Daniel Schwartz, 'Charter of Quebec Values on Collision Course with Constitution?', *CBC News*, 11 September 2014, http://www.cbc.ca/news/politics/charter-of-quebec-values-on-collision-course-with-constitution-1.1699637.

[140] 'PQ Willing to Use Notwithstanding Clause to Make Sure Controversial Secular Charter Becomes Law, Marois Says', *Postmedia News*, 31 March 2014, http://news.nationalpost.com/2014/03/31/pq-willing-to-use-notwithstanding-clause-to-make-sure-controversial-secular-charter-becomes-law-marois-says.

5. CONCLUSION: OF LEGAL TRANSPLANTS AND LEGITIMACY

The experience of the Canadian override provides a cautionary tale for those considering it as a constitutional model. It demonstrates a number of propositions. First, it supports Weill's assertion that the process of constitution making impacts upon the democratic legitimacy of a constitution.[141] In the case of the Canadian override, there was a stark contrast between the openness and inclusiveness of the making of the Charter as a whole and the closed and elitist manner in which the override was adopted at the eleventh hour. Second, the lack of thought and debate that went into the adoption of the Canadian override produced an ambiguous text which can be interpreted as providing three very different models of an override. Thus, when Israelis speak of adopting the Canadian override, it is not clear whether they mean Model I, II or III. Israeli public statements would indicate Model I. However, Canadians were told they were getting a Model I override, but ended up with Model III instead. This is another cautionary tale concerning legal transplants. Third, the Canadian experience with its override shows how the legitimacy of a constitutional provision is closely caught up in the circumstances in which it is used. It may be that the initial use or uses of the override has forever cast it as the *bête noire* of Canadian constitutional politics. I do not think that this was inevitable, however. As Manfredi and others have argued, the circumstances could have been different; but the circumstances are important.

Israelis continue to look to Canada and invoke Canada when considering adopting an override. Against this current, Weill has argued strongly that the override in the Basic Law: Freedom of Occupation was not a Canadian invention but has deep roots in the common law and Israeli law.[142] However, Israeli politicians are either not aware or do not use Weill's arguments about the Israeli roots of their own override. Instead, they specifically refer to Canada in the attempt to legitimise the 'Israeli override'. In doing so, they should understand the context in which the override exists in Canada.

There is another meaning to *bête noire*, which is its meaning in its original French. As stated above, the literal meaning of *bête noire* is 'black beast'. In French, it has the connotation of something that one is obsessed about, with a mixture of fear, hatred and fascination.[143] This certainly describes how Canadians feel about their override. Israelis would be well advised to understand this when 'the Canadian override' is hailed as a model to be embraced.

[141] Weill (n 77).

[142] Rivka Weill, 'Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power' (2011–12) 39 *Hastings Constitutional Law Quarterly* 457. Weill acknowledges that the inclusion of a notwithstanding clause in the Basic Law: Freedom of Occupation 'suggests that Canada served as an example to Israel's development and national maturation': ibid 509, citing Aharon Barak, *Interpretation in Law: Constitutional Interpretation* (Nevo 1994) 634 (in Hebrew). In fact, Zeev Segal has written that Barak wrote directly to the MKs considering amendments to the Basic Law and suggested the Canadian override to them: Segal (n 4) 45–46.

[143] http://languagegeek.net/2007/08/28/the-meaning-of-the-french-phrase-bete-noire/#sthash.z84RVqen.dpuf.

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