ARGUING AGAINST THE 'ARGUMENTAIRE'

Quebecers and the Canadian Charter of Rights

BY Jack Jedwab

OVER THE PAST TWENTY YEARS, THE PATRIATION OF THE CANADIAN CONSTITUTION HAS REMAINED A SOURCE OF CONSIDERABLE CONTROVERSY IN QUEBEC. MANY ATTRIBUTE THIS TO THE POLITICAL PROCESS IN WHICH THE QUEBEC GOVERNMENT LED BY PREMIER RENÉ LEVESQUE WAS ISOLATED BY THE LEADERS OF THE OTHER PROVINCES WHO ULTIMATELY CAME TO TERMS WITH THE FEDERAL GOVERNMENT ON A CONSTITUTIONAL AGREEMENT AND THE ENTRENCHMENT OF A *CHARTER OF RIGHTS AND FREEDOMS*. THE CANADIAN CONSTITUTION WAS THUS SIGNED OVER THE OBJECTIONS OF THE QUEBEC GOVERNMENT, AND TO EXPRESS THEIR DISAPPROVAL AN ALL-PARTY RESOLUTION WAS ADOPTED IN THE NATIONAL ASSEMBLY. SINCE THAT TIME THE ISSUE HAS REMAINED CENTRAL TO DISCUSSIONS SURROUNDING THE FUTURE OF QUEBEC WITHIN CANADA, AND IT IS FREQUENTLY NOTED THAT QUEBEC IS NOT A SIGNATORY TO THE CONSTITUTION.

There is a reasonably large consensus amongst Quebec's intellectuals – sovereignist and federalist alike – over the political events in 1981 that culminated in the patriation of the Canadian Constitution. Often connected to discussions of the Constitution is the presumed threat from the *Canadian Charter of Rights and Freedoms* arising in particular from those provisions relating to language and culture. Although little empirical evidence exists to support this assertion, many Quebec intellectuals and politicians contend that the provisions of the Canadian *Charter* are objectionable to the majority of the province's population. They do so despite polling data which consistently reaffirm that the *Canadian Charter of Rights and Freedoms* is popular with an important majority of Quebecers. More recently, a survey conducted by the firm Environics showed that a vast majority of Quebecers believe that the Canadian *Charter* has had a major positive impact on the protection of the rights and freedoms of Canadians.

The Charter of Rights and Freedoms has had a major positive impact on the protection of the rights and freedoms of Canadians.

	QUEBEC	REST OF CANADA
Agree	86 %	81
Disagree	11	16
DK/NA	3	3

All tables: Source: Focus-Environics, 2001-02

The persistence of the idea that the Canadian *Charter* is unpopular and unacceptable to most Quebecers is often presented in the more widely read texts dealing with the issue as a historic statement of fact. This idea can be traced to the views expressed by the late Premier René Levesque in the heat of the patriation debate. Referring to the *Charter* in his memoirs, Levesque pointed out that England had done very well without this legalistic yoke and nonetheless had not surpassed its citizens' human rights, and that Anglo-Canadians were leery of this 'government by judges' that was to be installed above parliament. Moreover, Levesque noted that Quebec possessed its own *Charter*. To further justify his objections to the (Canadian) *Charter*, Levesque referred to the views then articulated by Judge Pigeon to the effect that: 'this American-style project does not at all conform to the logic of our institutions ... having experienced the great slowness of the courts ... this new and complex responsibility will just multiply the delays and confusion' (Réné Levesque: memoirs translated by Phillip Stratford, McClelland and Stewart, 1986).

In this regard, it was neither clear at that time, nor is it apparent today, that Quebecers were more or less leery of the emergence of a 'government of judges' than the rest of the Canadian population. If recent findings are any indication, it seems that the majority of Quebecers do indeed believe that the judiciary should have the final word on fundamental rights.

In your opinion, which branch of government should have final say on questions related to the fundamental rights of Canadians? Should it be Parliament or the Supreme Court of Canada?

	QUÉBEC	REST OF CANADA
Parliament	30	37
Supreme Court	59	55
Both	4	3
Neither	1	1
Other	-	-
DK/NA	5	5

In your opinion, which branch of government should have final say on questions related to the fundamental rights of Canadians? Should it be politicians or judges?

	QUÉBEC	REST OF CANADA
Parliament	25	31
Supreme Court	59	60
Both	4	2
Neither	8	5
Other	-	-
DK/NA	3	2

The idea that Quebecers are opposed to the substance of the *Charter* has since found significant resonance amongst some of the country's leading scholars. Tel qu'indiqué ci-dessus, dans la 'Manifeste des intellectuels pour la souveraineté' le desapprobation de la *charte* canadienne constitue une partie essentielle de l'argumentaire.

L'argument linguistique. Parce qu'une *charte* des droits d'inspiration individualiste s'y trouve enchâssée, la constitution canadienne permet que soient contestées devant les tribunaux les lois du gouvernement du Québec. Les lois linguistiques québécoises ont été constraintes par cette situation.

L'argument constitutionnel. À la suite du rapatriement illégitime de la constitution en 1982, le Québec s'est trouvé exclu de la famille canadienne. Par ce coup de force constitutionnel, le Canada a limité les pouvoirs du Québec en matière de législation linguistique (la clause Canada) et imposé une *charte* des droits essentiellement individualiste qui confie à des juges nommés par l'État fédéral des pouvoirs considérables

However, Quebecers overwhelmingly support the principles enunciated in the Canadian *Charter* with respect to the equality of the English and French languages. That there may be contemporary debate around language policies detracts nothing from the adherence on the part of Quebecers to the *Charter*'s main disposition on language.

English and French should have equal status, rights and privileges in Canada.

	CANADA	QUEBEC	CANADA EXCL. QUEBEC
Agree	78	94	73
Disagree	21	6	26
DK/NA	1	-	1

Pour ce qui est du Québec, Jean-Francois Lisée affirme qu'il « n'est pas anodin que telle ou telle décision soit prise par ses propres élus ou par un pouvoir plus lointain, tributaire d'une autre majorité nationale que la sienne. D'ou sa farouche opposition a cet perte de pouvoir. » (Sortie de Secours, 80-81).

But it remains to be demonstrated that Quebec has indeed suffered a significant loss in power arising from the dispositions of the *Charter*. With respect to language, the majority of Quebecers believe that the provincial government has primary authority over language and whatever perceived encroachments may have occurred, this view has not been shaken by the presence of the *Charter*.

Who has and should have primary authority over language issues in Canada-Quebec respondents? (asked to Quebecers)

	HAS	SHOULD HAVE
Federal	25	27
Provincial	55	57
Municipal	2	2
All/Combination	3	4
DK	13	6

Some have argued that it is the multicultural provisions of the *Charter* that represent a serious concern to the desire of a majority of Quebecers to protect the French language and culture. Again, survey data fail to support this idea. As observed below, the vast majority of Quebecers respond favorably to the formulation of the multicultural provision of the *Charter*.

The preservation and enhancement of the multicultural heritage of Canadians is an objective that the government should support.

	CANADA	QUEBEC	CANADA EXCL. QUEBEC
Agree	82	86	80
Disagree	15	10	17
DK/NA	3	3	3

Moreover while a majority of Quebecers hold concerns about the future of the French language they do not appear to attribute them to the multicultural provisions of the *Charter*.

The preservation and enhancement of the multicultural heritage of Canadians is a threat to the future of the French language in Canada.

	CANADA	QUEBEC	CANADA EXCL. QUEBEC
Agree	25	39	22
Disagree	70	58	74
DK/NA	4	4	4

In the book 'As I Recall: Historical Perspectives', John Meisel and Guy Rocher contend that "the entrenchment of the *Charter* constitutionalized a certain vision of Canada – that of a nation comprising of individuals who enjoy identical constitutional rights – at odds with the 'two founding nations' ideal dear to Quebec federalists." In her essay 'Recognizing Difference', Jane Jenson contends that the capstone of this model of rights-bearing individuals was the *Charter* of Rights and Freedoms entrenched in the 1982 Constitution. It conferred a body of protected individual rights and guaranteed equal treatment, while being "explicitly hostile to diversities on the availability of rights based on province of residence." Through these same decades, the nationalist movement in Quebec (with both federalist and sovereignist wings) was developing another version of liberalism and its legitimate rights claims.

While the debate over the recognition of Quebec's distinct characteristics remains important and legitimate, the Canadian *Charter* neither denies nor curtails difference. In fact in many ways the *Charter* secures the rights to be distinctive. Casting the failure to enshrine recognition of Quebecers' distintiveness should not be construed as 'hostility' on the part of the *Charter*.

Nor is it clear that the desire for recognition of Quebec's specificity implies a collectivist rights orientation on the part of the population that is in opposition to the individualist orientation of the rest of Canada. Both in Quebec and elsewhere in Canada, the conception of rights cannot too rigidly be cast as individual versus collective, nor is public opinion so clear as to such a distinction.

Another view, espoused by David Schneiderman in his essay 'Human Rights, Fundamental Differences? Multiple *Charters* in a Partnership Frame', holds that, located properly within the context of 1982 and subsequent rounds of constitutional reform, the objections to the *Charter* may be better understood as dissenting views about its legitimacy. Imposed without the consent of Quebec politicians, the *Charter* as a whole is therefore rejected as a political project for generating pan-Canadian solidarity and unity. By objecting to the process by which the *Charter* emerged as supreme constitutional law, both Quebec and Aboriginal leaders have been placed in the position of having to question the legitimacy of the text of the *Charter* itself, leading to charges of illiberalism. Schneiderman notes that while some "throw cold water on the Canadian *Charter*, they heap praise upon the Quebec *Charter of Human Rights and Freedoms* – a rights document comparable in many ways... to the Canadian *Charter*."

It is unfortunate that, when it comes to the opinions of Quebecers on the *Canadian Charter of Rights*, assertions are made with no empirical evidence to substantiate them. It is perfectly legitimate for academics and politicians to insist that the Canadian *Charter* is contrary to what they perceive to be in the best interests of Quebecers. However, the ground is far less solid when these same people purport to represent the views of the majority of Quebecers on the *Charter*. When it comes to fundamental rights and freedoms, it is not apparent that the majority of Quebecers are more collectivist in their orientation than other Canadians.

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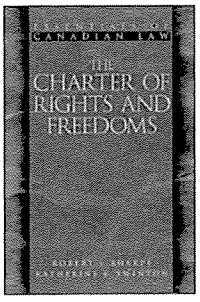

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