
DOES THE *CHARTER* MATTER?

Harry Arthurs and Brent Arnold*

This article investigates whether Canada has changed in ways the ways that proponents of the Charter desired and anticipated. We examine the progress of groups that the Charter was intended to benefit (Aboriginal peoples, women, visible minorities, and immigrants); areas of state action that the Charter was intended to regulate (the criminal process and bureaucratic behaviour); and aspects of our communal and public life that the Charter was intended to animate and enhance (politics and inter-group cultural relations). We rely on a significant number of studies of Canadian social development during the period from 1982 to the present. Available evidence suggests that progress towards the vision of Canada inscribed in the Charter has generally been modest, halting, non-existent, and, in some cases, negative. What we claim is that the Charter does not much matter in the precise sense that it has not – for whatever reason – significantly altered the reality of life in Canada.

Cet article examine si le Canada a changé par rapport à ce que les auteurs de la Charte voulaient et prévoyaient. Nous étudions le progrès des groupes que la Charte devait avantager (Autochtones, femmes, minorités visibles et immigrants), les zones d'action de l'État que la Charte devait régir (régime pénal et comportement bureaucratique), ainsi que des aspects de notre vie commune et publique que la Charte devait animer et améliorer (politique et relations culturelles intergroupes). Nous nous fions à un nombre important d'études sur le développement social canadien pendant la période allant de 1982 à aujourd'hui. Les éléments de preuve disponibles font penser que le progrès vers la vision du Canada qui est inscrite dans la Charte a généralement été modeste, hésitant, non existant et, dans certains cas, négatif. Nous prétendons que la Charte ne compte pas vraiment dans le sens où elle n'a pas considérablement modifié la réalité de la vie au Canada.

In this article, we investigate whether it can be said that Canada has changed in ways the ways that proponents of the *Charter* desired and anticipated. We examine the progress of groups that the *Charter* was intended to benefit (Aboriginal peoples, women, visible minorities, and immigrants); areas of state action that the *Charter* was intended to regulate (the criminal process and bureaucratic behaviour); and aspects of our communal and public life that the

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I. INTRODUCTION

The introduction of the *Canadian Charter of Rights and Freedoms*¹ in 1982 marked a transformation in Canadian legal doctrine, practice, and culture. Who would deny it? But did this legal transformation in turn accomplish – or even coincide with – measurable changes in the social and political life of Canada and Canadians? The answer to this question is by no means clear. What is clear, however, is that (for reasons we explore) there have been surprisingly few attempts to investigate social data that might provide an answer. We have sifted through a great deal of such evidence covering the period from the enactment of the *Charter* to the present.² Our very tentative conclusion is that the *Charter* does not in fact seem to have mattered very much in the sense that Canada today differs in relevant respects only modestly, if at all, from Canada as it was in 1982. We are much less tentative, however, about our second and more important conclusion: Canadian constitutional scholars ought to have asked the questions we have raised, ought to have begun to develop the tools to answer those questions, and, absent such tools, ought to be less celebratory or condemnatory about *Charter* judgments, culture, and politics. In other words, this essay is as much about the intellectual life of *Charter* scholarship as it is about the *Charter* itself.

¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

² Our initial research was completed in mid-2004 and has been selectively updated to incorporate important data sources that became available prior to October 2005. References in the text to “the *Charter* era” or “the past two decades” cover the period from 1982 to 2005; specific dates are provided in footnote references to “snapshot” studies that identify trends and developments during those years.

II. THE CHARTER: ASPIRATION, ACHIEVEMENT, ASSESSMENT

The *Charter* has become a preoccupation of legal scholars³ and appellate judges,⁴ and a staple of public law and criminal litigation practices, although perhaps less so than of commercial or conveyancing practices. Moreover, the *Charter* is generally perceived to have redefined the roles and altered the fortunes of various political actors and institutions, though precisely which and how is a matter of controversy. Some contend that the *Charter* has empowered rights-seeking citizens;⁵ others that it has favoured corporations,⁶ a “Court Party” of identity-based groups,⁷ or the

³ A survey of Canadian full-time law school faculty members found that 35 percent indicated a teaching and/or research interest in constitutional law including the *Charter*, the most frequently indicated area of interest; four of the top five areas of research interest were related to constitutional law. See Department of Justice Canada, *Research Report: Canadian Law School Faculty Survey* Prepared by Anna Paletta, Christopher Blain & Daniel Antonowicz (Ottawa: Canadian Council of Law Deans and Research and Statistics Division, Department of Justice Canada 2000) at 3-5. See also Theresa Shanahan, *Legal Scholarship: An Analysis of Law Professors' Research Activities In Ontario's English-speaking Common Law Schools* (Ph.D. Thesis, University of Toronto, 2002) [unpublished] at 203-204 and Appendix D [Shanahan]. Quicklaw's online 'JOUR' database for articles containing “Charter” in the title or in any field retrieved 303 results. This database includes thirty-seven academic journals and collections of research papers, plus twenty-two legal newsletters, but not specialist constitutional journals such as the *National Journal of Constitutional Law* or the *Review of Constitutional Studies*. Only a few publications contain references dating back to 1986; most date back only as far as the early to mid-1990s; some go only as far back as 2000. The total number of scholarly publications concerned with the *Charter* is therefore seriously understated, even more so when publications on the constitution in general are included.

⁴ The Ontario Court of Appeal alone decided 167 *Charter*-related cases over the 2000-2002 period (6 percent of its 3,702 reported and unreported decisions), while the Supreme Court of Canada decided ninety such cases (28 percent of its 253 decisions). Quicklaw online database.

⁵ Lorraine E. Weinrib, “The Supreme Court of Canada in the Age of Rights: Constitutional Democracy, the Rule of Law and Fundamental Rights Under Canada's Constitution” (2001) 80 *Canadian Bar Rev.* 699 [Weinrib].

⁶ Michael Mandel, *The Charter of Rights & the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson Educational Publishing, 1994) [Mandel]; Judy Fudge & Harry Glasbeek, “The Politics of Rights: A Politics

courts themselves.⁸ The consequences of these changes for Canada's political processes are also debatable. Has the *Charter* launched a constructive dialogue between courts and legislatures⁹ or undermined electoral democracy?¹⁰ Has it reinforced social movements¹¹ or promoted identity politics?¹² Has it become a symbolic rallying point for Canadian patriotism¹³ or exacerbated

with Little Class" (1992) 1 *Social and Legal Studies* 45.

⁷ F.L. Morton and Rainer Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

⁸ Allan Hutchinson, *Reading Between the Lines: Courts and Constitutions* (2002) [unpublished; on file with the authors].

⁹ Peter W. Hogg & 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 J.* 75.

¹⁰ A. Bogart, *Courts and Country: The Limits of Litigation and the Social and Political Life of Canada* (Don Mills, Ont.: Oxford University Press, 1994) [Bogart, *Courts and Country*].

¹¹ Weinrib, *supra* note 5; Miriam Catherine Smith, *Lesbian and Gay Rights in Canada: Social Movements and Equality-Seeking, 1971-1995* (Toronto: University of Toronto Press, 1999).

¹² James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995).

¹³ A recent commentary argues that "the Charter can be understood as the capstone of an institutional process that has helped to raise the intensity-level of Canadian nationalism as a whole." John Wright, Gregory Millard & Sarah Riegel, "Here's Where We Get Canadian: English-Canadian Nationalism and Popular Culture" (2002) 32:1 *The American Review of Canadian Studies* 11. The authors point out that "[a] number of observers have noted how the Charter has strengthened Canadians' sense of identification with their constitution," citing as examples Alan C. Cairns, *Disruptions: Constitutional Struggles from the Charter to Meech Lake*, ed. Douglas E. Williams (Toronto: McClelland and Stewart Inc., 1991) [Cairns, *Disruptions*]; Alan C. Cairns, *Charter Versus Federalism: The Dilemmas of Constitutional Reform* (Montreal and Kingston: McGill-Queen's University Press, 1992); and Alan C. Cairns, *Reconfigurations: Canadian Citizenship and Constitutional Change*, ed. Douglas E. Williams (Toronto: McClelland & Stewart Inc.); as well as Peter H. Russell, *Constitutional Odyssey: Can Canadians Be a Sovereign People?* (Toronto: University of Toronto Press, 1992); and David Milne, *The Canadian Constitution* (Toronto: James Lorimer and Co. 1991), especially Chapter 8. Michael Bliss is more expansive in arguing that "by the end of the century. . . it was clear that Trudeau's vision of a pluralistic society of free men and women, as expressed in the Charter and evolving multiculturalism, had become the Canadian state's core value. His very spirit had become the essence of his country." Michael Bliss, "Citizen Trudeau" *Time* (Canadian Edition) 156:15 (9 October 2000) 20. An earlier evaluation

regional, social, religious, and linguistic conflict?¹⁴ Has it become a strategy of last resort for groups denied access to the political process¹⁵ or a first principle shaping the behaviour of all political actors and institutions?¹⁶ Public attitudes towards the *Charter* and its custodians – judges and lawyers – exhibit similar ambiguities. On the one hand, two decades-worth of *Charter* good works by judges and lawyers has not much improved their reputation,¹⁷ nor has it persuaded Canadians that courts should displace legislators as the authors of public policy. On the contrary, a significant majority (54

held that “the 1982 Charter of Rights and Freedoms must be regarded as a manifesto of Canadian nationalism rather than a symbol of the triumph of liberal individualism.” Guy Laforest, *Trudeau and the End of a Canadian Dream* (Montreal: McGill-Queen’s University Press, 1995) at 136, cited in David Taras, “Mass Media Reporting of Canadian Supreme Court Decisions: Mapping the Terrain” (2000) 25:3 *Canadian Journal of Communication* 397.

¹⁴ David Abraham, “Citizenship Solidarity and Rights Individualism: On the Decline of National Citizenship in the U.S., Germany, and Israel” (2002), online: The Center for Comparative Immigration Studies <<http://www.ccis-ucsd.org/PUBLICATIONS/wrkg53.PDF>>.

¹⁵ Carl F. Stychin, *A Nation by Rights: National Cultures, Sexual Identity Politics, and the Discourse of Rights* (Philadelphia: Temple University Press, 1998).

¹⁶ Mandel, *supra* note 6.

¹⁷ The percentage of those who have high or moderate confidence in judges and lawyers has not changed significantly over almost twenty years. The figures stood at 15.2 percent (high) and 57.7 percent (moderate) in 1983 and at 18.2 percent and 53.1 percent, respectively, in 2001. The moderate category has consistently comprised the vast majority of respondents and has never dipped below 45.3 percent. Canadian Opinion Research Archive, Kingston, Ontario, “Confidence: Judges and Lawyers” (20 January 2003), online: Canadian Opinion Research Archive, Queen’s University, Kingston, Ontario <<http://www.queensu.ca/cora/trends/tables/ConfidenceJudges&Lawyers.htm>>. However, given the public’s well-known mistrust of lawyers, it is reasonable to assume that support for judges alone might be higher than these statistics suggest. While historical data is unavailable from the same source, an Ipsos-Reid/CTV/Globe and Mail poll from 2001 noted that, although 50 percent of Canadians believed that “some Supreme Court rulings are influenced by partisan politics,” 91 percent of Canadians had a “great deal or a fair amount of respect for the Canadian judiciary,” and 88 percent had “a great deal or a fair amount of respect specifically for the Supreme Court bench.” These results compared favourably with U.S. results holding that 85 percent of Americans have “a great deal or a fair amount of respect” for their own Supreme Court. Kirk Makin, “Canadians Feel Supreme Court Tainted by Partisan Politics” *The Globe and Mail* (3 July 2001) A1, A4.

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percent) believes that judges have too much power.¹⁸ However, Canadians do seem to be exceedingly positive about the *Charter* – in principle at least.¹⁹ They exhibit a considerable appetite for media coverage of *Charter*-related issues,²⁰ they maintain a decent regard for jurists as compared to “government” in general,²¹ and they accept that judges must make legally binding decisions that give effect to the constitution – including the *Charter*.²² In what sense, then, are we

¹⁸ Ipsos-Reid poll July 2003, cited in Jeff Sallot, “Public Against Judges Making Laws, Poll Says” *The Globe and Mail* (11 August 2003) A5 [Ipsos-Reid].

¹⁹ “Eighty-eight percent of Canadians have heard of the *Charter*, and the same number say it is a good thing for the country. Only 4 percent say the *Charter* is a bad thing for Canada. Approval is growing: among those who have heard of the *Charter*, 92 percent say it is a good thing – a 10-point increase over 1987 and 1999.” Centre for Research and Information on Canada, “The Charter: Dividing or Uniting Canadians?” (April 2002), online: <http://www.cric.ca/pdf/cahiers/cricpapers_april2002.pdf> at 8. While support for the *Charter* is clearly broad – it is “viewed favourably by large majorities in all regions” and as of 2002 was “higher than in previous years” – the same study suggests that this support may not be ‘deep,’ inasmuch as there are significant differences in public opinion regarding the actual content or significance of *Charter* rights. For instance, 54 percent oppose the existence of the “notwithstanding” clause, while 41 percent support it, suggesting a significant split on the fundamental issue of paramountcy of elected bodies versus paramountcy of the country’s supreme law; in addition, 56 percent support greater police powers to fight crime even at the expense of civil rights, while 41 percent are opposed, at 2.

²⁰ A search for “Charter of Rights and Freedoms” in the *Canadian Index*, an online database available to Canadian university researchers encompassing “Canadian journals, magazines, newspapers and business sources” with coverage from 1982 to 2003, retrieved fully 2,658 results. Of these, 308 were for articles or news stories published in 2003; 460 were published in 2002. A similar search of the Canadian Broadcasting Corporation’s online archives produced 482 results dating only as far back as 1999. Presumably a specialized search of terms related to topics and groups affected by Charter rulings – criminal justice, gays and lesbians, women, unions – would turn up additional references.

²¹ Those with “a lot” of confidence in government in general between 1983 and 1995 never amounted to more than 6.9 percent (in 1985) and those with even a “fair” amount peaked at 51.8 percent (also in 1985) and by 1995 had dwindled to 33.8 percent (compared to judges’ and lawyers’ 46 percent). Queen’s University Canadian Opinion Research Archive, “Confidence: Government” (30 August 2003), online: <<http://www.queensu.ca/cora/trends/tables/Confidence-Government.htm>>.

²² Ipsos-Reid, *supra* note 18.

asking “does the *Charter* matter?” The original promise of the *Charter* was made not only to academics, judges, legal practitioners, and political actors,²³ but ostensibly to all Canadians:

We must now establish [said Prime Minister Trudeau in 1981] the basic principles, values and beliefs which hold us together as Canadians so that beyond our regional loyalties there is a way of life and a system of values which make us proud of the country which has given us such freedom and such immeasurable joy.²⁴

This was also the expectation of at least some scholarly, judicial, and professional commentators who predicted that “the Charter will fundamentally change the Canadian political system and the very identity of the Canadian citizenry,”²⁵ and that its guarantees would

²³ Joel Bakan notes that enactment of the *Charter* “was widely celebrated by social activists and equality seeking groups. They saw the *Charter* as a vehicle for advancing social justice and equality.” Joel Bakan, “What’s Wrong with Social Rights?” [Bakan, “Social Rights”] in Joel Bakan & David Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992) 85 at 85 [Bakan & Schneiderman]. Among other things, “[i]t was claimed that, as an enforceable statement of values and aspirations, the *Charter* would help emancipate Canadians and, by increasing their political power, give them a stronger voice in their society.” Harry Glasbeek, “The Social Charter: Poor Politics for the Poor” in Bakan & Schneiderman, *ibid.* at 116 [Glasbeek, “The Social Charter”].

²⁴ Statement inscribed on copies of the *Charter* widely distributed by the federal government following its formal adoption by in 1982. This statement is also excerpted on the Government of Canada’s website celebrating the twentieth anniversary of s. 15 of the *Charter*: see Government of Canada, Department of Justice, “Equality: The Heart of a Just Society” (28 October 2005), online: <http://www.justice.gc.ca/en/s15/d_instrument.html> [Department of Justice]. The new constitution, *Charter* included, was first introduced in Parliament in November of the previous year: *House of Commons Debates*, 12 (20 November 1981) at 13013 (Hon. Jean Chretien).

²⁵ Alan C. Cairns, “An Overview of the Trudeau Constitutional Proposals” in Cairns, *Disruptions* (*supra* note 13) 58 at 62. Justice Thomas Berger described the *Charter* as “a valuable and uniquely Canadian undertaking” which would serve as “Canada’s contribution to evolving notions of liberal democracy and political pluralism.” Thomas R. Berger, “Towards the Regime of Tolerance” in Stephen Brooks, ed., *Political Thought in Canada: Contemporary Perspectives* (Toronto: Irwin Publishing Inc., 1984) 83 at 83 [Berger]. Even those writing in the mainstream legal literature, generally more circumspect in their assessments than their social science peers, were optimistic: “[a]n entrenched Charter of Rights and Freedoms should ensure that fundamental

“offer minorities a place to stand, ground to defend, and the means for others to come to their aid.”²⁶ It is therefore appropriate to ask whether “the basic principles, values, and beliefs” proclaimed by the *Charter* have indeed been “established” in any practical sense, whether a new national pride has emerged “beyond regional loyalties,” whether our political system has “fundamentally changed” for the better, and whether minorities’ newly defined “place to stand” has in some tangible way enhanced their communal identity and dignity or the social and economic conditions of their members.

These are difficult questions to answer: first, because of a fundamental ambiguity about what we mean when we speak of the *Charter*; second, because such questions are seldom asked; and third, because when they are, inappropriate or incomplete strategies are employed to probe for answers. We address each of these difficulties in turn.

What is the *Charter*? It is both an aspirational statement about the fundamental values that ought to define Canada as a polity and a

rights and freedoms will not be set aside by a transient majority. . . . [T]he *Charter* should also promote national unity by defining the common threads that bind us together.” J.-G. Castel, “The Canadian *Charter of Rights and Freedoms*” (1983) 61:1 *Canadian Bar Rev.* 1 at 1-2. Justice David C. McDonald testified to the *Charter*’s pervasiveness a mere two months after its signing into law: “The *Charter* is like an incoming tide. It flows over our plains and forests and into our own streets, our homes, our police stations, our seats of government and our courts. It cannot be held back.” Mr. Justice David C. McDonald, “Notes for Overview – Introductory Remarks” in Gerald L. Gall & Legal Education Society of Alberta & Canadian Institute for the Administration of Justice, eds., *Charting the Charter: Papers Prepared for Seminar Jointly Sponsored by the Legal Education Society of Alberta and the Canadian Institute for the Administration of Justice for Presentation in Calgary June 15, 1982, and Edmonton June 16, 1982* (Calgary: Legal Education Society of Alberta, 1982) 1 at 5. Prime Minister Trudeau, speaking of the draft *Charter*, boasted confidently that “[i]t will confer power on the people of Canada, power to protect themselves from abuses by public authorities. . . . Equal treatment for all, without discrimination due to sex, colour, or origin, will be enshrined.” Canada, Prime Minister Pierre Elliott Trudeau, *Statement by the Prime Minister, Ottawa, October 2, 1980 on the Constitution* (Ottawa: Office of the Prime Minister, 1980) at 6.

²⁶ Berger, *ibid.* at 96.

symbolic projection of those values.²⁷ It is an operational blueprint for relations between citizens and the state as well as among state institutions and agencies.²⁸ And it is a juridical text – Part I of the *Constitution Act, 1982* – that comprises “the supreme law of Canada” and renders “of no force and effect” inconsistent legislation and executive action,²⁹ if not necessarily judge-made law.³⁰ Each of these different *Charters* acquires different meanings, excites different expectations, engages different constituencies, evokes different responses, and implicates different social outcomes. Of course, in asking “does the *Charter* matter?” in the context of a legal publication, we place particular emphasis on the effects (including non-effects and perverse effects) of the juridical *Charter* – the *Charter* of lawyers, judges, legal scholars, and litigants. However, the aspirational and relational *Charters* exhibit effects (including non-effects and perverse effects) that are at least as significant. We will note these as well, where appropriate.

This emphasis on the juridical *Charter* poses a special analytical problem that is captured by the confession of one legal scholar that the twentieth anniversary of the *Charter* in 2002 evoked in her sentiments of “equivocation and celebration.”³¹ Others might characterize their feelings as “disappointment” or even, in Prime Minister Trudeau’s phrase, “immeasurable joy.”³² While such responses suggest that the *Charter* does indeed “matter” to the legal actors who work with it on a daily basis, their reactions are decidedly juridico-centric. Thus, all of the contributions to the *Osgoode Hall Law Journal’s* 2002 symposium issue, devoted to assessing the *Charter’s* legacy,³³ evaluated the impact of the *Charter* by

²⁷ See Jeremy Webber, “Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform” (1999) 21:2 *Sydney Law Rev.* 260.

²⁸ Jeremy Webber, *Reimagining Canada: Language, Culture, Community and the Canadian Constitution* (Montreal: McGill-Queen's University Press, 1994).

²⁹ *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11 at s. 52(1) [*Constitution Act, 1982*].

³⁰ *Charter*, *supra* note 1. See *Retail, Wholesale and Department Store Union, Local 580 [R.W.D.S.U.] v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573.

³¹ Diana Majury, “The *Charter*, Equality Rights, and Women: Equivocation and Celebration” (2002) 40 *Osgoode Hall Law J.* 297.

³² Department of Justice, *supra* note 24.

³³ (2002) 40:3 *Osgoode Hall Law J.*

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examining the case law generated by it or by focussing on the court's philosophy, logic, or doctrine in specific areas of law. Absent from this symposium, and from virtually all *Charter* scholarship over the past twenty-odd years, has been any empirical examination of its concrete, real-life effects as experienced by its intended beneficiaries. Even when, occasionally, quantitative methodologies are employed, it is legal behaviours and outcomes that are generally quantified, not the social phenomena that are, supposedly, their ultimate consequence and justification. Thus, decisions are tallied according to given categories of outcomes:³⁴ the *Charter*-friendliness of specific judges and courts³⁵ or the win/lose record of particular groups of litigants.³⁶ The focus of scholarship, in other words, has been primarily on the status and well-being of *Charter* rights, not of the rights-holders themselves. Empirical measurement is mobilized to assess particular features of the litigation process rather than to evaluate its social consequences. The reaction of even scholarly legal actors to the *Charter* is thus informed by a skewed, not to say self-regarding, perspective on whether the *Charter* "matters."

However, the same might be said about most evaluative questions posed to legal practitioners, functionaries, judges, and academics. As revealed by *Law and Learning*,³⁷ a comprehensive report on legal

³⁴ See e.g., F. L. Morton, Peter H. Russell & Michael J. Withey, "Judging the Judges: The Supreme Court's First One Hundred Charter Decisions" in Paul W. Fox & Graham White, eds., *Politics: Canada*, 7th ed. (Toronto: McGraw Hill Ryerson Ltd., 1991) 59; Cynthia L. Ostberg, "Charting New Territory? Fifteen Years of Search and Seizure Decisions by the Supreme Court of Canada, 1982-1997" (2000) 30:1 *American Review of Canadian Studies* 35; and James B. Kelly, "The *Charter of Rights and Freedoms* and the Rebalancing of Liberal Constitutionalism in Canada, 1982-1997" (1999) 37 *Osgoode Hall Law J.* 625.

³⁵ F. L. Morton, Peter H. Russell & Troy Riddell, "The *Canadian Charter of Rights and Freedoms*: A Descriptive Analysis of the First Decade, 1982-1992" (1994) 5 *National J. Of Constitutional Law* 1 [Morton, Russell & Riddell]

³⁶ See e.g., F. L. Morton & Avril Allen, "Feminists and the Courts: Measuring Success in Interest Group Litigation in Canada" (2001) 34 *Canadian J. of Political Science* 55.

³⁷ To make full disclosure, Harry Arthurs, one of the authors of this article, was chair and principal author of this report, *Law and Learning: Report to the Social Sciences and Humanities Research Council by the Consultative Group on Research and Education in Law* (Ottawa: Social Science and Humanities Research Council of Canada, 1983), though not of the Research Reports that

research and education prepared and issued more or less contemporaneously with the adoption of the *Charter*, the dominant paradigms of Canadian legal research in the early 1980s were doctrinal and theoretical. The principal object of scrutiny was legal texts; few legal scholars used empirical or other social science methodologies, and even fewer were trained to use them. While Canadian legal scholarship has no doubt advanced some distance beyond the modest ambitions of that period (in part stimulated by the *Charter*, it must be said), it has not yet accepted the need to put law's claims routinely and rigorously to the test.³⁸ While more Canadian legal scholars now have doctoral degrees, more have training in the social sciences, and more are interested in what such research might tell us, studies of law's causes and consequences are still relatively rare. For example, a recent study of legal academics showed that only 3 percent were engaged in empirical research of any description.³⁹ True, for some twenty years the *Canadian Journal of Law and Society* has published studies of legal institutions and processes that are informed by social science methodologies including (but by no means restricted to) empirical methodologies. Other Canadian legal periodicals also do so, and important qualitative assessments of legal phenomena have been undertaken in reports and monographs. But empirical studies of constitutional law – arguably the cornerstone of any legal system – are rare indeed, both in Canada and in other countries.⁴⁰ This is not to deprecate other methodologies. They may, of course, yield important insights and they have been utilized by scholars to ask questions about the impact of the *Charter* that could not be pursued by examining conventional

provided evidence for its conclusions. See Alice Janisch, *Profile of Published Legal Research: A Report to the Consultative Group on Research and Education in Law based on a survey of Canadian Legal Publications* and John S. McKennirey, *Canadian Law Professors: A Report to the Consultative Group on Research and Education in Law based on the 1981 survey of full-time law professors in Canada* (Ottawa: Social Science and Humanities Research Council of Canada, 1982).

³⁸ For differing views see Symposium Issue: *The Arthurs Report on Law and Learning 1983-2003* (2003) 18:1 *Canadian J. of Law & Society*.

³⁹ Shanahan, *supra* note 3 at 204.

⁴⁰ A leading American example is Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: University of Chicago, 1993) [Rosenberg]. For a review of the literature, see Idit Kostiner, "Evaluating Legality: Toward a Cultural Approach to the Study of Law and Social Change" (2003) 37 *Law & Society Rev.* 323 [Kostiner].

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decisional materials.⁴¹ Still, empirical evidence does offer an important way of confirming, challenging, or amending findings concerning the effects of the *Charter* based on more impressionistic approaches. That is why it is surprising, for example, that Canada's *National Journal of Constitutional Law*, founded in 1991, has yet to publish a single empirical study of the social consequences of constitutional litigation.⁴² Nor do such studies abound elsewhere in the literature of constitutional scholarship. Indeed, William Bogart's *Courts and Country* and his more recent *Consequences: The Impact of Law and Its Complexity*⁴³ represent two of the very few Canadian attempts to assess such consequences, either in the constitutional field or more generally.⁴⁴ An examination of his work may help to explain why other scholars have hesitated to embark on similar endeavours.

III. HOW WOULD WE KNOW IF THE *CHARTER* MATTERS AND WHY SHOULD WE WISH TO?

In *Courts and Country*, Bogart notes the difficulty of measuring the impact of litigation and, especially, of disaggregating its effects from those of other societal developments and state interventions. Moreover, he continues, compliance with court rulings is highly variable and their effects are often indirect and sometimes unintended.⁴⁵ And, he concludes, even assuming litigation effects

⁴¹ See e.g., Mandel, *supra* note 6; Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs* (Toronto: University of Toronto Press, 1997).

⁴² It has published several empirical studies. On *Charter* related topics. See e.g. F.L. Morton & Ian Brodie, "The Use of Extrinsic Evidence in *Charter* Litigation before the Supreme Court of Canada" (1993) 3 *National J. of Constitutional Law* 1; Morton, Russell & Riddell, "A Descriptive Analysis," *supra* note 35. However, while such studies provide statistically-based descriptions of court procedures and decisions, they make no attempt to assess their ultimate social effects.

⁴³ Bogart, *Courts and Country*, *supra* note 10; W.A. Bogart, *Consequences: The Impact of Law and Its Complexity* (Toronto: University of Toronto Press, 2002) [Bogart, *Consequences*].

⁴⁴ Michael Mandel's 1994 effort provides another notable exception, though empirical effects form just one aspect of a larger argument about the impact of the *Charter* on Canadian politics. *Supra* note 6.

⁴⁵ See also Jeremy Webber, "Tales of the Unexpected: Intended and Unintended Consequences of the Canadian Charter of Rights and Freedoms" (1993) 5:2 *Canterbury Law Rev.* 207.

could be clearly identified, there is no “objective” method of assessing their costs and benefits.⁴⁶ Nonetheless – drawing on Gerald Rosenberg’s controversial book *The Hollow Hope* – Bogart is willing to concede that, in principle and under specified conditions, courts may be “effective causes of significant change.”⁴⁷ Not surprisingly, he reminds us, such conditions are rarely encountered.

In *Consequences*, Bogart aspires to a more empirically grounded account of the effects of law. While the paucity of Canadian legal impact studies forces him to treat experience with our *Charter* largely as counterpoint to Rosenberg’s study of American Bill of Rights litigation, which draws upon a rather more extensive body of socio-legal scholarship, this is by no means the only difficulty identified by Bogart. Indeed, he catalogues the conceptual and methodological difficulties that bedevil all attempts to assess the impact of law, in general, and of constitutional litigation, in particular.⁴⁸ To begin, defining the “problem” for which a law or legal ruling is required or desired is a politically charged and value-laden task.⁴⁹ To argue that particular outcomes are produced or caused by, or even related to, a specific statute, court ruling, or administrative intervention requires that: (i) “the types of influence and their relationships . . . be indicated clearly,” (ii) “the evidence that could substantiate these sources and connections . . . be ascertained,” and (iii) “all other possible explanations for the change

⁴⁶ Bogart, *Courts and Country*, *supra* note 10 at 46-49.

⁴⁷ Rosenberg, *supra* note 40 (as summarized here by Bogart in *Courts and Country*) suggests that court decisions will be influential when: (1) there is ample legal precedent for change; (2) there is support for change from substantial numbers in the Congress and from the executive; and (3) there is either support from some citizens or at least minimal opposition from all citizens and (a) positive incentives are offered to induce compliance, or (b) costs are imposed to induce compliance, or (c) court decisions allow for market implementation, or (d) key administrators and officials are willing to act and see court orders as a tool for leveraging additional resources or for hiding behind. Bogart, *Courts and Country*, *ibid.* at 51. However, says Bogart, Rosenberg concludes through a number of case studies in the U.S. that “courts can *almost never* be effective producers of significant social reform” and that, while he found no evidence of decisions mobilizing social reform (in Bogart’s paraphrase) “litigation may actually galvanize opponents who are already very aware of the issues and related developments.” *Ibid.* at 55.

⁴⁸ See generally, Bogart, *Consequences*, *supra* note 43.

⁴⁹ *Ibid.* at 84-86.

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other than the law being examined. . . be explored and evaluated.”⁵⁰ This last requirement appears particularly difficult to satisfy, as myriad factors are capable of generating “plausible rival hypotheses.”⁵¹ Optimally, of course, impact studies would be designed in advance, to test controlled legal “experiments” in “multiple time series” in which the effects of law are assessed across several similar jurisdictions (some of which have enacted the law in question, others of which have not and serve as controls) at several time points in time.⁵² Unfortunately, Bogart notes, this ideal situation is seldom available, and studies must therefore often “be done in some compromised fashion.”⁵³ The importance of determining the effect of laws, he suggests, is only reinforced by the frequency with which their most dramatic consequences turn out to have been unintended.⁵⁴

Fully conscious, then, of the difficulties entailed in any attempt to gauge the impact of the *Charter*, we have set ourselves a somewhat different question. That question derives from the often-euphoric and -overstated claims of those who conceived, promulgated, embraced, and used the *Charter*. Those claims come down to this: that adoption of the *Charter* would effect significant improvement in the individual and collective lives of Canadians; that equality rights would improve the life chances of members of the groups named in section 15 (and, as we now know with hindsight, of “analogous groups”); that the rights guaranteed to Aboriginal peoples and linguistic and cultural minorities – both under section 15 and elsewhere in the *Constitution Act, 1982* – would enable them to enjoy a less precarious and more complete communal existence; that legal rights were enumerated with some specificity so that no one who confronts the coercive power of the state – exercised by the police, public agencies, and civil servants – need fear abusive or illegal treatment; that fundamental freedoms and democratic rights would promote and protect a more robust Canadian political culture; and that even the relatively anemic and anomalous guarantees of mobility rights would ensure that Canadians could come and go more freely without having to risk their human capital or social entitlements.

⁵⁰ *Ibid.* at 91-92.

⁵¹ *Ibid.* at 93-94.

⁵² *Ibid.* at 98.

⁵³ *Ibid.* at 99.

⁵⁴ *Ibid.* at 99-109.

Against this background, then, we pose the questions that animate this study: Does the *Charter* matter? Is Canada a more equal country than it was in 1982? Are Canadians less likely to encounter abuse at the hands of the state? Has the communal life of Aboriginal peoples and linguistic minorities been enhanced? Is our political culture more robust? Is it easier for us to cross international and provincial boundaries? Or is the contrary true? Have inequalities proliferated and intensified? Are police and welfare officers more abusive? Is communal life more impoverished? Is the quality of political debate more anemic? Do we encounter more obstacles when we cross borders? And not least: Why have *Charter* scholars been so seldom tempted to answer these questions – or even to ask them?

These are complicated questions. Most of them, frankly, cannot be answered. For reasons elaborated by Bogart, qualitative judgments – what constitutes a robust political culture, for example – depend on carefully defined benchmarks, but definitions are not easily agreed-upon. Quantitative judgments, as he notes, depend on longitudinal studies – of, say, the number of police assaults on citizens in 1982 and 2005, or the widening or narrowing of the wage gap between otherwise comparable workers of different ethnic or racial groups – but few such longitudinal studies exist. Worse yet: assuming benchmarks can be agreed, and studies undertaken, the issue of causation seems almost irresolvable. If there are fewer (or more) police assaults, is that because of the *Charter* or because of better (or worse) training or discipline, greater (or diminished) fear of tort claims by victim, changes in the demography of the police force or of those arrested, or the effect upon Canadian police and popular sensibilities of American television dramas? If gays and lesbians enjoy greater dignity and suffer less discrimination in the workplace or in their legal and social entitlements, is this a triumph for the *Charter*, or is it attributable to social and cultural changes, including some changes that high-profile *Charter* litigation may have helped to publicize? Or have other legal regimes such as human rights commissions and tribunals actually done the heavy lifting with more frequent and more practical interventions? Have similar or greater changes occurred in other countries that are comparable to Canada but have no *Charter* or equivalent legal regime? Finally, evidentiary issues and issues of causation aside, serious issues of periodicization arise. Why, after all, should we confine our inquiries to the period during which the *Charter* has been in force? Conceivably, extending our inquiries to an earlier period might

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reveal that the *Charter* – far from bringing about social or legal transformations – merely codified, ratified, or legitimated tendencies and processes under way for decades. And if we could look into the future, would we find that famous *Charter* victories – whether in courts of law or of public opinion – did not in the long term actually achieve the anticipated positive outcomes because their holdings were narrowed by a new, less bold generation of judges; because further reflection revealed flaws in the original holding; or because supervening political, economic, or social developments frustrated implementation of judicial remedies?

It is hugely difficult, then, to *know* whether the *Charter* matters. But it can hardly be irrelevant. If, as a society, we are asked to invest considerable financial resources, institutional energies, intellectual effort, and moral credibility in important public policy initiatives – in health care, education, policing, auto safety, labour and environmental standards, and even culture – we ought ideally to begin by asking: What is it we are attempting to achieve, and is this new initiative likely to achieve it? And after more than two decades, hopefully sooner, we would surely revisit the program in order to undertake a cost-benefit analysis, however imperfect. Of course, that is an idealized version of the way in which public policy is made. Of course, emotive and symbolic arguments, special pleading, entrenched interests, unshakeable prejudices, coincidence, opportunism, and sheer inertia are often more powerful determinants of public policy than informed calculations of efficacy. But that does not mean that they are appropriate determinants.

If it could be shown that the *Charter* does not matter, that it is not accomplishing what it was intended to, would that not be a good reason for rethinking the whole enterprise? Perhaps some might propose – as did Mao Zedong on the effects of the French Revolution – that it is too soon to tell. This is a sensible response, but it implies that at some future date the question should be asked and answered. Perhaps some might argue that, even if it does no good, at least the *Charter* – unlike, say, rent control or public education – does no harm. This too may be a sensible response, but it treats the absence of harm as a factual conclusion, rather than as a hypothesis to be investigated. Perhaps some might argue that the good that the *Charter* accomplishes is non-quantifiable, that it becomes manifest not primarily in measurable outcomes produced by explicit legal commands, but more subtly and symbolically by

transforming our fundamental values, our comprehension of relations between citizens and the state, and our grammar of civic discourse. This may be the most sensible and sophisticated response of all. But to accept it at face value is to rely on a map of society that locates law at the centre (“the rule of law”), assigns the material forces of political economy to the periphery, ascribes great symbolic and didactic powers to legal institutions and actors, but, oddly, disavows precisely the characteristic of law that is conventionally thought to distinguish it from other normative systems: its ability to mobilize the coercive power of the state. This, to put it unkindly, but not unfairly, is a map drawn by lawyers. It is therefore subject to obvious frailties.

We do not rely on such a map. Our ambition is not to show that the *Charter* has in fact produced (or failed to produce) specific outcomes. It is simply to investigate whether it can be said that Canada has changed in ways the ways that proponents of the *Charter* desired and anticipated. We have examined a significant number of studies of Canadian social development during the period from 1982 to the present, most of which were not prepared with a view to proving or disproving any particular hypothesis about the *Charter*. These studies, taken individually, have many obvious flaws: few precisely bracket the two decades under review, most reflect the particular professional or personal preoccupations of their authors or sponsors, some suffer from methodological flaws, and others lack clear-cut conclusions. Our summaries doubtless fail to do some of them justice and we do not claim to have exhausted all original sources, even though we have tried to be fairly comprehensive in our use of secondary materials. However, taken collectively, we do believe we are proffering some of the best evidence available about the extent to which Canadians during the *Charter* era have become more equal; more politically engaged; more comfortably ensconced within minority communities, cultures, and language groups; more mobile; and more justifiably confident of proper treatment by police and bureaucrats.

To anticipate our findings, available evidence suggests that progress towards the vision of Canada inscribed in the *Charter* has generally been modest, halting, non-existent, and, in some cases, negative. And to anticipate objections to those findings, we neither assert nor deny that these disappointments might be attributable to any or all of: inherent defects in the *Charter*; perverse interpretations by judges; a lack of commitment to *Charter* values by the legislative

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or executive branches of government; intractable illiberal tendencies in our institutions and people; or the eruption of international or domestic crises affecting our political economy, natural environment, or public security. We do not even deny the possibility that however bad things may have been in the recent past, they might have been even worse without the *Charter*, or that they might become better in the near future because of it. What we do claim, to reiterate, is that the *Charter* does not much matter in the precise sense that it has not – for whatever reason – significantly altered the reality of life in Canada.

To recapitulate: this study selectively examines the progress of groups that the *Charter* was intended to benefit (Aboriginal peoples, women, visible minorities, and immigrants); areas of state action that the *Charter* was intended to regulate (the criminal process and bureaucratic behaviour); and aspects of our communal and public life that the *Charter* was intended to animate and enhance (politics and inter-group cultural relations). It relies on empirical studies that purport to document developments in each of these areas. Most of these studies were not undertaken with a view to assessing the effects of the *Charter*, and, indeed, many of them do not even mention it. Rather, they focus on how things have actually changed, if at all, in each area since 1982. And to reiterate: this selective focus based on the availability of evidence has had several limiting effects. First, we have used only longitudinal studies (or series of studies), which allows us to evaluate the extent and direction of change; and we have had to accept the periodicizational, methodological, and other limitations of these studies. Second, we have therefore failed adequately to investigate some fields where the *Charter* may indeed have had dramatic effects, such as the standing of gays, lesbians, and disabled persons,⁵⁵ but where social data are lacking. Third, we have

⁵⁵ Limitations of time, space, and available data have prevented us from investigating the experience of persons with disabilities, which, we suspect, approximates that of visible minorities and Aboriginal peoples. Persons with disabilities have been trapped in the cycle of economic deprivation that we explore in our conclusion in part VII. Indeed, their economic position may be more dire, since their full participation in economic life requires investments in the retrofitting of housing, schools, workplaces, and public facilities, as well as profound alterations in entrenched attitudes and procedures in those and other venues. See the groundbreaking, but largely non-empirical, research of M. David Lepofsky: “The Long Arduous Road to a Barrier-Free Ontario for People With Disabilities: The History of the *Ontarians With*

not thoroughly documented certain phenomena, such as growing income inequality, which, though of great concern to many *Charter* beneficiaries, are not addressed by the juridical *Charter* itself. And finally, we have tended to downplay speculation about what has caused the trends we are documenting, especially speculation about the role of law and legal institutions. While such speculation is not only legitimate but also central to any debate over the long-term effects of the *Charter*, the premise of this study is that speculation and debate will both improve if we first focus on data that may suggest how, if at all, Canadian society has actually changed.

IV. THE PROGRESS OF EQUALITY-SEEKING GROUPS

A. Aboriginal Peoples

On a purely theoretical level, it has been argued that the logic of entrenching recognition of Aboriginal rights within the body of an essentially liberal, Western, and individualistic legal device was tenuous if not innately dysfunctional.⁵⁶ It is hardly surprising, then, that the actual impact on the lives of First Nations peoples of the *Charter* (and of the simultaneous recognition and affirmation of their “existing aboriginal and treaty rights”)⁵⁷ has been ambiguous at best.

Various indicators suggest a lack of progress towards social and economic equality for First Nations peoples in the *Charter* era. An Assembly of First Nations (AFN) report⁵⁸ noted in 2001 that “a

Disabilities Act – The First Chapter” (2003-2004) 15 National J. of Constitutional Law 125; “A Report Card on the Charter's Guarantee of Equality to Persons with Disabilities after 10 Years: What Progress? What Prospects?” (1997) 7 National J. of Constitutional Law 263; and “The Charter's Guarantee of Equality to People with Disabilities: How Well Is It Working?” (1998) 16 *Windsor Yearbook on Access to Justice* 155.

⁵⁶ Mary Ellen Turpel argues that the exercise of Aboriginal rights under the *Charter* requires claimants to work within an alien discourse that is ill-suited to their reality and their needs. “Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences” in Richard F. Devlin, ed., *Canadian Perspectives on Legal Theory* (Toronto: Emond Montgomery Publications Ltd., 1991) 503 at 517-19.

⁵⁷ *Constitution Act*, 1982, *supra* note 29 at s. 35(1)

⁵⁸ Assembly of First Nations Communications Unit, “Fact Sheet: Socio-Economic Exclusion of First Nations in Canada” (2001), online: <http://www.afn.ca/Programs/Treaties%20and%20Lands/factsheets/see_fact.htm> [AFN, “Socio-Economic Exclusion”].

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glaring socio-economic disparity between First Nations and Canadian citizens” still existed despite the *Charter* and the constitutional entrenchment of Aboriginal and treaty rights. This disparity existed because “Canadian authorities very often flout the rights of First Nations and/or fail to follow up on certain judgments made by the Supreme Court” regarding these rights. The unemployment rate for non-native Canadians in 1996 was 9.8 percent, compared to 28.7 percent for Indians on reserves. Federal spending on Aboriginals through the Department of Indian Affairs and Northern Development (DIAND) represented only 0.5 percent of Canada’s gross domestic product (GDP) in 1999, while natural resources taken from First Nations’ ancestral lands accounted for 11.1 percent of GDP. A 1998 United Nations (UN) report found “little or no progress in the alleviation of social and economic deprivation among Aboriginal people” in Canada.⁵⁹ In 2002, Aboriginal representation in the federal public service has improved somewhat, but to a lesser extent than for women, visible minorities (2.4 percent), or persons with disabilities (1.3 percent).⁶⁰ While Aboriginal peoples’ representation improved from 1989 to 1998 in the categories of management and administrative support (by 0.9 and 1.2 percent, respectively), it dropped for scientific and professional positions in the mid-1990s and only returned to its 1989 level (1.6 percent) by the period’s end. Overall, Aboriginals continued to be less well-represented than any other group in each of the three categories.⁶¹

Despite the universal applicability of *Charter* equality provisions, employment equity policies produced highly variable results for Aboriginal peoples as between the federal and provincial jurisdictions and as among the provinces, no doubt due to variation

⁵⁹ *Ibid.*

⁶⁰ Abigail B. Bakan, Audrey Lynn Kobayashi & Status of Women Canada, “Employment Equity Policy in Canada: An Interprovincial Comparison” (2000), online: Status of Women Canada <<http://dsppsd.pwgsc.gc.ca/Collection/SW21-46-1999E.pdf>> at 67 [Bakan, Kobayashi & SWC]. Another study similarly notes an increase in representation from 1.8 percent in 1986 to 2.2 percent in 1995. See T. John Samuel & Aly Karam, “Employment Equity for Visible Minorities” [Samuel & Karam] in Leo Driedger & Shiva S. Halli, eds., *Race and Racism: Canada’s Challenge* (Montreal: Published for Carleton University by McGill-Queen’s University Press, 2000) 134 at 139 [Driedger & Halli].

⁶¹ Bakan, Kobayashi & SWC, *ibid.* at 68.

“in the demographic structure of the work force, in economic conditions that affect job availability and work force needs, and variations in cultural and political practices” within each jurisdiction.⁶² For example, Ontario’s provocatively entitled *Job Quotas Repeal Act 1995*⁶³ put an end to a brief statutory experiment designed to promote employment equity for Aboriginals (as well as for women, visible minorities, and disabled people).⁶⁴ Legislation apart, Ontario Aboriginals continued, in general, to experience far higher unemployment than non-racialized groups at all levels of education,⁶⁵ as well as lower employment rates two years after post-secondary graduation.⁶⁶ Aboriginal peoples made modest gains in occupational status in areas such as management and the professions,⁶⁷ but they remained under-represented relative to foreign and Canadian-born racial minorities. They remained most heavily concentrated in sales/service or semi-skilled occupations.⁶⁸

While under-represented in the workforce, Aboriginal peoples were over-represented in the penal system.⁶⁹ Despite comprising

⁶² *Ibid.* at 23.

⁶³ *Job Quotas Repeal Act 1995*, S.O. 1995, c. 4

⁶⁴ Contrary to what is implied by the polemical title of the repealing statute, the repealed statute – the *Employment Equity Act, 1993*, S.O. 1993, c. 35 – did not actually mandate the use of quotas to advance employment equity. The repeal statute was unsuccessfully challenged on *Charter* grounds by the four intended beneficiary groups: *Ferrel v. Ontario (Attorney General)* (1997), 149 D.L.R. (4th) 335, aff’d. (1998), 42 O.R. (3d) 97(C.A.), appeal dismissed [1999] SCCA No. 79. See Bakan, Kobayashi & SWC, *supra* note 60 at 32.

⁶⁵ See Jean Lock Kunz, Anne Milan & Sylvain Schetagne, *Unequal Access: A Canadian Profile of Racial Differences in Education, Employment and Income A Report Prepared for Canadian Race Relations Foundation by the Canadian Council on Social Development* (Toronto: The Foundation, 2000) at 19 [Kunz, Milan & Schetagne].

⁶⁶ *Ibid.* at 20.

⁶⁷ The percentage of Aboriginals in senior and middle management increased from 6.3 percent in 1991 to 6.9 percent in 1996, while in it increased from 9.4 to 11.1 percent in the professions. *Ibid.* at 21.

⁶⁸ For instance, by 1996, 19.7 percent of Aboriginals were employed in the category of “Sales/Service-Other Manual Workers,” compared to just 9.6 percent of Canadian-born visible minorities. *Ibid.* at 20-21.

⁶⁹ See generally, Canada, Royal Commission on Aboriginal Peoples, *Aboriginal Peoples and the Justice System: Report of the National Round Table on Aboriginal Justice Issues* (Ottawa: Royal Commission on Aboriginal Peoples, 1993); Correctional Services Canada Aboriginal Issues Branch, “Demographic

only 2.8 percent of the population of Canada (according to 1996 Census data),⁷⁰ Aboriginals contributed a multiple of this figure to populations admitted to provincial/territorial custody (17 percent) or on probation (13 percent) during the 1990s.⁷¹ During approximately the same period, Aboriginals rose from 11 percent to 17 percent of the federal prison population.⁷²

The 1998 UN report cited by the AFN⁷³ decried continuing problems with housing and the persistently high suicide rate among Aboriginal peoples. The issue of Aboriginal suicide occupied a prominent place in the analysis of the Royal Commission on Aboriginal Peoples (RCAP), whose studies revealed that suicide rates of Inuit and Indians were respectively 3.3 times and 3.9 times higher than the national average for the preceding ten to fifteen years.⁷⁴ This rate fluctuated wildly from 1979 to 1991, reaching its highest points in 1981 and 1987, while tracking trends in the general population from 1985 to 1991.⁷⁵

RCAP also documented the deplorable state of housing for

Overview of Aboriginal Peoples in Canada and Aboriginal Offenders in Federal Corrections” (20 July 1999), online: <http://www.csc-scc.gc.ca/text/prgrm/correctional/abissues/know/10_e.shtml> 2.1 [Correctional Services Canada].

⁷⁰ *Ibid.* at 1.0.

⁷¹ The overall rate in each category has not varied by more than 2 percent over ten years, despite greater fluctuations within each province/territory. Canadian Centre for Justice Statistics, “Aboriginal Peoples in Canada” (2001), online: Statistics Canada <<http://www.statcan.ca:80/english/freepub/85F0033MIE/85F0033MIE01001.pdf>> at 18.

⁷² Correctional Services Canada, *supra* note 69 at 2.1.1.

⁷³ AFN, “Socio-Economic Exclusion,” *supra* note 58.

⁷⁴ Canada, Royal Commission on Aboriginal Peoples, *Choosing Life: Special Report on Suicide Among Aboriginal People* (Ottawa: Minister of Supply and Services Canada, 1995) at 11 (Co-chairs Rene Dussault & Georges Erasmus). Given the increase in population since the 1960s to the Commission’s report in 1995, this translated into an increase of “about 70 percent” in “absolute numbers” for the period. This does not take into account estimates to the effect that “up to 25 per cent of accidental deaths among Aboriginal people are really unreported suicides.” *Ibid.* at 17.

⁷⁵ *Ibid.* at 13. This suggests there was no correlation between the inception and operation of the *Charter* and conditions affecting suicide rates in Aboriginal communities or the country as a whole.

Aboriginal peoples.⁷⁶ Most significant for our purposes are the changes that occurred during the *Charter* era.⁷⁷ RCAP noted that – despite escalating need – federal and provincial funding had actually declined from 1988 to 1995,⁷⁸ which reduced the supply of new fully financed, on-reserve homes from 1,800 in 1991 to 700 in 1995.⁷⁹ From 1986 onwards, funding for low-income housing on reserves was less than that available elsewhere,⁸⁰ while subsidies for building and repairs between 1988-1989 to 1993-1994 succeeded in bringing just 46 percent of homes to “adequate” status according to the modest standards of the Department of Indian Affairs and North Development (DIAND).⁸¹ Further, DIAND’s capital subsidy housing program budget had not been increased since 1983.⁸² However, by 1993-1994, 92.1 percent of on-reserve households had water service and 85.6 percent had sewage service⁸³ – in both cases, a measurable improvement.

Many studies have documented the poor state of Aboriginal health. While Aboriginal life expectancy has improved over the past few decades and has moved somewhat closer to that of the general population, the gap remained significant throughout the *Charter* era. Thus, in 1978-1981, immediately before the advent of the Charter, Indian men had a life expectancy of 61.6 years compared to 71 years for non-Indians; by 1990, the gap narrowed from 9.4 years to 7;⁸⁴

⁷⁶ Canada. Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* vol. 3, (1 August 1996) s. 4 (Co-chairs René Dussault & Georges Erasmus), online: The Commission <http://www.ainc-inac.gc.ca/ch/rcap/index_e.html>

⁷⁷ RCAP does not suggest a *Charter*-based obligation to provide housing, but does suggest such an obligation might exist under s. 36(1) of the *Constitution Act, 1982*. *Ibid.* vol. 3, s. 4 at 2.2.

⁷⁸ *Ibid.* vol. 3, s. 4.

⁷⁹ *Ibid.* vol. 3, s. 4 at 1.2.

⁸⁰ *Ibid.* vol. 3, s. 4 at 2.2.

⁸¹ The level of funding allocated should have been sufficient to bring this number to 95 percent. *Ibid.* at vol. 3, s. 4.

⁸² This was supplemented by funding provided under Bill C-31 (*infra* note 87) in 1994. *Ibid.* at vol. 3, s. 4 at 4.1.

⁸³ An improvement from the 1990-1991 figures of 86.4 and 80 percent, respectively. *Ibid.* at vol. 3, s. 4 at 3

⁸⁴ *Ibid.* at vol. 3, s. 3 at 1.1.

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but by 1996 it had widened again to 7.5 years.⁸⁵

Related to concerns about the social and economic well-being of Aboriginal peoples are concerns about language, culture, and identity. An AFN report relying on census data from 1981 and 1996 describes the “steady erosion” of Aboriginal languages. Respondents who reported speaking an Aboriginal mother tongue rose by 24 percent, but those speaking it in the home grew by only 7 percent; consequently, the incidence of those speaking an Aboriginal language at home declined from 76 percent to 65 percent. The decline was particularly pronounced for “endangered” languages, and home use of some had “practically disappeared by the 1990s.”⁸⁶ More obviously attributable to the *Charter* is the effect of Bill C-31,⁸⁷ passed in 1985 as the result of *Charter* challenges to citizenship provisions of the *Indian Act*⁸⁸ that discriminated against Aboriginal women. A former president of the Congress of Aboriginal Peoples describes C-31 as “the Abocide bill” because its now-gender-neutral provisions eliminated Indian status for Aboriginals after two consecutive generations of marriage to non-status Indians. Although the bill restored status to many women who had lost it, it also empowered bands to deny “C-31 Indians” the right to live on the reserves. Approximately 40 percent of bands, including some of the country’s largest, have availed themselves of this authority, thus making them ineligible for the majority of benefits associated with status under the *Indian Act*.⁸⁹

⁸⁵ Renée Dupuis, Robert Chodos & Susan Joanis, *Justice for Canada’s Aboriginal Peoples* (Toronto: James Lorimer & Company Ltd., 2002) at 26. This study provides a second indicator, the incidence of tuberculosis per 100,000 population: even after a dramatic decline from 58.1 in 1991 to 35.8 in 1996, incidence among registered Indians on reserve was, at its lowest, still six times as high as for the general population.

⁸⁶ Assembly of First Nations, “Canada’s Aboriginal Languages 1996” (20 July 2002), online: <<http://www.afn.ca/PressReleases&Speeches/canada.htm>>.

⁸⁷ Bill C-31, *An Act to Amend the Indian Act*, enacted as R.S.C. 1985, c. 32 (1st Supp.).

⁸⁸ R.S.C. 1985, Chap. I-5 [*Indian Act*].

⁸⁹ Harry W. Daniels, “Bill C-31: The Abocide Bill” (19 July 1998), online: Congress of Aboriginal Peoples <<http://www.abo-peoples.org/programs/C-31/Abocide/Abocide-2.htm#Overview>>.

While not exclusively *Charter* concerns,⁹⁰ debates over the well-being of Aboriginal peoples have often implicated issues relating to their lands, resources, and governance. Some significant milestones have been passed in recent decades – the founding of Nunavut and the ratification of the Nisga’a Treaty in British Columbia, for example – but there have been many setbacks as well. An AFN assessment of the land claims and treaties processes in 1991 bemoans the federal government’s “obvious failure to adequately address the land rights issues of Canada’s aboriginal peoples” and argues that “[its] approach to aboriginal matters has remained fundamentally unchanged” despite the entrenchment in the *Constitution Act, 1982* of Aboriginal and treaty rights.⁹¹ The AFN estimated that, in addition to the 578 specific claims acknowledged by government, approximately 1,000 more were in the course of preparation. However, AFN noted, only forty-four claims had been settled between 1973 and 1991, and of 275 claims at various stages in the settlement process, probably “not . . . more than a dozen” were in active negotiation as of 1991.⁹² As of March 2003, Indian and Northern Affairs Canada reported 251 claims settled, out of a

⁹⁰ To clarify the authors’ position, our discussion of equality, land claims, and treaty and self-government rights of Aboriginal peoples does not depend on s. 35 of the *Constitution Act, 1982*, which is technically not part of the *Charter*, although enacted contemporaneously with it. Rather, we are exploring the benefits to Aboriginal peoples of s. 15 equality rights, and of the protection of land claims and treaty rights under s. 25 of the *Charter*, which the federal government itself recognizes as mandating the inherent right of self-government as a factor in *Charter* interpretation. Indian and Northern Affairs Canada, “The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government” online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html>. Aboriginal groups have declared that the inherent right is enshrined in s. 25. See Assembly of First Nations, “Implementation of Treaty Rights and the Inherent Rights to Self-Government-November 19, 1992,” online: <<http://www.afn.ca/resolutions/1992/con-nov/res11.htm>>.

⁹¹ Assembly of First Nations, “A Critique of Federal Government Land Claims Policies” in Frank Cassidy ed., *Aboriginal Self-Determination: Proceedings of a Conference Held September 30 - October 3, 1990* (Lantzville, B.C.: Oolichan Books & The Institute for Research on Public Policy, 1991) 232 at 232.

⁹² *Ibid.* at 241.

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total of 1,185 specific claims considered since 1973⁹³ Only fifteen comprehensive claims have been settled over the same thirty-year period.⁹⁴ In British Columbia, where the majority of comprehensive claims originate, progress has been slow. The B.C. Treaty Commission's Annual Report 2001 lists two First Nations at the second stage of negotiation, four at the third stage, forty-two at the fourth stage, and just one at the fifth stage.⁹⁵ The following year, the numbers were unchanged except that the number of nations at the second stage had risen from two to six⁹⁶ (meaning only that the government had accepted statements of intent to negotiate from four additional nations, and held an initial meeting with each). The Commission, in explaining its lack of progress, blamed the Supreme Court's 1997 ruling in *Delgamuukw v. British Columbia*⁹⁷ (which forced all parties into a lengthy reconsideration of their positions), the 2000 federal election, the 2001 British Columbia provincial election, the B.C. government's suspension of negotiations pending a referendum, a general overload of the treaty-negotiating system, and a high turnover of negotiators participating in the process.⁹⁸ In short, institutions at all levels of the process had – deliberately or inadvertently – frustrated progress on land claims settlements.

Progress toward Aboriginal self-government has been equally halting. Explicit constitutional recognition of an Aboriginal right of self-government was delayed indefinitely with the failure of the *Charlottetown Accord* in 1992. In the interim, federal policy has come to focus on recognition of self-government under the umbrella of section 35 of the *Constitution Act, 1982*, as part of the negotiation

⁹³ Indian and Northern Affairs Canada. Implementation Branch, "National Mini Summary: Specific Claims Branch" (26 July 2003), online: <http://www.ainc-inac.gc.ca/ps/clm/nms_e.html>.

⁹⁴ Indian and Northern Affairs Canada. Implementation Branch, "Comprehensive Policy and Status of Claims, February 2003" (February 2003), online: <http://www.ainc-inac.gc.ca/ps/clm/brief_e.pdf> at 3.

⁹⁵ The fifth stage involves finalizing a treaty. B.C. Treaty Commission, "Annual Report 2001: The Year in Review" (2001), online: <http://www.bctreaty.net/files_2/pdf_documents/2001_annual_report.pdf> at 7.

⁹⁶ B.C. Treaty Commission, "The Changing Landscape: Annual Report 2002" (2002), online: B.C. Treaty Commission <http://www.bctreaty.net/files_2/pdf_documents/2002_annual.pdf> at 6.

⁹⁷ [1997] 3 S.C.R. 1010.

⁹⁸ B.C. Treaty Commission, "Looking Back, Looking Forward: A Review of the B.C. Treaty Process" (2001), online: <http://www.bctreaty.net/files_3/pdf_documents/review_bc_treaty_process.pdf> at 5.

of comprehensive agreements and new treaties, and as an additional dimension to existing treaties.⁹⁹ A 1999 parliamentary research report, updated in 2000, complained that “[m]any years of negotiations have, to date, produced relatively few self-government agreements.”¹⁰⁰ To little avail: no new agreements were reached between 1999 and 2002.¹⁰¹ Shortly afterwards, the federal government introduced – and, in the face of strong AFN protests, promptly withdrew – the highly interventionist *First Nations Governance Act*.¹⁰²

In short, progress for Aboriginal peoples during the *Charter* era has been non-existent in some respects, such as rates of incarceration; glacial in others, such as land claims and self-government; perceptible but still modest in regard to health and life expectancy; and positive but uneven in regard to living standards and employment prospects. However, there is no evidence to suggest the *Charter* was responsible for any improvements that did occur. Indeed, it seems far more likely that any modest gains realized were the product of a prolonged campaign of grassroots mobilization through coalition-building, the leverage of double-edged judicial pronouncements,¹⁰³ temporary and fickle public support engendered

⁹⁹ Mary C. Hurley & Jill Wherrett, “Aboriginal Self-Government” (1 August 2000), online: Library of Parliament, Parliamentary Research Branch <<http://www.parl.gc.ca/information/library/PRBpubs/prb9919-e.htm>>.

¹⁰⁰ *Ibid.*

¹⁰¹ Indian and Northern Affairs Canada, “Agreements” (28 October 2005), online: <http://www.ainc-inac.gc.ca/pr/agr/index_e.html#FinalAgreements1>. The process evidently lurched forward in the year of the *Charter*’s twentieth anniversary: whereas only twelve final self-government agreements were achieved between 1992 and 2002, an additional ten were completed between 2002 and 2005. Given that the *Charter* itself has not changed in this time, it would appear that progress in this area has been more a function of political whim or will.

¹⁰² Assembly of First Nations, News Release “Standing Committee Forces End to Debate on Governance Act in Spite of Wide-Spread Opposition” (27 May 2003), online: Treaty Justice <<http://www.treatyjustice.org/docs/bille7/articles/enddebate.html>>. At the time of writing, the incoming Paul Martin Liberal government had cancelled this initiative – at least in its then-current form – in keeping with promises made to First Nations leaders during Martin’s 2003 party leadership bid.

¹⁰³ For example, *Calder v. British Columbia (A.G.)*, [1973] S.C.R. 313, which was ambiguous in its result but sufficiently supportive of a hazily defined concept of Aboriginal title to prompt the federal government to negotiate

by the awareness-raising RCAP report, and militancy taken very occasionally to the extreme of armed confrontation and conflict.

B. Women

It is perhaps telling that many surveys of women's progress toward equality, at least with respect to material factors, seem not to consider the *Charter* as an appropriate event or starting place from which to measure their current status.¹⁰⁴ Julia O'Connor, writing in 1998 about representation of employment equality strategies in the political process in Canada, begins instead with the year 1970 and attributes changes over three decades to a list of "key factors" from which the *Charter* is notably absent. These include "royal commission reports, the policy machinery related to women's issues, the federal government's obligations under key UN and [International Labour Organization] treaties, the women's movement, labour unions, and, to a lesser extent, political parties."¹⁰⁵ The "limited impact of the equality strategies" that has been realized has been "advanced primarily through bureaucratic policy machinery rather than through parliamentary or industrial relations channels"¹⁰⁶ or, presumably, *Charter* litigation.¹⁰⁷ Among the changes noted:

rather than take its chances with an unpredictable Supreme Court. These negotiations would drag on for more than twenty years, culminating eventually in the Nisga'a Treaty (brought into force by the *Nisga'a Final Agreement Act*, S.C. 2000, c.7)

¹⁰⁴ See, however, Sarah Lugtig & Debra Parkes, "Where Do We Go From Here?" (Spring 2002) 15:4 *Horizons* 14 at 15-16 [Lugtig & Parkes]. Lugtig and Parkes assess gains and losses for women specifically during the *Charter* era. They identify *legal* victories including rights to abortion, rights of disabled women to health care, and rights of Aboriginal women respecting votes in band council elections – as well as *political* defeats – including the revocation of the *Canada Assistance Plan*, decreased access to unemployment insurance, and cuts to welfare in Ontario.

¹⁰⁵ Julia S. O'Connor, "Employment Equality Strategies and Their Representation in the Political Process in Canada, 1970-1994" in Manon Tremblay & Caroline Andrew, eds., *Women and Political Representation in Canada* (Ottawa: University of Ottawa Press, 1998) 85 at 85 [O'Connor].

¹⁰⁶ *Ibid.* at 106.

¹⁰⁷ O'Connor notes that the introduction of *parental* leave in 1990, extending the maternity leave and benefits won in earlier decades to men, followed a *Charter* equality challenge to parental leave provisions for adoptive parents brought by a natural father. *Ibid.* at 87. In this instance, the *Charter* was used to deny women a monopoly over a right won by other means.

labour participation of women with young children increased from 50 percent in 1981 to 63 percent in 1993. Within this group, those with preschool-aged children increased their participation from 42 to 56 percent, and those with children under three years moved from 39 to 55 percent.¹⁰⁸ Women's representation in the public service (regardless of parental status) increased from 43.4 per cent in 1986 to 47.4 percent in 1995.¹⁰⁹ Another study measuring participation in the federal public service from 1987 to 1998 describes a gradual increase from 42.4 to 50.5 percent in this period.¹¹⁰ The percentage of paid maternity leaves increased from 77 percent in 1980 to 89 percent in 1991, though most of this 1991 figure was accounted for solely through unemployment insurance.¹¹¹

Has the *Charter* era witnessed significant improvements in the ratio of female-to-male earnings and in women's participation in particular occupational groups? With respect to earnings, women's earnings rose from 64.2 percent of men's in 1980 to 71.8 percent in 1992. While the aggregate improvement is marked, there remains a wide disparity between private- and government-sector percentages.¹¹² Moreover, the gain was short-lived and not indicative of even a slow but steady improvement in women's prospects: by 1994, women working full-time earned 68.5 percent of what their male counterparts did, and while the figure would vary a few percentage points from year to year,¹¹³ by 2002 and 2003 it had settled at 70.2 and 70.5 percent, respectively.¹¹⁴ It should be noted

¹⁰⁸ *Ibid.* at 86.

¹⁰⁹ Samuel & Karam, *supra* note 60 at 139.

¹¹⁰ Bakan, Kobayashi & SWC, *supra* note 60 at 67.

¹¹¹ O'Connor, *supra* note 105 at 86-87. O'Connor notes that despite this, some collective agreements had begun to include maternity leave and benefit provisions that exceeded national standards. She attributes the introduction of paid maternity leave and benefits to action taken pursuant to a recommendation the Royal Commission on the Status of Women made in 1970.

¹¹² Private-sector female employees in 1980 earned 60.6 percent of men's wages compared to 73.8 percent for female government workers; in 1992 they earned 67.9 and 79.8 percent, respectively. Wendy Robbins, "Pay Equity Laws Provide Patchwork of Remedies" (Spring 2002) 15:4 *Herizons* 10.

¹¹³ It would crest at 72.4 percent in 1995, dropping sharply by 4 percent within two years. Statistics Canada, "Average earnings by sex and work pattern (Full-time, full-year workers)," online: < <http://www40.statcan.ca/101/cst01/labor01b.htm>>.

¹¹⁴ *Ibid.*

that the picture becomes uglier when one looks at the ratio for all earners and not just full-time earners, which, from 1994 to 2003, never rose above 63.6 per cent.¹¹⁵ Moreover, what improvement there has been may be the product of negative causes: one analysis maintains that women's average after-tax income rose from 52 percent of men's in 1986 to 63 percent in 1997, but it attributes this change in part to "an 11.4% decrease in men's median earnings over this period."¹¹⁶

Moreover, income figures do not fully capture the dynamics of women's status in the job market. As Michael Mandel notes, "women are simultaneously waging a struggle for equality with men *qua* women, and a struggle alongside men for a decent standard of living and quality of working life *qua* working people."¹¹⁷ A recent review comparing data from 1967 to 1995 argues that little has changed: in 1967, "almost half" of women aged sixty-five and over lived below the poverty line, and by 1995, 43.3 percent were still in poverty. The proportion of single mothers below the poverty line increased from one-third to 57.2 percent. More women were performing non-standard work (i.e., "work that is part-time, casual, seasonal and without benefits or union protection") than previously.¹¹⁸

¹¹⁵ Statistics Canada, "Average earnings by sex and work pattern (all earners)," online: <<http://www40.statcan.ca/101/cst01/labor01a.htm>>.

¹¹⁶ Karen Hadley, *And We Still Ain't Satisfied: Gender Inequality in Canada – A Status Report for 2001* (Toronto: CJS Foundation for Research and Education and The National Action Committee on the Status of Women, 2001) at 3 [Hadley].

¹¹⁷ Mandel, *supra* note 6 at 438. Writing in the mid-1990s, Mandel notes that women "continued to be segregated into low-paying jobs," holding only 19.3 percent of the ten highest-paying jobs ("general managers and other senior officials"), while dominating the ten lowest-paying jobs (such as stenographers, typists, and sewing machine operators). They also continued to be "three times as likely as men to work only part-time." Mandel calculates that accounting for such factors reduces women's earnings as a percentage of men's from the official figure of 71.8 percent to an actual figure of 63.8 percent. *Ibid.* 438 at n. 74.

¹¹⁸ Shelagh Day & Gwen Brodsky, "Women's Economic Inequality and the *Canadian Human Rights Act*" in Donna Greschner *et al.*, eds., *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) 113 at 120. The authors express their disappointment with the failure of the *Canadian Human Rights Act* to accelerate the pace of change: "With quasi-constitutional prohibitions against

Women's representation increased in all occupational groups considered from 1984 to 1990. Most notably, the percentage of women managers and administrators rose from 32 to 41 percent, while the percentage of women professionals rose from 46 to 50 percent. As a percentage share of all female employment, however, these categories constituted only 11 and 21 percent respectively. Most women continued to be employed as clerical workers (30 percent in 1990, down from 32 percent in 1984), with a very slight decline in those employed in unskilled service work, the third-largest category (17 percent in 1990, down from 18 percent in 1984). O'Connor characterizes these results as indicative of a "slow rate" of decline in gender segregation, occurring "only at the upper end of the occupational distribution."¹¹⁹ As Karen Hadley demonstrates,

discrimination in employment and services in place for more than two decades, women could reasonably have expected to see more improvement." While they note that *Charter* litigation has "given life to the minimalist language of the CHRA and provincial human rights laws" (at 137), their rebuke could well be extended to the same failure of the *Charter's* fully constitutional prohibition against gender discrimination to affect the material impact of such legislation. Karen Hadley presents recent data which supports Day and Brodsky's point about the greater presence of women in non-standard occupations, reporting that 72 percent of part-time workers are women, and that, in 1999, 28 percent of all employed women (compared with 10 percent of men) worked less than thirty hours per week. She notes further disparities between unionized and non-unionized non-standard work: whereas women in the former made just 69 percent of men's wages, they made 86 percent of men's wages in non-unionized non-standard work, "because wages for both were close to the minimum wage floor." Hadley, *supra* note 116 at 8.

¹¹⁹ O'Connor, *supra* note 105 at 96-97. Recent data suggests that these trends carried forward to 1999, when women constituted 51.8 percent of professionals (up from a 1987 figure of 49.8 percent, but down from 52.2 percent in 1994); participation in management appeared lower than indicated by O'Connor, starting at 28.9 percent in 1987 and rising to 35.1 percent in 1999 – unchanged from its 1994 figure. Statistics Canada, *Women in Canada, 2000: A Gender-Based Statistical Report*, 4th ed. (Ottawa: Statistics Canada, 2000) at 128 [Statistics Canada, *Women in Canada*]. Women's participation in selected trades remained low through the latter part of the *Charter* era: the percentage of women enrolled in apprenticeship programs for the major trades in total stood at 0.6 percent in 1988 and by 1997 was still only at 1.6 percent. *Ibid.* at 96. Mandel somewhat wryly notes one direct connection between the *Charter* and improved representation of women in professions: the flood of *Charter* litigation had increased the presence of women lawyers from 15.5 percent in 1981 to 20 percent by the time of *Symes v. Canada* [1993] 4 S.C.R. 695. Mandel, *supra* note 6 at 444-45. By 1993, women constituted 50 percent

even progress identified at this upper end is problematic in that equality of status is often not translated into commensurate income gains. According to data from 1996, women in the category of management tended to be concentrated in the lower-level management positions, and average incomes for women in this group stood at \$39,048 compared to \$58,680 for men. Moreover, women's stronger presence in professional roles is due in large part to their dominance in nursing and teaching (in which they hold 95 percent and 69 percent of positions, respectively).¹²⁰ Data for 2004 continues to support this thesis, showing the number of women nearly doubling that of men in the field of education, and more than quadrupling it in health care and social assistance, but still lagging behind in the "professional, scientific and technical services" sector.¹²¹ In the federal public service, women's representation in management positions and in scientific/professional roles increased from 14.1 percent and 25 percent in 1989 to 25.1 percent and 32.3 percent in 1998, respectively, but women's overwhelming concentration in administrative support positions had not changed (women constituted 83.1 percent of these workers in 1989 and 84 percent in 1998).¹²²

Other measurements, perhaps less direct than employment and income factors but no less material in their effect, suggest the advent of the *Charter* has had relatively little impact on women's lives. Day and Brodsky argue that, as women's socio-economic status makes

of law students, 28 percent of law professors, and 27 percent of practicing lawyers. *Ibid.* at 445 n. 85.

¹²⁰ Hadley, *supra* note 116 at 19. Hadley further notes that although women had assumed more positions in higher-paying professions such as medicine, dentistry, and the social sciences, they still represented just 20 percent of professionals in natural sciences, engineering and mathematics. *Ibid.* By 1999, women in the professional category filled over half of all positions in nursing, teaching and the "artistic/literary/recreational" and "social sciences/religion" subcategories. Statistics Canada, *Women in Canada*, *supra* note 119 at 128. It appears these proportions are unlikely to change significantly in the first years of the new century; women's full-time enrolment in university engineering and applied sciences in 1997-1998, while up from its 1992-1993 figure, still only constituted 21.5 percent of program enrolment, and women accounted for just 29.4 percent of enrolment in mathematics and physical sciences. *Ibid.* at 94.

¹²¹ Statistics Canada, "Employment by industry and sex," online: <<http://www40.statcan.ca/101/cst01/labor10a.htm>>.

¹²² Bakan, Kobayashi & SWC, *supra* note 60 at 68.

them more likely than men to rely on government programs for their survival, they are disproportionately susceptible to adverse effects from changes to such programs.¹²³ They argue that the *Canadian Health and Social Transfer* and the *Budget Implementation Act*, “the most drastic changes to social programs of the last 40 years,” were presented as purely fiscal measures, unrelated to the rights of women.¹²⁴ They then demonstrate through a review of *Charter* cases a disturbing tendency by governments and courts to “[conduct] the discrimination analysis in such a way as to break the cause and effect linkage between the inequality complained of and the *Charter*’s equality guarantees.”¹²⁵ Thus, recent reductions in government spending have had the effect of reducing both wages and employment in the public sector. This has a disproportionate impact on women, because the public sector offers them better jobs and higher salaries than does the private sector and is less likely to concentrate them in lower-status jobs. Cuts therefore reduce the number of attractive jobs available to women.¹²⁶ The availability of child care has risen and fallen over the course of the *Charter* era, marked by an increase in supportive legislation and funding through the 1980s and a levelling or reduction as a result of neo-liberal policies adopted in the 1990s.¹²⁷ As fees increased and subsidies

¹²³ Shelagh Day & Gwen Brodsky, *Women and the Equality Deficit: The Impact of Restructuring Canada’s Social Programs* (Ottawa: Status of Women Canada, 1998) at 29-30 [Day & Brodsky]. A recent collection of essays surveys the disproportionate impact that the neoliberal drive for privatization has had on women: see generally, Brenda Cossman & Judy Fudge, *Privatization, Law, and the Challenge to Feminism* (Toronto: University of Toronto Press, 2002). For international comparisons, see generally Kerry Rittich, *Recharacterizing Restructuring: Law, Distribution, and Gender in Market Reform* (Boston: Kluwer Law International, 2002).

¹²⁴ Day & Brodsky, *ibid.* at 30.

¹²⁵ *Ibid.* at 82. In spite of this, the authors proceed to make *Charter* arguments against the constitutionality of the *Budget Implementation Act, 1997*, S.C. 1997, c. 26. See *ibid.* at 109.

¹²⁶ Isabella Bakker, “Deconstructing Macro-Economics through a Feminist Lens” in Janine Brodie, ed., *Women and Canadian Public Policy* (Toronto: Harcourt Brace & Company Canada Ltd., 1996) 31 at 44-45.

¹²⁷ Gillian Doherty, Martha Friendly & Mab Oloman, *Women’s Support, Women’s Work: Child Care in an Era of Deficit Reduction, Devolution, Downsizing and Deregulation* (Ottawa: Status of Women Canada, 1998) at 17-19 [Doherty, Friendly & Oloman].

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fluctuated,¹²⁸ overall access to child care diminished, as did opportunities for choice among alternative child care services. The consequence was to constrain women's options with respect to their participation in the labour force.¹²⁹ Whether recent initiatives by the federal government will reverse these trends remains to be seen.¹³⁰

The availability of affordable housing for women has evidently been unaffected by the entrenchment of equality rights. In Toronto, higher vacancy rates in the 1990s did not ease the problem of homelessness. In fact, shelter use rose from roughly 1,000 per day in the mid-1980s to nearly 5,000 at the end of the 1990s, and "among shelter users the proportion of women has risen dramatically."¹³¹ This is attributable to a combination of rising rents and increasing

¹²⁸ Day care and other fees increased from 1993 to 1995 in most provinces and territories, while family income dropped. The national average after-tax income dropped from \$47,300 in 1989 to \$43,700 in 1994, measured in constant 1994 dollars. Generally, child care fees increased in all jurisdictions from 1989 to 1995 while provincial/territorial subsidies variously stayed the same, decreased or increased; interview data suggests, however, that regardless of changes in the dollar amounts of subsidies, child care workers in all jurisdictions but Manitoba and the Northwest Territories perceived that subsidies had not kept pace with increases in fees. *Ibid.* at 19-25. The number of day care spaces has increased nationally. Statistics Canada, *Women in Canada*, *supra* note 119 at 109.

¹²⁹ Doherty Friendly & Oloman, *supra* note 127 at 32-33.

¹³⁰ A political compromise between the Liberal minority government and the NDP resulted in increased spending for social programs via revisions to the February 2005 budget. The revised budget, passed as Bill C-48, *An Act to authorize the Minister of Finance to make certain payments*, received royal assent 20 July 2005. The budget sets aside \$700 million in trust in 2005 and 2006 for the creation of a national child care program. CBC News, "In-depth: Budget 2005 – Highlights" (24 June 2005), online: <<http://www.cbc.ca/news/background/budget2005/>>. Details of this initiative are given in the government's summary of the budget plan: Government of Canada, Department of Finance Canada, *The Budget Plan 2005* (Ottawa: Department of Finance Canada, 2005) at 116-20. Prime Minister Paul Martin described it as a "very important budget for child care." CBC News, "Commons amends budget in surprise midnight vote" (24 June 2005), online: <<http://www.cbc.ca/story/canada/national/2005/06/24/newparliament050624.html>>.

¹³¹ Centre for Equality Rights in Accommodation, Women's Housing Program, *Women and Housing in Canada: Barriers to Equality* (Toronto: Centre for Equality Rights in Accommodation, 2002), online: <http://www.equalityrights.org/cera/docs/CERAWomenHous.htm> [Women's Housing Program].

economic inequality over the past two decades,¹³² the impact of which was felt disproportionately by women, who comprise by far the largest group of renters requiring assistance.¹³³

The availability of abortions for women who want them has been used as an example of the concrete impact of constitutional rights litigation in both the U.S.¹³⁴ and Canada.¹³⁵ While Bogart, writing in the mid-1990s, speculated that “access to abortions, across the country as a whole, may be decreasing,”¹³⁶ the picture is actually more complicated. Abortions per 1,000 women increased in Canada from 11.8 in 1982 to 14.9 as of 2002, while abortions per 100 live births increased from 19 to 32.1.¹³⁷ However, the *Charter*’s equality provisions notwithstanding, access to abortions varies widely across the country. From 1996 to 2000, no clinic abortions were reported from the three territories or the provinces of Saskatchewan or Prince Edward Island; the number of clinic abortions per year decreased markedly in Nova Scotia, New Brunswick and Manitoba even as it

¹³² *Ibid.* The cuts to social assistance became the subject of an unsuccessful *Charter* challenge in *Masse v. Ontario (Ministry of Community and Social Service)*, (1996) 134 D.L.R. (4th) 20 (Ont. Div. Ct.). The Centre for Equality Rights in Accommodation makes note of another such case, *Gosselin c. Québec (Procureur général)* (2002) 221 D.L.R. (4th) 257 (S.C.C.), which also proved unsuccessful – and argues that “[t]his type of litigation must continue to be initiated.” *Ibid.*

¹³³ Women’s Housing Program, *supra* note 131 at 19.

¹³⁴ Rosenberg, *supra* note 40; Bogart, *Courts and Country*, *supra* note 10.

¹³⁵ Bogart, *ibid.* This argument is reproduced in part in W.A. Bogart, “Women’s Issues and the Impact of Litigation” [Bogart, “Women’s Issues”] in Margaret Jackson & N. Kathleen Sam Banks, eds., *Ten Years Later: The Charter and Equality for Women: A Symposium Assessing the Impact of the Equality Provisions on Women in Canada* (Burnaby: Public Policy Programs Simon Fraser University at Harbour Centre, 1996) 107 [Jackson & Banks].

¹³⁶ Bogart, “Women’s Issues” *ibid.* at 114. He explains: “It is possible to obtain an abortion if near a clinic and in that regard there maybe more abortions. However, aside from these limited areas abortions across the country may now be less accessible. For example, in Ontario only about half of gynecologists and less than 1% of general practitioners perform the procedure.”

¹³⁷ For the period of 1982 to 1995, see Statistics Canada, *Women in Canada*, *supra* note 119 at 73. For the period of 1998 to 2002, see Statistics Canada, “Induced abortions by age group,” online: <<http://www40.statcan.ca/101/cst01/health43.htm>>; Statistics Canada, “Induced abortions per 100 live births (Hospitals and clinics),” online: <<http://www40.statcan.ca/101/cst01/health42a.htm>>.

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was rising in central Canada and British Columbia.¹³⁸ Disparity continued from 1998 to 2002, with the same provinces and territories still not reporting, but clinic abortions did rise at uneven rates in all provinces except Nova Scotia.¹³⁹

This disparity in access to clinical abortions is disturbing since the overall increase in the abortion rate appears to be attributable to a seven-fold increase in such abortions. Most of this increase occurred within two years of the Supreme Court's *Charter*-based ruling in the first *Morgentaler* case.¹⁴⁰ This appears to be a clear instance in which the *Charter* did indeed "matter." However, and certainly contrary to the spirit of the *Charter*, it mattered much more in some parts of the country than in others.

Evidence with respect to changes in the extent of violence against women in the *Charter* era is mixed. Spousal assaults became less common, though not in all provinces,¹⁴¹ spousal homicides of women

¹³⁸ Statistics Canada, "Induced Abortions by Province and Territory of Report" (Clinics), 1996-2000," online: <<http://www.statcan.ca/english/Pgdb/health40c.htm>> [Statistics Canada, "Induced Abortions, 1996-2000"].

¹³⁹ In Nova Scotia, abortions actually dropped in number for this period. The number in British Columbia increased by over 2,500, compared to an increase of just forty-five in Ontario. Statistics Canada, "Induced Abortions by Province and Territory of Report" (Clinics), 1998-2002," online: Statistics Canada <<http://www40.statcan.ca/101/cst01/health40c.htm>> [Statistics Canada, "Induced Abortions, 1998-2002"].

¹⁴⁰ *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*]. In 1990, the number of abortions performed in clinics nationwide jumped to 20,236 (from 7,059 in the previous year). Similarly, the number of clinic abortions per 1,000 women increased from 1.1 to 3.2 while the number per 100 live births jumped from 1.8 to 5. The trend began, however, immediately after *Morgentaler*. The number of abortions leaped from 4,617 to 7,059 between 1988 and 1989; the 1988 figure was actually down from a pre-*Charter* high in 1980. The difference from 1988 to 1989, while much smaller than that from 1989 to 1990, was to that point the single largest increase in availability of clinic abortions since clinics began in 1978. Statistics Canada, *Women in Canada*, *supra* note 119 at 73. Recent data suggest that the number of clinic abortions per year continued to rise from 1996 to 1998, after which it dropped slightly and recovered by 2000, only to drop again to a lower rate in 2002 than in 1998. See Statistics Canada, "Induced Abortions, 1996-2000," *ibid.*; Statistics Canada, "Induced Abortions, 1998 to 2002," *supra* note 138.

¹⁴¹ Status of Women Canada (SWC) reports that from 1993 to 1999 the incidence of spousal assault against women for the country as a whole dropped from 12 to 8 percent of couples, though it remained the same or rose in three

fluctuated;¹⁴² sexual assaults of lesser severity rose and fell, while those of greater severity dropped somewhat,¹⁴³ but stalking of women by intimate partners may well have increased.¹⁴⁴ Status of Women Canada attributes the apparent reduction in spousal assaults and the actual decrease in spousal violence to “improved social interventions, such as the increased use of services by abused women,” but cautions that “it is still too early to draw any definitive conclusions.”¹⁴⁵

There is some suggestion that victims of sexual harassment in the workplace have gained greater access to remedies as a result of the *Charter*. Beth Symes, while offering no supporting evidence, attributes this change (and others) in the status of women to the effect, albeit indirect, of the *Charter*.¹⁴⁶ However, the extent of the *Charter*'s contribution is by no means clear. As Symes herself notes, harassment “is now specifically prohibited in human rights legislation, has been negotiated into many collective agreements and

provinces. Status of Women Canada & Federal/Provincial/Territorial Ministers Responsible for the Status of Women (Canada), *Assessing Violence Against Women: A Statistical Profile* (Ottawa: Status of Women Canada, 2002) at 12 [SWC, *Assessing Violence*].

¹⁴² SWC, *Assessing Violence*, *ibid.* at 17. The report's authors speculate that reductions in the rate have been due to “increased community-based supports, mandatory charging policies and improved training of police officers . . . [and] the fact that women may have developed a lower tolerance for spousal violence and an increased tendency to leave relationships before the violence reaches a critical and deadly stage.” *Ibid.* at 17-18. Although changes in domestic legislation are reviewed, the *Charter* is mentioned only once, in the context of a portion of one provincial bill that was revised in response to *Charter* challenges. *Ibid.* at 64.

¹⁴³ *Ibid.* at 18-20.

¹⁴⁴ *Ibid.* at 20-21. Harassment by ex-husbands rose from 900 reported incidents in 1995 to approximately 1,300 in 2000; “boyfriends” began at just over 400 in 1995, dropped slightly in 1997, and had risen to approximately 500 by 2000.

¹⁴⁵ *Ibid.* at 21.

¹⁴⁶ While noting that these changes cannot be attributed *directly* to the *Charter*, Symes paraphrases Sylvia Bashevkin's argument that “the enactment of the *Charter* in 1982 created an early momentum which generated higher expectations for women in Canada than for [their] counterparts in the United Kingdom in the United States.” Beth Symes, “Ten Years Later: Is the *Charter* an Appropriate Tool for Social Change?” in Jackson & Banks, *supra* note 135, 11 at 23.

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workplaces have designed workplace discrimination and harassment policies to deal with this issue.”¹⁴⁷ This would seem to suggest that the problem is being dealt with largely outside the ambit of the *Charter*. Indeed, a 1999 analysis of sexual harassment complaints to the Canadian Human Rights Commission attributed the increased level of harassment claims not to the *Charter* but to a Supreme Court decision that makes no mention of the *Charter*, even by way of background.¹⁴⁸

Political representation of Canadian women has clearly increased since the *Charter* was adopted in 1982. Trimble and Arscott report that from 1970 to 2000, the proportion of women in provincial legislatures improved from 2.3 per cent to 26 per cent.¹⁴⁹ But the news was not uniformly good. With respect to women’s presence in provincial government, the authors note that there is no single pattern of linear progress, but rather four distinct patterns, with some provinces and territories showing steady improvement in women’s representation over the last five elections, others showing decline, some trapped in a holding pattern, and still others recovering from recent sharp declines.¹⁵⁰

¹⁴⁷ *Ibid.* at 21.

¹⁴⁸ Sandy Welsh, Myrna Dawson & Elizabeth Griffiths, “Sexual Harassment Complaints and the Canadian Human Rights Commission” in Donna Greschner *et al.*, eds., *Women and the Canadian Human Rights Act: A Collection of Policy Research Reports* (Ottawa: Status of Women Canada, 1999) 177 at 189, citing *Janzen v. Platy Enterprises Ltd.* (1989), 58 Man. R. (2d) 1 (S.C.C.). Strangely, other authors cite this same case, which found sexual harassment to be a form of sexual discrimination, as evidence of progress under the *Charter*, again despite the fact that the case does not cite or mention it. See Lugtig & Parkes, *supra* note 104.

¹⁴⁹ Linda Trimble & Jane Arscott, *Still Counting: Women in Politics Across Canada*. (Peterborough, ON: Broadview Press, 2003) at 40 [Trimble & Arscott]. See also Donley T. Studlar & Richard E. Matland, “The Dynamics of Women’s Representation in the Canadian Provinces: 1975-1994” (1996) 29 *Canadian J. of Political Science* 269 at 273 [Studlar & Matland], which tracks the progress of women in provincial politics from 1975 to 1993 and concludes that, although progress was considerable in every province (except, perhaps in Newfoundland, which started at 2 percent and never rose above its 1984 figure of 5.8 percent), the final percentage and the rate of growth varied widely from province to province. The highest percentage reached anywhere was in Prince Edward Island at 28 in 1993; in that year, figures were in the double-digits everywhere except Newfoundland and Nova Scotia.

¹⁵⁰ Trimble & Arscott, *ibid.* at 53-56.

The percentage of female members of the federal Parliament rose from just 0.4 per cent in 1970 to 20.6 per cent in 2000, while the percentage of women Senators for the same period rose from 4.5 to 40 per cent.¹⁵¹ Candidacy of females in federal elections increased steadily across the three major political parties of the day, with the most dramatic increases occurring between 1985 and 1994.¹⁵² A similar pattern obtains for female candidates for provincial legislatures.¹⁵³ Studlar and Matland cite systemic and policy factors accounting for improvements in women's representation,¹⁵⁴ but also attribute it to the heightened political mobilization of the women's movement in the 1980s and 1990s, a trend in which the adoption of the gender equality clause of the *Charter* was a "watershed event."¹⁵⁵ It is difficult to imagine the *Charter* as a decisive factor, though, when one compares Canada's progress to that of other countries; while women's representation at the federal level had risen to 18 percent in 1993, it was still below the levels of nine industrialized democracies, including countries (Sweden, the Netherlands, Germany, and Austria) where women won the franchise at about the same time as in Canada.¹⁵⁶ Even as the Canadian figure rose from

¹⁵¹ *Ibid.* at 40.

¹⁵² Studlar & Matland, *supra* note 149 at 281. Progress, not uniform, was greatest in the NDP and least in the former Progressive Conservative (PC) party. *Ibid.* at 280. Trimble & Arscott carry this comparison forward from 1993 to 2000 and reveal that by the latter date, only 13 per cent of PC candidates were women, compared to 22 per cent of Liberal and 30 per cent of NDP candidates. Worst of all was Canadian Alliance, for which only 11 per cent of candidates were women. *Ibid.* at 63.

¹⁵³ Studlar & Matland, *ibid.* at 283-84.

¹⁵⁴ Among these are the "extraordinarily high" turnover rate of Members of Parliament in the House of Commons and provincial legislatures, the weaker incumbency advantage of Canadian politicians due to the "volatility of the electorate," and proactive policies of the NDP, which were "specially designed to improve women's representation." *Ibid.* at 275.

¹⁵⁵ *Ibid.* at 291.

¹⁵⁶ Non-aboriginal Canadian women gained the right to vote in 1918. In 1995, Sweden had the highest representation at 40 percent, followed by Norway at 39 percent and Finland at 34 percent. Lynda Erickson, "Entry to the Commons: Parties, Recruitment, and the Election of Women in 1993" in Caroline Andrew & Manon Tremblay, eds., *Women and Political Representation in Canada* (Ottawa: University of Ottawa Press, 1998) 219 at 222 [Erickson].

20.6 percent in 2000 to 21.1 percent in 2004,¹⁵⁷ Canada placed only thirty-eighth out of 127 countries with women elected to national parliaments.¹⁵⁸ The tendency of parties to nominate women candidates in ridings where there was little chance of winning persisted into the mid-1980s, but the practice had diminished considerably and arguably disappeared by the mid-1990s.¹⁵⁹

Moving from raw numbers to practical explanations, a candidate survey taken after the 1993 election revealed broad discrepancies from party to party with respect to candidates' perception of the need for more women's representation.¹⁶⁰ Despite Studlar and Matland's

¹⁵⁷ The number of women *candidates* rose more sharply, from 20.7 percent in 2000 to 23.2 percent in 2004. However, as a result, the percentage of successful women candidates actually fell somewhat. Gina Bishop, "Women's Representation After the 2004 Federal Election" 6 *Opinion Canada* (21 November 2004), online: <http://www.opinion-canada.ca/en/articles/article_111.html [Bishop].

¹⁵⁸ This 21.1 percent amounted to 65 seats out of 308 in the House of Commons. Inter-Parliamentary Union, "Women in National Parliaments: World Classification," online: <<http://www.ipu.org/wmn-e/classif.htm>>. Canada's modest record in electing women to parliament accounts in part for its recent decline from first to third to eighth in the United Nations Human Development ratings. Most of the countries ranked higher overall also ranked higher than Canada with respect to percentages of women in government at the ministerial level (24.3 percent in Canada) and representation in parliament at the lower- or single-house level (20.6 percent). Interestingly, Canada had the highest percentage of women in its upper house or senate among those top-ten countries with bicameral federal parliaments (32.4 percent). United Nations Development Programme, *Human Development Report 2003: Millennium Development Goals: A Compact Among Nations to End Human Poverty* (New York, Oxford: Oxford University Press, 2003) at 327.

¹⁵⁹ Studlar & Matland, *supra* note 149 at 289.

¹⁶⁰ NDP candidates most strongly supported the proposition that "there should be many more women" in Parliament, at 85 percent. Liberal support ran at 59 percent, and Reform support was the lowest at 20 percent. Significantly, 73 percent of female Reform candidates supported it, while only 15 percent of male Reform candidates did. The party with the next-largest gender response gap was the Liberal party in which 91 percent of women supported, compared to 48 percent of men. Erickson, *supra* note 156 at 228-29. Although the political map had been redrawn by the time of the 2004 election, it appears that partisan commitments to this issue had remained static. In 2004, 24 percent of Liberal candidates were women, while only 12 percent of candidates for the new Conservatives – the ideological inheritors of the Reform Party and later the Canadian Alliance – were women. Bishop, *supra*

optimistic findings, Erickson presents survey data indicating that constituency associations still made less effort to recruit women when they assessed their party's chance of electoral victory as "good" than when they considered it "unlikely" or "hopeless."¹⁶¹ Erickson makes no mention of the *Charter* in accounting for results good or bad; she instead argues that levels of representation are a function of party nomination policies and attitudes, and that the "supply" of women candidates – the paucity of which is part of the problem – is a function of "a system of social practices through which women's lives and resources are constrained by gender-structured opportunities and expectations."¹⁶²

The significance of the *Charter* era for women has thus been marginal at best in the political domain. The *Charter* has no doubt symbolically reinforced the political mobilization of Canadian women. However, judging by the greater electoral progress in other countries that have no such constitutional charter – for example, the Scandinavian countries and the Netherlands – it may have done less than is assumed.

In other areas, the Charter era has either caused or coincided with a considerable enhancement of women's legal rights – for example, with regard to access to abortion and to protection against sexual harassment in the workplace. However, the full enjoyment of these rights apparently remains hostage to the effects of local social structures and attitudes, labour market conditions, and government social policies. This is particularly true in areas that are less

note 157. These results put all parties on the wrong side of public opinion, according to which nine in ten Canadians support increasing the number of women in elected office. Centre for Research and Information on Canada, News Release, "Canadians More Confident in Political Leaders; Still Insist Campaign Promises Must Be Kept" (4 November 2004), online: Queen's University <http://www.queensu.ca/cora/polls/2004/November4-canadians_more_confidant_in_political_leaders.pdf> [CRIC].

¹⁶¹ Erickson, *ibid.* at 238-39, 244-45. The NDP appears to consistently defy this general trend.

¹⁶² *Ibid.* at 247. Interestingly, Erickson cites evidence from the year of the 1993 election that "[w]hile opinion about women in politics appeared to be generally favourable, there was substantial sentiment in some quarters against projects designed to increase women's representation," and that special measures to do so fell prey to a backlash against "special interest" groups. *Ibid.* at 226-27.

amenable to rights-based arguments. Thus, while it was possible to build abortion rights on a foundation of section 7 *Charter* promises of “security of the person” and gender equality, there has been much less progress with respect to equally fundamental needs such as access to housing and child care – areas where the gendered impacts of policy changes are just as keenly felt but in which *Charter* remedies are unavailable because the *Charter* does not protect economic rights.

Finally, of all equality-seeking groups, women have arguably been the most assiduous and skilful in invoking the *Charter*. It is worth noting that LEAF (Women’s Legal Education and Action Fund) – a leading advocacy group for women’s rights – has been a major architect of *Charter* jurisprudence.¹⁶³ Women are entering law schools in increasing numbers (they now often comprise a majority of entrants) and occupy more and more influential positions on the bench and in the legal profession.¹⁶⁴ Several research centres,

¹⁶³ Women’s Legal Education and Action Fund, “Leaf Front and Centre at the 20th Anniversary of the *Charter*” (2002) 12:2 LEAFLINES 1, online: <<http://www.leaf.ca/leafines-spring2002.pdf>>; Women’s Legal Education & Action Fund, *Equality and the Charter: Ten Years of Feminist Advocacy Before the Supreme Court of Canada* (Toronto: Emond Montgomery Publications Limited, 1996); Christopher P. Manfredi, *Feminist Activism in the Supreme Court: Legal Mobilization and the Women’s Legal Education and Action Fund* (Vancouver: University of British Columbia Press, 2004); and Lise Gotell, *Feminism, Equality Rights and the Charter of Rights and Freedoms in English Canada, 1980-1992: “The Radical Future of Liberal Feminism?”* (Ph.D. Thesis, York University, 1993) [unpublished].

¹⁶⁴ At the University of Toronto, for instance, female law students outnumbered men in four of the five academic years 1998 to 2003. Shirley Neuman, *Provost’s Study of Accessibility and Career Choice in the Faculty of Law, Presented to the Committee on Academic Policy and Programs of the Governing Council of the University of Toronto, February 24, 2003* (26 March 2003), online: University of Toronto <<http://www.newsandevents.utoronto.ca/misc/lawaccess.pdf>>. Nationwide, in 2000, more women were called to the bar than men (1,530 compared to 1,308). Janice Mucalov, “Women in Law” *National* 11: 5 (August-September 2002) 12 at 13 [Mucalov]. The number of women called to the bar in Ontario in the same year was equal to that of men and exceeded it for the two years following. Law Society of Upper Canada, “Law Society Honours Role Models at Call to Bar Ceremonies” (26 March 2002), online: Canada NewsWire <<http://www.newswire.ca/en/releases/archive/February2002/22/c4512.html>>. Recent studies suggest that even in the legal realm, genuine equality remains a distant goal. Although the quantity of women’s participation has improved

professorial chairs, academic organizations, and journals now ensure that women's issues receive the attention of skilled scholars in law and associated policy disciplines.¹⁶⁵ But one should not simply assume that positive results flow from this apparent juridification of the women's movement. On the one hand, similar or superior progress towards women's equality has been observed in many countries where no *Charter* equivalent exists, and where women have successfully pursued strategies of social and political mobilization rather than litigation strategies. On the other, Canadian women have by no means confined their efforts to the legal arena, and the nature of the interaction between legal and other strategies remains to be investigated.¹⁶⁶ The struggle for gender equality in Canada underlines how difficult it is to unravel *Charter* effects from other developments and how careful one must be not to confuse high levels of legal activity and success with measurable social progress.

C. Immigrants and Visible Minorities

While the experience of immigrant and minority groups differs considerably, many appear to suffer greater economic disadvantage relative to other Canadians than they did prior to the advent of the *Charter*. A recent report by the CSJ Foundation surveying the economic position of "racialized groups"¹⁶⁷ reveals that employment

significantly, it appears that the quality of their experience continues to be characterized by discrimination and relative powerlessness. See generally, Mary Jane Mossman, "Gender Equality Education and the Legal Profession" (2000) 12 (2d) Supreme Court Law Rev. 187. It may well be that even the improvement in numbers alone has been chimerical: the persistence in law firms of barriers to advancement and of a wage gap that worsens with seniority has led to an "exodus" of women leaving the practice of law "60% more quickly than men." Mucalov, *ibid.* at 13.

¹⁶⁵ See e.g., the *Canadian Journal of Women and the Law*. Several centres devoted to feminist legal studies have come into being, such as the University of British Columbia's Centre for Feminist Legal Studies and its Chair in Feminist Legal Studies (established in 1992), York University's Institute for Feminist Legal Studies, and Simon Fraser University's Feminist Institute for Studies on Law and Society. The Ontario Bar Association now features a practice section devoted to feminist legal analysis.

¹⁶⁶ For a subtle investigation of this point in the American context, see Kostiner, *supra* note 40.

¹⁶⁷ The term corresponds to Statistics Canada's "visible minority" category, which includes "persons, other than Aboriginal peoples, who are non-Caucasian in race or non-white in colour." Grace-Edward Galabuzi & CSJ

earnings for these groups in 1995 were 15 percent lower than the national average. Within these groups, those who arrived as immigrants between 1986 and 1990 reported incomes 18 percent lower than those of non-immigrants; those who arrived after 1990 earned 36 percent less than non-immigrants.¹⁶⁸ This amounted to a decrease in dollar amounts from \$22,538 to \$16,673.¹⁶⁹ From 1996 to 1998, the difference in before-tax income of racialized groups relative to non-racialized groups rose from 23 to 26 percent, while the after-tax income difference rose from 20 percent in 1996 to 21 percent in 1997 and dropped again to 20 percent in 1998.¹⁷⁰ The report calculates that this gap has grown from about 2 percent for those immigrating between 1966 and 1975 to 28 percent for the most recent immigrants.¹⁷¹ Although the national poverty level dropped from 1986 to 1991, the number of distinct ethnocultural minority groups suffering from poverty increased, while the percentage of these groups experiencing unemployment rates higher than the national average rose from 46 to 76 percent.¹⁷²

Foundation for Research and Education, *Canada's Creeping Economic Apartheid: The Economic Segregation and Social Marginalization of Racialized Groups*, (Toronto: CSJ Foundation for Research and Education, 2001) at 40 [Galabuzi & CSJ Foundation].

¹⁶⁸ *Ibid.* at 47. For a useful breakdown of incomes one year after landing by immigrant category and year of landing, see Elizabeth Ruddick, "Trends in International Labour Flows to Canada: Statistics Canada Economic Conference 2000" (2000), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/pdf/research/stats/labour/flows.pdf>>. For a detailed profile of the relative performance of immigrant categories, see Citizenship and Immigration Canada, "The Economic Performance of Immigrants: Immigration Category Perspective" (1998), online: Citizenship and Immigration Canada <<http://www.cic.gc.ca/english/research/papers/category/category/b.html>>. For a single time-point view of the economic participation of recent immigrants as of 1996, see generally, Citizenship and Immigration Canada, *Canada's Recent Immigrants: A Comparative Portrait Based on the 1996 Census* (Ottawa: Minister of Public Works and Government Services, 2001), online: <<http://www.cic.gc.ca/english/pdf/research-stats/1996-Canada.pdf>>.

¹⁶⁹ Galabuzi & CSJ Foundation, *supra* note 167 at 39. The authors note further that "[t]his gap also coincided with the general cutbacks in the levels of government transfers, either in federal employment insurance benefits or provincial social assistance benefits, during much of the 1990s."

¹⁷⁰ *Ibid.* at 40-42.

¹⁷¹ *Ibid.* at 47.

¹⁷² *Ibid.* at 51.

Prospects for the most vulnerable immigrants – refugees – have most certainly worsened since the 1980s. A 1998 report notes that average earnings for refugees in their first full year after landing have declined appreciably since 1988, and that this drop was not related to the business cycle.¹⁷³ The earnings gap between all tax filers (aged 35 to 44) and refugees upon landing increased by 35 percent from the 1980s to 1992.¹⁷⁴ The decline in earnings observed at the point at which they first acquire landed status persists through subsequent years. The rate at which refugee earners close the gap decreased throughout the 1980s so that “more recent cohorts have been ‘catching up’ to all tax filers at a far slower rate than was previously the case.”¹⁷⁵

Returning to the problem of racialized groups in general, data for 1998 reveal that earnings discrepancies are not merely the result of the average lower education of such groups. While incomes were higher for members of racialized groups with university educations than for those without, the *average* difference in income between those with higher education compared to their non-racialized counterparts was actually higher (at 24 percent) than was the difference between racialized and non-racialized persons with less than high school education (22 percent). The *median* income difference at both education levels was identical at 24 percent.¹⁷⁶ This is significant in light of the fact that data from 1991 and 1996 suggest that even racialized groups who reach higher average levels of educational attainment than the general population are nonetheless concentrated in clerical, service, and manual labour jobs.¹⁷⁷

¹⁷³ The authors note that government-assisted refugees with paid employment had average earnings of \$10,534 at the depth of the 1982-1983 recession, while earnings for the same group at the lowest point of the 1991-1993 recession had declined to \$6,260 in constant 1995 dollars. Citizenship and Immigration Canada, “The Changing Labour Market Prospects of Refugees in Canada” (March 1998), online: <<http://www.cic.gc.ca/english/research/papers/labour/labour-toc.html>>.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.* The report’s authors speculate that the decrease in earnings might be attributable to a combination of factors including a change of the countries of origin or language abilities of recent refugee cohorts and changes in the structure of the Canadian labour market.

¹⁷⁶ Galabuzi & CSJ Foundation, *supra* note 167 at 43.

¹⁷⁷ *Ibid.* at 53. Visible minorities, both Canadian and foreign-born, across most age categories completed post-secondary education in greater numbers in 1996 than in 1991. The percentage of Canadian-born minorities age 35-64 who

Contrary to this last finding, Lautard and Guppy report that “occupational dissimilarity” of visible minority groups from the rest of the labour force actually decreased from 1981 to 1991. However, while this improvement roughly coincided with the first decade of the *Charter*, the authors demonstrate that it is in fact the continuation of trends beginning as early as 1971.¹⁷⁸ A more recent study, tracing changes in status from 1991 to 1996, offers mixed conclusions.¹⁷⁹ Also inconclusive was the percentage of each group in the lowest

completed university rose from 26.6 to 32.3 percent, while foreign-born minorities moved from 31 to 32.6 percent. By comparison, the percentage for Canadian-born non-members of racial groups was 18.2 percent in 1991 and by 1996 had still only reached 21 percent. Kunz, Milan & Schetagne, *supra* note 65 at 16. Despite uniform improvements in educational attainment, employment level trends for university graduates in this time period were inconsistent across groups; the unemployment rate for Canadian-born visible minorities dropped from 6.8 to 6.3 percent, while for foreign-born minorities it began high at 9.3 percent and rose to 10.4 percent in 1996. Only Aboriginals fared worse, beginning at 15.1 percent unemployment and ending at 16.5 percent, while Canadian-born non-members of racial groups dropped from 5 to 4.2 percent. Employment rates for visible minorities two years after graduating from post-secondary studies were lower for visible minorities than for non-members of racial groups in seven out of eight categories of study in 1992; by 1997, employment rates for minorities were lower in all eight categories. *Ibid.* at 19-20.

¹⁷⁸ Hugh Lautard & Neil Guppy, “Revisiting the Vertical Mosaic: Occupational Stratification Among Canadian Ethnic Groups” in Peter S. Li, ed., *Race and Ethnic Relations in Canada*, 2nd ed., (Don Mills: Oxford University Press, 1999) 219 at 235-41.

¹⁷⁹ Although proportionately fewer Canadian- and foreign-born minorities could be found at the senior- and middle-management category in 1996 than in 1991, the same could be said of non-members of racial groups, and the 1996 percentages for each group were comparable (10.2, 8.8, and 10 percent respectively); evidently the number of positions in this category decreased, as the percentage of persons in the category dropped for every racial group. The proportion of each group in the professions increased, and for both years, a higher proportion of Canadian-born visible minorities was employed in the professions than for any other racial group, followed by non-members of racialized groups, then by foreign-born visible minorities; Aboriginals had the lowest concentration in the professions. The trends over time for both categories of minority appear to mirror those of non-members of racialized groups. Kunz, Milan & Schetagne, *supra* note 65 at 21.

income quintile.¹⁸⁰ Racial minority participation in the public sector showed some improvement, with visible minorities increasing their share from 2.7 percent in 1987 to 5.1 percent in 1998¹⁸¹ and increasing their share of management and scientific/professional positions within the public service.¹⁸² Progress in federally regulated industries was also observed between 1989 and 1994.¹⁸³ A detailed analysis reveals, however, that as of 1995, minority representation in public-sector operational and technical positions was still only at 1.8 percent and 2.4 percent, respectively. This last figure is equal to the minority share of executive positions as reported by the same study.¹⁸⁴ By comparison, visible minorities constituted between 9.4 percent and 11.2 percent of the general population.¹⁸⁵

There are some indications that racial discrimination has indeed decreased in the era of *Charter*-entrenched equality and multiculturalism. Reitz and Breton report that, while a Henry and Ginsberg study in 1984 revealed that a black job applicant in

¹⁸⁰ While Canadian-born non-members of racial groups were generally less concentrated here than were Canadian or foreign-born visible minorities regardless of educational attainment, the percentage difference ranged from less than 1 percent in some categories at some times to as much as 11 percent at others. It is worth noting, however, that from 1991 to 1996 the concentration of Canadian-born non-members of racial groups in the lowest quintile decreased at the highest and lowest levels of educational attainment, while it increased for both categories of visible minority. *Ibid.* at 23.

¹⁸¹ Bakan, Kobayashi & SWC, *supra* note 60 at 67.

¹⁸² 1.9 percent and 7.6 percent respectively in 1989 to 2.8 percent and 10.1 percent in 1998. *Ibid.* at 68.

¹⁸³ Minority share of positions in banking rose slightly from 12.1 to 13.7 percent, in communications from 5.3 to 7.2 percent, in transportation from 3.8 to 4.3 percent, and in 'other' industries (including metal and coal mines, petroleum and natural gas, and industrial chemicals) from 3.7 to 6.2 percent. Samuel & Karam, *supra* note 60 at 146-48.

¹⁸⁴ *Ibid.* at 140. Significantly, the authors of this study do not link progress in employment to the *Charter*, but attribute it instead to the increase of third-world immigration in the 1970s, to the U.S. civil rights movement, and to the 1984 Abella Report and subsequent changes to equity legislation in 1986 and 1995. *Ibid.* at 134-37.

¹⁸⁵ These figures are taken from the 1991 and 1996 census, respectively. Statistics Canada, "Proportion of Visible Minorities, Canada, Montréal, Toronto and Vancouver, 1981 to 2001," online: <<http://www12.statcan.ca/english/census01/Products/Analytic/companion/etoimm/tables/canada/vismin.cfm>>.

Toronto was five times more likely to be told the position was filled after a white applicant was invited for an interview, the discrepancy had disappeared by the time of a 1989 follow-up study.¹⁸⁶ They also report a shift in Canadian public opinion with respect to black-white marriages, with disapproval waning from 52 percent in 1968 to 35 percent in 1973 and 16 percent in 1988. The authors generalize that these figures represent a drop of roughly 2 percent per year¹⁸⁷ suggesting that while tolerance increased during the *Charter* period, there was nothing conspicuous about the rate at which it did so relative to the decade that preceded it.¹⁸⁸

Other measures defy generalization about progress in racial tolerance. Public preference with respect to models of racial integration changed over the *Charter* period in a fashion that is not only unexpected, but contrary to the intention of section 27, which explicitly valorizes the “preservation and enhancement of the multicultural heritage of Canadians.” Thus, support for a “mosaic” model dropped from 56 percent in 1985 to 44 percent in 1995, while the popularity of the “melting pot” model increased from 27 to 40 percent.¹⁸⁹ The perception that various ethnic groups have “too much power” increased uniformly from 1985 to 1995 with respect to every group except whites (who were perceived to have become significantly less powerful from 1990 to 1995) and East Indians/Pakistanis (against whom the sentiment rose dramatically from 15 percent in 1985 to 22 percent 1990, dropping to 18 percent

¹⁸⁶ The authors caution the reader, however, that in 1989 the demand for labour was much greater than in 1984, and that “heavy labor demand often temporarily improves the opportunities for disadvantaged groups.” Jeffrey G. Reitz & Raymond Breton, “Prejudice and Discrimination in Canada and the United States: A Comparison” in Vic Satzewich, ed., *Racism and Social Inequality in Canada: Concepts, Controversies and Strategies of Resistance* (Toronto: Thompson Educational Publishing Inc., 1998) 47 at 60-61.

¹⁸⁷ Reitz & Breton, *ibid.* at 59-60.

¹⁸⁸ Indeed, the *Charter* does not figure in the overall examination. A comparative look at the U.S. and Canada suggests that “blatant racism is marginal and the social distance between racial minorities and other groups is diminishing” equally in both countries “despite the historical differences between race relations in Canada and race relations in the United States.” *Ibid.* at 65. Among these differences, of course, would be the different eras in which racial equality was constitutionally entrenched in each country.

¹⁸⁹ Leo Driedger & Angus Reid, “Public Opinion on Visible Minorities” in Driedger & Halli, *supra* note 60, 152 at 165.

in 1995).¹⁹⁰ General public perception of the existence of racial discrimination rose from 55 percent in 1980 to 67 percent by 1995, but “feelings of uneasiness” among Canadians with respect to minority groups decreased from 1975 to 1995.¹⁹¹ More recent surveys trace a “substantial recovery” in public perception of the impact of immigration on employment levels by 1997-1998 (i.e., a decrease in “fears that immigration was exacerbating the scarcity of employment opportunities”), as well as increased support for higher levels of immigration.¹⁹² In the same vein, resistance to “non-white” immigration “dwindled” between 1989 and 1996.¹⁹³ However, there is considerable regional variation in these results.¹⁹⁴

¹⁹⁰ *Ibid.* at 170. Though data before 1980 are not available for most groups, the available data suggests that for some groups the advent of the *Charter* coincided with the reversal or halting of a trend in which figures had been dropping since 1975. The perception that “natives” had too much power dropped from 7 to 6 percent in this time, then more than doubled to 13 percent by 1985 and again to 33 percent in 1995. For Jews, the sentiment dropped markedly from 28 percent to 13 percent by 1985, after which it remained static with a slight increase to 14 percent by 1995.

¹⁹¹ *Ibid.* at 167. The “feelings of uneasiness” measure relies on data from 1975 to 1995 collected at five-year intervals; this data reveals no consistent correlation with the pronouncement or coming into force of *Charter* equality provisions. While East Indians/Pakistanis and Natives experienced their largest drops in uneasiness from 1980 to 1985, blacks’ greatest improvement occurred over the five years prior to 1980, and all groups represented except for East Indians/Pakistanis have experienced brief upsurges in uneasiness at various times over the course of the *Charter* era.

¹⁹² The authors note these improvements paralleled “substantial improvements in the unemployment figures over the same period,” just as the recession of the early 1990s had lead to a “marked erosion of levels policy support.” Citizenship and Immigration Canada, “Executive Summary – A Detailed Regional Analysis of Perceptions of Immigration in Canada” (June 1998), online: <<http://www.cic.gc.ca/english/research/papers/regional.html>>.

¹⁹³ This represented a drop in the “already-small minority of respondents endorsing racist exclusionary practices.” *Ibid.*

¹⁹⁴ *Ibid.* A later report finds that support for current immigration policy levels (i.e., the degree to which respondents feel levels are too high or too low, as opposed to support for either higher or lower levels) is negatively correlated with higher regional rates of immigration, and that this correlation is weakened somewhat by improved economic conditions. Douglas L. Palmer for Strategic Policy Planning and Research, Citizenship and Immigration Canada, “Executive Summary – Canadian Attitudes and Perceptions Regarding Immigration: Relations with Regional Per Capita Immigration and Other Contextual Factors” (August 1999), online: Citizenship and

Political representation of ethno-cultural groups and visible minorities has improved in the *Charter* period, though with some exceptions and contrary trends. In 1991, the Royal Commission on Electoral Reform reported that the number and percentage share of seats in the House of Commons had improved for both ethnic and visible minorities, though not evenly (the percentage of ethnic minorities rose from 9.4 percent in 1965 to 16.3 percent in 1988, while for visible minorities the change was from 0 percent to just 2 percent).¹⁹⁵ The report does not comment on the effect of the *Charter*, and the progression of numbers suggests no appreciable acceleration in the early *Charter* years through 1988. Jerome Black suggests that the situation had improved somewhat by the 1993 election, in which thirteen visible minority candidates won seats in the Commons compared to just ten in total for the previous eight elections. He notes, however, that even at this number, “visible minorities remained dramatically under-represented in Parliament” when their share of seats (4.4 percent) was compared to their share of the population (9.8 percent, according to 1991 census data).¹⁹⁶ As only two of those successful minority candidates were women, it has been observed that visible-minority women remain particularly under-represented.¹⁹⁷ Marginal numerical gains were made with the 1997 election of nineteen candidates from visible minority backgrounds, representing 6.3 percent of seats in the House, but by this point in time visible minorities comprised 11.2 percent of the total population.¹⁹⁸

The impact of the *Charter* for immigrants and racial minority

Immigration Canada <<http://www.cic.gc.ca/english/research/papers/perceptions.html>>.

¹⁹⁵ Canada, Royal Commission on Electoral Reform and Party Financing, *Ethno-Cultural Groups and Visible Minorities in Canadian Politics: The Question of Access* vol. 7 (Ottawa: Royal Commission on Electoral Reform and Party Financing and Canada Communications Group – Publishing, Supply and Services Canada and Dundurn Press, 1991) at 130.

¹⁹⁶ Jerome H. Black, “Representation in the Parliament of Canada: The Case of Ethnoracial Minorities” [Black] in Joanna Everitt & Brenda O’Neill, eds., *Citizen Politics: Research and Theory in Canadian Political Behaviour* (Don Mills: Oxford University Press, 2002) 355 at 359-60 [Everitt & O’Neill].

¹⁹⁷ Yasmeen Abu-Laban, “Challenging the Gendered Vertical Mosaic: Immigrants, Ethnic Minorities, Gender, and Political Participation” in Everitt & O’Neill, *ibid.* 268 at 272.

¹⁹⁸ Black, *supra*, note 196 at 361.

groups has been equivocal. Improvements in their position since adoption of the *Charter* often simply followed the trajectory of longer-running historical trends that antedated it. Moreover, evidence of such improvements is often inconclusive or contradictory. For example, racial minorities and immigrants participate in various occupations more frequently than before, but overall income disparity between them and the rest of the population appears to be increasing. Or, to cite another example, as racial discrimination wanes, more members of minority groups are finding their way to political office, but the next generation of immigrants is having a harder time getting into Canada than previous cohorts.¹⁹⁹

D. Gays and Lesbians

As we have suggested, for most equality-seeking constituencies the *Charter* era has not been a period of measurable advances. Arguably, however, the *Charter* did confer important but non-quantifiable gains – in rights, dignity, respect and acceptance – on at least some groups. Gays and lesbians, who only a decade ago were acknowledged as an “analogous group” entitled to *Charter* protection,²⁰⁰ may be one such group. On the other hand, their position may differ from that of the other equality-seeking groups we have identified in two respects.

First, gays and lesbians, unlike members of other groups protected by the *Charter*, are not visually obvious. Thus, those who chose to self-identify or were stereotyped almost certainly suffered overt discrimination, harassment by police and other officials, and deprivation of various rights and benefits. These are the kinds of harms whose post-*Charter* fluctuations we have attempted to chart. However, an unknown, but likely significant, proportion of gays and lesbians escaped overt victimization by remaining “invisible” both visually and statistically. We have to acknowledge, therefore, that our methodology cannot capture the total pre- or post-*Charter* experience of this or similar equality-seeking groups.

Second, accepting that gays and lesbians have indeed achieved both quantifiable and non-quantifiable gains since 1982, it is difficult

¹⁹⁹ See part V below.

²⁰⁰ *Egan v. Canada*, [1995] 2 S.C.R. 513 [*Egan*]; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; and *M. v. H.*, [1999] 2 S.C.R. 3 [*M. v. H.*].

to determine whether or to what extent these gains can be attributed to the *Charter*, to Human Rights Codes and other legislative interventions,²⁰¹ or simply to reductions in homophobic attitudes that can be observed in many socially emancipated countries such as Denmark, which decriminalized homosexual relations between consenting adults in 1933, and the United Kingdom, which did so in 1967 (two years before Canada in 1969), or Belgium, Holland, and Spain, all of which gave legislative approval to same-sex marriage slightly in advance of Canada. Nor can social, political, and legal developments be easily disaggregated one from the other. High-profile *Charter* judgments may indeed embolden or even compel legislators to dismantle legal forms of discrimination – as in the case of same-sex marriages²⁰² – but such judgments may themselves result from changing social attitudes that allow or encourage judges to abandon old taboos and legitimate new forms of social relations. Moreover, such attitudinal changes do not necessarily occur spontaneously. They may be provoked by social activism, made poignant by literary or dramatic representations, and valorized by media exposure and discussion.

Does the *Charter*, then, matter to gays and lesbians in the sense in which we have been asking that question throughout this essay? What is the significance of the fact that they have made gains equal to or greater than those in some countries with no *Charter* equivalent or, like the United States, with different litigation outcomes? Are gays and lesbians less susceptible than other equality-seeking groups to the forces of political economy whose power we discuss in the conclusions of this essay? We do not know the answer to these

²⁰¹ Human Rights legislation in a number of Canadian jurisdictions was amended to provide protection against discrimination based on sexual orientation before the Supreme Court's decision in *Egan (ibid.)*, which extended *Charter* protection to gays and lesbians. See e.g., *An Act to amend certain Ontario Statutes to conform to section 15 of the Canadian Charter of Rights and Freedoms*, S.O. 1986, c. 64, s. 18; *Human Rights Amendment Act, 1992*, S.B.C. 1992, c. 43, ss. 2-7; *An Act to Amend the Human Rights Act*, S.N.B. 1992, c. 30, ss. 1, 3-8; *An Act to Amend Chapter 214 of the Revised Statutes, 1989, the Human Rights Act*, S.N.S. 1991, c. 12, s. 5.

²⁰² Following a favourable response to its reference to the Supreme Court in *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75; [2004] 3 S.C.R. 698, the federal government passed *The Civil Marriage Act*, S.C. 2005, c. 33, which expands the common-law definition of "civil marriage" to include same-sex couples.

questions, but certainly view them as appropriate for further inquiry.

V. LEGAL AND DUE PROCESS RIGHTS: PROTECTION AGAINST ABUSE BY STATE OFFICIALS

Charter protections for legal rights have given rise to considerable controversy. Since such protections are most often invoked in criminal proceedings, the *Charter* is perceived to have shifted the balance towards protecting the rights of the accused and away from ensuring the effective operation of the justice system. Typically, critics of the *Charter* claim that, under its influence, conviction rates have decreased, that those who are convicted are dealt with less harshly, and that the public is exposed, as a result, to a greater risk of harm from criminal activity. These are striking claims, and one would expect them to be supported by some kind of persuasive evidence. However, not only is such evidence lacking, but some scholars maintain that during the *Charter* era the state has become neither less efficient nor more reticent about locking up society's undesirables. Michael Mandel demonstrates, for instance, that despite the enlarged procedural protections that *Oakes*²⁰³ supposedly afforded persons accused of drug offences, convictions under the *Narcotic Control Act*²⁰⁴ did not diminish during the *Charter* era. On the contrary, convictions for possession for the purposes of trafficking rose by 19 percent from 1982 to 1986, while convictions for trafficking and for possession rose by 28.9 percent and 78.3 percent respectively.²⁰⁵ Moreover, the length of sentences and the rigour of probation conditions also increased steadily from the mid-1970s,²⁰⁶ while prison sentences in the 1980s were the longest in Canadian history. At the institutional level, Mandel reports, the National Parole Board was invested with new powers that resulted

²⁰³ *R. v. Oakes* (1986), 26 D.L.R. (4th) 200 (S.C.C.)

²⁰⁴ R.S.C. 1985, c. N-1 (Repealed, 1996, c. 19, s. 94).

²⁰⁵ Mandel, *supra* note 6 at 196-97. In 2002, the police-reported rate of total drug offences continued a nine-year climb, due in part to the advent of new synthetic substances but also to an increase in cannabis offences, which constituted three in four drug incidents that year. Most cannabis-related offences were for simple possession, the incidence of which had doubled since 1991. The 93,000 drug incidents reported in 2002 constituted a 3 percent increase over the previous year and marked a twenty-year high. Statistics Canada, "The Daily: Crime Statistics" (24 July 2003), online: <<http://www.statscan.ca/Daily/English/030724/d030724a.htm>>.

²⁰⁶ Mandel, *supra* note 6 at 220.

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in the proportion of the population under criminal sentence restrictions outstripping by fourfold the Depression-era figure.²⁰⁷ The number of police per capita has also grown which, as Mandel notes, might itself account for much of the increase in reported crime.²⁰⁸ In somewhat similar fashion, the *Askov*²⁰⁹ decision (in which a section 11(a) *Charter* challenge resulted in the dismissal of 50,000 pending criminal charges) created political pressure in Ontario for spending increases of \$86 million per year from 1989 to 1992, in order to build new courtrooms and appoint additional judges and Crown prosecutors.²¹⁰ During roughly the same period, far from falling because of the supposed effect of “accused-friendly” *Charter* rulings, the prison population increased by 27 percent and the probation population by 30 percent.²¹¹

²⁰⁷ *Ibid.* at 220-21.

²⁰⁸ *Ibid.* at 221.

²⁰⁹ *R. v. Askov* (1990), 59 C.C.C. (3d) 449 [*Askov*].

²¹⁰ Mandel, *supra* note 6 at 226-27.

²¹¹ *Ibid.* at 227. According to the Canadian Centre for Justice Statistics, federal justice spending (in constant 1986 dollars), which had decreased significantly from 1983-1984 to 1985-1986 and remained at this level for several years, rose once again to its 1983-1984 level in 1991-1992, where it remained before dropping from 1993-1994 to 1994-1995. Interestingly, while Mandel attributes increased justice spending in Ontario in the early 1990s to the *Askov* fallout, increased federal spending on the justice system at the same point in time mirrored federal increases in health and social services, which followed the same brief arc described above between 1991 and 1995. Though total justice spending followed this pattern, its constituent parts did not: spending (in current dollars) on police increased steadily from 1985-1996 at around \$3.3 billion to level off at \$5.8 billion in 1994-1995. Court costs also climbed steadily from over \$600 million in 1988-1999 to peak at under \$900 million by 1992-1993 and drop gradually to just over \$800 million in 1994-1995. Canadian Centre for Justice Statistics, *The Juristat Reader: A Statistical Overview of the Canadian Justice System* (Toronto: Thompson Educational Publishing, 1999) at 5-7. Following the decline in 1994-1995, total justice spending increased over the next several years, though not dramatically, from just under \$10 billion in 1996-1997 to \$11.1 billion by 2000-2001. The bulk of this expense continued to be related to policing, which over the same period rose from approximately \$5.9 billion to \$6.8 billion. The cost of courts rose from \$859 million to over \$1 billion, while spending on prosecutions climbed from \$265 million to \$335 million. The only area of justice spending in which federal expenses decreased over the five-year period was in contributions to legal aid plans, which dropped sharply from \$536 million in 1996-1997 to \$455 million the following year, and gradually increased over the remaining period to reach \$512 million in 2000-2001. Statistics Canada, “Justice

A more recent examination by Kent Roach argues that the long-term effect of *Charter* legal rights and the resulting focus on due process has been to increase the efficiency and legitimacy of plea bargaining, which he argues is typical of a “crime-control model” of justice – the most repressive of the models in his taxonomy.²¹² Roach describes the overall effect of the *Charter* as an increase in crime control; for instance, when courts invalidated warrantless searches under *Charter* as unreasonable, legislatures responded by making them legal.²¹³ Prison counts increased by 50 percent and other forms of punishment by 60 percent in the first ten years of the *Charter*, and imprisonment rates under the *Young Offenders Act*²¹⁴ increased despite a public perception of leniency resulting from the act.²¹⁵ He

Spending,” online: Statistics Canada <<http://www.statscan.ca/english/Pgdb/legal13.htm>>. This drop reversed a decade-long trend that had seen legal aid spending more than triple from 1984-1985 to 1994-1995. Canadian Centre for Justice Statistics, *ibid.* at 9.

²¹² Kent Roach, *Due Process and Victims' Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at 113 [Roach, *Due Process*].

²¹³ *Ibid.* at 313.

²¹⁴ R.S.C. 1985, c. Y-1 (Repealed, 2002, c. 1, s. 199) [*Young Offenders Act*].

²¹⁵ Roach, *Due Process*, *supra* note 212 at 313. A recent survey of twenty years' data suggests that the average rate of apprehended youths actually *charged* by police was 27 percent higher from 1986-1996 than in the 1980-1983 period, a jump the authors suggest was directly attributable to the introduction of the *Young Offenders Act* and a consequent “reduction in the use by police of informal means – that is, in police discretion” in dealing with young offenders. Peter J. Carrington, “Trends in Youth Crime in Canada, 1977-1996” (1999) 41 *Canadian J. of Criminology* 1 at 18. See also Peter J. Carrington, “Changes in Police Charging of Young Offenders in Ontario and Saskatchewan after 1984” (1998) 40 *Canadian J. of Criminology* 153. Comparative survey data reveals that for the period 1995 to 1998 youths were more likely to be convicted of at least one charge per case than were adults, and were more likely to receive custodial sentences. John Howard Society of Alberta, “Harsh Reality of the Young Offenders Act” (1999), online: <<http://www.johnhoward.ab.ca/res-pub.htm#post>> at 2. For each of these years, the majority of adults convicted received custodial sentences of less than one month, while an even greater majority of young offenders were sentenced to one-to-six months' custody. *Ibid.* at 5. This discrepancy may be accounted for in part by the fact that custodial sentences are often used by courts as a means of rescuing young offenders from homelessness or precarious home lives, but it also stems from the indeterminacy of the Act itself, which “does not provide a consistent statement of [its] intent in its Declaration of Principle. Consequently, youth court judges have had more

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notes generally that the actual impact of *Askov* in terms of amnesty for criminals was smaller than reported, since in many cases several of the charges dismissed were against the same individuals²¹⁶ and that the “due process revolution” did not lead to the decriminalization of “victimless crimes.”²¹⁷

Indeed, the dynamic of the criminal justice system, even during a period of dramatic *Charter* litigation, may be largely uninfluenced by legal developments. This seems, at least, to be the working hypothesis of a 2001 report by the Canadian Centre for Justice Statistics. The report – which does not even mention the *Charter* or legal rights – instead probes for correlations between criminal statistics and environmental factors including unemployment, education, divorce rates, population density, and migration.²¹⁸ While such correlations are not easily established (as will be seen below), many statistical indicators – including crime rates, conviction rates, legal aid applications, and incarceration rates – exhibit a singular trend. The total crime rate fluctuates throughout the *Charter* era but peaks dramatically around 1991.²¹⁹ Criminal charges against youths follow the same pattern.²²⁰ “Clearance rates” – offences resulting in the laying of charges – follow the general pattern described above, although they peak slightly earlier, with the highest number of

freedom since the introduction of the *Young Offenders Act* to sentence youths based on a multitude of conflicting principles.” *Ibid.* at 9. See also John Howard Society of Alberta, “Youth Crime in Canada: Public Perception vs. Statistical Information” (1998), online: <<http://www.johnhoward.ab.ca/res-pub.htm#post>>.

²¹⁶ Roach, *Due Process*, *ibid.* at 92-93.

²¹⁷ Soliciting, hate propaganda, pornography, gambling, drugs, and suicide stayed on the books; abortion is an exception to this, having narrowly avoided recriminalization following *Morgentaler*, *supra* note 140. *Ibid.* at 148-50.

²¹⁸ Canadian Centre for Justice Statistics & Statistics Canada, *Graphical Overview of the Criminal Justice Indicators 2000-2001* (Ottawa: Statistics Canada, 2001) at 67-75 [CCJS & Statistics Canada]. These are presented in a series of graphs without analysis or interpretation, as are the criminal justice statistics.

²¹⁹ Property crimes in particular mirror the general trend, though violent crimes instead rise steadily from 1977 through to 2001. *Ibid.* at 2. For actual number of charges against adults per year, see *ibid.* at 14. Despite the steady increase in violent crime, the homicide rate, while fluctuating greatly, ends the period lower than it began, having stood at 3/100,000 compared to just over 1.75 by 2001. *Ibid.* at 4.

²²⁰ *Ibid.* at 10-12.

charges per 100,000 occurring in 1989 (nearly 25,000). A steady decline from 1983 through 2001 in charges for crimes involving property is offset by steady increases in charges for violent and other crimes.²²¹ Applications for legal aid begin at around 600,000 in 1983-1984, crest to nearly 1,200,000 by 1992-1993, and drop to over 800,000 by 2000-2001. Application acceptance levels mirror this trajectory, although by the period's end successful applications as a percentage of applications appears to have dropped.²²²

On the other hand, some indicators do vary from the general pattern. Average probation counts, which peak at around 100,000 per year in 1992-1993, do not subside; they stay high through the decade, reaching their highest level at about 110,000 in 1997-1998.²²³ Average counts of "actual-in" federal inmates rise steadily throughout most of the *Charter* era.²²⁴ Interestingly, the numbers of cases heard and of cases resulting in "guilty" verdicts both dropped steadily from 1994-1995 to 2000-2001.²²⁵ The number of admissions to provincial correctional institutions also departs from the general pattern in that it declines over the *Charter* period. However, the rate of *remand* admissions (or persons waiting trial) generally begins much lower than the sentenced rate in 1978-1979 (approximately 56,000) and increases throughout the pre-*Charter* and *Charter* periods. The end result, in which remand admissions (118,566) exceeded sentence admissions (80,928) by 2000-2001, stands in stark contrast to 1982-1983, when there were more than twice as many sentenced admissions as remanded.²²⁶ Average counts of adults in provincial institutions show the same pattern, a growing contrast between sentenced and remanded inmates.²²⁷ Provincial and territorial rates of sentenced and remand incarceration follow a similar trajectory to those at the federal level, in that the sentenced rate peaks in 1992-1993 and declines through to 2000-2001, while the remand rate rises consistently from 1986-1987 through to 2000-2001. This change amounts to a 37 percent increase in the proportion

²²¹ *Ibid.* at 19.

²²² *Ibid.* at 37.

²²³ *Ibid.* at 62.

²²⁴ *Ibid.* at 59.

²²⁵ The total number of cases dropped from 446,086 to 375,466 while the number resulting in "guilty" verdicts began at 270,874 and ended at 226,979. *Ibid.* at 22.

²²⁶ *Ibid.* at 54.

²²⁷ *Ibid.* at 56.

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of total incarcerations due to remands, and a 75 percent increase in the number of remand incarcerations over the bulk of the *Charter* period. Remand admissions matched sentenced by 1996-1997 and have continued to increase as sentenced admissions have declined.²²⁸ The duration of time spent on remand also increased steadily from 1990-1991 to 2000-2001, and the proportion of remand times exceeding three months has more than doubled.²²⁹ Overall, environmental and demographic factors appear to offer few compelling explanations for the crime trends described above.²³⁰ Assuming the *Charter* is indeed also irrelevant to the changes in crime statistics, the only exogenous factors remaining would seem to be shifts in the politics and administrative practice of policing.²³¹

Anecdotal, rather than statistical evidence may, however, suggest a new hypothesis. In some respects the *Charter* era, far from witnessing enhanced respect for the newly entrenched “principles of fundamental justice” (section 7), has arguably coincided with a retreat from those principles. Royal commissions, public inquiries, and academic commentators, for example, have documented significant instances of police abuse.²³² Force has been heavy-

²²⁸ Canadian Centre for Justice Statistics, “Juristat: Custodial Remand in Canada, 1986/87 to 2000/01” (7 November 2003), online: Statistics Canada <<http://www.statscan.ca>> at 6-7.

²²⁹ *Ibid.* at 12. For individual provincial and territorial remand and sentenced figures, see *ibid.* at 18-19.

²³⁰ The unemployment rate for men, for example, does peak around 1992 to 1993 as does the crime rate; however, even higher peaks are seen in 1983 and 1997, when crime rates were comparatively much lower than in 1992-1993. Economic performance (measured here in terms of gross domestic product), often linked inversely with criminal activity, did improve from 1993 to 2001 as the crime rate dropped, though there is no dip in performance by 2001 to account for the slight upturn in crime in the same year. The divorce rate bears no correlation to crime rates *in general*, having peaked in 1987 and dropped steadily through to 1997 as the total crime rate was rising. The rate of children born to teenagers was also in decline as crime rates peaked. Population growth in urban centres increased consistently from 1992 to 2000 but did not reach its most dramatic rate until 1995, by which time crime was in decline. CCJS & Statistics Canada, *supra* note 218 at 67-74.

²³¹ See 51-52, above.

²³² Nova Scotia, Royal Commission on the Donald Marshall, Jr. Prosecution & T. A. Hickman, Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations (Halifax, N.S.: The Commission, 1989); Ontario Human Rights Commission, *Paying the Price: The Human*

handedly deployed to control and disrupt peaceful political demonstrations.²³³ The post-9/11 security state has become

Cost of Racial Profiling – Inquiry Report (Toronto: Ontario Human Rights Commission, 2003); AFN, “Socio-Economic Exclusion,” *supra* note 58; Commission on Systemic Racism in the Ontario Criminal Justice System, Report of the Commission on Systemic Racism in the Ontario Criminal Justice System (Toronto: Queen’s Printer for Ontario, 1995); and Toni Williams, “Racism in Justice: The Report of the Commission on Systemic Racism in the Ontario Criminal Justice System” in Susan C. Boyd, Dorothy E. Chunn & Robert J. Menzies, eds., (Ab)Using Power: The Canadian Experience (Halifax: Fernwood Publishing Company Limited, 2001) 200. As of 2002, The Association for the Defence of the Wrongly Convicted (AIDWYC) reported no fewer than thirty-five exonerated and pending cases of wrongful conviction. Association in Defence of the Wrongly Convicted, “The Innocence File” (2002) 2 The AIDWYC Journal 8, online: <<http://www.aidwyc.org/Journal2.pdf>> at 8. Among the most common factors in cases of wrongful conviction: a “[h]igh level of community pressure on the police to apprehend a suspect,” and “‘tunnel vision’ in the investigation.” Lawrence Greenspon, “Disclosure of Evidence” (2002) 2 The AIDWYC Journal 10, online: <<http://www.aidwyc.org/Journal2.pdf>> at 10.

²³³ See generally, W. Wesley Pue, ed., *Pepper in Our Eyes: The APEC Affair* (Vancouver: University of British Columbia Press, 2000); Canada, Commission for Public Complaints Against the RCMP & E. N. Hughes, Commission Interim Report Following a Public Hearing into the Complaints Regarding the Events That Took Place in Connection with Demonstrations During the Asia Pacific Economic Cooperation Conference in Vancouver, B.C. in November 1997 at the UBC Campus and at the UBC and Richmond Detachments of the RCMP (Ottawa: Minister of Public Works and Government Services, 2001). Commissioner Hughes was critical of the extent to which security concerns may infringe *Charter* freedoms:

[N]either the federal government nor the RCMP may curtail political criticism by protesters. The right to express political views lies at the very core of the freedom of expression provided for in the Charter. The fact that a visiting leader may be merely upset or angered by the expression of contrary political views and criticism by Canadians does not justify the suppression of such expression.

Quoted in Trevor C.W. Farrow, “Negotiation, Mediation, Globalization Protests and Police: Right Processes; Wrong System, Issues, Parties and Time” (2003) 28 Queen’s Law J. 665 at 687. As Farrow notes, despite these findings, even the most peaceful of the subsequent international meetings continued the trend of constitutionally indefensible measures:

[V]iolation of freedom of expression is exactly what occurred at the

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entrenched in legislation (though not yet subjected to *Charter* challenges),²³⁴ and increasing police militancy has both undermined attempts at civilian control of abuse and encouraged “law and order politics” at the very moment when falling crime rates might have justified more lenient public policies.²³⁵

June 2002 G8 Summit in Alberta. Given the indiscriminate breadth of the Summit shutdown and the resulting total inability of protesters to gain any kind of meaningful access to the Summit meeting sites, this shutdown was likely, at least in part, an unconstitutional infringement of speech and assembly. Toronto Video Activist Collective, *Tear Gas Holiday: Québec City Summit 2001*, Jungli Seiko, Mari Leesmen & Malcolm Rogge, eds., (Toronto: TVAC, 2003).

²³⁴ *Anti-terrorism Act*, S.C. 2001, c. 41. Scholars have pointed to the potential of this legislation to interfere with civil rights. See Sujit Choudhry & Kent Roach, “Racial and Ethnic Profiling: Statutory Discretion, Constitutional Remedies, and Democratic Accountability” (2003) 41 *Osgoode Hall Law J.* 1; Reem Bahdi, “No Exit: Racial Profiling and Canada’s War against Terrorism” (2003) 41 *Osgoode Hall Law J.* 293; and W. Wesley Pue, “The War on Terror: Constitutional Governance in a State of Permanent Warfare?” (2003) 41 *Osgoode Hall Law J.* 267 [Pue]. In addition, a recent Canadian Bar Association report documented the almost-immediate use of the new legislation by law enforcement agencies to justify the criminalization of political dissent and racial profiling. See International Civil Liberties Monitoring Group (ICLMG), “In the Shadow of the Law: A Report by the International Civil Liberties Monitoring Group (ICLMG) in response to Justice Canada’s 1st annual report on the application of the *Anti-Terrorism Act* (Bill C-36)” (14 May 2003), online: Canadian Bar Association <<http://www.cba.org/CBA/News/PDF/Shadow.pdf>>, cited in Pue, *ibid.* at n. 11 [ICLMG].

²³⁵ Dianne Martin documents a case in which 192 files “alleging serious misconduct” against members of the Metro Toronto Police Force escaped scrutiny because the Metro Police’s Internal Affairs “routinely failed to notify the Police Complaints Commissioner” when complaints were received, in a bid to “drastically limit the scope of the PCC to inquire into misconduct” via “[i]nternally developed practices and procedures, designed to ensure that the vast majority of serious allegations of misconduct would be beyond civilian review.” Ray Kuszelewski & Dianne L. Martin, “The Perils of Poverty: Prostitutes’ Rights, Police Misconduct, and Poverty Law” (1997) 35:4 *Osgoode Hall Law J.* 835 at 857. An American scholar who documents the draconian punishments for criminal youth involved in the drug epidemic of the 1980s notes with respect to analogous provisions under Canadian law that a decrease in violent crime and in the drug trade in the late 1990s had largely eliminated the need for such laws: “People have reason to feel safer. At least the objective conditions for tough-on-crime, send-them-to-prison approach

We earlier suggested that we would not try to demonstrate causal relations between the adoption of the *Charter* and the developments in the areas of Canada's social and political life that it was meant to address. However, these anecdotes, along with data presented above, at least suggest the need to investigate an hypothesis: that the *Charter* era not only coincided with a toughening of attitudes, policies and behaviours in the criminal justice system, but may actually have caused them. Mandel, for one, suggests that the *Charter*-based ruling in *Askov* in the late 1980s may have triggered an increase in state expenditure on the criminal justice system, which in turn may have had the short-term effect of increasing the Ontario prison and probation population. Such changes fuel a perceived increase in crime, which in turn provides a justification for repressive crime-control strategies. Bogart's examination of capital punishment in the United States suggests a similar punitive logic at work:

There are myriad complaints that the spreading of rights, including through the courts, has not been accompanied by a corresponding observance of responsibilities. Perhaps the criminal justice system, administered by the courts, has become the misplaced repository for an unfocused but determined insistence on such responsibility. If individuals have so many rights, then they alone are responsible for their criminal acts – and deserve to be punished, to lose their freedom.²³⁶

If this hypothesis can be sustained, the real-life consequences of the *Charter* would seem to have been to leave citizens more, rather than less, exposed to abuse and injustice. What an irony if indeed it should turn out that the *Charter* may have confounded both the fears of “law and order” hard-liners and the hopes of idealistic advocates of procedural due process.

have been undermined.” Wayne N. Renke, “Sensible Justice: Alternatives to Prison, by David C. Anderson,” Book Review of *Sensible Justice: Alternatives to Prison* by David C. Anderson (1999) 37 *Alberta Law Rev.* 823 at 827. A Canadian author notes that neoconservative denunciations of the perceived “appalling” increase in violent crime as a justification for the “predictable litany of needed get tough reforms” blatantly overlook the fact that, “rather than demonstrating a troubling increase, crime rates generally have declined steadily for the past several years.” Dianne L. Martin, “Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies” (1998) 36 *Osgoode Hall Law J.* 151.

²³⁶ Bogart, *Consequences*, *supra* note 43 at 161.

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Of course, not all infringements of citizens' legal rights occur within the criminal justice system. Other domains of state action may be sites of equally egregious violations. Indeed, it is possible to argue that while the criminal justice system deals with a relatively small "clientele," a much greater number of Canadians experience the coercive power of the state in their encounters with various public bureaucracies that determine the quality of their daily lives. Thus, the way in which people are treated by welfare officers, tax collectors, immigration officials, health departments and school boards may ultimately determine the quality of their "life, liberty and [the] security of [their] persons" – the substantive interests sought to be protected by "the principles of fundamental justice" whose application is mandated by the *Charter*.²³⁷

Once again, we are in no position to offer statistics or, for that matter, even anecdotal evidence. At best, we can suggest two hypotheses that may be worth investigating. The first is that worthy state projects – designed to promote *Charter* values or other progressive and humanitarian ideals – may falter or fail because they are badly conceived, designed, administered, or funded. Human rights commissions, for example, are often overwhelmed by huge caseloads, in part because their efforts have publicized the availability of recourse to "clients" who previously thought they had none.²³⁸ In addition, like any agency with finite resources, they

²³⁷ *Charter*, *supra* note 1, s. 7.

²³⁸ The most comprehensive recent account of human rights commissions in Canada documents the expansion of commission caseloads over several decades, attributing growth to the continual increase in legislation protecting human rights, expansive judicial interpretations of these protections, and the increase in responsibilities entrusted to commissions over time. The authors note that the Ontario commission processed only forty-five cases in its inaugural year (1962-1963), but by the late 1970s the number exceeded 1,000 and had passed 2,500 per year by the mid-1990s. R. Brian Howe & David Johnson, *Restraining Equality: Human Rights Commissions in Canada* (Toronto: University of Toronto Press, 2000) at 71 [Howe & Johnson]. As of March 2003, this figure stood at 2,137. Ontario Human Rights Commission, *Annual Report 2002-2003* (Toronto: Ontario Human Rights Commission, 2003), online: <<http://www.ohrc.on.ca/english/publications/index.shtml>> at 6 [Howe & Johnson]. While several provincial commissions experienced fluctuations in caseload over the course of the *Charter* era, most were handling considerably more cases by 1996-1997 than in 1982-1983 (with only Manitoba handling fewer; interestingly, Québec's commission, while handling nominally more cases at the end of this period than at the beginning,

assign priorities to some initiatives over others. Since they find it difficult to turn away individual complainants, they typically focus their attention and energy on processing and prosecuting such complaints. Thus, a pattern often emerges: strategic educational programs or systemic interventions are sacrificed;²³⁹ individual complaints grow to the point where they cannot be dealt with promptly; delays engender public and political criticism; pressures mount to clear the backlog; and the commission responds by dismissing marginal claims or diverting them to other *fora*, by pressuring complainants to accept settlements, and by avoiding complex litigation that might settle issues of principle. In the end, ironically, the human rights commission itself comes to be regarded with suspicion by its “clients” and with dismay by its natural allies in government or civil society, accused of neglecting the fundamental justice it owes to its client groups, the same groups whose equality claims are enshrined in the *Charter*. Similar disillusionment may set in with social assistance programs, public schools, and health care systems. And not without reason: such programs and agencies are statistically likely to perform below expectations, to resort to expedient but unprincipled measures, and sooner or later, therefore, to become candidates for *Charter* scrutiny and litigation.

One arena in which this pattern has manifested itself is the processing of immigrants and refugees, although in this instance *Charter* litigation features as root cause rather than inevitable result. The prospects for people attempting to immigrate to Canada may

experienced a drop from 2,002 cases in 1980-1981 to 1,409 by 1996-1997). The federal commission’s caseload increased from 447 to 2,025 during this time. Early commission work focussed almost exclusively on race-related discrimination; the advent of legislated protection against sex discrimination meant that by 1995-1996 the majority of claims dealt with by Ontario’s commission were gender-related (27 percent, compared to 23 percent for race-related complaints). *Ibid.* at 71-73.

²³⁹ The workload of the Ontario Human Rights Commission provides a case in point: the number of educational initiatives initiated by the Commission stood at 1,725 in 1980-1981; by 1990-1991, it had dropped to a mere 332. While other provincial commissions may not reflect a similar decline, at their highest points, the British Columbia, Saskatchewan, and Manitoba commissions undertook nowhere near a comparable number of programs. British Columbia, for instance, began with fifty-two programs and by 1990-1991, though it had nearly quadrupled its efforts to 200, still offered less than one-eighth the number in Ontario a decade earlier. Howe & Johnson, *ibid.* at 74.

actually have worsened due to the well-intentioned decision by the Supreme Court in *Singh*,²⁴⁰ which held that the *Charter* applied to all claims processed within Canada. Michael Mandel notes that the rate of successful refugee claims rose from 33 percent in 1985 – before *Singh* – to 76 percent in 1989, but then dropped to 48 percent in 1993 through a combination of “compassion fatigue” and changes to immigration policy.²⁴¹ It is easy enough to explain this ebb and flow. The government responded with measures designed to force claimants to obtain entrance visas abroad – beyond the reach of the *Charter* – where immigration officials cannot be challenged even if they make “arbitrary and capricious” choices with “no semblance of due process.”²⁴² Meanwhile, the *Charter* presents no obstacle to government raising immigration standards, requiring higher levels of education, and reducing its target intake for UN Convention refugees in order to accommodate a higher proportion of business

²⁴⁰ *Singh v. Canada (Minister of Employment and Immigration)* [1985], 17 D.L.R. (4th) 422 (S.C.C.) [*Singh*].

²⁴¹ Mandel, *supra* note 6 at 252-53.

²⁴² *Ibid.* at 254. A task force of the Canadian Council for Refugees reported numerous problems and noted that “failings are institutional, endemic, structural. The problems will not go away until the system itself changes.” In a 1996 survey of problems at Canada’s visa posts the Council noted the difficulties in even obtaining a clear picture of Canada’s refugee intake process:

The very fact that the posts are overseas means that they cannot be subject to the close scrutiny afforded to in-Canada processes. The information is scattered around the world. Refugees, because of their vulnerability, are among those least likely to lodge complaints. Those who are accepted and resettle in Canada are on balance likely to have had better experiences than those who were rejected, whose complaints, if they have them, will probably never reach the NGOs.

This survey reported concerns that access to some posts was “severely limited,” that decisions taken by immigration officials “appear to be arbitrary,” and that “treatment of refugees is sometimes biased by considerations such as their colour, their wealth or their professional or educational background.” Canadian Council for Refugees, “State of Refugees in Canada” online: Canadian Council for Refugees <<http://www.web.net/~ccr/state.html#Introduction>> [Canadian Council for Refugees, “State of Refugees in Canada”].

immigrants within its overall annual goals.²⁴³ Moreover, recent figures suggest that even refugees who reach Canada are often denied the procedural rights supposedly guaranteed by *Singh*. A report by the Canadian Council for Refugees notes Canada's participation in a "disturbing international trend" in the increase in detention of refugees.²⁴⁴ There are early indications that treatment of

²⁴³ Mandel, *supra* note 6 at 255. Absolute numbers have fluctuated over the past two decades – the total immigration in 1982 stood at 121,330, peaked at 256,757 (in 1993), and stood at 222,411 at 2001. However, the percentage of refugee immigration dropped from 20.1 percent in 1985 to a record low of 8.3 percent in 1994, rebounding slightly by the end of the decade to rest at 12.5 percent by 2001. Canadian Council for Refugees, "Immigration to Canada, 1979-2001," online: <<http://www.web.ca/~ccr/immstats.html>>. Canadian refugee intake through the mid-1990s also reflected a European bias, with European refugees constituting the largest percentage of those resettled in Canada from 1993 to 1996, at rates that consistently outstripped the European share of the world's refugee population. This bias came at the expense of refugees from Africa and especially the Middle East, groups consistently under-represented in Canada's resettlement program. The Canadian Council for Refugees notes that this disproportion was due in part to the efforts to resettle refugees from the former Yugoslavia but was "also likely a result in part of the greater concentration of Canadian visa offices and staff in Europe than in other regions of the world." *Ibid.* The former explanation could possibly account for the fact that Europeans constituted 51.5 percent of refugees resettled in Canada in 1994, at a time when the United Nations assessed the European proportion of global refugee resettlement need at 40.1 percent, and possibly also the fact that in 1995 those figures were 62.5 percent and 38.5 percent, respectively; nevertheless, it fails to explain the extreme discrepancy in 1993, when Canada's resettlement was 26.3 percent European while the proportional need for European resettlement stood at just 0.28 percent. In that year, Canada resettled over 3,000 European refugees when the U.N. recognized the need for only 200 European resettlements worldwide. Canadian Council for Refugees, "Refugees Worldwide, Assessment of Global Resettlement Needs and Resettlement in Canada: Statistical Overview 1993-1996" (February 1997), online: <<http://www.web.net/%7Eccr/stat1.htm#cont>>.

²⁴⁴ Detainees under Canadian law may be held on grounds that they present a risk of flight or a danger to the public, or because their identity is in question. The Council notes that the effect of the replacement of the 1978 *Immigration Act* with the *Immigration and Refugee Protection Act* in 2002 on detention rates is not yet ascertainable. Canadian Council for Refugees, "State of Refugees in Canada." *Supra* note 242. While the average number of days a refugee was detained in Canada fluctuated wildly and stood lower in 2000-2001 than it had in 1996-1997 (a drop from just over twenty-one days to just under twenty-one days), the total number of days detained jumped from 138,481 in 1996-1997

this sort will become increasingly common in Canada as a result of policies prompted by new anti-terrorism initiatives.²⁴⁵

The second hypothesis builds on the first. Not only is it the fate of public agencies to fall short of expectations, but that fate has been hastened and made more certain by neo-liberalism. As neo-liberal policies have reduced public revenues and expenditures, and as neo-liberal politicians have disparaged the programs on which public funds were expended (and by implication their intended beneficiaries), the behaviour of those who deliver such programs has altered. Fewer resources are available to respond to needs, fewer officials are available to adjudicate claims, fewer clients are content with either outcomes or the procedures by which they are reached, and fewer recognitions or rewards flow to civil servants who are faithful proponents of now-unpopular policies.²⁴⁶ In these more

to peak at 224,423 in 1999-2000. Most troubling of all was the steady climb in the number of persons detained from 6,401 in 1996-1997 to 9,148 in 2000-2001 – nearly a 50 percent increase over five years. Canadian Council for Refugees, “Detention Statistics” (undated), online: <[http://www.web.net/~ccr/Detention Statistics.htm](http://www.web.net/~ccr/Detention%20Statistics.htm)>.

²⁴⁵ ICLMG, *supra* note 234 at 9.

²⁴⁶ The case of human rights commissions is instructive in respect of the two hypotheses discussed in this section. As early as 1977 the Ontario commission was bemoaning a lack of sufficient funds to address the doubling of its caseload, a tripling of its community relations programs, an increase in the complexity of discrimination cases, and the resulting increased legal costs this entailed. Funding for the federal commission decreased by 8 percent in 1993 and a further 9 percent in 1997; for provincial commissions, the decline began in the 1980s and continued through the 1990s, with only Ontario, Québec, and Prince Edward Island seeing a temporary increase in the late 1980s (followed by a protracted decline over the early-to-mid-1990s). Howe & Johnson, *supra* note 238 at 76-79. Howe and Johnson explain the impact of the fiscal restraint which characterized the *Charter* era on the operations of the commissions:

Common problems were these: inadequate commission staff due to hiring freezes or lay-offs; increased delays in responding to formal complaints; case backlogs; and difficulty carrying out new responsibilities in areas such as affirmative action, race relations, and systemic discrimination. These problems led to sluggish human rights operations and to the symbolic (rather than substantive) treatment of rights. They also lead to rising criticism by human rights advocates, minority groups, and even the officials of the underfunded commissions. These criticisms were reported periodically in the media, in the academic literature, and in Auditor General reports,

stressful conditions, we hypothesize, humane instincts are dulled, civil behaviour becomes more difficult to sustain, and systems tend to fail. By all accounts today, being a student in a school or university, a patient in a hospital, an arriving passenger under interrogation by an immigration office, or a welfare recipient seeking housing or a subsistence allowance is a more difficult, and sometimes more demeaning, experience than it used to be in the immediate pre-*Charter* years.²⁴⁷ In strict *Charter* terms, perhaps, discretionary entitlements or privileges are being diminished in all these examples, not “rights.” But those who experience abusive encounters with state officials and agencies are unlikely to make such subtle distinctions.

While data are not available to test either of these hypotheses, it seems highly improbable that the *Charter* has improved the quality of “fundamental justice” experienced by millions of ordinary citizens who are exposed on a daily basis to the risk of casual, personal, and systemic abuse by state bureaucracies.

VI. POLITICAL AND CULTURAL PLURALISM

One of the ambitions of the *Charter* was to reinforce and enhance

interest group briefs, and legal cases.

Ibid. at 79. Recall, also, the disappointment expressed by feminist scholars with respect to the pace of women’s progress in the *Charter* period. *Supra* note 118.

²⁴⁷ Here again, the example of human rights is revealing. A “report card” distributed in 1997 to stakeholders including “equality-seeking groups and advocacy organizations,” “employer organizations and business groups,” and “human rights officials and commissions staff” rated the commissions according to criteria including accessibility, promptness, objectivity, fair procedures, and compensation. Nearly all provincial commissions received an overall grade of “C.” Those remaining – the Ontario, Manitoba, and federal commissions – all scored a “D.” Survey responses from equality-seeking and advocacy groups (which sponsor individual human rights complainants, who are the commissions’ clientele) yielded the following generalizations: “commission staff are highly complacent, a result of decreased morale. . . . Human rights staff are too willing to screen out ‘trivial’ cases, and when they do accept complaints, they too often give them inadequate attention and investigation. Human rights officers try too hard to discourage complainants from initiating complaints and, once initiated, from continuing on with them.” Howe & Johnson, *ibid.* at 138-43.

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the democratic character of Canadian society through the protection of both political freedoms and cultural and social expression. It is extremely difficult to provide an empirical foundation for qualitative assessments in either area. However, we will provide at least some suggestive evidence.

It at least seems clear that if greater political freedom exists in Canada following adoption of the *Charter*, fewer Canadians wish to avail themselves of it. Voter participation in federal elections – the crudest measure of the health of our political democracy – fell from 76 percent in 1979 to 61 percent in 2000,²⁴⁸ and marginally again to 60.5 percent in 2004.²⁴⁹ Turnout at the provincial level shows no decisive trend but certainly evidences no *Charter*-inspired frenzy to participate.²⁵⁰ Increased abstention from voting seems to correlate closely with diminished confidence in or respect for politics and politicians.²⁵¹ Thus, while in 1968, only 26 percent of

²⁴⁸ Centre for Research and Information on Canada, *Voter Participation in Canada: Is Canadian Democracy in Crisis?* (2001), online: <http://www.cric.ca/pdf/cahiers/cricpapers_nov2001.pdf> at 4 [CRIC, *Voter Participation*]. This study notes that turnout in other democratic countries has similarly declined; for example, participation in the United Kingdom's 2001 election was lower than in Canada's 2000 federal contest. Turnout in the United States "has not changed much over the last 30 years, but it was already very low to begin with." *Ibid.* at 6. One commentator summarizes Canada's performance as "near the bottom of the industrialized-world turnout league tables. . . . Canada has never had a peculiarly high turnout, but the gradual decline from the 1960s to the 1980s, followed by the precipitate drop in the 1990s, has taken us from the lower middle of the pack to near the very back." Richard Johnston, "Canadian Elections at the Millennium," *Choices* 6:6 (September 2000) at 13, cited in CRIC, *Voter Participation*, *ibid.* at 6.

²⁴⁹ Linda McKay-Panos, "Right to Vote" (2004) 29:2 *Law Now* 38 at 38.

²⁵⁰ A 2001 study comparing election results from the 1980-1989 period to the 1990-2001 period reveals that "turnout has declined in five provinces, risen in three provinces, and remained unchanged on two. . . . Where turnout has increased, the size of the increase has been relatively small. . . . Average turnout has not changed significantly in Ontario or Alberta, but the level of participation in those provinces (respectively, 58 percent and 53 percent at the most recent elections) nonetheless is very low." CRIC, *Voter Participation*, *supra* note 248 at 5.

²⁵¹ Interestingly, public confidence in the House of Commons has become less polarized, while confidence in political parties has become far more so. In 1979, 38 percent of respondents had a "a great deal" of confidence in the House while only 15 percent had "very little"; by 2001, these numbers stood at 24 percent and 26 percent respectively. Political parties commanded "a

Canadians believed that government leaders were “crooked,” by 1997 the number had more than doubled to 55 percent.²⁵² In 1968, 51 percent were prepared to say that the national government cared what they thought; by 2001 that number had fallen to 27 percent.²⁵³ In 1997, only 18 percent of university students expressed a preference to work in the federal public service, while 64.8 percent were focussed on the private sector.²⁵⁴ The *Charter* has apparently failed to immunize Canadians against a growing tendency in liberal democracies to treat public processes and institutions with indifference.²⁵⁵

On the other hand, in certain respects, over the past two decades Canadian political life has become more inclusive and more

great deal” of confidence from 30 percent of respondents and “very little” from 22 percent in 1979; by 2001, these figures stood at 13 and 39 percent. *Ibid.* at 16.

²⁵² “Canadian Public Opinion on Representative Democracy,” online: Canadian Public Opinion Research Archive, Queen’s University <http://www.queensu.ca/cora/trends/tables/attitudes_toward_representative_institutions.ppt> at Figure 3. Also see Centre for Research and Information on Canada, “Citizen Participation and Canadian Democracy: An Overview,” online: <http://www.cric.ca/pwp_re/cric_studies/citizen_participation_and_cdn_democracy_aug_2003.ppt>. Somewhat perversely, confidence levels in politicians have rebounded somewhat since 1992 (with 48 percent of Canadians expressing “a great deal or some confidence” in political leaders in 2004, compared to 42 percent in 2002 and 19 percent in 1992), while belief in the honesty or ethics of these same leaders remains low (currently hovering at 23 percent, up 2 percent from 2002). CRIC, “Canadians More Confident,” *supra* note 160.

²⁵³ CRIC, *Voter Participation*, *supra* note 248 at 15.

²⁵⁴ When asked their opinions specifically about the federal public service, the largest percentage of respondents either “agreed” or “strongly agreed” that it: “Has too much bureaucracy,” “Is resistant to change,” “Is too political,” “Is too rules and process oriented,” and “Is constantly downsizing.” Jennifer L. Smith & Susan Snider, *Facing the Challenge: Recruiting the Next Generation of University Graduates to the Public Service* (Ottawa: Public Service Commission of Canada, 1998) at 82-84.

²⁵⁵ See Robert D. Putnam, Susan J. Pharr & Russell J. Dalton, “Introduction: What’s Troubling the Trilateral Democracies?” in Susan J. Pharr & Robert D. Putnam, eds., *Disaffected Democracies: What’s Troubling the Trilateral Democracies?* (Princeton, NJ: Princeton University Press, 2000) 3 at 13-21 [Putnam, Pharr & Dalton]. Some essays in this book provide comparative data for Canada.

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representative of Canada's diversity²⁵⁶ and, in that sense, more democratic. However, to put this claim in perspective, when Canada's progress can be measured against that of other countries – notably in regard to the participation of women – Canada still lags well behind relevant comparators, as noted above.²⁵⁷

In terms of changes in the concentration of political power during the *Charter* era, the picture is mixed. The federal Conservatives governed with significant majorities from 1984 to 1993, and the Liberals with similar majorities from 1993 to 2004 before slipping to a minority position in that year. Indeed, from the 1970s onward, the trend seemed to be towards greater concentration of electoral power. In 1979 and 1980, the winning parties – first the Conservatives, then the Liberals – achieved 36 percent and 44 percent of the popular vote, respectively, and held 48 percent and 52 percent of the seats in the House. However, in 1984 and 1988, the winning Conservatives received 50 percent and 43 percent of the votes and held 75 percent and 57 percent of the seats. From 1993 to 2000 (including the intervening election of 1997) the dominant Liberals remained constant at about 41 percent of the vote, while their share of seats decreased from 67 percent to 57 percent. In part, however, the apparently impregnable parliamentary majorities of the governing party resulted from the emergence of deep fault lines within the Canadian political system. Thus, whereas the Conservatives in the 1980s shared the ballot with only two other significant contenders,²⁵⁸ the Liberals faced four serious opponents in each of the subsequent elections from 1993 to 2000. The fracturing of opposition support allowed the Liberals to maintain their parliamentary dominance²⁵⁹ until 2004, when the Conservative Party of Canada (a merger of the Canadian Alliance and the

²⁵⁶ *Ibid.* at 46-47.

²⁵⁷ *Ibid.* at 36-37.

²⁵⁸ The Liberals and NDP each won in a significant number of ridings. The Social Credit Party and myriad smaller parties failed to secure a single seat. Information and Documentation Branch Library of Parliament, "Electoral Results by Party: 1867 to Date" (31 August 2004), online: <<http://www.parl.gc.ca/information/about/process/house/asp/PartyElect.asp?Language=E>>.

²⁵⁹ The Progressive Conservatives, NDP, Bloc Québécois, and Reform Party (reincarnated as the Canadian Alliance for 2000) competed in these three elections; the best showing for any one party was that of the Alliance in 2000, with 22 percent of seats. *Ibid.*

Progressive Conservatives) won sufficient votes and seats to reduce the Liberals to minority status.

At the provincial level, the evidence is likewise mixed. To mention only the largest provinces, Ontario – after forty-three years of Conservative rule – experienced four changes of government involving three different parties in six elections between 1985 and 2003, arguably a sign of a healthy democracy. British Columbia changed governments twice between 1989 and 2001, as did Québec between 1989 and 2002. However, Alberta from 1971 to the present has been governed by the same party, which has never been seriously challenged during the entire period. Overall, then, our political culture seems to have become, at different moments and in different places, both more and less robust in the years following the introduction of the *Charter* – an ambiguous conclusion that suggests that the *Charter* itself may not have figured largely in the outcome. On the other hand, at particular moments, the *Charter* itself has provoked political controversy and, to that extent, may have affected the outcome of elections. One example would be the adoption of the *Charter* itself, as part of the controversy over patriation of the Constitution, which animated the forces of Québec nationalism and arguably helped to produce the Conservative victory of 1984.²⁶⁰ Another would be the controversy over gay and lesbian marriage that featured in the 2004 campaign, most notoriously when the former Conservative justice critic provoked a backlash against his party by urging invocation of the “notwithstanding clause” to roll back legislative gains made by gays and lesbians that conservatives regard as examples of the *Charter* being “used as the crutch to carry forward all of the issues that social libertarians want [*sic*].”²⁶¹

Of course, changes in government do not necessarily produce significant changes in policy. A healthy society, it is said, is a quarrelling society. Has the *Charter* helped to make Canadian society more quarrelsome? Public opinion polls suggest that there

²⁶⁰ The “betrayal” of Québec by Canada and the other provinces spurred Québec Premier René Lévesque to publicly endorse Mulroney, and it caused the Parti Québécois to shelve its separatist agenda and devote its resources and political capital to Mulroney’s campaign. John F. Conway, *Debts to Pay: English Canada and Québec from the Conquest to the Referendum* (Toronto: James Lorimer & Company Publishers, 1992) at 126.

²⁶¹ Campbell Clark, Brian Laghi & Steven Chase “Leaders’ Last Push for Power” *The Globe and Mail* (26 June 2004) A1.

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have indeed been significant shifts in public opinion on key issues over time: on whether the health care system works, on immigration and race relations, on whether taxes are too high, and on whether Canada's relations with the United States are too friendly or antagonistic. One would hope that these shifts were the result of open debate not only within the political class but among ordinary citizens. However, the ability of ordinary citizens to reach informed opinions is very much a function of the diversity of sources of information and perspectives available to them. In this respect, pluralism has suffered a distinct setback in Canada, as a result of growing concentration of media ownership.²⁶² Content analyses of media reporting on important issues suggest that this concentration has indeed narrowed the spectrum of political and social views available to Canadians.²⁶³

²⁶² One observer described the situation with respect to print media in 2002: "From the pre-World War One period, when 138 publishers ran 138 dailies, in Canada, we have reached a situation where the largest chain currently has 34% of the national readership, five media companies cover 83% of the national circulation, and the five remaining independent owners account for less than 2%." In a trend that mirrors the situation in the United States, "[o]nly eight English markets in Canada support more than one daily newspaper, and in a couple of these, one chain owns both papers." Enn Raudsepp, "The Daily Newspaper Industry under the Microscope: Monopolies, Concentration, Conglomeration and Convergence" (June 2002) *Canadian Issues* 25 at 26 [Raudsepp]. The statistics are comparable for broadcasting, for which "[the] top five ownership groups owned 68% of all television stations in 2000, up from 28.6% in 1970. . . . [S]ingle-station ownership was far less common in 2000, with just six such entities." Canada, House of Commons, Standing Committee on Canadian Heritage, *Our Cultural Sovereignty: The Second Century of Canadian Broadcasting* (Ottawa: Standing Committee on Canadian Heritage, 2003) at 393 (Chair: Clifford Lincoln) [Standing Committee on Canadian Heritage].

²⁶³ Current levels of concentration mean that the role of daily newspapers in "establishing the public agenda and providing a forum for vigorous public debate" has "steadily diminished, and the voices that are left tend to represent an increasingly homogenous perspective on social, economic and political affairs—that of the business class." Raudsepp, *ibid.* at 26. Speaking at a recent conference on the subject, Raudsepp cited a study revealing that 75 percent of news stories in Canadian papers consisted of coverage of "canned event[s]" such as press conferences rather than reporter-originated stories. "Journalists Question Media Ownership in Canada" *The Dominion* (10 November 2003), online: The Dominion <<http://dominionpaper.ca/accounts/2003/11/10/journalist.html>>. The problem of concentration has attracted government's concern throughout the *Charter* era: see e.g., Canada, Task Force on

Ironically, the *Charter* – far from ensuring a broader diversity of media perspectives – has been invoked to protect or reinforce growing media consolidation and growing corporate financial influence within the political process. Appellate courts have impeded or struck down attempts to apply competition laws to media companies,²⁶⁴ limit campaign expenditures by well-financed single-issue lobbies,²⁶⁵ regulate the dissemination of polling results

Broadcasting Policy, *et al.*, *Report of the Task Force on Broadcasting Policy* (Ottawa: Minister of Supply and Services Canada, 1986). A more recent government committee report summarizes its experience with this issue: “a variety of witnesses expressed concern that the concentration of media under a small number of ownership groups will pose a threat to the democratic process by reducing access to a diverse range of different views and opinions. Witnesses expressing this view would like to see restriction on the concentration of ownership to prevent the possibility of having just one voice in particular contexts.” Standing Committee on Canadian Heritage, *ibid.* at 393. While media executives were quick to assure the Committee that consolidated media ownership has not reduced the diversity of opinions, leading academics were quick to disagree. Professor Marc-François Bernier argued that “[c]onvergence, or to put it another way, concentration, generally creates – and this has been borne out by several studies – a form of growing pressure to make content compatible with the businesses plans of the conglomerates.” *Ibid.* at 400. Professor John Miller of Ryerson University was more emphatic:

Are there more reporters covering the news now than there were ten years ago? I guarantee you there are not. Are their owners able to vote for you? Do they live in town or thousands of miles away? Can you talk to them on Main Street? No, you cannot. These papers are owned by six giant media companies, some with interests in television, radio, filmmaking, and the Internet. These are papers whose owners’ first loyalty is not to readers but to shareholders, who view the delivery of news and information as contributing nothing to the revenue side of their ledgers, just to their overhead. *Ibid.*

The now-infamous editorial policy of the Asper family-controlled CanWest Global media company and the events leading to the dismissal of publisher Russell Mills provide eloquent support for these observers’ worst fears; see *e.g.*, Katherine Macklem, “Can the Aspers Do It?” *Macleans* 115:14 (8 April 2002) 48; and Russell Mills, “Democracy, the Media, and a Fired Publisher” (2002) 16:2 *Canadian Speeches* 8.

²⁶⁴ *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

²⁶⁵ *Libman v. Québec (Attorney General)*, [1997] 3 S.C.R. 569, in which the Court struck down a third-party meeting expense limit in Québec’s *Referendum Act*. The *Canada Elections Act*, S.C. 2000, c. 9 was drafted to

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and advertising that might distort voting patterns,²⁶⁶ and forbid commercial advertising that undercuts important public policies.²⁶⁷ By contrast, on other issues much more central to the process – for example, on the question of widely discrepant constituency sizes favouring rural voters – they have refused to intervene.²⁶⁸ To be fair, however, while the courts have been relatively insensitive to the power of corporations and privileged electorates to exercise undue influence over public opinion and public policy, they have been willing to create space for countervailing political forces more dependent on shoe-string resources and grassroots strategies. For example, they have prevented de-registration and de-funding of fringe political parties,²⁶⁹ permitted the dissemination of political literature in airports²⁷⁰ and on utility poles,²⁷¹ and protected

conform with the dicta in *Libman* by providing for higher third-party spending limits in federal elections. These limits were struck down in *Harper v. Canada (Attorney General)*, [2002] A.J. No. 1542 and *Canada (Elections Canada) v. National Citizen's Coalition*, [2003] O.J. No. 3939. Leave to appeal the ruling in *Harper* was granted: *Harper v. Canada (Attorney General)*, [2003] S.C.C.A. No. 76 [*Harper*]; the Supreme Court reserved judgment on 10 February 2004. Allison Dunfield, "Judgment Reserved in Gag Law Case" *The Globe and Mail* (10 February 2004), online: <<http://www.globeandmail.com/servlet/story/RTGAM.20040210.wharp0210/BNStory/National/>>. In a decision on 18 May 2004, the Supreme Court held that the impugned provisions of the act were constitutional.

²⁶⁶ *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877; *Harper*, *ibid.* The *Charter's* potential for interference in this regard was clearly demonstrated in the recent federal election. In *R. v. Bryan* (2003) 233 D.L.R. (4th) 745 (B.C.S.C), the *Charter's* freedom of expression provisions were used to strike down prohibitions in the federal Election Act on the premature broadcasting of election results in electoral districts where polls have not yet closed. Elections Canada then announced that the court's decision would be applied across Canada for this election, presumably in acknowledgement that they had greatest salience in British Columbia. Elections Canada, News Release, "Chief Electoral Officer Announces Policy on Application of British Columbia Supreme Court Decision" (10 June 2004), online: <<http://www.elections.ca/content.asp?section=med&document=jun1004&dir=pre&lang=e&textonly=false>>.

²⁶⁷ *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199.

²⁶⁸ *Reference re Provincial Electoral Boundaries (Sask.)*, [1991] 2 S.C.R. 158. See generally Rainer Knopff & F. L. Morton, *Charter Politics* (Scarborough: Nelson Canada, 1992) at c. 12.

²⁶⁹ *Figueroa v. Canada (Attorney General)*, [2003] S.C.J. No. 37.

²⁷⁰ *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139.

²⁷¹ *Ramsden v. Peterborough*, [1993] 2 S.C.R. 1084.

“leafleting” by social movements and trade unions as freedom of expression.²⁷² However, these protections have been rather tentative and somewhat peripheral to the mainstream of political developments. It remains to be seen whether they are sufficient to ensure the survival and intensification of vigorous public debate on a wide range of controversial topics.

To sum up, there clearly have been genuine debates since 1982 over many fundamental and controversial political issues – Québec secession, western alienation, free trade, the welfare state, and the *Charter* itself. However, a significant body of popular and expert opinion holds that Canada’s political culture today is less vibrant, less democratic, than it was a generation ago.²⁷³

Political culture, however, does not exist in isolation from the

²⁷² *United Food and Commercial Workers, Local 1518 (U.F.C.W.) v. Kmart Canada Ltd.*, [1999] 2 S.C.R. 1083; *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, [2002] 1 S.C.R. 156.

²⁷³ Various causes have been cited for this malaise including: legalization of the politics of both the left and the right under the *Charter*, whose net effect has been a growing democratic deficit and whose “chief political beneficiary is a quasi-one-party government in Ottawa” (Reg Whitaker, “The Flight from Politics” (2002):11 *Inroads* 187; the disappearance of the three-party “hegemony” in federal politics and the resulting fragmented and regionalized party system (and electorate), which tends to “rob general elections of their capacity to act as great collective decision-making events” (R. Kenneth Carty, William Cross & Lisa Young, “Canadian Party Politics in the New Century” (2001) 35:4 *J. of Canadian Studies* 23 at 36); the alarming concentration of power in the office of the Prime Minister (see *e.g.*, Donald J. Savoie, *Governing from the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999); Herman Bakvis, “Prime Minister and Cabinet in Canada: An Autocracy in Need of Reform?” 35:4 *J. of Canadian Studies* 60); and the threat posed by growing voter cynicism and indifference (see *e.g.*, Hugh Segal, “Lack of Legitimacy Threatens Democratic Governance” (2003) 17:2 *Canadian Speeches* 7; Therese Arseneau, Robert M Campbell & A Brian Tanguay, “Reforming Canada’s Political Institutions for the Twenty-First Century” (2001) 35:4 *J. of Canadian Studies* 5; Guy Saint-Pierre, “Public and Politicians Urged to Halt Degeneration of Democracy” (2002) 16:1 *Canadian Speeches* 21; William Cross & Lisa Young, “Party Democracy Ten Years After Charlottetown” (November 2002) *Canadian Issues* 10; and John Graham, “Reinvigorating Democracy: Dealing with September 11th through Modern Town Hall Meetings” (November 2002) *Canadian Issues* 21).

civil society in which it is bred. As we have already suggested, in some respects the changes in civil society that it was hoped that the *Charter* would engender have not materialized. The plight of Aboriginal peoples has not been much ameliorated, if at all. The project of multiculturalism, which is mentioned but not given prominence in the *Charter*, has seemingly gone off the boil. Immigrants – despite new guarantees of their legal and equality rights – seem to be having a tougher time integrating into society and the economy.

Nonetheless, by many measures, Canadian society remains quite tolerant – indeed, surprisingly so given the cultural dominance of its powerful neighbour, the United States. Surveys show repeatedly that on a number of controversial social issues, Canadian public opinion – and on many issues, Canadian law – remains far more progressive.²⁷⁴ One might have expected the opposite, given that the United States has had for much longer than Canada its own well-entrenched Bill of Rights, a tradition of waging political and social controversy by means of constitutional litigation, an activist court – and until fairly recently, a liberal one – and an influential, rights-conscious legal academy. Perhaps the lesson to be learned is that constitutional Bills of Rights do not transform public attitudes and legislative performance as much as the authors of the *Charter* imagined.

VII. CONCLUSION

Acknowledging the shortcomings of our methodology and the limitations of our evidence, and acknowledging that our conclusions are necessarily qualified by the presence of exceptions and counter-examples, our evidence still shows that in many respects the *Charter* era has been a disappointment. The years since 1982 have not witnessed much progress towards equal dignity and life-chances for members of many marginalized communities, more positive encounters by ordinary citizens with the state and its agents, or the emergence of a more vibrant civic and political culture. When Canada's experience is measured against that of some European countries with no comparable document, those countries often appear to have made equal or superior progress towards realizing the

²⁷⁴ Michael Adams, *Fire and Ice: The United States, Canada and the Myth of Converging Values* (Toronto: Penguin Canada, 2003).

values articulated in the *Charter*. When it is measured against that of the United States, which has a much lengthier and more intense experience with its *Charter*-equivalent – the Bill of Rights – equality, due process, and political freedoms seem in many respects to be more secure here than there.

It would be fair to propose, then, that other factors must explain recent changes in Canadian society, culture, and politics. If not the *Charter*, what then?

Political economy, above all. As our data generally suggest, if one were to establish a gradient that descends from the most affluent to the least affluent members of society, one would find at each point on that gradient not only lower living standards, but lower levels of educational attainment, health, personal safety and security, civic participation, political influence, and respect from police and other state officials. Moreover, as one descended the gradient, one would almost certainly encounter members of *Charter*-protected groups in ever-increasing numbers. Certainly disproportionate numbers of people of colour, Aboriginal peoples, women, and disabled people are to be found at the lower end of the gradient, though perhaps not immigrants, gays or lesbians. The best prospects for greater progress towards the equality values of the *Charter* would therefore be to redistribute wealth. And not just towards equality values: towards legal rights, political rights, associational rights, and perhaps language rights as well. However, most available studies suggest that throughout the *Charter* era, economic inequality in Canada has been growing rather than diminishing,²⁷⁵ especially as successive governments have reduced social services and other transfer payments to the poor²⁷⁶ and reconfigured the tax system so to reduce its redistributive effects.²⁷⁷ If our hypothesis is correct, this

²⁷⁵ See Marc Frenette, David Green & Garnett Picot, “Rising Income Inequality Amid the Economic Recovery of the 1990s: An Exploration of Three Data Sources” (Ottawa: Analytical Studies Research Division, Statistics Canada, Working Paper 219, 2004).

²⁷⁶ See e.g., Ann Curry-Stevens, *When Markets Fail People: Exploring the Widening Gap between Rich and Poor in Canada* (Toronto: Centre for Social Justice Foundation for Research and Education, 2001).

²⁷⁷ See e.g., Emmanuel Saez & Michael Veall, “The Evolution of High Incomes in Canada, 1920-2000” (Cambridge: National Bureau of Economic Research, Working Paper 9607, 2003). Saez and Veall show that from 1990 to 2000, the top 1 percent of Canadian taxpayers increased their share of all income from

might explain why the *Charter* has failed to achieve many of its ambitions.

Of course, the *Charter* was not designed to transform Canada's political economy. On the contrary, when it was adopted, its architects took considerable care neither to protect property nor to redistribute wealth.²⁷⁸ An attempt in the early 1990s to complement the *Charter of Rights and Freedoms* with a so-called Social Charter might have overcome this limitation, but that attempt ultimately failed.²⁷⁹ So have occasional attempts to persuade courts to read

9.3 to 13.6 percent, while the top 10 percent increased its share during the same period from 35.5 to 42.3 percent.

²⁷⁸ As Patrick Monahan notes, the Supreme Court of Canada established in *Irwin Toy v. Québec*, [1989] 1 S.C.R. 927, that "economic rights are generally not protected by the *Charter*"; this interpretation relied on the fact that the *Charter*'s drafters had consciously omitted protection for property rights under s. 7 despite a proposal supporting its inclusion that was ultimately rejected by the Trudeau government. This has led to a judicial deference to governments in designing economic and social welfare policy that has immunized it from s. 15 equality challenges (as in *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 and *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497) except in cases of "compelling justification for judicial intervention" (as in *M. v. H.*, *supra* note 200, where an Ontario law that excluded homosexuals from eligibility for benefits was struck down). Patrick Monahan, *Constitutional Law*, 2d ed. (Toronto: Irwin Law, 2002) at 396-97, nn. 31, 34. Further, Michael Mandel observes:

[T]he *Charter* implicitly removes questions of economic power from the scope of judicial review by consigning them to a purely hortatory part of the constitution. Part III, entitled "Equalization and Regional Disparities," claims that Canadian governments "are committed to" the following egalitarian ideals: (a) promoting equal opportunities for the well-being of Canadians; (b) furthering economic development to reduce disparity in opportunities; and c) providing essential public services of reasonable quality to all Canadians. But these commitments are prefaced by the disclaimer that they do not in any way alter the legislative authority or powers of any government, which ensures that no court will take the government to task for failing to live up to them.

Mandel, *supra* note 6 at 341-42.

²⁷⁹ Proposed by the Ontario NDP government during the negotiations that produced the ill-fated *Charlottetown Accord*, the Social Charter was dismissed even by sympathetic commentators as unlikely to produce positive outcomes.

economic equality into the *Charter*.²⁸⁰

This is not an argument for amending the *Charter* to create a right of equal access to public goods, or to prevent poor and working

See e.g., Mandel, *supra* note 6 at 109-114; Bakan & Schneiderman, *supra* note 23. Joel Bakan argues:

[T]he very idea of a social charter or union is flawed, and that, in any of its proposed forms, it is unlikely to do what those who support it want it to do. This is because social rights, as they are articulated in social charter proposals, are too vague to guarantee anything of substance, do not touch the complicated causes of poverty and disadvantage, and their symbolic message is at best ambiguous.

Bakan, "Social Rights," *supra* note 23 at 86. Hester Lessard offers similar criticism: "[A] social charter can also be viewed as leaving the existing map of power-no power in place, and, by giving political and moral authority to that map, making us feel good about a social landscape that would recognize the most needy in our political economy without actually reworking the topography." Hester Lessard, "Creation Stories: Social Rights and Canada's Social Contract," in Bakan & Schneiderman, *supra* note 23, 101 at 102.

²⁸⁰ Recent unsuccessful attempts to use the *Charter* to force governments to change their social spending priorities include: *Masse v. Ontario (Ministry of Community and Social Services)*, [1996] S.C.C.A No. 373 (Ontario has no positive duty to provide welfare assistance); *Gosselin v. Québec (Attorney General)*, [2002] 4 S.C.R. 429, 2002 SCC 84 (Québec social assistance regime does not violate the *Charter* regulation by providing lower level of benefits for persons under thirty year of age); *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78, [2004] 3 S.C.R. 657 (British Columbia has no duty to fund or provide a particular therapy for autistic children); and *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (N.A.P.E.)*, 2004 SCC 66, [2004] 3 S.C.R. 381 (Newfoundland can delay implementation of its pay equity legislation because of financial exigency). As Gwen Brodsky notes, attempts at winning economic equality through *Charter* have been frustrated by:

(1) governments' unwillingness to undertake progressive law reforms voluntarily, (2) lack of access by poor people to the resources necessary to engage in the litigation process, (3) regressive, anti-egalitarian positions advanced in the courts by governments, and (4) judicial insensitivity to the problems of group disadvantage.

Gwen Brodsky, "Social Charter Issues" in Bakan & Schneiderman, *supra* note 23, 43 at 51-52.

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class Canadians from suffering the legal, social, or political disabilities associated with economic deprivation (though ironically Prime Minister Trudeau – as an academic – had proposed precisely such provisions).²⁸¹ In the first place, there is no evidence that such constitutional provisions would accomplish very much. After all, relatively poor countries such as India and South Africa, which have constitutionalized social and economic rights, have been unable to redistribute wealth or power even with the help of an activist judiciary, while other, more affluent, countries such as the Netherlands and Sweden have become more egalitarian unaided by constitutional prescriptions. And secondly, we share the belief of other *Charter* agnostics that it may be unwise to place much faith in transformative strategies that depend primarily on judges and lawyers. Their institutional arrangements, their ideological predispositions, their intellectual formation, and their professional identification with affluent clients and powerful state interests make it unlikely that they can or will function effectively as change agents.

Political economy, then, above all, but not political economy alone: geo-political forces increasingly determine the inclination and capacity of states to make good on what their constitutions proclaim and their legislators promise.²⁸² Culture defines their vision of the right and the relevant; technology realigns relationships and redistributes comparative advantage; demography produces tectonic shifts in the needs, entitlements, and behaviours of key constituencies; and natural endowments and catastrophes cause the fortunes of local populations to rise and fall.

These forces, and countless others, have changed Canada considerably during the *Charter* era. But to what extent have they in turn been reinforced, retarded, redirected, or pre-empted by the *Charter*? As *Charter* agnostics, we argue that the burden of

²⁸¹ Pierre Elliott Trudeau, “Economic Rights” (1961-1962) 8 McGill Law J. 121.

²⁸² Robert Putnam describes a general decline in the “*capacity* of political agents to act on citizens’ interests and desires,” largely due to increasing globalization – he uses the term “internationalization” – which “creates a growing incongruence between the scope of territorial units and the issues raised by interdependence, reducing the output effectiveness of democratic nation-states” and has “undermined the ability of national governments to implement their chosen policies and respond to citizen demands in a satisfactory way.” Putnam, Pharr & Dalton, *supra* note 255 at 25 [emphasis in original].

demonstrating its power and influence falls on those who hold that view. In our view, the available evidence suggests, at a minimum, that the *Charter* has mattered less than was hoped and expected by its authors and those who live on its avails; less than is claimed by those who fear that it has done too much or too little or the wrong things; and less than imagined by true believers of all persuasions who do not wish to have their hopes, fears, or opinions challenged by even the modest evidence we have been able to deploy.