

Governing With the *Charter*: Legislative and Judicial Activism and Framers' Intent¹

by James B. Kelly

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James Kelly has written an important and thoughtful new book on the effect of the *Canadian Charter of Rights and Freedoms*² on governance in Canada. The book makes a realistic and sober intervention into the fractious debate about judicial activism and whether there is a genuine dialogue between courts and legislatures in Canada, but its most important contribution is increasing our understanding of the role that Departments of Justice play in vetting new legislation for possible *Charter* challenges. The book, recently short-listed for the Donner Prize for best Canadian public policy book, is well written and makes effective use of empirical, legal and historical data. It should be read by all those interested in the *Charter* and its complex effects on Canada.

Kelly starts his analysis with a survey of the existing literature on the *Charter*. He concludes that:

both left- and right- wing critics share common ground with the supporters of judicial activism as all three positions minimize the importance of legislative activism and ignore the institutional reform of the machinery of government that directly challenges judicial hegemony over the *Charter*.³

He argues that much of the existing literature starts with judicial invalidation of laws whereas the *Charter* is far more frequently applied within government to determine the risk of proposed legislation being invalidated under the *Charter*. The process of *Charter* vetting was indeed contemplated on the face of the *Charter* as governments were given three years to put their statutes in order before equality rights came into effect.

Kelly provides a detailed account of the drafting of the *Charter*. He stresses the crucial role of the Joint Committee Proceedings in 1981-1982 that strengthened the *Charter*. The importance of the Joint Committee has been stressed by others, most

1. James Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent* (Vancouver, University of British Columbia Press, 2005) [Kelly].
2. Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].
3. Kelly, *supra* note 1 at 24.

notably by Alan Cairns,⁴ whose important work is strangely not given prominence in Kelly's account. Nevertheless, Kelly is surely right to reflect on this crucial part of our constitutional history. The role of interest groups in the strengthening of the *Charter* also lends support to Ted Morton's and Rainer Knopff's "Court Party" thesis,⁵ which otherwise is criticized by Kelly. Kelly does not draw a connection between the fact that the executive branches of provincial and federal governments were prepared to water down the *Charter* to next to nothing in an attempt to win provincial support for a minimal *Charter* in 1980 and his argument that the next generation of these officials, much more than judges, are now the real guardians of the Constitution.

Kelly continues on the theme of the drafting of the *Charter* in his next chapter on "Framers' Intent."⁶ In this chapter, he makes the argument that the framers of the *Charter*, whom he sees largely as Prime Minister Trudeau and the federal Department of Justice officials who drafted the *Charter*, intended that the courts would engage in more judicial activism than they had under the *Canadian Bill of Rights*.⁷ This conclusion is undoubtedly correct and underlined by the fact that the *Charter*, unlike the *Canadian Bill of Rights*, specifically requires judicial invalidation of inconsistent legislation and the award of judicial remedies. At the same time, Kelly does not give much credit to other framers such as Alan Blakeney, Sterling Lyon and Peter Lougheed.⁸ Indeed, Kelly seems to accept that section 33 has become something of a dead letter and does not really explore its contribution to Canadian constitutionalism.

One of the great strengths of Kelly's book is that it is realistic in the sense of being rooted in the raw material. He reminds the reader of the fact that far more statutes are upheld rather than invalidated when challenged under the *Charter* and that most *Charter* litigation arises from the criminal process. Hence one of the most important and, for my money, the best chapter in his book is his examination of the Supreme Court and police conduct. He reminds readers that between 1982 and 2003, 52% of all *Charter* challenges heard by the Supreme Court involved the conduct of officials, most notably the police.⁹ During this same time period, Kelly notes that the Supreme Court excluded unconstitutionally obtained evidence under section 24(2) in 44% of the cases it heard.¹⁰ Kelly uses these data as support for his cleverly phrased conclusion that crime control has "been stirred not shaken" under the *Charter*. I agree with this conclusion, but I am less sure than Kelly that the reason for this is

4. See e.g. Alan C. Cairns, *Charter versus Federalism The Dilemmas of Constitutional Reform* (Montreal and Kingston: McGill-Queen's University Press, 1992).

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

6. Kelly, *supra* note 1 at 80.

7. S.C. 1960, c.44, reprinted in R.S.C. 1985, App. III.

8. See e.g. Roy Romanow, John Whyte & Howard Leeson, *Canada . . . Notwithstanding The Making of the Constitution 1976-1982* (Toronto: Carswell/Methuen, 1984).

9. Kelly, *supra* note 1 at 35.

10. *Ibid.* at 111.

“the court’s balanced approach to legal rights and the judicial remedies under the Charter.”¹¹ It seems to me that the answer lies more in Parliament’s unabated enthusiasm for the criminal sanction and the organizational nature of the criminal process which often makes the due process rights of the accused of minimal relevance to the operation of the crime control assembly line.¹²

Kelly’s realistic approach continues in the next chapter when he examines the Supreme Court’s record in non-criminal cases. Those who listen to popular debates about the Supreme Court’s activism will be surprised to learn that the Court has only invalidated an average of about three statutes a year under the *Charter*. Kelly also points out that 20 of the 64 invalidated statutes were enacted before 1982,¹³ which suggests that the Court was striking down old laws that were perhaps not supported by current majorities and that had not been developed with the *Charter* in mind. At the same time, however, this valuable statistic indicates that over two thirds of the statutes invalidated by the Court under the *Charter* were enacted after they had presumably been vetted for compliance with the *Charter*. At first glance this statistic might undermine Kelly’s thesis about the importance of *Charter* vetting, but he refines the number by suggesting that only 12 statutes enacted after 1990 have been invalidated. This indicates that *Charter* vetting has become more effective, at least in avoiding judicial invalidation.¹⁴ These newer laws have also benefited from what Kelly notes was a relaxation or “softening” of the Court’s section 1 test.¹⁵

Kelly also heeds the realist insight that the ultimate meaning of rights depends on remedies and he documents how although the Supreme Court relied on nullification as a remedy in 80% of its cases where the *Charter* was violated between 1982-1992, the blunt nullification remedy was only used in 33% of cases between 1993-2003. This is an extremely important finding as is Kelly’s conclusion that the difference was made up by the interpretative remedies of reading in or reading down the legislation to cure its constitutional defects in 27% of cases and by the use of suspended declarations of invalidity in 33% of cases between 1993-2003.¹⁶ Kelly argues that the suspended declaration allows cabinet to devise the ultimate remedy and “it is unclear how the Supreme Court functions as a third chamber of parliament if policy responses to judicial decisions are designed and implemented by the cabinet, supported by the bureaucracy.”¹⁷ At the same time, however, Kelly does not examine the implications of the increased use of the reading in remedy which will usually give the

11. *Ibid.* at 109.

12. See generally Kent Roach, *Due Process and Victims’ Rights: The New Law and Politics of Criminal Justice* (Toronto: University of Toronto Press, 1999) at c. 2-3.

13. Kelly, *supra* note 1 at 143-44.

14. *Ibid.* at 148.

15. *Ibid.* at 141.

16. *Ibid.* at 175.

17. *Ibid.* at 175-76.

court the last word about the limits of an overbroad statute. This remedy has been used in several high profile cases such as the *Vriend*¹⁸ gay rights case, the *Sharpe*¹⁹ child pornography case and the investigative hearing cases.²⁰

Kelly critiques the widely accepted thesis that the *Charter* has increased centralization within Canadian federalism. He demonstrates that the Supreme Court has been harder on the federal government than the provinces with 39 out of the 64 statutory invalidations being of federal legislation and with provincial invalidations more likely to be softened by the use of a suspended declaration of invalidity.²¹ Here, Kelly's reliance on numbers may not tell the whole story especially with respect to high profile Supreme Court invalidation of provincial laws. It is not an accident that the provinces and not the federal government have used section 33 most notably in Quebec's response to the Court's invalidation of parts of Quebec language legislation and Alberta's 1999 attempt to outlaw gay marriage. The latter legislation is also significant to Kelly's thesis because it arose from a private member's bill that was presumably not subject to the same *Charter* vetting as government bills.

Kelly makes a detailed case for the view that the *Charter* has made the federal Department of Justice an influential central agency within the federal government. He describes how line departments are influenced by their lawyers including the Senior General Counsel who sits on each department's executive committee. A *Charter* analysis has to accompany proposals to Cabinet and the Department of Justice has first and second kicks at the *Charter* can in terms of the advice it provides to the departments and the drafting of legislation. Kelly even suggests that the Treasury Board keeps an eye on each department's litigation costs and "this important resource effectively disciplines line departments to the seriousness of a *Charter* review under the direction of the DOJ."²² Kelly concludes that it is the process of rights vetting within government and not the ability of courts to strike down laws that matters most.

Kelly carefully documents the rights vetting used by the federal Department of Justice, but he does not seem overly concerned about its lack of transparency or the fact that the Attorney General of Canada has never reported to Parliament under section 4.1 of the *Department of Justice Act*²³ that a bill approved by a cabinet of which he or she is a member is inconsistent with the *Charter*. Although the *Charter* vetting

18. *Vriend v. Alberta*, [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385.

19. *R. v. Sharpe*, 2001 SCC 2, [2001] 1 S.C.R. 45, 194 D.L.R. (4th) 1.

20. *Application under s. 83.28 of the Criminal Code (Re)*, 2004 SCC 42, [2004] 2 S.C.R. 248, 240 D.L.R. (4th) 81.

21. Kelly, *supra* note 1 at 186, 190.

22. *Ibid.* at 235. This attempt at cost internalization is intriguing but I question whether *Charter* litigation makes up a heavy amount of government's litigation expenses and the effects of the extensive time lag between a bill being prepared and the costs of eventually defending the legislation from *Charter* litigation.

23. *Department of Justice Act*, R.S.C. 1985, c.J-2, s. 4.1.

process is defended as a valuable exercise in coordinate constitutionalism, Kelly does not really describe the standards that the federal Department of Justice uses to sign off on a proposal as *Charter* consistent. His silence on the issue may reflect the concerns of those within government that he interviewed for respecting the solicitor-client privilege that exists with respect to the advice that the Department of Justice offers to government. In any event, Professor Hiebert has reported on the basis of her own interviews with Justice officials that the standard used in the Department of Justice is the low one of whether a credible *Charter* defence can be made of the proposed legislation or even perhaps only that the legislation is not patently inconsistent with the *Charter*.²⁴ This evidence, combined with the Attorney General's failure to issue one report of inconsistency under section 4.1 of the *Department of Justice Act*, does not inspire confidence, at least for me, in pre-enactment scrutiny as a transparent or vigorous exercise of coordinate constitutionalism.

Are there alternatives to an executive dominated and secretive process of *Charter* vetting? An intriguing exception mentioned by Kelly is the unique role that the Quebec Human Rights Commission plays in the vetting of Quebec legislation. In Quebec, the legislation is vetted for consistency with both the Canadian and Quebec *Charters*. Moreover, the Quebec Human Rights Commission submits public briefs to the relevant committee of the National Assembly outlining its concerns about the constitutionality of proposed legislation. In the rest of Canada, *Charter* vetting takes place in secret, protected by the twin barriers of claims of solicitor-client and Cabinet privilege. There also seems to be some evidence that publicity and transparency improve pre-enactment scrutiny in Quebec because Kelly's interviewees estimate that the National Assembly acts on the Quebec Human Rights Commission's public suggestions about 60% of the time.²⁵ It would have been fascinating to have a fuller account of Quebec's distinct and more transparent approach to rights vetting.

Kelly also provides a brief account of the rights vetting of Bill C-36, Canada's *Anti-Terrorism Act*,²⁶ by both the Department of Justice and by a special Senate committee. Kelly defends this as "the most balanced example of legislative activism in Canada"²⁷ but does not consider the effects of the Department of Justice keeping its legal analysis secret, including the possibility that it may have been based on controversial claims that the state could claim support in a right to security in its fight against terrorism. Although Kelly defends Bill C-36 as coordinate constitutionalism, many disputed the conclusion that all aspects of Bill C-36 were constitutional,²⁸ and

24. Janet Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montreal: McGill-Queen's University Press, 2002) at 10, 12.

25. Kelly, *supra* note 1 at 218.

26. *Anti-Terrorism Act*, S.C. 2001, c.14.

27. Kelly, *supra* note 1 at 247.

some argued that maintaining the minimum standards of the *Charter* should not have been the focus of the political debate about the necessity or wisdom of the controversial law.²⁹ Kelly also does not acknowledge that some of the recommendations made by the Senate committee that conducted a pre-study of Bill C-36 were rejected when party discipline was imposed to secure speedy passage of the legislation. Senate committees can be more independent of party discipline than House of Commons committees and, as Kelly notes elsewhere, some Commons committees have been used by the Cabinet as a resource “in the next round of Charter politics with the Supreme Court.”³⁰

Kelly has written a fine and important book, but like any book on this subject, it is not likely to please everyone. At the same time, Kelly deserves praise for being fair in his account of the work of others and not descending into the personal arguments that have sometimes burdened the literature.

Kelly’s claim that “judicial activism does not threaten democracy, because it is consistent with the intention of the *Charter*’s framers”³¹ is not likely to be accepted by conservative critics. They will be able to argue, with some justification, that even the limited federal insiders whom Kelly believes are the true framers of the *Charter* did not imagine that the Court would use the *Charter* to strike down Canada’s abortion or felony murder laws or would enforce Canada’s *Miranda* rules with an American-style absolutist exclusionary rule. Left-wing critics of the *Charter* are also likely to find that Kelly’s account of *Charter* vetting within government does not obviate their concerns that the *Charter* will give governments an excuse not to be active in fields such as social justice. They may also argue that Kelly discounts the “policy distortion” that can arise from *Charter* vetting³² or how *Charter* vetting within government is part of the legalization of politics.³³ They will also point to cases such as *Chaoulli*³⁴ as invalidations of provincial legislation that, even if softened by a suspended declaration of invalidity, will have profound and negative effects.³⁵

Some in the political science world may not agree with Kelly’s conclusion that the Department of Justice has become a central agency on par with the Prime Minister’s Office, the Privy Council Office, the Treasury Board or the Department of

28. See generally many of the essays in Ronald J. Daniels, Patrick Macklem & Kent Roach, eds., *The Security of Freedom: Essays on Canada’s Anti-Terrorism Bill* (Toronto: University of Toronto Press, 2001).

29. See Kent Roach, *September 11: Consequences for Canada* (Montreal: McGill-Queen’s University Press, 2003) at c. 3 for my own account of the drafting and debate around Bill C-36.

30. Kelly, *supra* note 1 at 248.

31. *Ibid.* at 11.

32. Mark Tushnet, “Policy Distortion and Democratic Debilitation: Comparative Illumination of the Counter-majoritarian Difficulty” (1995) 94 Mich. L.Rev. 245.

33. Michael Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, rev. ed. (Toronto: Thompson, 1994); Ran Hirshl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

34. *Chaoulli v. Quebec* (Attorney General), 2005 SCC 35, [2005] 1 S.C.R. 791.

35. See e.g. the essays by Andrew Petter and Alan Hutchinson in Flood, Roach & Sossin, eds., *Access to Care Access to Justice* (Toronto: University of Toronto Press, 2005).

Finance.³⁶ By Kelly's own admission, the Department of Justice does not attempt to veto policy initiatives in the line departments, but simply tries to make them more constitutional. Moreover, he concedes that governments will sometimes decide to run *Charter* risks. Some may also question some of the methodology in this book. The criteria for counting are not always clear and more information about Kelly's extensive interviews with justice officials would have been helpful. Finally, some may dispute that legislative activism is an accurate term for a Cabinet-dominated process.

Those who believe in *Charter* dialogue may conclude that Kelly's overall approach is more sympathetic to the idea of dialogue than his prior writings with Christopher Manfredi on this subject.³⁷ Kelly effectively extends the dialogue thesis to the pre-enactment phase of the legislative process. Indeed, his conclusions that the *Charter* has not produced judicial supremacy, but rather has allowed Cabinet-centred legislative activism are remarkably consistent with those articulated by dialogue theorists. I also think he is mistaken when he suggests that dialogue theorists have a "belief in the infallibility of judicial actors."³⁸ If this were so, dialogue theorists would surely defend judicial supremacy and would have little interest in legislative replies to *Charter* jurisprudence.

I also have some reservations about Kelly's defence of coordinate constitutionalism and his conclusion that "the parliamentary arena is the actor principally responsible for the protection of rights."³⁹ If by this he means simply that governments must assess all laws for consistency with the *Charter* and that this will occur with greater regularity than judicial scrutiny, I can accept this weak form of coordinate constitutionalism mainly on positive as opposed to normative grounds. I concede that executive-style *Charter* vetting has disciplined some majoritarian excesses especially in the field of criminal law. At the same time, however, it has also produced some legislation that Kelly notes reverse Supreme Court decisions in favour of the rights of the accused.⁴⁰

If, on the other hand, Kelly is making a normative argument that Parliament should be able to act on its own view of the *Charter* even when it differs from the considered views of the courts, then I have reservations. There is a hint that Kelly prefers this much stronger form of coordinate constitutionalism when he quickly dismisses the idea that governments may learn from *Charter* jurisprudence as a "faulty assump-

36. Donald J. Savoie, *Governing From the Centre: The Concentration of Power in Canadian Politics* (Toronto: University of Toronto Press, 1999).

37. Christopher J. Manfredi & James B. Kelly "Six Degrees of Dialogue: A Response to Hogg and Bushell" (1999) 37 *Osgoode Hall L.J.* 513; Christopher J. Manfredi & James B. Kelly "Misrepresenting the Supreme Court's Record? A Comment on Sujit Choudhry and Claire E. Hunter, 'Measuring Judicial Activism on the Supreme Court of Canada'" (2004) 49 *McGill L.J.* 741.

38. Kelly, *supra* note 1 at 31.

39. *Ibid.* at 263.

40. *Ibid.* at 249.

tion” and one that reflects “the limitations of the judicial-centred approach of the Charter”⁴¹ that he associates with dialogue theory. This strong form of coordinate construction is popular among some influential commentators in both the United States and Canada,⁴² but in my view it begs the fundamental question of how the rights of the truly unpopular will fare in what is ultimately a majoritarian institution. In an age of anxiety about crime and terrorism, the idea that the independent judiciary has a vital role in defending the rights of the accused and the wrongfully convicted should not be ignored. One does not have to accept that judicial actors are infallible to be worried about in-your-face reversals of pro-accused *Charter* decisions that are enacted quickly in Parliament with all-party approval and no public voice of dissent from within the Department of Justice. Defenders of strong coordinate construction often criticize judicial or legalistic interpretations of the *Charter*, and they point out that not even the Court can agree on how to interpret the Constitution. At the same time, however, they do not deal with the danger that non-legalistic approaches may trivialize the rights of the accused. Parliament was, for example, quick to deny prisoners the right to vote, with some Parliamentarians confessing that they could just not get excited about the rights of murderers.⁴³ The new federal government has recently declared in the preamble to its new mandatory minimum sentence law its desire to respect the *Charter* while at the same time providing no escape clause from mandatory minimums and attempting to expand a constructive murder offence that has already been declared unconstitutional by the Supreme Court.⁴⁴

In the end, I am not sure whether Kelly is content to defer to parliamentary views about the rights of the accused when they differ from the rights of the independent courts. If he does endorse this strong form of coordinate construction, especially in the field of criminal justice that his own work rightly reveals is the heart of the *Charter*, then I must respectfully disagree. Possible outlets and sober second thoughts for this form of strong coordinate construction that I can accept are references back to the Court or the use of section 33, but these dialogic features of Canadian constitutionalism receive little attention from Kelly. Although he takes dialogue theorists to task for focusing too much on the courts, Kelly can be criticized

41. *Ibid.* at 213.

42. In the United States see Mark Tushnet, *Taking the Constitution Away from the Courts* (Princeton: Princeton University Press, 1999); Larry Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (New York: Oxford University Press, 2004). In Canada see Christopher P. Manfredi, *Judicial Power and the Charter*, 2d ed. (Don Mills: Oxford University Press, 2001); Hiebert, *supra* note 24.

43. Kent Roach, *The Supreme Court on Trial: Judicial Activism or Democratic Dialogue* (Toronto: Irwin Law, 2001) at 188. For the majority of the Supreme Court’s conclusion that the Parliamentary debates about this law “offer more fulmination than illumination” see *Sauve v. Canada*, 2002 SCC 68, [2002] 3 S.C.R. 519 at para. 21.

44. Bill C-10, *An Act to amend the Criminal Code (minimum penalties for offences involving firearms) and to make a consequential amendment to another Act*, 1st Sess., 39th Parl., 2006, cl.16(1) (amending s.230 of the *Criminal Code* declared unconstitutional by the Supreme Court in *R. v. Martineau* [1990], 2 S.C.R. 633).

for not focusing enough on how judicial interpretations of the *Charter* should or should not influence the interpretation of the *Charter* within government.

The fact that Professor Kelly's book will provoke debate only affirms its importance. I learned much from this book. Professor Kelly has made an outstanding and genuine contribution to the growing *Charter* literature with his detailed, realistic and readable account of democratic, judicial and legislative activism under the *Charter*.

Kent Roach

Prichard-Wilson Chair of Law and Public Policy

Faculty of Law, University of Toronto

