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Bills of Rights as Instruments of Nation Building in Multinational States: The Canadian *Charter* and Quebec Nationalism

Sujit Choudhry[1]

On the eve of the twenty-fifth anniversary of the *Canadian Charter of Rights and Freedoms*, Canada was plunged once again into an existential debate over the very nature of the Canadian political community.[1] As has happened so often in the past, the issue was Quebec. The triggering event for this latest round of constitutional introspection was a question put to Prime Minister Stephen Harper in Quebec City on June 23, 2006. Quebec's political elites have long referred to the province, its institutions, its symbols, and its collective goals in national terms. The provincial legislature is the National Assembly, its head of government the prime minister as opposed to a mere premier, its national holiday called la Fête Nationale, a range of public policies promoting French as Quebec's public language publicly described as tools of nation building, and the question of Quebec's continuing membership in the Canadian federation the "national question" – the nation in each instance not being Canada. The occasion for the prime minister's visit to Quebec was la Fête Nationale. The prime minister was asked whether celebrating Quebec's national holiday signified his acceptance of the notion that Quebec was a nation. The prime minister declined to answer, stating that the debate over whether Quebec is a nation was "semantic" and "doesn't serve any purpose."[2]

The issue would probably have died there. Yet, a few days later, then-Liberal leadership candidate Michael Ignatieff stated in a speech that Quebec was indeed a nation within Canada.[3] In his policy platform, he went even further. Since Quebecers "have come to understand themselves as a nation, with a language, history, culture and territory that marks them out as a separate people," Ignatieff called for the Constitution to be amended to explicitly acknowledge "the national status of Quebec."[4] Ignatieff's proposal provoked an immediate and hostile reaction from his two leading rivals, Stéphane Dion and Bob Rae. Neither was opposed in principle to the idea that Quebec

was a nation. Rather, their objections were strategic. Ignatieff had argued that the constitutional recognition of Quebec as a nation would not come with any additional powers and had as its goal the dampening of nationalist sentiment. However, Dion and Rae feared that it would perversely have exactly the opposite effect.[5] At the very least, it would serve as constitutional encouragement for a series of demands to reconstitute Canada around two nations, Quebec and Canada. The goal would be dramatically enhanced powers for Quebec on an asymmetric basis that would reflect its unique status as a province *and* a nation – *un province pas comme les autres*.[6] Others opined that it could also serve as a springboard to statehood, a prospect made more likely by the probable failure of constitutional negotiations.[7]

Ignatieff's proposals dominated the Liberal leadership race over the course of the fall and badly divided the party. The party's Quebec wing complicated matters further when it passed a resolution in October that made the recognition of Quebec as a nation official party policy and mandated the consideration of options to "officialize" this status.[8] The resolution raised the spectre of open civil war on the eve of the Liberal leadership vote in December. The Bloc Québécois sought to exploit these divisions by indicating in November that it would table a motion in the House of Commons that would "recognize that Quebeckers form a nation."[9] It was a win-win proposition for the Bloc Québécois. Facing dissension from within his own caucus, Prime Minister Harper responded with a resolution of his own, to recognize the "Québécois" as "a nation within a united Canada."[10] The New Democratic Party and the Liberals immediately announced their support for the resolution. In an instant, the Bloc Québécois' coup became a blunder. Ultimately, it capitulated, which led to the motion being easily passed by the House of Commons at the end of November.[11] The passage of the motion by the House in turn led to the withdrawal of the Liberal policy resolution before it was debated.

It would be tempting to analyze this episode in purely political terms. But, instead, this chapter draws attention to a puzzle and a curious omission. Dion's reaction to Ignatieff's proposal states the puzzle: "Do we want this recognition to be purely symbolic, or do we want it to lead to concrete consequences on, say, the division of powers or the allocation of public funds? And how does this approach square with the previous question? It is contradictory to affirm that the recognition of Quebec as a nation is necessary but purely symbolic."[12]

Dion's puzzlement stems from the fact that although the constitutional recognition of Quebec as a nation generated heated debates, it was strictly a symbolic measure that would have had no legal effect. To Dion, a constitutional symbol, "although desirable, is not necessary."[13] In this respect, the proposed amendment was quite unlike the distinct society clauses in the Meech Lake and Charlottetown Accords, which were interpretive provisions.

However, even in these earlier episodes, the concrete legal effect, if any, of those clauses ultimately mattered less than their explicit acknowledgment of Quebec's distinctiveness. And the most trenchant opponents of Ignatieff's proposals joined the debate on the terrain of constitutional symbolism. As they put it, to constitutionally entrench the recognition of Quebec's national status would be an assault on the idea of a single Canadian nation.[14] Constitutional symbols mattered centrally to both the proposal's proponents and its detractors. The question is why?

The curious omission is the *Charter*. The notion of one Canada was most closely associated with Pierre Trudeau. The *Charter* was Trudeau's central instrument for nation building. Moreover, the *Charter* was a direct response to the centrifugal pressures of Quebec nationalism. So, not surprisingly, it was Quebec that objected most to the *Charter*. And it was the adoption of the *Charter* over Quebec's objections that sparked two decades of constitutional politics to reach a constitutional accommodation with that province, including Ignatieff's proposals. In short, the *Charter* is an integral part of why Canada found itself debating Quebec's status as a nation nearly twenty-five years after it was adopted. Yet, the *Charter* was hardly mentioned at all during the debate over Ignatieff's proposal.

The objective of this chapter is to link the puzzle and omission – that is, to tie the debate over the constitutional recognition of Quebec as a nation to the impact of the *Charter* on Canadian constitutional culture. One of the debate's most striking features is that support for Ignatieff's initiative was sharply polarized on linguistic grounds. Francophones within Quebec were its most enthusiastic supporters, whereas anglophones outside of Quebec were its most vociferous critics. This pattern of political opinion reflects differing underlying patterns of national identification. Francophones inside Quebec tend to view Quebec as their primary national political community, whereas anglophones outside Quebec tend to identify with Canada.

It will be argued that these competing patterns of national identification reflect the rather mixed legacy of the *Charter*. The *Charter* was intended to serve as the centrepiece of a common Canadian nationality that transcended the linguistic divide. Yet, while the *Charter* has been an effective tool for anglophone nation building, it has been unsuccessful in combating Quebec (read francophone) nationalism. Indeed, not only did the *Charter* not offset Quebec's nationalism, it may also have made things worse. This is a cautionary tale to plurinational polities faced with the same challenge as Canada – of building a common political identity against the backdrop of competing nationalisms and attempting to do so through a bill of rights.

Quebec Nationalism and the *Charter* Project

In the academic literature, the idea that there was a direct link between the genesis of the *Charter* project and Quebec nationalism no longer commands

significant attention. Canadian debates about the *Charter* now take as their starting point the Bickelian charge that judicial review is a deviant institution in a liberal democracy that is in need of justification. The theory of dialogue as an account and justification of the Canadian practice of judicial review – potentially applicable to other jurisdictions as an alternative to American-style judicial supremacy – is the latest turn in this constitutional conversation.[15] What the actual political forces were that gave rise to the *Charter* is no longer at the forefront of scholarship.

However, it was not always this way. To recover the connection between the *Charter* and the rise of nationalism in Quebec, we need to return to the scholarship produced in the wake of the adoption of the *Charter* and the following decade of constitutional politics. The link was perhaps most famously made by Peter Russell.[16] Russell's question was why federal politicians, principally Trudeau, made the *Charter* their major constitutional priority between 1968 and 1981. Until that point, the federal goal had been the patriation of the Constitution – in other words, the adoption of a domestic amending formula that would terminate the imperial role in formal constitutional change. Placing the *Charter* front and centre was therefore a dramatic change. Russell's answer was the rise of Quebec nationalism or, more precisely, a significant shift in the character of Quebec's constitutional demands. Until the 1960s, Quebec's constitutional claims – advanced in constitutional politics and before the courts – had been defensive, aimed at safeguarding the existing areas of jurisdiction granted to Quebec by the *Constitution Act, 1867*.[17] However, in the 1960s, Quebec's goals shifted to the expansion of its jurisdiction over social and economic policy in order to enable the province to engage in a nation-building enterprise and construct a modern Quebec, the major institutions of which operated in French.

Why this shift in Quebec took place is itself a complex story.[18] To a considerable extent, it was a defensive response to the dramatically increased role of Ottawa in economic and social policies after the Second World War. Federal policy activism meant an increase in the importance of federal institutions, especially the federal bureaucracy, which worked in English and in which francophone Quebeckers were a small minority. Another factor was the enormous social change within Quebec. After the war, there was massive urbanization and industrialization, in a context where anglophones dominated positions of economic leadership and many of the professions. These demographic and economic shifts underlined and reinforced the role of language as the basis for the unequal distribution of economic power within the province, which was documented so vividly by the Royal Commission on Bilingualism and Biculturalism.[19] Quebec's political elites responded by mobilizing francophones around the nationalist project of *maîtres chez nous*, which encompassed both the expansion of Quebec's jurisdiction and the use of these new tools to construct a modern set of economic

and political institutions to ensure the survival of a modern, francophone society. The upgrading in the status of Quebec overtook the older idea of *la nation canadienne-française*, which resided both inside and outside the province, because of the necessity for territorial jurisdiction to engage in a modern project of nation building.

The *Charter* was the federal government's defensive response to these centrifugal pressures. To be sure, as Alan Cairns has noted, the domestic and international forces that led to the adoption of the *Charter* were much broader than just the need to respond to Quebec.[20] Yet, Russell persuasively argues that the desire to combat Quebec nationalism was central to the federal government. The primary sources support Russell's analysis. The most important federal document was *Federalism for the Future*, which was released in February 1968 in conjunction with the Confederation of Tomorrow Conference.[21] The document acknowledges that the impetus for constitutional reform was Quebec, specifically "the dissatisfaction of the people of Canada of the French language and culture with the relative positions of the two linguistic groups within our Confederation."[22]

However, the response was not to meet Quebec's demands for enhanced autonomy on the terrain of federalism. Rather, the federal government's view was that "first priority should be given to that part of the Constitution which should deal with the rights of the individual – both his rights as a citizen of a democratic federal state and his rights as a member of the linguistic community in which he has chosen to live."[23] This choice was initially presented as a matter of logic since "the rights of people must precede the rights of governments."[24] Yet, *Federalism for the Future* goes on to emphasize the contribution of a constitutional bill of rights as the basis for national unity. The constitutional entrenchment of "individual human rights for all Canadians ... is a fundamental condition of nationhood" and rights "are ... fundamental to the will of the nation to survive."[25] "[T]ake these rights away," it continued, "and few Canadians would think their country worth preserving."[26]

Constitutions, Nationalism, and Nation Building

So how exactly was the *Charter* supposed to further national unity? We can get a handle on the nation-building function of the *Charter* and bills of rights more generally by making three sets of distinctions. The first is the distinction between two varieties of nationalism. On the one hand, nationalism is often paired with claims of self-determination and sovereignty. This is the nationalism of national minorities, such as the Quebecois, the Scots, and the Catalans. The political goal underlying the kinds of nationalist movements ranges from autonomy to states of their own. This is the dominant understanding of nationalism in the legal imagination. Accordingly, the regulation of nationalist politics becomes a matter for international law, with the principal question being under what circumstances peoples' right

to self-determination encompasses the right to statehood. International law has generally been very resistant to these claims.[27] The centrality of this conception of nationalism to the legal imagination became clear during the debate over Ignatieff's proposal. For example, some argued that choice of the term "nation" over "distinct society" carried legal significance because a nation possesses the right to self-determination under international law.[28]

On the other hand, nationalism can be understood as "nationalizing nationalism."[29] The goals of this variety of nationalism are neither internal autonomy nor statehood. Rather, the energy of nationalism is directed at an existing political community in a process whereby states, already extant, create nations. At its core, nationalizing nationalism consists of a set of policies that are designed to homogenize the national culture and language to coincide with those of the dominant ethnolinguistic group and to centralize political and legal power in institutions dominated by the majority group and which operate in its language. In states that contain minority nations, such as Quebec, these minorities respond to nationalizing nationalism by engaging in defensive nation-building projects of their own. Indeed, many Quebec federalists who harbour no desire to secede nonetheless supported the Ignatieff proposal precisely because it reinforced defensive claims of jurisdiction by Quebec in the service of preserving and promoting its unique linguistic identity.

Legal scholars have focused on the first form of nationalism but not on the second, which brings us to the second distinction – between different ways in which constitutions can serve as instruments of nationalizing nationalism.[30] Historically, the most direct way has been to centralize legal and political power. This centralization occurred, for example, in Spain with the abolition of the *Generalitat* in Catalonia in 1714 and the *Fueros* of the Basque province and Navarre in the early nineteenth century. The state would possess jurisdiction over language and education, which would allow it to set the majority's language as the official language of the state and of instruction in schools. Another mechanism was the elimination of pre-existing forms of legal pluralism, to require all ethnolinguistic groups to participate in a common legal-constitutional order, organized around common judicial institutions dominated by members of the majority group, applying the legal system of the dominant group (as occurred in settler societies in North America). In other words, one way of responding to Quebec's nationalism would have been to engage in a centralizing project of this sort. The use of constitutional design in the service of nationalizing nationalism in fact was attempted in the colonial period in Canada between 1840 and 1867. It was a spectacular failure.

However, the *Charter* project points to the use of a constitutional bill of rights to engage in a similar nationalizing project. At first blush, this action

seems bizarre since the first set of nationalizing strategies involves the centralization of political and legal power, whereas a bill of rights sets limits on such policies. Yet, a bill of rights can nonetheless serve this role, and now we get to the final distinction. There are two ways to think about the nation-building role of a bill of rights: the *regulative* conception and the *constitutive* conception. On the regulative conception, the function of a bill of rights is to enable individuals to invoke the machinery of the courts to set binding constraints on political decision making. Serving this function does not depend on a bill of rights having any effect on citizens' political identities. On the constitutive conception, a bill of rights constitutes the demos that it also constrains. It encodes and projects a certain vision of political community – in particular, the idea of a political community as consisting of rights-bearing citizens of equal status. To serve as an instrument of nation building, a bill of rights must alter the very self-understanding of citizens.

This is the idea of civic citizenship, most famously presented by Ernest Renan.[31] I have characterized the argument for civic citizenship previously in the following way.[32] A constitutional order must meet two constraints, the *legitimacy* constraint and the *stability* constraint. The legitimacy constraint is normative, while the stability constraint is sociological. The ambition of liberal constitutionalism is that a constitutional order must both be legitimate and must enjoy the allegiance of a sufficient number of its citizens to work. On the liberal conception, the conditions for the legitimate exercise of public power are the rights and institutions of representative government that one finds in a typical liberal-democratic constitution. The ambition of the civic conception of citizenship is that these same conditions also supply the necessary motivational element for those institutions to work. Additionally, the connection between legitimacy (normative) and stability (sociological) is not contingent. Rather, it is conceptual – in other words, it is the ambition of the civic conception of citizenship that citizens view themselves as part of the same constitutional-legal order, *precisely because* that order is legitimate.

The *Charter* as a Nation-Building Instrument

The *Charter* relies on both the regulative and constitutive conceptions of a bill of rights to serve as an instrument of nation building. In regulatory terms, the *Charter* imposes legal restraints on minority nation building by Quebec, through the rights to inter-provincial mobility and to minority language education for children. The centrality of the mobility and minority language education rights provisions to the nation-building project of the *Charter* is underlined by their exemption from the notwithstanding clause, unlike most *Charter* rights. Both rights can be understood as a response to potential or actual policies of linguistic nation building by Quebec, and,

indeed, Quebec has objected to both.[33] The *Charter* prohibits the use of disincentives to inter-provincial migration by guaranteeing the right to "move and take up residence in any province" and "to pursue the gaining of a livelihood in any province."[34] These rights are subject to laws of general application "other than those that discriminate among persons primarily on the basis of province of present or previous residence" and "laws setting down reasonable residency requirements for the receipt of social services.[35] Quebec objected because the province "legitimately discriminates in its legislation to preserve and enhance its integrity as a culturally differend [sic] society operating within the context of the dominant Anglophone culture of the continent."[36]

Far more important as a tool of minority nation building in Canada is the linguistic assimilation of international and inter-provincial migrants. The key tool in this case is education. Under the Canadian Constitution, education lies in the provincial jurisdiction and encompasses power over the language of instruction and curriculum.[37] This power has been crucial for Quebec because it has permitted that province to establish and operate a primary and secondary educational system that works in French, which is a centrepiece of linguistic nation building. It has also enabled Quebec to create French-language universities, an indispensable support for the use of French in economic and political life, which is the source of considerable controversy in other plurinational states. Conversely, it has denied to the federal government the power to set a standard curriculum in a shared national language, a common instrument of nation building in many countries.

Absent the *Charter*, Quebec could have mandated that the exclusive language of public education in Quebec – at all levels – be French. Yet, the *Charter* granted the right to certain categories of citizens to receive minority language primary and secondary education for their children where numbers warrant. The federal government justified this right by reframing the problem of linguistic disadvantage. For Quebec, the problem was the diminished status of French within Quebec. The federal government responded by attempting to break the equation of French with Quebec, by making the issue the status of francophones across Canada. As *Federalism for the Future* puts it, "the people of the French language and culture do not have the same opportunities as do those of the English language to live their lives, to raise their children ... in their own language *in all parts of Canada*."[38] The goal was to make Canada the home for francophones from coast to coast. The minority language education provisions were the centrepiece of this strategy. Yet, the language rights applied symmetrically to Quebec's Anglophone minority.

The flashpoint of controversy within Quebec has been the right of anglophones who received their primary school instruction anywhere in Canada in English to have their children educated in English in Quebec – the so-called "Canada Clause."[39] This provision was sharply attacked by Premier René Levesque as undermining "the capacity of our National Assembly to protect French culture in Quebec."[40] Quebec's *Charter of the French Language* attempted to limit this right to parents who had been educated in English in Quebec.[41] The Canadian *Charter* was drafted specifically to render this policy unconstitutional, which the Supreme Court of Canada did in one of its first *Charter* judgments.[42] Another provision of the *Charter*, which grants citizens whose children have received their schooling in English anywhere in Canada the right to English-language education for their children in Quebec, also limits Quebec's ability to linguistically integrate migrants from other provinces.[43] An attempt to construe this right narrowly was recently found to be unconstitutional.[44] For Quebec, minority language education rights are very controversial, precisely because they limit Quebec's ability to encourage the linguistic integration of migrants to Quebec from other parts of Canada, not just immigrants to Canada.

Russell was rightly skeptical of the language rights provisions as a tool of nation building. Despite the entrenchment of the right to minority language education, French outside Quebec continues to decline, as does English within Quebec. In other words, the territorialization of language communities has continued apace. In addition, although the *Charter* grants the right to interact with the federal government and New Brunswick in French, these rights do not apply to dealings with other governments.[45] Francophones must still use English to interact with provincial governments. Moreover, even if such rights had been entrenched, the practical reality remains that the major economic and political opportunities are only open to those who speak English. As Jean Laponce has argued, if a language is not the language of the public sphere and is only spoken at home, it will eventually decline.[46]

Although the *Charter* grants the right to minority language, it does not grant the right to lead a complete life in French. Parallel forces have occurred in Quebec, reinforced by the emigration of anglophones. As Russell notes, as European settlement extended into western Canada in the late nineteenth and early twentieth century, it may have been possible to create a truly bilingual society in the Canadian west. Instead, the federal government took exactly the opposite position, most infamously in the Manitoba schools crisis.[47] Thus, Ken McRoberts is correct when he argues that the dream of a bilingual Canada from sea to sea is now over.[48] If the goal of the language rights provisions of the *Charter* was to roll back the clock on linguistic assimilation, they are "too little too late."[49]

However, the *Charter* was also intended to function constitutively as the germ of pan-Canadian constitutional patriotism. As *Federalism for the Future* states, "a constitution is more than a legal document; it is an expression of how the people within a state may achieve their social, economic and cultural aspirations through the exercise and control of political authority."[50]

In a federal state such as Canada, since citizens share these rights irrespective of language or province of residence, a bill of rights serves as a transcendent form of political identification – the spine of common citizenship that unites members of a linguistically diverse and geographically dispersed polity across the country as a whole. Cairns puts this point well: "[T]he *Charter* fosters a conception of citizenship that defines Canadians as equal bearers of rights independent of provincial location. This legitimizes a citizen [sic] concern for the treatment of fellow Canadians by other than one's own provincial government."[51]

Russell's skepticism of the constitutive effects of a bill of rights – which is shared by Dion – stems from an underlying skepticism regarding the efficacy of symbolic constitutionalism.[52] For both individuals, a constitution can only become a source of political identification and the basis of a national identity because of its concrete effects on public policy. Subsequent experience has proven that Russell was right and wrong. Outside of Quebec, the *Charter* has generated a new pan-Canadian patriotism, likely much more quickly than even the most optimistic predictions suggested. However, within Quebec, the *Charter* has decidedly not had this effect. The *Charter* has not served to bind francophone Quebeckers to the Canadian constitutional order. Indeed, the sharply differentiated effect of the *Charter* on Canadian constitutional culture suggests that it may now be harder, because of the *Charter*, to build a unifying account of the Canadian constitutional order that transcends linguistic and regional divides.

The conflicting reactions to the Meech Lake Accord within and outside Quebec powerfully illustrate these points. Outside of Quebec, the public reaction to Meech Lake was very hostile, as famously described by Alan Cairns.[53] There were two points of criticism. The first was the process whereby the accord was reached. The proposed constitutional amendments were arrived at as the result of closed-door negotiations between the premiers and the prime minister. The complete package was then presented to the Canadian public as a *fait accompli*, a seamless whole that could not be altered for fear that the whole deal would unravel. As a legal matter, this approach grew out of the relevant procedures for constitutional amendment themselves, which required the consent of the two chambers of federal Parliament and the provincial legislatures.[54]

During the Meech Lake process, citizens outside Quebec rejected this process for constitutional change by rejecting its underlying theory. They asserted themselves, not the governments, as the constituent actors in the constitutional process. The Constitution did not belong to governments; it belonged to them. In the language of Trudeau, the rights of citizens precede the rights of governments. This was dramatically different from the way in which citizens had situated themselves *vis-à-vis* the Constitution before the *Charter*. The *Charter* had transformed Canadians outside Quebec into constitutional

actors and the basic agents of constitutional change. As the Charlottetown process made clear, Canadian constitutional culture would not permit constitutional amendments without widespread public consultation.

The transformative effect of the *Charter* on constitutional culture also explains the hostile reaction to perhaps the central provision in the Meech Lake Accord – the distinct society clause. The clause would have mandated that the Constitution be interpreted to recognize "that Quebec constitutes within Canada a distinct society" and would have affirmed "[t]he role of the legislature and Government of Quebec to preserve and promote the distinct identity of Quebec."[55] The clause did not identify in what precise respects Quebec was distinct from the rest of Canada and, indeed, the precise legal effect of the clause was the subject of widespread contestation. Outside Quebec, the fear was that the clause would provide for the unequal application of the *Charter*, by authorizing Quebec to limit the *Charter* in a manner not open to other provincial governments. In particular, there was a concern that it would provide additional constitutional support for linguistic nation building on the part of Quebec.

Now the question is why the unequal effect of the *Charter* mattered at all. Canadian public policy has long been differentiated on a provincial or regional basis because of vast differences in demography and the structure of the economy. The answer was that for Canadians outside Quebec the *Charter* was what made Canada a country and was the spine of a Canadian citizenship that was shared by all Canadians, both those within and outside Quebec. Consequently, the potential for its unequal application across Canada was an assault on a basic, non-negotiable term of the Canadian social contract and the very identity of the country. As Cairns puts it, "the *Charter* norm is ... sustained by a citizenry that views the possibility of a distinct and weaker *Charter* regime in another province as a constitutional affront. It offends the norm of an equal rights-possessing citizenry uniformly present in the federal, ten provincial and two territorial arenas. The *Charter* generates a roving normative Canadianism oblivious to provincial boundaries, and thus hostile to constitutional stratagems such as the Meech Lake 'distinct society' that might vary the *Charter*'s availability in one province."[56]

However, within Quebec, the view on the distinct society clause was exactly the opposite, rooted in a particular account of the history and origins of Canada. For Quebec, the adoption of federalism and the creation of Quebec was a direct response to the failure of the United Province of Canada, a British colony that resulted from the merger of the previous colonies of Lower Canada (later Quebec) and Upper Canada (later Ontario), which existed between 1840 and 1867. The history here is complex.[57] In brief, citizens of both Lower and Upper Canada elected equal numbers of representatives to a legislative assembly, although the largely francophone citizens of the former outnumbered the largely anglophone citizens of the latter.[58] The

language of government was meant to be English.[59] The goal behind the merger and departure from representation by population was to facilitate the assimilation of francophones – that is, to engage in English language nation building even before anglophones were a majority. As time went on, Upper Canada became more populous and demanded greater representation in the joint legislature, which was resisted by francophones who feared they would be outvoted on matters important to their identity. The result was political paralysis. Federalism was the solution – providing for representation by population at the federal level but also creating a Quebec with jurisdiction over those matters crucial to the survival of a francophone society in that province, such as education through institutions that operated in French.

So, to Quebec, Canada is unintelligible except against the backdrop of the idea that the institutions of federalism are designed to protect Quebec's linguistic distinctiveness. This idea is at the heart of the "two nations" or "dualist" theory of Canada. Yet, the odd thing about the Canadian Constitution is that it lacks express recognition of this fact and treats Quebec on a basis of juridical equality to the other provinces. On the symbolic front, the Constitution is absolutely silent on who Canadians were, or were not, to be.[60] This silence may be nothing more than a function of the peculiar legal character and political function of the *British North America Act, 1867 (BNA Act)* as a statute of the British Parliament that granted Canada extensive powers of internal self-government but not independence. It may also reflect a lack of agreement on such a shared account at the time Canada came into being. Yet, as Charles Taylor has perceptively argued, whatever the reasons for this silence, the lack of such a statement did not come without its costs.[61]

It was accompanied by a political culture outside of Quebec that refused to acknowledge the French-Canadian understanding of Confederation. The formal juridical equality of the provinces reinforced this refusal, setting up the dominant constitutional conversation as the contest between province building and pan-Canadian nation building. The distinct society clause therefore mattered a great deal because it was the first time the Constitution would explicitly acknowledge a view of what Canada was for. The concrete legal effect of the clause counted for a whole lot less than this simple statement. Indeed, by the end of the Meech Lake process, the clause mattered much less for what it did than for what it said.[62] And so the repudiation of the clause on the basis of a theory of Canada that was grounded in the *Charter* set up the *Charter* as an obstacle to, rather than as a central component of, how many Quebecers understood the nature of their relationship with Canada.

Now this is not the only reason that the *Charter* has failed to take in Quebec as the seed of pan-Canadian nationalism. Another strike against the *Charter* was the process whereby it was adopted, over Quebec's insistence that there

was a constitutional convention granting it a veto over constitutional change. Patriation in the face of the asserted veto damaged the legitimacy of the 1982 Constitution in the eyes of many Quebecers.[63] The claim of a veto for Quebec again derived from a constitutive account of the Canadian constitutional order, in which Canada was understood as a plurinational federation in which Quebec was a constituent actor. So any constitutional amendments that affected Quebec's ability to safeguard its linguistic identity (including its role in central institutions) would require its consent. And competing views over popular involvement in the constitutional amendment procedure *after* 1982 have made it difficult for the *Charter* to serve as the basis for a shared Canadian identity. The *Charter* fuels a view of Canadian citizens irrespective of province of residence as the constituent actors in the amending process. This position is largely irreconcilable with a veto for Quebec and sets up another disjunction between the notion of Canada constituted by the *Charter* and Quebec's account of a plurinational Canada. This gap between these two views of the amending process is illustrated by the referendum over the Charlottetown Accord, which was, in effect, two referenda held simultaneously – one in Quebec and one in the rest of Canada, with differing views on what the relevant majorities were.

The second reason is language. The stated aim of the *Charter* project was to serve as a common basis of citizenship that transcended the linguistic divide. The principal mechanism for doing so was minority language education rights provisions. These provisions were more than regulative measures that constrained linguistic nation building by Quebec. They communicated a conception about the place of language in Canada, with two components. First, they were designed to inculcate a self-understanding in francophones that Canada as a whole was their home, not simply Quebec, and a corresponding set of understandings for anglophones in Quebec. Second, by detaching linguistic identity from a province of residence, by opting for personality over territoriality as the basis of language of education, and by granting a right for linguistic minorities to choose their linguistic identity, the *Charter* adopted a stance of neutrality on matters of linguistic choice.

This position challenged the very legitimacy of linguistic nation building by Quebec. Moreover, this constitutional choice was likely to be non-neutral in its effect on Quebec's ability to protect and promote the French language. Although the minority language rights provisions apply symmetrically to francophone minorities outside Quebec and the anglophone minority in Quebec, they are rather unequal in their impact. The reason is that English is the dominant language of North America and, indeed, is now the dominant language of international economic life. So the economic pressures for francophones to assimilate are great. What this means is that for Quebec to continue as a French-speaking community in the modern world, it must

adopt linguistic policies that in other provinces are unnecessary. The symmetrical character of the minority language education rights provisions conceals a lack of symmetry in fact. This lack of symmetry is symbolically important because it marks a repudiation of Quebec's understanding of what Canada is for.

Conclusion: Bills of Rights as Nation-Building Instruments in Plurinational Places

Had the *Charter* been effective at combating Quebec nationalism and serving as the glue of a pan-Canadian national identity, the last twenty-five years of constitutional politics would not have happened. There would have been no Meech Lake Accord, no Charlottetown Accord, and no referendum in 1995 in which the country came close to break-up because of the threat of a unilateral declaration of independence in the event of a yes vote. And there would have been no proposal for, let alone a vote in favour of, a motion of the House of Commons recognizing the "Québécois" as a nation, even within a united Canada. Yet, because all of these things have happened, one of the basic political purposes of the *Charter* was not met. I would go even further and suggest that it was the role of the *Charter* as the central element of a pan-Canadian patriotism outside of Quebec that explains the vehemence of those who rejected Ignatieff's proposal that Quebec's national status be recognized in the Constitution for principled, not pragmatic, reasons. Andrew Coyne, for example, argues that the recognition of Quebec as a nation cut against an account of Canadian national identity under which "we are tied together by something more than blood, something higher than ethnicity."[64] To be sure, Coyne draws on a view of Canada that dates back to the founding of Canada itself, when George-Étienne Cartier famously proclaimed that Confederation would constitute "a political nationality with which neither the national origin, nor the religion of any individual, [will] interfere."[65] However, this view of Canada was strengthened by the *Charter*, which furthered its logic by guaranteeing all Canadians a set of rights independent of race and ethnic background.

So, to invoke the notion of one Canada was inevitably to invoke the legacy of Trudeau. And it was the *Charter* that lay behind the criticisms of the use of the term "Québécois" in the House of Commons resolution, as opposed to "Quebecker," because the former is ambiguous on whether it refers to a political community defined by ethnicity, language, or territory. The suggestion was that if ethnicity or language were the shared element of political identity of the nation recognized by the House of Commons and the definition of citizenship embodied therein, it cut against the grain of the trans-ethnic and linguistic notion of equal citizenship embedded in the *Charter*. Indeed, the power of the Trudeau vision was so great outside Quebec that the Ignatieff campaign was forced to respond by releasing a remarkable

document that attempted to reconcile Ignatieff's proposals with Trudeau's views.[66]

The Canadian experience holds more general lessons. Canada is a particular kind of divided society, in which there are competing nationalisms within the same political place. These places are variously referred to as multinational polities,[67] plurinational polities,[68] or, most recently, plurinational places.[69] In some cases, these places are states, such as Bosnia Herzegovina, Sudan, Sri Lanka, and Cyprus. In other cases, it falls within part of a state, as does northern Ireland. In yet other cases, it traverses the boundaries of a state, as does Kurdistan, which straddles the borders of Turkey, Iraq, and Iran. In all of these situations, ethnic, religious, and/or linguistic identities have served as the basis for nationalist mobilization, and each national group is engaging in competing nation-building projects that often conflict. For majorities, the goal is nationalizing nationalism; for minorities, it is state-seeking nationalism, leading to autonomy or secession, irredentist or otherwise. The *Charter* project was an attempt to use a bill of rights as a nation-building instrument to build a shared political identity that transcends the linguistic divide in a plurinational context. Moreover, the *Charter* was adopted as part of a process of constitutional *transition*, as Canada severed its final legal connections with the United Kingdom and adopted an indigenous source of title for the Canadian constitutional order. In other plurinational places, bills of rights are also looked to at moments of constitutional transition to serve as the basis of a shared political identity. The question is whether this reliance is realistic.

It is very difficult for bills of rights on their own to serve a constituting role in defining a new political identity. Contrary to those who argue for the possibility of a pure "constitutional patriotism" based on the commitment to universalistic principles of political morality, a bill of rights must be nested in a contingent context – a constitutional narrative drawing on a web of political memory forged by shared experiences, challenges, failures, and triumphs.[70] The Canadian experience tells us that in plurinational places, there is an additional hurdle. The task is not simply to situate a bill of rights in a contingent historical and political context. The task is to do so in a context in which the existence of competing nationalisms makes the dominant question of constitutional politics the conflict between competing national narratives. If the ambition of a bill of rights as a constitutive instrument of nation building is to serve as a central element of an overarching narrative, by standing apart from, and transcending, these competing narratives, a plurinational context is a particularly difficult environment in which to do so. Indeed, there is the danger that rather than transcending those national narratives, a bill of rights will be drawn back into it. This is what has happened in Canada. And if this would happen in Canada, where we have managed our nationalist politics peacefully and within the rule of

law, the difficulties may be greater still for countries emerging from violent conflict.

There are many reasons to value a bill of rights. Following John Hart Ely, we may argue that a bill of rights is required to protect the preconditions of the democratic process.[71] We could be Dworkinians and claim that rights are the conditions for the legitimate exercise of public power, and a bill of rights enforced by judicial review is the best means for implementing this commitment.[72] With Mark Tushnet and Jeremy Waldron, we could dispute whether judicial supremacy is the best institutional arrangement through which we can realize our commitment to liberal democracy.[73] Yet, whatever the reasons for adopting a bill of rights, constituting a nation by a bill of rights alone is not one of them.

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Notes

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9 The motion was ultimately introduced by Gilles Duceppe, leader of the Bloc Québécois on November 23, 2006, one day after the prime minister introduced his motion in the House of Commons. *House of Commons Debates*, 39th Parl., 1st Sess, No. 85 (November 23, 2006) at 5234.
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35 Ibid. at s. 6(3).
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13
The Internal Exile of Quebecers in the Canada of the Charter

Guy Laforest

I will begin this chapter on a personal note. More than twenty-five years ago, when the *Canadian Charter of Rights and Freedoms* came into effect, I was living in Montreal and studying at McGill University.[1] Among my professors were two great intellectuals who were also great idealists, Charles Taylor and James Tully.[2] I learned much from them, and, over time, they became friends of mine. Other professors influenced me perhaps less directly but just as meaningfully, namely Blema Steinberg, Daniel Latouche, James Mallory, and Harold Waller. Their approach was tinged with realism, and it perfectly offset Taylor's and Tully's approach. In philosophy, the realist approach is that of liberalism without illusions, as expounded by Judith Shklar, Raymond Aron, Isaiah Berlin, and Karl Popper among others. In politics, according to these authors, one must first and foremost avoid the worst and must understand that cruelty, fear, terror, and violence can crush the human person and attack his or her dignity and privacy. In this respect, I share the judgment of Irvin Studin, who recently wrote that Canada is a tremendous success on the scale of humanity, one of the countries among the most "peaceful, just and civilized."[3] A country where, to add my own voice, the strong as well as the weak can sleep soundly in a decent, comfortable and humane social environment without fear of the worst. All of this counts, therefore, for a tremendous development in the history of mankind.

I start on this note to provide a sense of proportion for the analysis that will be developed regarding the internal exile of Quebecers in the Canada of the *Charter*. Like a number of other people in Quebec, in terms of political identity and belonging, I am not a happy citizen in the Canada of the *Charter*.[4] Beyond my personal feelings, I think this sentiment is explained by the fact that Quebec is not properly integrated into the new Canada that has arisen since the constitutional reforms of 1982. Paradoxically, this reform saw the light of day, to a large extent, due to the dynamism and pressure exerted by Quebec on Canada in the aftermath of the Quiet Revolution. This chapter will argue that instead of improving the situation, constitutional