



Judicial interference in Canada's
parliamentary democracy

UNSEATING RESPONSIBLE GOVERNMENT



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Foreword by the Honourable Jack C. Major

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Foreword

The Canadian Charter of Rights and Freedoms was enacted with the consent of nine provinces in 1982. Upon its passing, significant concern was expressed that the *Charter* would undermine the Canadian system of parliamentary democracy, replacing it instead with a system of judicial supremacy (and court overreach).

These fears have found their place in recent decisions of the Supreme Court of Canada, which suggest that the Court may be moving toward a modification of Canada's constitution. The trend of court overreach is regrettable, as it creates unnecessary conflict between the courts and Parliament. The trend also erodes the role and duty of legislatures to enact legislation that accords with and protects *Charter* rights in a timely manner.

An aid in this brewing problem is the timely release of this paper by the Macdonald-Laurier Institute. Through exhaustive research and compelling prose, the authors carefully explain how Canadian courts, particularly the Supreme Court of Canada, have gradually departed not only from the constitutional settlement of 1867, but additionally from the choices made by the framers of the *Constitution Act, 1982*.

As the paper points out, this seeming departure is starkly unsupported by compelling reasons or by reasons at all. But as its authors also note, it remains possible that the recent actions of the Supreme Court of Canada have been substantially misunderstood, and any statement suggesting the empowerment of the judiciary to directly weigh in on the parliamentary process has been misconstrued. Indeed, the paper points to reasons to believe that this is so. If that is the case, then the recommendations made in this paper, some of which chart new territory, will prove unwarranted. But if that is not the case, then a quality paper such as this one will provide a basis for serious thought and action. The scarcity of scholarship of this level is regrettable.

— The Honourable Jack C. Major
Puisne Justice of the Supreme Court of Canada, 1992–2005

Executive summary | sommaire

When the *Canadian Charter of Rights and Freedoms* came into force in 1982, many warned that it would undermine the foundations of Canada’s system of parliamentary democracy and usher in a new age of judicial supremacy. For a time, those concerns appeared overstated. Canadian courts exercised a degree of restraint, and the basic contours of Westminster parliamentary governance remained intact. More than 40 years later, that early judicial restraint has largely given way.

Canadian courts now play a far more assertive and expansive role in shaping the country’s political and legal order. What was once a system grounded firmly in parliamentary supremacy has been steadily reworked through constitutional interpretation. This shift has not occurred through formal amendment or explicit redesign. Instead, it has emerged gradually through judicial decisions that have redefined both the meaning of rights and the proper role of courts in public life.

The cumulative effect is an erosion of Parliament’s traditional authority. Legislatures continue to pass laws, but they do so in an environment where the boundaries of acceptable policy are increasingly determined through litigation. Over time, this has altered the balance between political and judicial authority at the heart of Canada’s constitutional system.

This troubling transformation has unfolded through several distinct but reinforcing developments:

- The invention of the “living tree” as an autonomous approach to constitutional interpretation, enabling courts to expand constitutional meaning over time and move beyond earlier constraints.
- The relativization of *Charter* rights under section 1, where rights are routinely subordinated to broad and *ad hoc* judicial balancing.
- The expansive, substantive reading given to section 7’s guarantee of “life, liberty, and security of the person,” transforming it into a wide-ranging basis for reviewing legislation.

- The elevation of “reasonable hypotheticals” as a basis for finding legislation non-compliant with the *Charter*, particularly in the application of section 12’s provision against cruel and unusual punishment to mandatory minimum sentences.
- The inflation of equality rights under section 15 through an interpretation that extends judicial oversight into complex areas of social policy.
- An increasing tendency to countenance judicial supervision of the parliamentary process, marking a departure from traditional boundaries between courts and legislatures.

Taken together, they represent a significant shift away from the traditional foundations of parliamentary democracy in Canada. Through the accretion of undisciplined judicial interpretations, courts are, in important respects, reshaping the scope of legislative authority.

Restoring constitutional balance will involve making use of the mechanisms in our constitution that are designed to preserve the role of political authority alongside the courts. Governments should act deliberately and consistently in defence of their institutional role, including by:

- Reasserting legislative freedom by invoking section 33 of the *Charter*, also known as the notwithstanding clause or parliamentary sovereignty clause, where warranted.
- Instructing Crown counsel to advocate for revisiting problematic judicial precedents in defending against lawfare – litigation intended to subvert public policymaking.
- Preventing courts from questioning parliamentary proceedings by amending legislation governing the admission of evidence.
- Curtailing lawfare by tightening procedural thresholds for Crown liability.
- Correcting the Supreme Court’s misinterpretation of section 24 of the *Charter*, by amending it to limit the remedies that courts may grant in relation to legislative conduct or proceedings.

Canada’s constitutional order depends on a careful balance between political and judicial authority. That balance has shifted – gradually, but decisively. Reasserting it is essential to preserving a system in which elected representatives, not courts, remain at the centre of public decision-making. [MLI](#)

Lorsque la Charte canadienne des droits et libertés a été mise en vigueur en 1982, de nombreuses voix ont signalé son potentiel à compromettre les bases de la démocratie parlementaire et à inaugurer une ère de suprématie judiciaire au Canada. Pendant un moment, ces craintes ont paru exagérées, les tribunaux ayant fait preuve de retenue, et la gouvernance parlementaire de type Westminster étant restée intacte. Plus de 40 ans après, cette retenue judiciaire initiale a largement disparu.

Les tribunaux jouent désormais un rôle bien plus important pour l'ordre politique et juridique du pays. L'interprétation constitutionnelle a graduellement transformé un système autrefois fondé sur la primauté du Parlement. Ce changement n'est pas le fruit d'un amendement ou d'une refonte explicite, mais des décisions judiciaires qui ont progressivement redéfini à la fois les droits et le rôle des tribunaux dans la vie publique.

L'effet cumulatif s'est traduit par l'érosion progressive du pouvoir traditionnel du Parlement. Désormais, les législatures adoptent les lois dans un contexte où l'acceptabilité est de plus en plus définie devant un tribunal, ce qui modifie l'équilibre entre les pouvoirs politique et judiciaire au cœur du système constitutionnel canadien.

Cette mutation s'est opérée à travers plusieurs évolutions distinctes se renforçant réciproquement :

- L'adoption de l'approche qualifiée d'« évolutive », qui confère intrinsèquement aux tribunaux la faculté, au fil du temps, d'étendre la portée constitutionnelle au-delà de ses limites historiques.*
- La relativisation des droits assurés par la Charte conformément à l'article 1, les droits devenant systématiquement subordonnés à un rééquilibrage judiciaire étendu et ad hoc.*
- L'interprétation extensive et approfondie de la garantie relative à la « vie, la liberté et la sécurité de la personne » énoncée à l'article 7, la transformant en une base extrêmement large pour l'examen d'une loi.*
- L'élévation des « hypothèses raisonnables » au rang de fondement pour conclure à la non-conformité d'une loi avec la Charte, en particulier la disposition de l'article 12 contre les peines cruelles et inusitées, en vertu de laquelle une peine minimale obligatoire peut être jugée inopérante.*
- La flambée des droits à l'égalité prévus à l'article 15, résultant d'une interprétation qui étend la compétence des tribunaux à des secteurs complexes de la politique sociale.*

- Une propension accrue à admettre la surveillance judiciaire du déroulement parlementaire, ce qui modifie la démarcation classique entre les tribunaux et les organes législatifs.

Considérés globalement, ces éléments constituent un éloignement important des fondements traditionnels de la démocratie parlementaire au Canada. Par l'agrégation d'interprétations judiciaires non conformes aux normes établies, les tribunaux redéfinissent, à d'importants égards, l'étendue de la compétence législative.

La restauration de l'équilibre constitutionnel s'appuiera sur les dispositifs prévus par notre Constitution, destinés à préserver le rôle de l'autorité politique aux côtés des tribunaux. Les gouvernements se doivent d'intervenir de façon intentionnelle et cohérente pour préserver leur rôle institutionnel, notamment à travers les mesures suivantes :

- *En réaffirmant la liberté législative au moyen de l'article 33 de la Charte, également connu sous le nom de « clause dérogatoire » ou « nonobstant », lorsqu'elle se justifie.*
- *En chargeant les procureurs de la Couronne de plaider en faveur d'une révision des précédents judiciaires contestables, l'objectif étant de contrer les « guerres juridiques », c'est-à-dire les débats visant à perturber l'élaboration des politiques publiques.*
- *En interdisant aux tribunaux de contester les travaux parlementaires par la modification de la législation encadrant l'admissibilité des preuves.*
- *En limitant les « guerres juridiques » par le renforcement du seuil de compétence pécuniaire.*
- *En corrigeant l'interprétation inexacte de l'article 24 de la Charte par la Cour suprême, au moyen d'un amendement destiné à restreindre les réparations ordonnées par les tribunaux en lien avec les lois ou les procédures.*

L'ordre constitutionnel du Canada s'appuie sur un équilibre subtil entre les autorités politique et judiciaire. Cet équilibre a été modifié de façon progressive, mais déterminante. Il est fondamental de le restaurer afin de garantir un système dans lequel les représentants élus, et non pas les tribunaux, occupent le rôle central dans la prise de décision publique. [MLI](#)

Introduction

In October 2025, the Supreme Court of Canada unveiled its new, black judicial gowns. This change severed a 150-year-old practice of the judges donning the iconic red and white ermine robes, and through it, a connection to the English legal tradition from which the Court originated. Characterized by Chief Justice Richard Wagner as “one tradition that we have decided to modernize,” it manifested, at a superficial level, the culmination of a deeper, growing ambivalence, or even antipathy, in judicial attitudes toward Canada’s legal heritage.

When the *Canadian Charter of Rights and Freedoms* was enacted as part of the *Constitution Act, 1982*, many commentators warned that it would undermine the foundations of Canada’s system of parliamentary democracy and usher in a new age of judicial supremacy. Although the Supreme Court of Canada began fulfilling this prophecy soon thereafter, it tempered this shift while expressing a reticence to transgress the long-standing separation of political and judicial authority inherited from the British constitution. But more than 40 years after the *Charter’s* adoption, that initial reticence has been eclipsed. Exemplifying the erosion of our constitutional inheritance, in 2024 the Supreme Court of Canada went so far as to assert in *Canada (Attorney General) v. Power*, 2024 SCC 26, that “the *Charter* effected a revolutionary transformation of the Canadian polity.” With this rationalization, the Court subverted more than 300 years of constitutional tradition. Adopting a proposition hitherto unknown in any other Westminster system, it held that a plaintiff could sue the Crown for damages merely for the enactment of legislation.

This paper reviews the ways in which Canadian courts have undermined the traditional modes of parliamentary governance in Canada, with particular attention to the impact of *Charter* jurisprudence. It argues that the irresponsible exercise of judicial power under the *Charter* has unsettled the balance between political and judicial authority in the Canadian constitution. It sets out the

foundations of Canada’s parliamentary democracy and discusses its inheritance, from the United Kingdom, of the Westminster model of responsible government. It examines the deliberate choices made by the *Charter’s* framers that sought to constrain judicial power under the 1982 Constitution. It reviews the various ways in which judicial decision-making has contributed to the erosion of Canada’s Westminster inheritance, paying particular attention to the last two decades and featuring jurisprudential developments that have undermined the authority of the political branches. It concludes by offering a set of primarily *political* recommendations for correcting course and responding to these expansions of judicial power.

The Westminster model in Canada

The foundations of the Westminster system of parliamentary democracy in Canada find their origins in the United Kingdom. The *British North America Act, 1867* (*BNA Act*, now the *Constitution Act, 1867*) endowed Canada with “a Constitution similar in Principle to that of the United Kingdom.” The two core axioms of Britain’s Victorian constitution, and indeed that of the present-day constitution of the United Kingdom, are the doctrine of parliamentary sovereignty and the principle of responsible government. Supporting these axioms is the doctrine of parliamentary privilege, which protects parliamentary processes from undue interference by other branches of the state, including the judiciary. Parliamentary sovereignty, responsible government, and parliamentary privilege are central features of the Westminster constitution.

Parliamentary sovereignty

The doctrine of parliamentary sovereignty holds that Parliament may enact any law, except those that bind its successors. It underpins Parliament’s capacity to secure the common good – the flourishing of the political community and the complex set of conditions that foster it (Duke 2016) – such that in the British constitution it is Parliament that is chiefly responsible for deliberating upon, making, and changing the law. While the doctrine provides that Parliament

enjoys plenary legislative authority, in practice, the exercise of this legislative freedom is tempered by constitutional convention and political constraints. In short, the doctrine of parliamentary sovereignty embodies the principle of legislative freedom, which is in turn framed by the political constitution (Ekins 2023).

The principle of legislative freedom is reflected in the political achievement of Confederation, which united the peoples of British North America as a self-governing political community. The *BNA Act* divided sovereign legislative power between the provinces and the federal Parliament, while formally maintaining unitary parliamentary sovereignty in the Imperial Parliament in London. Leading up to the enactment of the *BNA Act*, the Fathers of Confederation drew upon Sir William Blackstone’s formulation of parliamentary sovereignty to explain how the sovereignty of the Imperial Parliament – the only institution capable of amending the proposed *BNA Act* and committed to upholding the responsible government of the colonial legislatures – would secure the legislative authority of the provinces against federal domination (Vipond 1991, 31; Blackstone 1765).

Accordingly, the legislative freedom of Parliament and the provinces was constitutionally enshrined from the beginning of the federation. Within the framework established by the *BNA Act*, the federal Parliament in Ottawa and the various provincial legislatures were sovereign within their respective spheres of jurisdiction (Walters 2017, 115). As the Privy Council stated in *Hodge v. The Queen* (1883), 9 App. Cas. 117, “the local legislature is supreme, and has the same authority as the Imperial Parliament, or the Parliament of the Dominion, would have had under like circumstances.” To the extent that the courts were called upon to determine the scope of these respective powers, it was only insofar as it was necessary, in a federal system, for there to be some authority “to control the limits of the respective sovereignties” (*Northern Telecom v. Communication Workers*, [1983] 1 S.C.R. 733). Moreover, even these judicial determinations remained subject to the Imperial Parliament’s residual power to legislate in any matter for Canada.

In practice, the Imperial Parliament’s residual legislative power meant that the federal Parliament in Ottawa could amend the *BNA Act* in response to judicial decisions that it perceived as unduly constraining of its legislative authority. Under conventions formalized in the *Statute of Westminster* (1931), the Imperial Parliament in London legislated for its colonies only at their

request and consent. As a result, it was open to the Parliament of Canada to expand its legislative jurisdiction, where it lacked any requisite powers to govern, by requesting the Imperial Parliament to amend the *BNA Act*. Such a request was issued by a joint address adopted by a simple majority of the Senate and of the House of Commons, a procedure that was akin to the ordinary act of legislating. In this way, the principle of legislative freedom of the federal Parliament was upheld.

For example, in 1937, the Privy Council found that the Canadian Parliament lacked the power under the *BNA Act* to legislate the creation of an unemployment insurance program (*Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 355). In response, Parliament requested and obtained an amendment to the *BNA Act* from the Imperial Parliament allowing it to adopt such legislation, which it subsequently did in 1940. Although the legislative freedom of Parliament and the provinces may have had to be confirmed through this procedure, the fact remains that under the 1867 constitutional settlement, no legislative act was beyond the powers of a Canadian legislature.

As a corollary of the principle of legislative freedom, prior to 1982, Canadian courts recognized that they lacked the legitimate authority to intervene in the lawmaking process or to evaluate the merits of legislation. In the Westminster model, the law courts are only given secondary billing. By longstanding constitutional principles, entrenched in the *Bill of Rights* (1689), the judiciary was proscribed from questioning or interfering with parliamentary processes. Hence, as the Supreme Court of Canada aptly summarized in the *Patriation Reference*, [1981] 1 S.C.R. 753: “Courts come into the picture when legislation is enacted and not before,” for it “would be incompatible with the self-regulating ... authority of ... Parliament to deny their capacity to pass any kind of resolution.” We elaborate upon this doctrine of parliamentary privilege further below.

Under the constitutional scheme granted to Canada, and consistent with the principle of legislative freedom, the primary role of the courts was to resolve disputes according to law. It was in the course of discharging that task that the courts may be required “to declare the common law and expound the statute law” in an authoritative manner (*Segal v. City of Montreal*, [1931] S.C.R. 460). But it did not follow that the courts possessed a general jurisdiction to interpret the law *in abstracto*, nor did the courts profess to exercise a plenary

lawmaking or superintending power. In conformity with principles inherited from the United Kingdom's constitution, Canadian courts were not to judge the wisdom of legislative enactments, but acted to maintain the division of powers between Parliament and provincial legislatures. As noted above, this exercise of judicial power remained subject to a legislated response from the Imperial Parliament in London, on the request of the Canadian Parliament.

Responsible government

The second pillar of the Westminster model is the principle of responsible government. According to this principle, the Crown in its executive capacity (i.e., the government) is responsible to and governs only for so long as it can maintain the support of the House of Commons. Constitutional conventions define and regulate the relationships between ministers and the House of Commons, and responsible government is part of the political constitution of Canada (*Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69). It is by virtue of this principle that Parliament is supreme, not only in its capacity to create and change the law, but in its ability to hold the executive branch to account.

This arrangement differs from the American conception of the separation of powers. The prime minister and the premiers of each province are not directly accountable to the electorate outside of regularly scheduled elections, but must instead maintain the confidence of the House of Commons or the respective provincial legislature. By convention, the Governor General asks the political party that is able to do so, because it can attract support in the House of Commons, to form government. Conversely, the need for judicial oversight of the executive branch is significantly limited under this system: since the government of the day must maintain the confidence of the elected representatives sitting in Parliament or the provincial legislature, those representatives in turn ensure that the government of the day remains responsible to them, and through them to the electorate.

Granted, responsible government has not always existed in Canada. Representative legislatures were not established in this country until the *Constitution Act, 1791*. Even after that, early pre-Confederation legislatures did not enjoy responsible government until after Lord Durham's report in response to the unrest of the 1837 rebellions in Upper and Lower Canada, which recommended unifying the two colonies under a single legislature (Russell 2004, 14–15). Nonetheless, responsible government was well

entrenched in Canada prior to the enactment of the *Constitution Act, 1982*, and remains so to this day.

Parliamentary privilege

A corollary of parliamentary sovereignty is the doctrine of parliamentary privilege. While the principle of responsible government ensures that it is Parliament that chiefly supervises the executive branch, the doctrine of parliamentary privilege ensures that Parliament can carry out its functions without undue interference by the other branches. The doctrine of parliamentary privilege is an integral part of the Westminster system that is Canada's constitutional heritage. It is a vital constitutional doctrine that insulates the legislative process from executive and judicial interference and protects the capacity of Parliament and the legislatures to act for the common good.

Under the doctrine of parliamentary privilege, Parliament is the guardian of its own procedures and regulates its own internal affairs. The doctrine of parliamentary privilege is as old as the existence of Parliament itself. One of its earliest manifestations is article 9 of the English *Bill of Rights* (1689), which provides (in modern spelling):

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

Consequently, the doctrine of parliamentary privilege provides for “freedom from interference with ‘the parliamentary work of a Member of Parliament – i.e., any of the Member’s activities that have a connection with a proceeding in Parliament’” (*Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2018 SCC 40, quoting Maingot (2016)). For example, the courts lack the jurisdiction to allow cross-examination at trial of witnesses on testimony they provided to Parliament (*Prebble v. Television New Zealand Ltd.*, [1995] 1 A.C. 321), to adjudicate a claim for damages arising from an internal parliamentary investigation (*Duffy v. Canada (Senate)*, 2020 ONCA 536), or to apply a justiciable “duty to consult” those persons who may be affected by contemplated legislation (*Authorson v. Canada (Attorney General)*, 2003 SCC 39; *Mikisew Cree* 2018). The freedom that parliamentary privilege extends to legislators is meant to shield legislative processes from interference by the other two branches, including the judiciary.

In Canada, parliamentary privilege has been traced to at least 1758, when the law accorded to the legislative assembly of Nova Scotia “all the power considered necessary for a legislature and its members to perform their parliamentary work” (*New Brunswick Broadcasting Co. v. Nova Scotia (Speaker of the House of Assembly)*, [1993] 1 S.C.R. 319, quoting Maingot (1982)). Every Canadian legislature has enjoyed parliamentary privilege, whether as a matter of common law or express constitutional provision. For the Parliament of Canada, its parliamentary privileges and its power to legislate the same are expressly recognized by the *Constitution Act, 1867*, section 18, which provides that:

The privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof respectively, shall be such as are from time to time defined by Act of the Parliament of Canada, but so that any Act of the Parliament of Canada defining such privileges, immunities, and powers shall not confer any privileges, immunities, or powers exceeding those at the passing of such Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland, and by the members thereof.

Meanwhile, the privileges of the provincial legislatures are “aptly and properly described as part of the constitutional law of the province” (*Fielding v. Thomas*, [1896] A.C. 600). In *New Brunswick Broadcasting* (1993), a majority of the Supreme Court of Canada affirmed that notwithstanding their unwritten nature, the privileges of the provincial legislatures have an “inherent constitutional” status.

In fact, the significance of parliamentary privilege has been reaffirmed on numerous occasions by Canadian courts, beyond the *Patriation Reference* (1981) mentioned above. For instance, the Supreme Court has described parliamentary privilege as “part of the fundamental law of the land” (*New Brunswick Broadcasting* 1993) and as “important to our constitutional equilibrium” (*Canada (House of Commons) v. Vaid*, 2005 SCC 30). It is accepted that parliamentary privilege “exists to protect the independence of Parliament and thereby further Parliament’s ability to oversee the activities of government” (*Alford v. Canada (Attorney General)*, 2024 ONCA 306).

Until recently, the courts disclaimed the idea that the enactment of legislation can be subject to certain procedural constraints or requirements of notice. For example, in *Authorson* (2003), the Supreme Court rejected the idea that the courts could impose such constraints on legislative bodies. The Court reaffirmed this view in *Mikisew Cree* (2018). However, it has undermined the vitality of the doctrine of parliamentary privilege more recently in the *Power* (2024) case, discussed later.

The Charter and Canada's Westminster inheritance

Did the enactment of the *Constitution Act, 1982*, particularly the adoption of the *Canadian Charter of Rights and Freedoms*, sweep away the foundations of Canada's Westminster inheritance? As the late Roderick Macdonald pointed out almost two decades ago, Canadian legal education has, since 1982, consistently downplayed the teaching of basic aspects of the constitution in favour of a single-minded focus on the *Charter*. This myopic focus, he suggested, has contributed to the formation of generations of lawyers who are conceptually ill-equipped to engage in constitutional analysis that does not involve rights issues (Macdonald 2007). It is perhaps no coincidence that it has become usual to hear of a supposed "*Charter* revolution" from friends and foes of the *Charter* alike (Morton and Knopff 2000).

However, this view overstates the extent to which the 1982 constitutional settlement was intended to overturn the prevailing constitutional tradition and practice in Canada. It may be granted that the *Constitution Act, 1982* introduced innovative elements to the Canadian constitution, the most consequential of which is judicial review under the *Charter* on rights grounds. But the *Charter's* framers did not intend for it to displace Canada's Westminster inheritance. To the contrary, they made reasoned choices aimed at preserving the pillars of the Westminster model of parliamentary democracy.

In this regard, three choices are especially noteworthy. First, the framers narrowly tailored the scope of the rights enumerated in the *Charter*, as a direct contrast to those in the US Bill of Rights. Second, they insisted on the inclusion of section 33 of the *Charter*, the “notwithstanding clause” or “parliamentary supremacy clause.” Third, the *Constitution Act, 1982* expressly contemplated a continuity with the Westminster tradition at multiple junctures.

Narrowly tailored *Charter* rights

While often lauded as a symbol of Canadian identity, the *Charter* is similar to many other bills of rights adopted across the world following the end of the Second World War. Where it differs from those instruments, however, is in the scope of the rights that it enumerates. Most notably, there is no express protection of private property rights in the *Charter*. In contrast to its international analogues and to the *Canadian Bill of Rights* (1960) adopted under Prime Minister John Diefenbaker, the *Charter* does not specifically enumerate a right to property, though section 26 affirms that the *Charter* does not displace other existing rights and freedoms.

The decision not to include property rights was a deliberate one on the part of the *Charter*'s framers. They were concerned that, empowered by the *Charter*, courts would overstep their role by replicating the experience of the so-called “*Lochner* era” of US Supreme Court jurisprudence. Named for the judgment in *Lochner v. New York*, 198 U.S. 45 (1905), this era was characterized by an activist American judiciary. Exercising judicial power that it claimed under the Bill of Rights and the Reconstruction Amendments, such as the protection of “life, liberty and property” under the Fourteenth Amendment’s due process clause, the United States Supreme Court struck down legislation aimed at improving the working conditions of various classes of employees.

The *Charter*'s framers were concerned with the vast scope of judicial power that a right to property, among other things, could entail. Accordingly, they carefully tailored the language used in section 7 of the *Charter*, which provides for “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Although section 7 was originally conceived as an analogue to the due process clause in the Fourteenth Amendment, the *Charter*'s framers intended to avoid judicial innovations employed by the American courts (*R. v. Holman* (1982), 28 C.R. (3d) 378, pp. 389–90). Under the doctrine of “substantive

due process,” American courts had begun to read substantive principles into the due process clauses of the American Bill of Rights, which would protect various fundamental rights from governmental action. While “due process” originally connoted a fair procedure, the judiciary was using the doctrine of substantive due process to strike down legislation based on the substance of the laws enacted.

To ensure that this experience would not be repeated in Canada, the *Charter’s* framers adopted the term “principles of fundamental justice” in section 7. They intended this language merely to ensure that any legislation that deprived individuals of “life, liberty and security of the person” would be subject to appropriate *procedural* safeguards (*Holman* 1982).

Most significantly, the framers included a limitation clause in the *Charter*. Section 1 provides:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Here, the *Charter’s* framers drew on postwar rights instruments, but with the aim of generalizing the “reasonable limits” that these instruments tended to recognize only in respect of specific rights (*Webber* 2009, 61). The overarching idea was to avoid Canada devolving into a “rights” culture akin to the United States by recognizing Parliament’s continued legitimacy to act in the common good (*Slattery* 1987, 746).

The notwithstanding clause

Beyond the textual formulations used in the enumeration of *Charter* rights, the framers introduced an additional mechanism. To prevent the possibility of judicial abuse of the *Charter*, they made the reasoned choice to preserve parliamentary supremacy through section 33 of the *Charter*. On its face, section 33 of the *Charter* enables Parliament or a provincial legislature to declare that a particular enactment shall operate “notwithstanding” any of sections 2 and 7 to 15 of the *Charter*, for a renewable period of five years.

Scholars sometimes object that the notwithstanding clause was a political compromise, as though this mere fact delegitimizes it – but not the other provisions of the *Charter* that were equally the product of compromise. The

inclusion of the notwithstanding clause in the *Charter* stoked controversy from the outset, with the proponents of American-style judicial supremacy – that is, the ability of judges to have the final say on the content of rights – objecting that it undermined the rights ostensibly “guaranteed” by the *Charter*.

In truth, the clause was intended to empower the legislative branches to interpret (or reinterpret) *Charter* rights in ways that depart from judicial specifications of those rights (Newman 2019; Sérafin, Sun, and Ménard 2023; Sigalet 2024). In so doing, it would avoid the creation of an American system of outright judicial supremacy (Newman 2019). As the framers understood, under the Westminster system that Canada inherited it is Parliament, not the courts, that holds the primary responsibility for upholding the rights of individuals.

This separation of responsibilities is an intelligent arrangement, considering the respective institutional capacities of the political and judicial branches. While the courts are constrained to adjudicate upon the particular disputes that come before them, Parliament has the capacity to deliberate upon the good of the political community as a whole. In the Westminster system of parliamentary democracy, it remains the legislature that can reason about rights freely and uninhibited by the constraints of the particular case, and it is the political branches that are best positioned to act accordingly.

The preservation of Westminster elements

Although less noticed than the formulation of *Charter* rights or the notwithstanding clause, any remaining doubts that the framers of the *Constitution Act, 1982* intended to preserve Canada’s Westminster inheritance may be dispelled by the references in the 1982 Act, both express and implicit, to Canada’s traditional constitution. Most definitively, sections 52(2) and 53 of the 1982 Act recognize a number of enactments as part of the “Constitution of Canada” and substitute modernized names for the earlier names of those enactments.

In the *Charter* itself, section 26 provides that “[t]he guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.” Section 29 states that “[n]othing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools” – a reference to protections

for minority education originally conferred in the *BNA Act*. Even the division of powers between the federal and provincial orders of government under the *BNA Act* is recognized in section 32 of the *Charter*, which addresses separately the scope of application of the *Charter* to matters “within the authority of Parliament” (s. 32(1)(a)) and “within the authority of the legislature of each province” (s. 32(1)(b)).

Even after the advent of the *Charter*, then, the framers expressly intended that Canada’s prior constitutional order, including its Westminster inheritance, would not be displaced. Each of these choices stands as a recognition of the basic fact that Parliament, as well as the provincial legislatures, were to retain the constitutional pre-eminence conferred by the affirmation in the *BNA Act* that Canada would have a “Constitution similar in Principle to that of the United Kingdom.” That these choices were the result of a political compromise, as the detractors of the notwithstanding clause like to point out, further supports the pre-eminent position that the political branches would have under the 1982 Constitution. Indeed, the fact is that the entirety of the *Constitution Act, 1982* – and our constitutional settlement as a whole – is the product of political compromise (Newman 2019).

The judiciary and the *Charter* revolution

There is good reason to think that the *Charter*’s framers did not intend it to displace the underlying principles of the Westminster system of parliamentary democracy, for they adopted specific measures that would avoid a radical displacement of Canada’s constitutional inheritance. Nonetheless, critics of the *Charter* have been proven correct in their warnings that it would enable judicial dominance in the governance of the country. As already noted, it is telling that by the time of the Supreme Court of Canada’s decision in *Power* (2024), a majority of the Court could confidently assert that “the *Charter* effected a revolutionary transformation of the Canadian polity.”

Yet in significant part, this transformation was effected not by the *Charter* itself, but by the decisions of judges interpreting it. Even as the Supreme Court disclaimed an intention to discard the Westminster tradition, its rulings in the first two decades of the *Charter* sowed the seeds of what was to come into full bloom after 2011, when the Court began to forcefully exert judicial power. These developments have served to dislocate the political branches in the constitutional balance. The jurisprudence of the last decade and a half has capitalized on the trajectory of the earlier cases and accelerated the expansion of judicial power.¹

Below, we canvass six ways in which the Supreme Court's jurisprudence has departed from the *Charter* settlement. This list is not intended to be exhaustive. It highlights noteworthy ways in which the judiciary, at first perhaps unconsciously, and later overtly, has unsettled the balance of the Canadian constitution.

Inventing the “living tree”

Under the traditional, common law approach, the courts treated the task of statutory interpretation as a search for the “manifest or expressed intention” of the enacting body (*Attorney-General for Canada v. Hallet & Carey Ltd.*, [1952] A.C. 427). According to Blackstone (1765), a leading expositor of the common law, “[t]he fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made” by reference to “the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law.” That is, the object of interpretation was conceived as the *legislative intent* as evidenced by the text of the provision along with contextual signifiers of intent (Ekins 2012).

This traditional outlook reflected an intelligible separation of powers between the legislative and judicial branches. By taking legislative intent to be the object of the interpretive exercise, in which the intention of the lawmaker (e.g., the Imperial Parliament, the federal Parliament, or the provincial legislatures) is to be inferred from the text and context, the courts properly aim to give effect to the lawmaking authority of the legislature. This respects the constitutional allocation of powers under the Westminster system. The relationship between legislative intent and lawmaking authority is fundamental to our constitutional arrangements; conversely, the idea that courts may simply “construct” a legislative intent from various interpretive sources amounts to a

usurpation of lawmaking authority. It is for this reason that fidelity to legislative intent has been described as “indispensable” to our legal system (Ekins and Goldsworthy 2014).

Yet, since the advent of the *Charter*, Canadian courts have often departed from this traditional understanding of interpretation and its fidelity to the lawmakers’ intention. On an orthodox progressive reading of our constitutional law, the “living tree” method of constitutional interpretation is a distinctively Canadian contribution to legal thought that attracts the admiration of courts around the world. For many of its proponents, part of the doctrine’s appeal lies in its apparent contrast with originalism, which is regarded as an American phenomenon (Binnie 2007). Nonetheless, this picture is misleading in two ways. First, the “living tree” method – in so far as it represents a coherent methodology of constitutional interpretation – is highly indebted to the theories of “living constitutionalism” developed by American legal progressives. Second, and more importantly, it can hardly be said to have characterized Canadian constitutional law and practice prior to the Supreme Court’s decision in *Hunter v. Southam*, [1984] 2 S.C.R. 145.

The “living tree” metaphor draws its origins from Lord Sankey’s reasons in *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, a 1929 decision of the Judicial Committee of the Privy Council. In that case, the Privy Council famously held that the word “persons” in section 24 of the *BNA Act*, which permitted “qualified persons” to be appointed to the Senate of Canada, included women. In Lord Sankey’s words, “[t]he British North America Act planted in Canada *a living tree capable of growth and expansion within its natural limits*” (p. 136; emphasis added). However, as many commentators have noted, Lord Sankey’s use of the metaphor in his judgment cannot be taken to imply the unwieldy, open-ended approach to constitutional interpretation subsequently imputed to the “living tree” idea (see, e.g., Miller 2009; Miller 2011; Finnis 2016; Honickman 2019).

It is revealing that the metaphor was never once cited by the Supreme Court of Canada between 1932 and 1978. Rather, it only became a fixture of Canadian constitutional law once it was rediscovered in the post-*Charter* era, when the Court cited it in its first-ever *Charter* judgment in *Law Society of Upper Canada v. Skapinker*, [1984] 1 S.C.R. 357, and then again in the landmark decision in *Hunter v. Southam* (1984), concerning the scope of section 8 privacy rights. (Even in *Hunter* itself, the citation to *Edwards* was in

support of the proposition that “a broad perspective” and “a broad, purposive analysis” was necessary in approaching constitutional instruments – hardly an endorsement of a distinctive methodology of constitutional interpretation.)

Although Lord Sankey’s formulation in *Edwards* suggested that there existed “natural limits” to the “living tree,” in practice Canadian courts have treated the notion as a licence to depart from the lawmaking intention that produced the constitutional provision or provisions at issue. In one prominent application of the concept, for example, the Supreme Court held that “Lord Sankey L.C.’s reference to ‘natural limits’ did not impose an obligation to determine, in the abstract and absolutely, the core meaning of constitutional terms” (*Reference re Same-Sex Marriage*, 2004 SCC 79, para. 28).

Because it manifests no principled and coherent methodology, the courts’ embrace and instrumentalization of the “living tree” approach to constitutional interpretation has fostered the augmentation of judicial power, albeit in sporadic and inconsistent ways. Much of the force of the “living tree” metaphor, along with its attendant unsettling of the traditional constitutional balance, can be attributed to its role as a cultural touchstone for the judiciary. The metaphor justifies a broad “progressive” approach to the Canadian constitution, and particularly the *Charter*, that would have been alien to many of its framers.

Indeed, precisely how rights are to be updated under the “living tree” method has never received a satisfactory judicial elaboration. Sometimes the Court appears to reason along the lines of Ronald Dworkin’s view that it is merely discovering the most justifiable “right answer” to the rights disagreement it faces (Dworkin 1978); at other times it appears to reach for Wil Waluchow’s view that the Court’s job is to update constitutional meaning according to the evolving moral norms of Canada as a political community (Waluchow 2007).

An example of the first, Dworkinian deployment of the “living tree” can be found in the Supreme Court of Canada’s jurisprudence on section 2(d) of the *Charter*, which protects the “freedom of association.”² In *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 (“*PSERA*”), an early landmark decision on section 2(d), the Supreme Court rejected the existence of a freestanding right to strike under the *Charter*. In upholding an Alberta statute prohibiting strikes by certain public sector workers, the Court reasoned that:

The rights for which constitutional protection is sought—the modern rights to bargain collectively and to strike, involving correlative duties or obligations resting on an employer—are not fundamental rights or freedoms. They are the creation of legislation, involving a balance of competing interests in a field which has been recognized by the courts as requiring a specialized expertise.

Noting that it had “affirmed a principle of judicial restraint” in the field of labour relations, the Court expressed surprise that “we should be considering the substitution of our judgment for that of the Legislature by constitutionalizing in general and abstract terms rights” that were for the legislature “to define and qualify in various ways.”

After 1987, the Supreme Court then made substantial incursions upon the principle that labour relations, like other areas that involve competing interests among various societal groups, should attract a deferential attitude toward the exercise of political authority. This trend culminated with *Saskatchewan Federation of Labour v. Saskatchewan*, 2015 SCC 4, in which the Supreme Court held, for the first time, that the right to “freedom of association” under section 2(d) encompassed a “right to strike.” The case concerned a 2007 provincial statute that prohibited public sector employees deemed “essential” from participating in strike actions. Justice Abella, writing for the majority of the Supreme Court, declared that “the arc [of the jurisprudence] bends increasingly towards workplace justice” and that it was the time to give “constitutional benediction” to a right to strike. In the course of its ruling, the Court overturned its earlier precedent in *PSERA* (1987) and appealed to the living tree notion that rights should be interpreted “generously.”

In the result, the *Saskatchewan Federation of Labour* judgment gives the impression of a raw exercise of judicial will, based on Justice Abella’s own views of what constitutional protections were desirable (or Dworkinian “right answers”), rather than a genuinely judicial act of giving effect to the lawmaking intention expressed in section 2(d) of the *Charter*. The case aptly demonstrates that the “living tree” concept has been used to enlarge judicial power beyond its proper ambit. It does so by licensing courts to ignore the lawmaking intention manifested in constitutional provisions and to update the meaning of *Charter* rights, while displacing legislative authority. Apart from its dramatic but

sporadic use in constitutional adjudication, the main pernicious effect of the “living tree” is the legitimacy it has offered to other doctrinal innovations that contribute to judicial policymaking.

Relativizing legal rights

The Supreme Court of Canada’s entrenchment of the “living tree” metaphor as the lodestar of constitutional interpretation in the post-*Charter* era stands out for its mythologizing qualities. Nevertheless, this idea is far from its most significant contribution to the jurisprudence. Likely more consequential than the “living tree” has been the adoption of a general test of proportionality for rights limitations under section 1 of the *Charter*.

In *R. v. Oakes*, [1986] 1 S.C.R. 103, the Supreme Court of Canada developed the “*Oakes* test” for analyzing whether the prima facie infringement of a *Charter* right by a law was justified under section 1. The case involved a challenge to the constitutionality of the reverse onus then applied to drug trafficking offences under the *Criminal Code*. The case has taken on a much more profound significance in constitutional jurisprudence, however, owing to the fact that the Court announced a “balancing” or “proportionality” test to resolve the question of whether an infringement of a *Charter* right was “demonstrably justified.”

Under the *Oakes* test, the government bears the burden of defending a law found to infringe a *Charter* right by showing that the law (i) serves a compelling purpose, (ii) is rationally connected to that purpose, (iii) minimally impairs the affected right, and (iv) has benefits that outweigh the deleterious consequences. The four stages of the test comprise a form of proportionality inquiry, in which the court evaluates the propriety of the state’s objective against the means chosen to attain that objective (*R. v. K.R.J.*, 2016 SCC 31). Nonetheless, the text of section 1 itself does not mandate the use of the *Oakes* test, and the proportionality analysis that *Oakes* sets out is merely a judicial interpretation of the meaning of the term “reasonable limits.” Scholars have speculated that the test was influenced by or even lifted from German Constitutional Court jurisprudence (Morton and Knopff 2000; Grimm 2007).

Whatever its origins, one principal effect of adopting the *Oakes* test has been to engender a broad interpretation of the scope of the rights enumerated in the *Charter*. As Webber (2009) has pointed out, the adoption of a conceptual division, between (i) the limitation of a right and (ii) the justification of that

limitation, tends to foster an interpretive approach whereby an expansive scope is accorded to the right at the first stage, only to be curtailed by a consideration of “societal interests” at the second stage. Having given the right a “generous” interpretation at the first stage, the burden is then placed on the government at the second stage to justify the state action that infringed the right, under the *Oakes* test.

This two-stage division between a right and its limitation, inherent in the Supreme Court of Canada’s approach to section 1 of the *Charter*, gives rise to several problems. First, as noted, it encourages *Charter* rights to be broadly construed, even to the point where they embrace clearly anti-social conduct. For example, the *Oakes* framework has enabled Canadian courts to take a very expansive view of freedom of expression under section 2(*b*), such that prohibiting the possession of child pornography restricts the right (*R. v. Sharpe*, 2001 SCC 2). Under the prevailing approach, a person may have a “right” to engage in objectively wrongful behaviour, which denudes rights of their claim to special priority in legal reasoning (Urbina 2017).

Second, the two-stage division has drawn courts away from the task of properly interpreting the meaning of *Charter* rights. Having set out an array of broadly construed rights, this approach instead directs the exercise of judicial power towards controlling the effects and ends that legislatures and the government may impose in infringing or restricting those rights.

Under the proportionality analysis in *Oakes*, and particularly the final step of the test, the courts are to engage in an openly “normative” inquiry into whether the benefits of the law are in proportion to its deleterious consequences. Often, this inquiry is framed as a neutral technical and empirical exercise, based in part on social science evidence. But as Justice Brown observed in dissent in *K.R.J.* (2016), “what is ultimately being weighed is much more abstract and philosophical” and “[t]he moral nuances inherent in the question of justifiable limits on fundamental rights cannot be reduced to ‘technical questions of weight and balance.’” The application of proportionality analysis, then, can frequently disguise judicial assumptions about political morality that infuse the courts’ evaluations of the proportionality of the legislature’s chosen means (Miller 2014).

Third, the *Oakes* framework lends itself to a mischaracterization of legislatures as the domain of majoritarian policy and legislation as the mere expression of majority will or preferences. Whereas section 1 of the *Charter*

was originally intended to affirm the overarching importance of legislation in protecting public order and communal interests in a free and democratic society, the two-stage, bifurcated approach turns this traditional understanding on its head. Under the Westminster system, it is Parliament that is the principal and democratic source of rights protection. When the legislature acts to secure some end or ends, it is not seeking to balance rights *against* the common good. Rather, it forms a judgment about the appropriate boundaries of each person's rights as *constituents of* the common good, and it seeks to give effect to what each person is due (Ekins 2014). The view adopted in *Oakes* misconstrues most legislation as presumptive infringements of rights, which may be permitted to the extent that courts approve of the ends and effects a given law imposes (Webber et al. 2018, 36–39).

To illustrate, if the Supreme Court of Canada was ultimately willing to uphold prohibitions on child pornography in *Sharpe* (2001), then this is only because it has – for now – been satisfied that the government has met the burden of justifying its decision to criminalize the possession of this material. Under the *Oakes* test, the operative presumption is not that the criminal law can legitimately be used to protect vulnerable children from exploitation. Rather, it is that individuals have a “right” to “express” themselves through the creation and possession of such exploitative materials, subject to the government bearing the burden of justifying a limitation on this “right.”

Overall, the prevailing application of the *Oakes* framework has enabled judicial power to be augmented through its mischaracterization of legislative activity and the widespread deployment of proportionality analysis (Kennedy and Sigalet 2026). While each of the “prongs” of the *Oakes* test has been used for questionable judicial policymaking, it is the basic assumption of the test – that it is an inquiry into the “justified violation” of *Charter* rights – that sets it on a collision course with the Canadian tradition of parliamentary government. By viewing *Charter* rights as broadly framed interests, which stand to be everywhere “violated” or “infringed” by legislative action, the framework departs from the premise of the parliamentary tradition: that rights are to be realized in community and that genuine rights (as opposed to *claims of right*) do not compete against the common good, but take account of societal interests in the scope of the right itself (Webber 2014).

In our view, a better approach to the justification of rights limitations under section 1 is set out in the dissenting reasons of Justices Côté and

Brown in *Frank v. Canada (Attorney General)*, 2019 SCC 1. In that case, the Supreme Court considered whether provisions of the *Canada Elections Act* had unreasonably limited the section 3 right to vote of expatriate Canadian citizens, by denying voting rights to non-residents absent from Canada for more than five years until they resumed residence.

Applying the mechanical approach to the *Oakes* framework that we have criticized, Chief Justice Wagner, for the majority of the Court, held that the limitation on expatriate voting could not be justified. It is striking that Chief Justice Wagner insisted that “moral philosophy ... cannot readily serve as a source for a pressing and substantial objective” under the first step of the *Oakes* test, even as the majority judgment, in fact, substituted its own philosophy of “a fundamentally *inclusive* view of voting rights” and expatriates as “ambassadors of Canadian values” for Parliament’s philosophy of voting rights as rooted in a connection between electors and their communities (*Frank* 2019, paras. 51, 53, 80).

In contrast to the majority’s mechanical application of *Oakes*, Justices Côté and Brown argued in dissent that “[t]he limitations analysis must be flexible enough to accommodate” the “undeniable point that Parliament can constitutionally legislate in pursuit of, or in response to, considerations of political morality or philosophy” (*Frank* 2019, para. 126). In the context of section 3 of the *Charter*, it was significant that Parliament needed “to define and shape the boundaries and contours of a positive entitlement,” in this case the right to vote, “which, as such, necessarily requires legislative specification” (para. 124). Evaluating whether Parliament’s specification of the right to vote was a reasonable one, the dissent expounded a conception of legislative authority “as ‘turn[ing] on the capacity to secure the common good’, and its object as the common good itself” (para. 146, quoting Webber et al. (2018)).

Put differently, the dissenting judges in *Frank* articulated an interpretation of the *Charter*’s provisions as incomplete formulations of rights, which stand to be completed by the exercise of legislative authority to reasonably define the limits of those rights under section 1 (Webber 2009, 116–146). Consistent with the Westminster tradition, this alternative approach to the limitation of rights respects the capacity of Parliament and the provincial legislatures to deliberate upon the state of the law and to act to secure rights in community.

Expanding Section 7

In the early *Charter* decision of *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, the Supreme Court of Canada expressly rejected the intent underlying the text of section 7 of the *Charter*. As noted earlier, the formulation of “principles of fundamental justice” in section 7 had been carefully chosen to exclude judicial recourse to a “substantive” interpretation of the words “due process,” which the US Supreme Court had adopted in interpreting the Due Process Clauses of the Fifth and Fourteenth Amendments. Yet, the Supreme Court of Canada expressly rejected the intent of the *Charter*’s framers as a relevant consideration in interpreting its provisions. In doing so, the Court opened the door to later developments that would widen the ambit of the judicial power that the framers had worked to constrain.

Since 1985, it has become apparent that the courts have departed from the formulation chosen by the framers. After the *B.C. Motor Vehicle Reference* allowed for the possibility of evolving “principles of fundamental justice,” section 7 of the *Charter* gradually had new “principles” read into it. Subsequent decisions have transformed the provision into a screening mechanism, whereby virtually any public policy that fails to align with a narrow conception of instrumental rationality (i.e., means-ends analysis) is vulnerable to invalidation. That is, an inflationary interpretation of section 7 has permitted Canadian courts to scrutinize acts of lawmaking for conformity to judicially developed doctrines of “arbitrariness,” “overbreadth,” and “gross disproportionality.” Like the *Oakes* test, this approach posits a disjunction between individual interests, which are to be protected by *Charter* claims, and community interests, which fall to be defended by the government. The prevailing doctrine under section 7 considers the interests it protects (i.e., life, liberty and security of the person) in a manner that excludes the consideration of wider “societal concerns” within the scope of the right itself (*R. v. Brown*, 2022 SCC 18, para. 71).

This doctrinal development can be characterized as the *individualization* of section 7 (Stewart 2015). In *Canada (Attorney General) v. Bedford*, 2013 SCC 72, the Supreme Court held that whenever a law has an adverse impact on a person’s life, liberty, or security of the person, it infringes section 7 unless it is in accordance with the principles against “arbitrariness, overbreadth, and gross disproportionality” (para. 96). Importantly, *Bedford* introduced a novel interpretation whereby even “a grossly disproportionate, overbroad,

or arbitrary effect *on one person* is sufficient to establish a breach of s. 7,” regardless of any societal considerations (para. 123; emphasis added).

These propositions substantially lower the threshold for a section 7 infringement, at which point the onus is on the government to defend the law under section 1 and the prevailing *Oakes* framework. Given that legislative enactments are, by nature, formulated in general terms, *Bedford* all but guarantees that with respect to laws that impinge on life, liberty, or security of the person, *some* claimants will be able to establish a defect of instrumental rationality and show that the law is arbitrary, overbroad, and/or grossly disproportionate when applied in their particular cases. In essence, the Supreme Court’s approach treats a disconnect between a law’s means and ends, with respect to *any* individual who could be subjected to the law, as constitutionally suspect and attracting judicial scrutiny under section 7. Thus, in *Carter v. Canada (Attorney General)*, 2015 SCC 5, the Court held that the criminal prohibition on euthanasia, as a whole, was “overbroad” and infringed section 7 because the law would catch persons who were not “vulnerable” – rejecting the government’s arguments that it was difficult to target the criminal law solely to those who were vulnerable to being induced to commit suicide and that “every person is *potentially* vulnerable” (paras. 86–87).

Yet there are sound reasons for legislatures to formulate laws as general rules. Quite apart from the substantive ends to be achieved by the law, the technique of formulating legislation in broad terms (with a view to addressing mischiefs in the majority of cases) is justified by the demands of the rule of law, respect for the equality of persons, the limits of legislative foresight, considerations of efficiency, and the desire to limit official discretion (Ekins 2014). It is unrealistic to expect Parliament to legislate in such specific terms that would eliminate all possible means-ends gaps, particularly in areas of public policy where it must balance competing interests in acting for the common good of the political community.

The individualization of section 7 has had profound ramifications in the realm of socioeconomic policy. Through the expansive reading of “principles of fundamental justice,” Canadian courts have been empowered to interfere with policy decisions on drug addiction policy (*Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44), euthanasia (*Carter*, 2015), health care provision (*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35), regulating usage of public spaces (*Harm Reduction Nurses Association v. British*

Columbia (Attorney General), 2023 BCSC 2290), climate change targets (*Mathur v. Ontario*, 2024 ONCA 762), protections for children with gender dysphoria (*Egale Canada v. Alberta*, 2025 ABKB 394), and the removal of bike lanes (*Cycle Toronto v. Attorney General of Ontario*, 2025 ONSC 4397), among others. The typical course of adjudication in these cases consists in the judicial invalidation of some policy, disfavoured by the claimant activist group, on the grounds that the government has failed to adduce sufficient empirical evidence in favour of its approach. This exercise, however, wrongly assumes that political authorities are not entitled to act on non-empirical bases, such as philosophical-moral considerations and a conception of the common good.

In a troubling recent development, the Court of Appeal for Ontario has judicially enlarged the scope of section 7 once more, holding that the provision provides for a free-standing right to liberty (*Drover v. Canada (Attorney General)*, 2025 ONCA 468). Traditionally, the section 7 interests to life, liberty, and security of the person were understood to be confined to deprivations occurring in the context of the “administration of justice” – that is, situations where the claimant is exposed to criminal, judicial, or administrative proceedings (see *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46). Nonetheless, in *Drover*, a majority of the court discarded this understanding and ruled that the federal requirement that returning officers must reside in the riding to which they were appointed was contrary to section 7 as it impinged on the claimant’s “liberty.”

The doctrinal innovation adopted in *Drover* is certain to have a “transformative effect” and amounts to a “massive expansion of judicial power,” as the dissenting judge, Justice Miller, noted. The creation of a free-standing constitutional right to “liberty,” untethered from the “administration of justice” constraint, will expose virtually all legislation to constitutional scrutiny under section 7. Since “almost all legislation restricts the exercise of personal autonomy” in the course of setting the terms of interaction between citizens and “secur[ing] the conditions needed for the flourishing of all,” it follows that an individual right to liberty under the *Charter* “would alter the balance of power in our constitutional order” and countenance judicial supervision over the formulation and implementation of public policy (*Drover* 2025, paras. 105–06). While the decision is currently under appeal to the Supreme Court of Canada, its radical and destabilizing impact on public policy is extant law in Ontario.

Misusing “reasonable hypotheticals”

A rightful system of criminal justice depends upon respect for the legitimate authority of Parliament in deliberating upon and promulgating a coherent and just scheme of penalties for criminal offences. Yet perhaps no area of judicial decision-making has attracted such fierce public criticism as criminal sentencing, where the undisciplined exercise of judicial power threatens to nullify Parliament’s authority to set the sentencing agenda. Under section 12 of the *Charter*, which provides for “the right not to be subjected to cruel and unusual treatment or punishment,” Canadian courts have habitually ruled various mandatory minimum sentences to be unconstitutional.

The origins of these wanton deployments of judicial power can be traced to the Supreme Court of Canada’s judgment in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295. In that case, the plaintiff challenged the federal *Lord’s Day Act*, which mandated that stores be closed on Sundays. Sunday closing legislation had enjoyed popular support, including from both the traditionalist right and the pro-labour left (Burns 1986). Nonetheless, the Court unanimously struck the Act down on the grounds that it was “not consistent with the preservation and enhancement of the multicultural heritage of Canadians.”

It is significant that the Court allowed the claim to proceed even though the challenge was brought by a corporation, the eponymous Big M Drug Mart, to advance its commercial interests, rather than an individual who belonged to a group whose religious freedoms were allegedly infringed. Drawing what it saw as an implication of constitutional supremacy, the Court reasoned that “no one can be convicted of an offence under an unconstitutional law.” In doing so, however, the Court departed from the traditional role of the judiciary in adjudicating a concrete dispute between the parties. The result was a substantial augmentation of the jurisdiction of the courts in *Charter* matters, for they could now weigh in on matters of public policy even in the absence of parties that were directly affected.

While not fully appreciated at the time, the decision in *Big M Drug Mart* provided the impetus for the Court’s subsequent development of the controversial “reasonable hypothetical scenarios” doctrine as part of its section 12 jurisprudence. Under the doctrine, a court is entitled to evaluate a sentencing law not only based on whether it would lead to a “cruel and unusual” punishment on the facts of the immediate case before it, but also on other, *hypothetical* scenarios to which, it is claimed, the law might foreseeably

apply. First articulated by the Supreme Court in relation to section 12 in *R. v. Smith*, [1987] 1 S.C.R. 1045, the doctrine has grown in prominence since the judgment in *R. v. Nur*, 2015 SCC 15.

In *Nur*, a majority of the Supreme Court held that the three- and five-year mandatory minimums for possessing loaded prohibited firearms, such as handguns, sawed-off shotguns, and automatic firearms, were “cruel and unusual” punishment on the basis of a “reasonable hypothetical” scenario.³ Dismissing the Crown’s arguments that the doctrine is unpredictable, unworkable, and should be abandoned, the majority affirmed the vitality of the reasonable hypotheticals doctrine, while denying that the construction of hypothetical scenarios “is limited only by the bounds of a particular judge’s imagination.”

The robust deployment of this doctrine has had a distorting effect on criminal sentencing in Canada. To illustrate, in the recent case of *Quebec (Attorney General) v. Senneville*, 2025 SCC 33, the Supreme Court declared that the minimum sentences of one year’s imprisonment for the offences of possessing and accessing child pornography were unconstitutional. This ruling was based upon the claim that the mandatory minimum would be disproportionate, not in these particular offenders’ own cases – as they had been convicted of possessing several hundred files of child sexual abuse material – but in the hypothetical case of an 18-year-old who receives and keeps a “sext” from his friend’s 17-year-old girlfriend. Other sentencing provisions deemed to be unconstitutional under this approach have included, among others: a one-year minimum for possession of drugs for trafficking purposes (*R. v. Lloyd*, 2016 SCC 13), a 90-day minimum for possession of child pornography (*R. v. Swaby*, 2018 BCCA 416), a four-year minimum for reckless discharge of a firearm (*R. v. Hills*, 2023 SCC 2), and a one-year minimum for child luring (*R. v. Bertrand Marchand*, 2023 SCC 26).

The reasonable hypotheticals doctrine facilitates the use of judicial power to undermine Parliament’s criminal sentencing authority, for it accords great scope to judges to invent or endorse “reasonable” hypothetical scenarios that would trigger a constitutional remedy. To comply with the rigours of the doctrine, Parliament would have to do the impossible, namely, anticipate and devise solutions for all manner of hypothetical scenarios in crafting a minimum sentence. In effect, the doctrine has been deployed so expansively as to render virtually all mandatory minimum sentences, even the most minimal and seemingly proportionate schemes, vulnerable to constitutional invalidation.

The use of reasonable hypotheticals has been defended on the basis that in constructing a hypothetical scenario, the courts are simply engaged in an interpretive exercise – conducting statutory interpretation to determine the reasonable reach of a criminal law. This contention is fallacious. Under our constitutional order, the judiciary is chiefly charged not with interpreting laws in the abstract, but with resolving concrete disputes according to law. While judges must apply a faithful understanding of the law in the course of adjudicating a dispute, it does not follow that they are accorded a freestanding power to interpret the law in the abstract, or to declare legislation unconstitutional by constructing hypotheticals. As one appellate judge, writing in dissent, aptly observed, “there is no principled basis for taking into account” whether “a make-believe offender” would suffer a “cruel and unusual punishment” (*R. v. Hills*, 2020 ABCA 263; see also Alford and Van Geyn 2026).

Relatedly, it has been suggested that Parliament can simply work around the doctrine’s ramifications by enacting a “safety valve” in every mandatory minimum provision, so that the minimum sentence would not apply in situations in which a judge determines it would constitute cruel and unusual punishment in the particular case before the court.⁴ This response, however, does no more than deflect the essential challenge to the doctrine, which is that it represents an unprincipled expansion of judicial power and undermines Parliament’s ability to act authoritatively in determining appropriate sentences for criminal offences. It amounts to contending that one branch of the Crown, the judiciary, is entitled to exercise its powers *illegitimately* so long as another branch, Parliament, can attempt to exercise its *legitimate* powers in another way. At root, the response degrades the constitutional allocation of authority: primary responsibility for deliberating upon and choosing a regime of criminal sentencing lies with Parliament, and it is not for courts to indirectly challenge the wisdom of a law by speculating and passing judgment upon its “reasonableness” in hypothetical cases.

In its latest judgment in *Senneville*, the Supreme Court’s reasons signal no intention to pull back from the unprincipled trajectory of section 12 jurisprudence. According to the majority, “there is no compelling reason to depart from the precedent established by the Court’s jurisprudence on reasonably foreseeable scenarios” (para. 78). As a result, we can expect that constitutional challenges to Parliamentary efforts to impose some discipline in criminal sentencing will continue. To protect its authority to set the criminal

justice agenda, then, a future federal Parliament will likely be required to use the notwithstanding clause to insulate mandatory minimum sentences from judicial review.

Inflating “substantive” equality

In its early *Charter* jurisprudence, the Supreme Court of Canada did not immediately adopt an expansive reading of equality rights. Section 15(1) of the *Charter* provides that:

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

In its first major judgment on the provision in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, which dealt with a challenge to a prohibition on non-citizens becoming members of the British Columbia bar, the Supreme Court proceeded cautiously. Justice McIntyre, whose interpretation of section 15(1) was adopted by the majority, observed that equality “is an elusive concept and, more than any of the other rights and freedoms guaranteed in the *Charter*, it lacks precise definition.”

Although the Court ultimately invalidated the prohibition in *Andrews*, it hastened to acknowledge that it “is not every distinction or differentiation at law which will transgress the equality guarantees of s. 15 of the *Charter*.” What was crucial to the outcome was the absence of a compelling reason for distinguishing non-citizen from citizen lawyers. In Justice McIntyre’s view, it amounted to discrimination to preclude “an entire class of persons from certain forms of employment ... without consideration of educational or professional qualifications or the other attributes or merits of individuals in the group.”

This relatively restrained approach to constitutional equality rights prevailed through much of the 1990s and early 2000s, focused on the rationale (or lack thereof) for any given distinction imposed by law. In a landmark, unanimous decision in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497, the Supreme Court upheld an age restriction on survivors’ benefits under the Canada Pension Plan, setting

out a sophisticated analytical framework for s. 15(1) claims. Notably, the Court's analysis not only recognized that "equality is a comparative concept" and that it "is impossible to evaluate a s. 15(1) claim without... comparing the treatment of [the plaintiff] to the treatment accorded to a relevant comparator" group, but also took into account whether the law functions "by distinctions corresponding to the actual situation of individuals it affects" (paras. 24, 102). Put simply, the Court's section 15(1) analysis asked whether, for any impugned distinction created by the law, it was a reasoned distinction or merely arbitrary.

Moreover, the Court's approach granted significant deference to the legislature in formulating social policy, denying that "legislation must always correspond perfectly with social reality in order to comply with s. 15(1)" (*Law* 1999, para. 105). This approach was consistent with the overall tenor of the Court's section 15 jurisprudence as it then stood, which emphasized that "a Legislature should not be obliged to deal with all aspects of a problem at once" and "must surely be permitted to take incremental measures" and "given reasonable leeway to deal with problems one step at a time" (*McKinney v. University of Guelph*, [1990] 3 S.C.R. 229). Indeed, the Court stressed that Parliament was entitled to act upon "informed generalizations without running afoul of s. 15(1) of the *Charter* and being required to justify its position under s. 1" (*Law* 1999, para. 106). Applying this arbitrariness-focused framework, the courts had upheld the political branches' freedom to formulate public policy on economic development (*Lovelace v. Ontario*, 2000 SCC 37), the tailoring of social welfare payments (*Gosselin v. Quebec (Attorney General)*, 2002 SCC 84), and health care service provision (*Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78).

Nonetheless, a different line of jurisprudence signalled a shift towards the use of section 15(1) to dictate government policy through the undisciplined use of judicial power to effect distributive justice. For instance, in *Symes v. Canada*, [1993] 4 S.C.R. 695, the Supreme Court upheld the constitutionality of a federal tax regime that did not allow for childcare deductions. In dissent, Justice L'Heureux-Dubé set forth a distributive conception of equality rights and objected that the "goal of s. 15, with regard to gender, is the attainment of true substantive equality between men and women." Foreshadowing the expansive role that the *Charter* would take outside of the strict constitutional law context, Justice L'Heureux-Dubé stated in a later case that provisions

of the *Divorce Act* should be interpreted “consistent with *Charter* values of substantive equality rather than with the values of formal equality” (*Willick v. Willick*, [1994] 3 S.C.R. 670).

A majority of the Supreme Court eventually endorsed this distributive conception in *Vriend v. Alberta*, [1998] 1 S.C.R. 493, which involved a challenge to Alberta’s *Individual Rights Protection Act* (the precursor to the *Alberta Human Rights Act*). The plaintiff argued that the *IRPA* was under-inclusive because it failed to adopt “sexual orientation” as an express ground of prohibited discrimination. No positive act of the Alberta legislature was challenged in this case; rather, the case centred on an alleged failure to act.

Ultimately, the Court in *Vriend* held that the lack of a legislative prohibition against discrimination based on sexual orientation was an unjustified infringement of section 15(1). The majority, however, was not content to stop at this step, which went beyond those that the Court had hitherto taken under section 15. As a remedy, it ordered “sexual orientation” to be “read into” the *IRPA*, thereby adding it as a prohibited ground of discrimination under the statute. As the dissenting judge pointed out, this step amounted to an intrusion into the legitimate domain of the Alberta legislature, which had several options to respond to the decision, including to invoke the notwithstanding clause. But the majority expressed no concern on this front.

Although the Supreme Court’s attachment to “substantive equality” has remained central to its section 15 jurisprudence, it has since retreated from the more sophisticated framework found in its earlier case law. In *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30, the Court registered a significant departure from the arbitrariness-focused doctrine that had characterized its precedents in *Andrews* (1989) and *Law* (1999). In *Taypotat*, Justice Abella leveraged the notion of “substantive equality” to hold that all distinctions that imposed a burden upon a group with a characteristic protected by section 15(1) are *prima facie* discriminatory. This move was questionable, insofar as Justice Abella insisted that references to the term “arbitrary” in previous case law were merely synonyms for “discriminatory.” She went on to posit that the “focus of s. 15... is on laws that draw *discriminatory* distinctions – that is, distinctions that have the *effect* of perpetuating arbitrary *disadvantage* based on an individual’s membership in an enumerated or analogous group” (para. 18; emphasis added).

As one appellate judge observed, this doctrinal innovation introduced a “reductive” and “broad conception of disadvantage” that encompassed “potentially any setback to a person’s interests” (*R. v. Sharma*, 2020 ONCA 478, paras. 223-24). The overall impact of *Taypotat* and its progeny is to reduce section 15(1) to an instrument of judicially-enforced distributive justice.

The Court appeared to confirm this understanding of discriminatory “disadvantage” in *Fraser v. Canada (Attorney General)*, 2020 SCC 28. In that case, a majority of the Court, led by Justice Abella, held that laws may be deemed discriminatory solely on the basis of their “adverse effects,” without any consideration of the intent underlying the law and whether it was based upon reasoned distinctions. Thus, the majority ruled that an RCMP program permitting female members who worked part-time to buy back partial pension credit was discriminatory, since it did not allow them to purchase full credit – despite the fact that the program was intended to ameliorate the condition of RCMP members who faced childcare responsibilities.

In dissent, Justices Brown and Rowe pointed out that the majority had failed to outline any coherent method for section 15(1) claims. Their observations on the Court’s lack of apparent discipline in constitutional equality rights adjudication are worth reproducing in full:

Our disagreement is about the *meaning and requirements* of substantive equality: we view [Justice Abella’s] approach as lacking in the clarity and guidance necessary to give effect properly to the *Charter’s* purposes, notably with regard to legislation that is fundamentally *ameliorative*. It is for this reason that we highlight the lack of a substantive definition surrounding the norm of “substantive equality” in this Court’s jurisprudence. The concept has not been defined in a manner that renders s. 15 rights, or even the criteria by which they are adjudicated, knowable in advance by claimants and the state, or applicable with any consistency by courts.

This lack of definition *ex ante* is antithetical to any notion of judicial restraint. Where a legal test lacks defined bounds, courts applying it exercise truly arbitrary powers of review. And that is the point at which we have arrived

with “substantive equality.” It has become an unbounded, rhetorical vehicle by which the judiciary’s policy preferences and personal ideologies are imposed piecemeal upon individual cases. Consider our colleague’s approach here: legislation that is ameliorative in both intent and effect is judicially reconfigured because it is *not ameliorative enough*, or more precisely, *not ameliorative in ways our colleague would prefer*. (*Fraser* 2020, paras. 218–19; emphasis in original)

The *Fraser* judgment has allowed courts to treat a conjunction of (i) the alleged systemic disadvantages faced by a given group – “evidence about the physical, social, cultural or other barriers” – with (ii) a disproportionate impact on that group produced by the law, as establishing “indirect effects” discrimination contrary to section 15(1). In effect, this doctrinal innovation has greatly relaxed the requirement of causation that claimants would be expected to satisfy in other litigation contexts.⁵

It is hardly surprising that this judicial expansion of section 15(1) has resulted in absurd instances of judicial policymaking. In *Ontario Teacher Candidates’ Council v. The Queen*, 2021 ONSC 7386, the Ontario Divisional Court reasoned that a mathematics proficiency test requirement for elementary and secondary school teachers was discriminatory, because it led to a “lower pass rate for racialized teacher candidates” and therefore “imposes burdens and denies benefits in a manner that has the effect of reinforcing or perpetuating disadvantage” (paras. 95, 104). Although the Court of Appeal overturned the decision in 2023, it did so on the narrow ground that the plaintiffs had failed to adduce sufficient expert evidence of the impacts of the specific mathematics test that the Ontario government used, rather than identifying any defects in legal reasoning (*Ontario Teacher Candidates’ Council v. The Queen*, 2023 ONCA 788).

The following year, in *Mathur v. Ontario*, 2024 ONCA 762, the Court of Appeal permitted a challenge to Ontario’s climate change policy to proceed to trial. On its face, it denied that the *Charter* imposed positive obligations on the state to tackle climate change, which was in line with existing doctrine. Nonetheless, the Court of Appeal effectively endorsed such a principle anyway, for it held that the *Mathur* plaintiffs could establish a violation of

section 15(1) if they showed that the Ontario government acted insufficiently to reduce climate change and thereby imposed disproportionate burdens on certain disadvantaged groups. To be sure, there have been limited attempts to retrench the roving scope of section 15(1) claims. In *R. v. Sharma*, 2022 SCC 39, for example, the Supreme Court, by a narrow 5–4 majority, tried to correct course somewhat by holding that a claimant must show that the impugned law “created or contributed to the disproportionate impact on a protected group” (para. 49).

However, the imposition of a causation requirement has been less than successful in constraining the unprincipled exercise of judicial power in section 15(1) cases. This may be demonstrated in the Court’s latest equality judgment, *Quebec (Attorney General) v. Kanyinda*, 2026 SCC 7, in which an 8–1 majority ruled that Quebec had unconstitutionally excluded “refugee claimants” – persons who have yet to be approved for refugee status – from its subsidized daycare regime. The judgment in *Kanyinda* once again amplifies the pathologies of section 15(1) jurisprudence, as the majority, led by Justice Karakatsanis, deployed the “adverse effects” doctrine to hold that the regime discriminated “based on sex” because it resulted in “a disproportionate impact on the women refugee claimants” (para. 69).

Like the expansion of the scope of section 7 rights, the widening scope of section 15(1) under the “adverse effects” doctrine embraced in *Fraser* (2020) has granted Canadian courts substantial power to interfere with policy decisions legitimately reserved to the political branches. Since almost every conceivable law will distribute benefits and burdens unevenly between different groups, the Supreme Court’s current approach will invite litigation on virtually any act of law- or policy-making. In treating as irrelevant the question “*why* the law creates a disproportionate impact” and whether the legislature made a reasoned distinction in enacting the measure (*Kanyinda* 2026, para. 56), the Court creates a significant prospect of lawfare (i.e., activist litigation designed to advance social causes through legal rather than democratic processes) on contentious social policy choices that are normally reserved to the political branches. This prospect is only reinforced by the lax rules on proof of a harmful impact, which stress that “no specific form of evidence is required” on the law’s impact and may include “qualitative” evidence, judicial notice, judicial inference, or “a claimant’s own testimony” about “intersecting realities and identities” (*Kanyinda* 2026, paras. 52–55).

Supervising the parliamentary process

As the discussion above shows, the Supreme Court of Canada began taking significant liberties with the *Charter* after it was enacted. Over time, the impacts of this trajectory of growing judicial power have become more palpable. At the outset, however, the Canadian judiciary had disputed the view that the *Constitution Act, 1982* had wholly supplanted the scheme of the *Constitution Act, 1867*. Consistent with the intentions of the *Charter*'s framers, it repeatedly affirmed the extent to which the *Charter* continued Canada's inherited tradition of Westminster parliamentary democracy.

As Justice Wilson noted in the *Education Reference*, [1987] 1 S.C.R. 1148, “[i]t was never intended ... that the *Charter* could be used to invalidate other provisions of the Constitution” – a view affirmed by the majority in *Adler v. Ontario*, [1996] 3 S.C.R. 609. In 1990, Chief Justice Iacobucci (as he then was) rejected the suggestion that “the adoption of the Charter fundamentally altered the nature of the Canadian Constitution such that it is no longer ‘similar in Principle to that of the United Kingdom’ as stated in the preamble,” calling it a “rather wide” proposition and affirming that “it seems to me that the British system of constitutional government will continue to co-exist alongside the Charter” (*Southam Inc. v. Canada (Attorney General)*, [1990] 3 F.C. 465). And the following year, the Supreme Court acknowledged that the doctrine of parliamentary sovereignty was expressly codified in section 42(1) of the federal *Interpretation Act*, which requires every Act to be “construed as to reserve to Parliament the power of repealing or amending it” (*Reference re Canada Assistance Plan (B.C.)*, [1991] 2 S.C.R. 525). Other contemporaneous judicial rulings express that “[o]ne ought not to construe the *Charter* as if it were intended to undo 900 years of constitutional development” (*R. v. Van Vliet*, (1988) 45 C.C.C. (3d) 481).

From these judicial statements, it appears that the prevailing juristic view in the immediate aftermath of the *Charter*'s adoption was that it merely built an annex upon an existing constitutional edifice. These judges accepted, or at least thought it appropriate to express the view, that under the 1982 constitutional settlement, the courts are to maintain a respect for the Westminster tradition that Canada had inherited. The courts could no more “impugn” the legislative process in *Charter* review than they could prior to 1982 (*Reference re Canada Assistance Plan* 1991). In *Wells v. Newfoundland*, [1999] 3 S.C.R. 199, the Court held that “legislatures are subject to constitutional requirements for valid law-

making, but within their constitutional boundaries, they can do as they see fit. The wisdom and value of legislative decisions are subject only to review by the electorate” – a statement that could have been made by any Canadian court at any time between 1867 and 1982. But beneath these remarks, Canadian courts, led by the Supreme Court, were already engaged in doctrinal developments that would undermine the foundations of the constitutional settlement.

Toward the end of the 1990s, one major indication appeared that the Supreme Court openly embraced a newfound superintending role over policymaking. In the *PEI Provincial Judges Reference*, [1997] 3 S.C.R. 3, the Court announced that it would subject the process for determining the remuneration of provincially appointed judges to judicial control by requiring that their salaries be determined through independent commissions. In other words, it was now up to judges, and not elected officials or their delegates, to oversee the framework for remuneration from the public purse. The decision was nominally justified on the basis of section 11(d) of the *Charter*, which guarantees “an impartial and independent tribunal” to adjudicate criminal offences. But, in effect, the *Provincial Judges Reference’s* decision to create a system of independent commissions out of whole cloth stretched the vague language of the *Charter* beyond what could have reasonably been contemplated by its framers. In the meantime, of course, Canadian courts were also developing the doctrines of *Charter* adjudication discussed above.

In 2024, the Supreme Court signalled the zenith of its radical renovations to the constitutional framework in *Canada (Attorney General) v. Power*, 2024 SCC 26. Upending basic precepts of the Westminster parliamentary tradition, the Supreme Court of Canada took the unprecedented step of permitting damages awards to be made against the executive Crown for the enactment of legislation. The majority decision, by Chief Justice Wagner and Justice Karakatsanis, held that the Crown, in its executive capacity, may be held liable for damages under section 24(1) of the *Charter* if Parliament or the legislatures enacted invalid legislation that is “clearly unconstitutional, in bad faith or an abuse of power.” In effect, the *Power* judgment extends the scope of judicial review in an entirely novel direction, from determining the constitutionality of duly enacted laws to supervising the legislative process itself.

In the Westminster model, it is axiomatic that courts are not entitled to pass judgment on parliamentary deliberations or other aspects of the

legislative process, as this process is protected by parliamentary privilege. Section 24(1) of the *Charter* provides that a person whose *Charter* rights “have been infringed or denied may apply to a court of *competent jurisdiction* to obtain such remedy as the court considers appropriate and just in the circumstances” (emphasis added). Although it is settled law that a person may seek *Charter* damages for harms caused by acts of the *executive* (e.g., police officers, customs agents) (*Vancouver (City) v. Ward*, 2010 SCC 27), this provision has not previously been understood to allow damages awards to be made in relation to *legislative* acts. In our constitutional tradition, the law courts have never been considered as being of “competent jurisdiction” to supervise and question legislative processes.

Overturing this settled understanding in *Power*, Chief Justice Wagner and Justice Karakatsanis asserted that the *Charter* heralded a “revolutionary transformation of the Canadian polity,” arrogating to the courts a novel role in superintending the legislative process (para. 94; but see Sérafin and Sun 2024). The majority judgment manifests an unprincipled and disturbing augmentation of judicial power. It endorses an incoherent and unworkable standard for determining when legislative acts would attract liability. For instance, it is unclear how the “bad faith” standard can be applied when, in principle, “the intent of particular members of Parliament is not the same as the intent of Parliament as a whole,” and it is Parliament as a corporate entity that acts to enact legislation (*R. v. Heywood*, [1994] 3 S.C.R. 761). This is to say nothing of the fact that, under the Supreme Court’s “living tree” approach to the Constitution, what is constitutional one day could well be “clearly unconstitutional” the next (see *Schmidt v. Canada (Attorney General)*, 2018 FCA 55, para. 92).

From a legal perspective, the majority’s reasoning in *Power* is deeply flawed. Chief Justice Wagner and Justice Karakatsanis wrongly asserted that the proposition that “damages may be awarded under s. 24(1) for the enactment of legislation that breaches a *Charter* right” was grounded in a precedent from two decades earlier. Crucially, however, neither article 9 of the English *Bill of Rights*, the source of the doctrine of parliamentary privilege, nor the doctrine itself, were ever argued or considered in that earlier case (*Mackin v. New Brunswick*, 2002 SCC 13). It follows that the decision cannot be taken as authority for the proposition that damages can be awarded in relation to purely legislative acts. In addition, the *Power* majority entirely failed to consider or even mention section 18 of the *Constitution Act, 1867*, which constitutionalizes Parliament’s

power to define its “privileges, immunities, and powers” (see *Alford* 2024). Since one part of the constitution cannot contradict another part (*Adler* 1996), the idea that the *Charter* effected a “revolutionary transformation” that curtailed the doctrine of parliamentary privilege is untenable.

Moreover, the Court’s affirmation of its novel role in policing parliamentary processes undermines the principle of responsible government. According to the majority, the courts’ seizure of these new powers was merely part of their “constitutional oblig[ation] to hold the government accountable” (para. 95). However, this reasoning overlooks the role that the House of Commons (and its provincial counterparts) historically played under the Westminster tradition. A perverse consequence of the *Power* judgment is that it gives the executive an incentive to exercise an even greater degree of control over legislators and the parliamentary process, since the judgment allows the executive Crown to be held liable for legislation it may have had no role in proposing or drafting (as, for example, when the current government is defending legislation enacted under a previous Parliament). Historically, one critique of responsible government as a check on government action is that party discipline within the Canadian political system makes it difficult, in practice, for legislators to disagree with the government, especially in cases of majority government (see, e.g., Savoie 1999; Savoie 2008). There is some truth to this assessment, though it tends to be overstated in light of the power that individual parliamentarians continue to wield. It is conceivable that the *Power* judgment will amplify this pathological aspect of the political dynamic between the executive, its ministers, and the House of Commons.

By holding that legislative processes can give rise to liability for compensation, the *Power* judgment stymies the capacity of Parliament and the provincial legislatures to act for the common good. The decision also undermines any notion of a “dialogue” between the legislature and the courts. If the legislature engages in such a dialogue by enacting law that modifies or departs from judicially articulated understandings of the constitution (see, e.g., *R. v. Mills*, [1999] 3 S.C.R. 668), its conduct could now render the executive liable to pay compensation to those subject to the law. In view of the “revolutionary” bearings of the Court, a judicial reappraisal is unlikely to occur in the near future. Nevertheless, Parliament and the provincial legislatures may attempt a legislative response to curtail the deleterious impact of *Power*, as we discuss further in the conclusion below.

Conclusion

The ascendancy of judicial power since the adoption of the *Charter* has not been wholly unanticipated. But both the scope of its expansion and the depth of the disruption of traditional modes of parliamentary governance have unsettled the balance of our constitution. As this paper has shown, the judicial usurpation of political authority cannot fairly be characterized as the result of isolated instances of activist decision-making. Whatever other causal factors are at play, we argue that systematic flaws of Canadian jurisprudence have contributed substantially, resulting from the accretion – conscious and unconscious – of undisciplined judicial interpretations and innovative adjudicative methodologies.

To be sure, this aggrandizement of judicial power is not attributable solely to the *Charter*. This paper has not discussed the wider political dynamics enabling the aggrandizement of judicial power (Morton and Knopff 2000; Macfarlane 2013; Sigalet 2025). Nor has it addressed the other areas of law in which judicial decision-making has become detached from its proper foundations in constitutional and juridical principle, such as administrative law (*Auer v. Auer*, 2024 SCC 36), contract law (*C.M. Callow Inc. v. Zollinger*, 2020 SCC 45), tort law (*Nevsun Resource Ltd. v. Araya*, 2020 SCC 5), the law of federalism (*References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11), Aboriginal law (*R. v. Desautel*, 2021 SCC 17), and immigration law (*Kanthasamy v. Canada (Citizenship and Immigration)*, 2015 SCC 61). The trajectory of the jurisprudence in these areas confirms that the deployment of judicial power in novel and unprincipled ways is not an isolated phenomenon, but a systemic trend.

To date, there has been a tendency among political actors at the federal and provincial levels to regard judicial interferences in policymaking as errant, one-off cases that can be fixed through appeal to a higher court. This is almost certainly a function of how judicial power has been partly *enabled* by political regimes unwilling to take responsibility for important yet polarizing rights disputes (Sigalet 2025). However, it appears unlikely that Canadian courts will, by their own impetus, forestall or reverse the dramatic expansion of judicial power that has taken place. It is apparent that the courts are not only bound by the constraints of precedent, but also the inertial force of a judicial culture that,

as openly affirmed in *Power*, views the post-1982 settlement as a “revolutionary transformation.” Thus, absent political initiative, the ongoing displacement of political by judicial authority is likely to continue.

Against the tide of judicial power, legislatures and the executive can take several steps to restore the constitutional balance. We would propose that lawmakers could:

- **Reassert legislative freedom by invoking the notwithstanding clause:** In the face of inflationary, tendentious, or anti-social interpretations of *Charter* rights, the political branch should be prepared to countenance routine deployments of section 33, the notwithstanding clause, in order to uphold its constitutional responsibility to govern for the common good. In deploying the notwithstanding clause, the political branches should be prepared to explain the basis of their reasoned disagreement with the prevailing judicial interpretation of the *Charter* (if the clause is invoked pre-emptively) or a court ruling that it seeks to correct (if the clause is invoked *post hoc*). The Constitution imposes no formal constraints on how this can be done and there are many avenues whereby politicians can set out a reasoned justification for invoking the notwithstanding clause, including the use of preambular clauses in the invoking legislation, statements in parliamentary debates and other proceedings, public statements by the Minister of Justice or other relevant ministers, and legal submissions in related litigation.

We emphasize that public criticism of judicial decision-making, including by politicians, is a constitutionally legitimate activity. Extra-judicial constitutional interpretation is both a fact of Canadian constitutionalism and a normatively desirable activity (Sérafín, Sun and Focroulle Ménard 2023; Hartery and Sigalet 2024). In fact, public scrutiny of the courts is contemplated by the very nature of judicial review, which is typically justified by virtue of the courts’ role in offering reasoned justifications for their decisions (*Vriend* 1998). Contrary to some suggestions, such criticism is entirely compatible with “the rule of law” and “judicial independence” (contra Canadian Bar Association 2026; Christian 2025). The rule of law mandates that each branch of the Crown, including the judiciary, must act in accordance with the law and within the constitutional allocation of authority; and judicial independence should not be equated with judicial immunity from criticism (Sérafín

and Sun 2025; Sun 2026). It follows that elected officials are acting well within their legitimate purview in drawing attention to or criticizing judicial deviations from legal or constitutional principle. Ironically, heavy-handed attempts to discredit legitimate criticisms of the judiciary and judicial decision-making risk contributing to the politicization of the rule of law (Ekins 2025).

- **Instruct Crown counsel to advocate for revisiting problematic precedents:** In appropriate cases, the federal and provincial Attorneys General should instruct Crown counsel to prepare to argue in favour of reconsidering or overturning unprincipled judicial precedents. Under the exception to the doctrine of *stare decisis* adopted in *Bedford* (2013), a lower court is entitled to revisit a precedent “if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate” (para. 42). While the *Bedford* exception has largely been deployed to overturn settled precedent in favour of inflationary readings of the Constitution (such as the adoption of a right to assisted suicide (*Carter* 2015)), it is open to litigants to argue that the judicial innovations should themselves be overturned. Though it may be difficult to establish that the threshold is met (see *R. v. Caswell*, 2015 ABCA 97), an increased willingness on the part of governments to challenge and adopt a more dynamic approach to problematic precedents may contribute to a shift in judicial culture over time. It also remains open to counsel to use more traditional methods of addressing problematic precedents, such as by distinguishing the precedent or arguing that it was decided *per incuriam*. In some cases, this approach can impel the court to re-examine or tailor the scope of the earlier precedent (see, for example, *R. v. Marshall (No 2)*, [1999] 3 S.C.R. 533).
- **Reassert parliamentary privilege by amending the *Evidence Acts*:** To respond to the *Power* (2024) judgment and its undermining of parliamentary privilege, Parliament and the provincial legislatures should enact amendments to their respective *Evidence Acts* to prohibit courts from questioning statements made during parliamentary proceedings or imputing bad faith to parliamentary actions. These amendments can be formulated along the lines of section 16(3) of the *Parliamentary Privileges Act 1987* of Australia, which has been held by English courts

to be “declaratory of the common law” as to the effect of article 9 of the English *Bill of Rights* (*Office of Government Commerce v. Information Commissioner*, [2010] Q.B. 98, para. 41).⁶

By prohibiting courts from questioning proceedings in Parliament, these amendments would restate the relevant principles of parliamentary privilege in the Westminster tradition. While it is uncertain whether the courts will faithfully comply with this explicit restatement of Canada’s constitutional inheritance, its enactment would offer parliamentary authorities the occasion to argue for reconsideration of the expansion of judicial power in *Power*, and for the restoration of longstanding parliamentary privileges.

- **Curtail lawfare by tightening procedural thresholds for Crown liability:** To limit the impact of lawfare – activist litigation designed to advance social causes through legal rather than democratic processes – on the capacity of the political branches to act for the common good, Parliament and the provincial legislatures should consider tightening the procedural thresholds for proceedings against the Crown. It should be recalled that Crown liability is of relatively modern origins and rests on a statutory footing. At common law, prior to the enactment of the *Petitions of Right Act*, there was no remedy against the Crown in respect of any act or omission by the Crown or its officers or servants (*City of Quebec v. The Queen* (1894), 24 S.C.R. 420). On orthodox legal and constitutional principles, therefore, it follows that the legislature is entitled to enlarge or narrow the scope of Crown liability.

Two recent enactments in Ontario provide a model of this approach. First, in 2019, Ontario imposed a screening procedure on tort claims against the Crown alleging “bad faith,” requiring, *inter alia*, prospective claimants to set out the material facts for the claim and a court to be satisfied that the claim had a reasonable possibility of success before the proceeding could go ahead (*Crown Liability and Proceedings Act, 2019*, s. 17). Second, in 2023, the Ontario legislature extinguished causes of action against the Crown in relation to development works at Ontario Place (*Rebuilding Ontario Place Act, 2023*, s. 17). Thus far, both provisions have been held to be compliant with section 96 of the *Constitution Act, 1867* – which has been judicially interpreted to confer constitutional status on the “core jurisdiction of the superior courts” – though one case

is under appeal to the Supreme Court of Canada (*Poorkid Investments Inc. v. Ontario (Attorney General)*, 2023 ONCA 172; *Ontario Place Protectors v. Ontario*, 2025 ONCA 183).

- **Reassert parliamentary privilege by amending section 24 of the Charter:** To correct the Supreme Court’s misinterpretation of section 24(1) of the *Charter* and its undermining of parliamentary privilege, the federal and provincial governments should consider adopting an amendment to the *Charter* that would reinstate the traditional prohibition on questioning proceedings in Parliament found in the English *Bill of Rights* (Kennedy 2024).

Inspired by the wording of section 16(1) of the Australian *Parliamentary Privileges Act 1987*, courts could be prohibited from intruding into the legislative process and granting *Charter* remedies by inserting after section 24(1) of the *Charter*:

24(1.1) For greater certainty, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to Parliament and the legislatures, and the guarantee in this Charter of certain rights and freedoms shall not be construed as to abrogate or derogate from the provisions of article 9 of the Bill of Rights, 1688.

24(1.2) For greater certainty, a court shall not grant any remedy or relief under subsection (1) in relation to legislative conduct or proceedings, including the preparation, enactment, amendment, or repeal of legislation.

- **Bring back the traditional gowns:** The Supreme Court could signal a commitment to preserving and restoring Canada’s distinctive Westminster model of constitutionalism by returning to the old judicial gowns. At the very least, such a move would signal respect for our constitutional inheritance and traditions (Holloway 2025). If the next Chief Justice will not restore this tradition, then perhaps an amendment to the *Supreme Court Act* will suffice.

Under the *Charter*, judicial power in Canada has grown in unsettling ways. Through the expansive interpretation of various provisions of the *Charter*, the courts have exerted significantly more control over the law- and policy-making

process than the framers envisioned. These legal developments are at odds with the constitutional tradition of parliamentary government that Canada received from the United Kingdom and have to date remained largely unchallenged. Still, it should be recalled that the ideas of responsible government and parliamentary sovereignty were themselves political achievements in pre-Confederation politics. Preserving and reasserting them, in the post-*Charter* era, promises also to be a chiefly political undertaking. **MLI**

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Endnotes

- 1 It is noteworthy that since 2011, the Supreme Court of Canada has struck down an increasingly higher percentage of federal and provincial statutes in the cases it hears (Sigalet and Snow 2025).
- 2 In contrast, Waluchow’s understanding of the living tree is best represented in *Kindler v. Canada (Minister of Justice)*, [1991] 2 S.C.R. 779, and *United States v. Burns*, 2001 SCC 7 (see Miller 2007). Both cases concerned whether extraditing prisoners to face the death penalty would violate section 7 of the Charter. In *Kindler*, a majority of the Supreme Court permitted the extradition, reasoning that a 1987 parliamentary vote against reinstating the death penalty in Canada was insufficient evidence of a violation of the principles of fundamental justice. Ten years later, in *Burns*, the Court reversed itself and insisted that “the fact of successive governments and Parliaments over a period of almost 90 years have refused to inflict the death penalty” supported denying extradition due to a violation of section 7 (para. 77).
- 3 Among other things, the majority held that the construction of such a hypothetical could not take account of the bifurcated structure of many sentencing provisions, which permit Crown prosecutors to elect between proceeding by summary conviction (involving a lower sentence) or by indictment (making the offender liable to a greater sentence). Put simply, the doctrine requires courts to treat all mandatory minimum sentences, for the purposes of constitutionality under section 12, as if they could apply to any hypothetical offender – even though the reality of Crown discretion means that it is unlikely that an indictment will be sought for less severe transgressions of the law.
- 4 In *Senneville*, the Supreme Court endorsed this “safety valve” approach as it aimed to blunt criticism of the pernicious consequences of the reasonable hypotheticals doctrine (para. 113).
- 5 It is arguable that this loosening of the standard of causation permits laws to be struck down for allegedly imposing a disproportionate burden on some group, even when that burden is partly attributable to pre-existing disadvantages or to acts of private discrimination.

- 6 Section 16(3) provides that: “In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of: (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament; (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.” Significantly, this section was enacted as a legislative response to an Australian court decision, *Reg. v. Murphy* (1986), 64 A.L.R. 498, which had wrongly decided that it was permissible to have cross-examination at trial on submissions made to a Parliamentary committee.

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