ANDREW PETTER

THE POLITICS OF THE CHARTER

THE ILLUSIVE PROMISE OF CONSTITUTIONAL RIGHTS

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THE POLITICS OF THE *CHARTER*: THE ILLUSIVE PROMISE OF CONSTITUTIONAL RIGHTS

Andrew Petter is a leading constitutional scholar who served from 1991 to 2001 as a British Columbia MLA and cabinet minister, including Attorney General. In *The Politics of the Charter*, Petter assembles a set of his original essays written over three decades to provide a coherent critique of the political nature, impact, and legitimacy of the *Canadian Charter of Rights and Freedoms*. Showing how *Charter* rights have been shaped by the institutional character of the courts and by the ideological demands of liberal legalism, the essays contend that the *Charter* has diverted progressive political energies and facilitated the rise of neo-conservatism in Canada.

Drawing upon his constitutional expertise and political experience, Petter evaluates the *Charter* in practical, legal, and philosophical terms. These essays, along with a new introduction and conclusion, map out Petter's political philosophy and review the entirety of the *Charter* record. *The Politics of the Charter* is vividly written, free of legal jargon, and accessible to a broad readership, and will provoke renewed discussion about how best to achieve a more compassionate and egalitarian Canadian society.

ANDREW PETTER is a professor in the Faculty of Law at the University of Victoria.

In memory of my parents
who encouraged me to question orthodoxy
and always to look for a better way.

Acknowledgments

The essays in this collection represent my evolving critique of the political nature and legitimacy of the *Canadian Charter of Rights and Freedoms* from its enactment in 1982 to the present day. The introductory and concluding essays are new. The others were first published between 1986 and 2009 and are reprinted here with permission of the copyright holders. These essays are reproduced in their original form with only minor modifications designed to reduce duplicative and superfluous language, to clarify meaning, and to achieve consistency of style and form. A title and quotation have been attached to chapter 2, which is excerpted from a longer essay; and a few endnotes have been added or augmented to update citations and to provide information that has come to light since their initial publication.

My work on these essays has been greatly assisted by the generous support I have received from the Faculty of Law of the University of Victoria, where I have been a faculty member since 1986, and from Osgoode Hall Law School, where I was a faculty member from 1984 to 1986. My ability to complete the collection was further aided by a grant from the Law Foundation of British Columbia, and by a month-long residency in 2008 at the Rockefeller Foundation's Bellagio Center.

I wish also to extend my appreciation to the editors of the publications in which these essays first appeared, to the editors at the University of Toronto Press for their encouragement and assistance in bringing this collection to fruition, and to the anonymous reviewers of the manuscript for their helpful comments. Two of the essays are co-authored, and one derives from my contribution to a co-authored survey article. I am grateful to my co-authors both for their collaborations and for their permission to include these essays in this collection.

An enormous number of colleagues and friends have generously provided me with ideas and advice concerning these essays over the past three decades. They include Joe Arvay, Harry Arthurs, David Beatty, Edward Belobaba, Benjamin Berger, Allan Blakeney, John Borrows, Gwen Brodsky, Gillian Calder, Jamie Cameron, Jamie Cassels, Don Casswell, Sujit Choudhry, Cheryl Crane, Avigail Eisenberg, Robin Elliott, Gerry Ferguson, Colleen Flood, Hamar Foster, Judy Fudge, Donald Galloway, Harry Glasbeek, Donna Greschner, Reuben Hasson, Matthew Hennigar, Janet Hiebert, Peter Hogg, Grant Hushcroft, Martha Jackman, Tsvi Kahana, James Kelly, John Kilcoyne, Shauna Labman, Hester Lessard, Rod Macdonald, Patrick Macklem, Michael Mandel, Chris Manfredi, John McCamus, Ted McDorman, John McLaren, Michael M'Gonigle, Ally McKay, Mary Jane Mossman, William Moull, Danielle Pinard, Wes Pue, Kent Roach, Bruce Ryder, David Schneiderman, Lynn Smith, Lorne Sossin, Jeremy Webber, and John Whyte.

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critic, my greatest supporter, and my dearest companion. In her multiple roles as colleague, friend, and life partner, she has borne the brunt of my commitment to this project; and it is she to whom I owe the greatest debt for making this and all my life's journeys worthwhile.

Andrew Petter

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THE POLITICS OF THE *CHARTER*:
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Introduction

If I had to sum up my political philosophy in ten words, I would describe myself as a democrat who desires social equality and opposes political privilege. Democracy is a system of government by and for the people, though it has many variants. My vision of democracy is one that locates decision-making structures as closely as possible to citizens and that maximizes opportunities for public engagement. Equality, too, is a malleable concept, running the gamut from formal equality (which is preoccupied with the provision of equal treatment) to substantive equality (which is focused on the attainment of equal conditions). My commitment to equality leans strongly towards the substantive end of this spectrum, driven by a desire to reduce poverty and lessen disparities in wealth and power. Privilege, too, has a multitude of meanings. The form of privilege that most concerns me in the political context is the power of the few to hold sway, without popular direction or accountability, over the welfare of the many.

My critique of the *Canadian Charter of Rights and Freedoms*[1] is a product of this political philosophy. Even as a law student in the early 1980s, when the *Charter* was being promoted by Prime Minister Pierre Elliott Trudeau as necessary to ensure a just society, I worried that the promises made on its behalf were illusive and that its generalized rights would do little to improve conditions for the socially disadvantaged. At the same time, I feared that the authority judges would gain under the *Charter* would give rise to a new form of political privilege that would limit the scope for democratic decision making in Canada. Regrettably, the ensuing years have largely confirmed these suspicions.

The essays in this collection represent stages in a journey I have taken over the past three decades to pursue these concerns and, more gener-

ally, to explore the political nature and legitimacy of the *Charter*. That journey began when I was exposed to the earliest *Charter* decisions of the courts while working from 1982 to 1984 as an articling student and Crown solicitor at the Constitutional Law Branch of the Saskatchewan Ministry of Justice. The political philosophy that motivated me to embark upon that journey, however, was formed much earlier in my personal history.

It is a well-worn political truism that where one stands on public policy issues depends upon where one sits. In my case the seats that influenced my political thinking were varied, ranging from seats I held in government to those I occupied while growing up around family tables at which discussion of social and moral issues was encouraged by my parents. Yet three seats stand out in my mind as having particularly shaped the political philosophy that later informed my *Charter* analysis.

The first of these seats is the one I took most summers as a boy in the late 1950s and early 1960s at the annual CCF and later NDP picnics at Sea Bluff Farm outside Victoria. Huddled on blankets on the ground after exhausting ourselves with three-legged races and hayrides, and having filled our stomachs with hot dogs and ice cream, I and other children were treated to some of the finest political oratory in the land. The speakers included such socialist luminaries as M.J. Coldwell, Robert Strachan, and Harold Winch, but the perennial favourite of adults and children alike was Tommy Douglas. With colourful tales about lands of mice controlled by cats, and cream separators used by the rich to skim the best for themselves, Tommy explained with his compelling parables and vivid metaphors why elites, for all their pretensions and reassurances, could not be trusted to protect the interests of those less fortunate than themselves, and why democratic mobilization by ordinary people offered the best hope of attaining social justice. They were lessons that spoke to my inchoate sense of justice and that enabled me to see the possibility of a society in which everyone could enjoy a decent standard of living and participate as equals. But they were also lessons that alerted me to the fact that these egalitarian values and goals are not shared by all and cannot be taken for granted; rather, they must be fought for in the democratic arena against the might and guile of those who are accustomed to using their power and influence to maintain their superior social positions.

A seat I held a decade later reinforced my belief in the progressive

potential of democratic institutions. As executive assistant to the Minister of Housing in British Columbia's first NDP government, I became immersed in an activist social democratic administration seeking to advance social equality, economic security, and environmental sustainability. Passing 367 bills during its 1,200 days in office (about one every three days),[2] the government of Dave Barrett, among other things, transformed the province's welfare system, increased support for seniors, doubled parkland, created an agricultural land reserve, established a public automobile insurance corporation, and enhanced democratic accountability through legislative reforms.[3] Though the Barrett government was defeated in the 1975 election, I was impressed by how much it was able to achieve in this short time, and subsequently by how many of its accomplishments survived under successor administrations.[4] At the same time, the vilification of that government in the press, the vitriolic campaign waged against it by business and other established interests, and the coalescence of opposition politicians to defeat it, deepened my appreciation of the extent to which social elites are committed to maintaining their privileged position and of the lengths to which they will go to do so.

The following decade, I occupied a third seat that focused my attention on the potential dangers posed by an entrenched bill of rights to both progressive politics and democratic institutions. In the summer of 1981, during my transition from undergraduate to graduate law studies, I worked as a speechwriter for Saskatchewan Premier Allan Blakeney. That summer was a turbulent time in Canadian politics, with Prime Minister Trudeau waging his campaign to entrench a charter of rights in the Canadian Constitution over the objections of most provincial premiers. The position taken by Blakeney in this debate distinguished him from the federal NDP and from many other social democrats, whose tendency was to regard a charter of rights as an unqualified good. It also set him apart from his fellow premiers, whose opposition to the *Charter* was largely grounded in their concerns for preserving provincial jurisdiction. Blakeney's objection to the *Charter* was not that it would limit the powers of provinces but rather that it would limit the power of citizens to influence public policy through democratic engagement, which he, like Tommy Douglas, regarded as the best means of attaining social justice. Invoking memories of the *Lochner* era, a forty-year period in which the United States Supreme Court struck down almost two hundred laws regulating market activity,[5] he argued that an entrenched charter would enable the 'generally

conservative' courts to 'oppose redistribution of power and wealth in society.'[6] More fundamentally, he regarded an entrenched charter as a setback in the hard-fought struggle of ordinary people to attain democracy and as a reassertion of power by social elites, whose interests were threatened by popular political institutions. He thus maintained that no social democrat 'should voluntarily hand power from the political forum, where the policies of the majority find expression, to the judicial forum.'[7]

Blakeney's assessment of courts' conservative nature reinforced the opinions I had formed in law school. His belief in the progressive potential of politics and his distrust of social elites resonated with the lessons I had learned from listening to Tommy Douglas[8] and working in the Barrett government. And his commitments to democracy and equality, which were the bases of his opposition to the *Charter*, coincided with my own developing political philosophy. Furthermore, his willingness to challenge conventional thinking among social democrats appealed to my iconoclastic tendencies as well as to my growing scepticism of leftist orthodoxies. While working with the Barrett government, for example, I was attracted by the views of Resources Minister Robert Williams, an admirer of American political economist Henry George.[9] Williams wanted to reform the government-managed forest tenure regime by introducing market mechanisms aimed at producing greater competition and fairer rents. When the large forest companies that had prospered under the state-run system tried to paint him as a dangerous socialist, Williams responded that he was a Georgist who was more committed to free enterprise than they were.

Like Williams and some others on the left in British Columbia,[10] I distrusted monolithic government structures and was attracted by arguments in favour of decentralization and diversity, such as those advanced by E.F. Schumacher in his influential 1973 book *Small Is Beautiful*.[11] This placed me at odds with long-standing NDP policies favouring centralized state planning and aligned me with French Canadian progressives including, ironically, Professor Pierre Elliot Trudeau, whose 1961 essay 'The Theory and Practice of Federalism' had captured my imagination when I first read it in the late 1970s.[12]

It was with these attitudes and values that I encountered the first wave of *Charter* cases to come before the courts while working as an articling student and lawyer in the Constitutional Law Branch of the Saskatch-

ewan Ministry of Justice. The more I immersed myself in these cases, the more aware I became not only of the normative nature of the issues they raised, but also of the political dimensions of the judicial process through which those issues were addressed and resolved. These dimensions included the costs of engaging in *Charter* litigation, the procedural and evidentiary requirements of the courts, the experiences and attitudes of the judges, and the ideological assumptions underlying *Charter* rights themselves.

This growing awareness was accompanied by surprise and consternation at the lack of attention given to these dimensions by constitutional scholars and legal experts who commented on early *Charter* cases. The approach taken by these authorities largely disregarded the politics of *Charter* decision making, focusing instead on whether courts had gotten particular decisions 'right' or 'wrong' according to the commentators' own constitutional predilections. In other words, they approached the *Charter* as a legal instrument to be evaluated from a juridical perspective rather than as a political instrument to be evaluated from an ideological perspective. More fundamentally, I was troubled by the supposition of many of these commentators that the *Charter* was an unquestionably positive innovation whose rights represented an unqualified social good. This supposition struck me as naive and untenable, particularly when viewed against the backdrop of *Charter* cases that I saw being brought before the courts each day. These cases were raising controversial issues of policy and practice, and the judicial decisions to which they gave rise often involved political assumptions and policy positions that I regarded as dubious and regressive. Furthermore, the outcome of a disturbing number of these cases appeared to advance the interests of those with, rather than those without, power in society.

My move to Osgoode Hall Law School in 1984 to take up a position as an assistant professor provided me with an opportunity to reflect upon these concerns in a vibrant academic milieu that valued theoretical approaches and critical thinking. The result, two years later, was publication of 'The Politics of the *Charter*' [*Politics*] in which I presented my thesis that, contrary to the claims of its supporters, the *Charter* is a regressive political instrument more likely to hinder than to advance the interests of disadvantaged Canadians. The reasons for this, I maintained, lay partly in the nature of *Charter* rights, whose primary function is to constrain government action, but more fundamentally in the nature of the judicial system charged with their interpretation

and enforcement. Drawing upon the first nine *Charter* decisions of the Supreme Court of Canada, I sought to demonstrate that, beyond the confines of the criminal law, corporations and other powerful interests who oppose government intervention in the marketplace have the most to gain from *Charter* litigation, while the poor and other disadvantaged groups who rely on government action to protect their interests have the most to lose.

Politics marked my academic entry into the world of *Charter* politics, and it is the opening chapter in this collection. Influenced by the writings of Peter Russell,[13] Roderick MacDonald,[14] and J.A.G. Griffith,[15] and by the ideas of many of my Osgoode colleagues, this essay gained notice as one of the first political critiques of the Supreme Court of Canada's early *Charter* jurisprudence. Given its disregard for conventional *Charter* wisdom, and its departure in technique and tone from traditional legal writing, the essay stirred considerable controversy at the time, fuelling a debate among *Charter* critics and proponents that has since animated Canadian constitutional scholarship. The arguments advanced in *Politics*, while embryonic and unrefined, also provided the analytical framework and set the stage for my subsequent scholarship in this area.

The next two essays in this collection focus on particular Supreme Court of Canada decisions in order to delve more deeply into questions concerning the legitimacy of judicial review and the ideology of liberal legalism. Chapter 2, '*Charter* Legitimacy on Trial: The Resistible Rise of Substantive Due Process' [*Resistible Rise*], was written in 1986 as part of a survey of constitutional cases co-authored with Patrick Monahan. It examines the *British Columbia Motor Vehicle Reference*,[16] in which the Court held that section 7 of the *Charter* guarantees substantive as well as procedural due process. This ruling was significant because it disregarded the stated intentions of the *Charter*'s framers and opened the door to judicial review concerning the substance of public policy on issues such as abortion, social assistance, and public health insurance. *Resistible Rise* contests the Court's characterization of judicial review as being 'objective and manageable'; it also argues that judges who deny the political dynamics of *Charter* interpretation are unable to discharge their constitutional responsibilities in a manner that is responsive to those dynamics or that is sensitive to concerns regarding their lack of legitimacy and expertise. The result was a decision that stripped *Charter* adjudication of all political inhibitions and that sought to justify a judicial role in public policy making that went far beyond that envisioned by the *Charter*'s framers.

Chapter 3, 'Private Rights/Public Wrongs: The Liberal Lie of the *Charter*' [*Liberal Lie*] was written in 1987 following my return to British Columbia to assume a teaching position at the Faculty of Law of the University of Victoria. This essay, co-authored with Allan Hutchinson, explores the ideology of liberal legalism that underlies *Charter* adjudication. Focusing on the *Dolphin Delivery* case,[17] in which the Court excluded from *Charter* scrutiny a common law injunction against picketing private property, *Liberal Lie* shows how this ideology induces judges to treat private property entitlements and the laws that support them as a pre-political foundation on which *Charter* rights are bestowed and against which the constitutionality of state action is judged. As a result, the major source of inequality in society – the unequal distribution of such entitlements – is removed from *Charter* scrutiny, and the restraining force of the *Charter* is directed against those arms of the state best equipped to redress such inequality – the legislative and executive branches. The essay argues that judges are required to adhere to the ideology of legal liberalism in order to perpetuate the myth that their *Charter* role is legal rather than political, and to portray themselves as 'neutral arbiters' rather than governmental decision makers.

Chapter 4, 'Canada's *Charter* Flight: Soaring Backwards into the Future' [*Charter Flight*], was written in 1988 for a British audience, at a time when many in that country were urging the adoption of a constitutional bill of rights. Synthesizing arguments developed in *Politics* and my subsequent *Charter* essays, it reviews the first seven years of Supreme Court of Canada decisions to illustrate the political dangers associated with such a bill. This essay warns that the *Charter*'s impact on Canadian politics will, at best, be to divert progressive energies, inhibit market regulation, and legitimize prevailing inequalities in wealth and power; at worst, it could undermine social programs and block future reforms. *Charter Flight* reiterates the claim advanced in *Liberal Lie* that rights adjudication is unavoidably ideological. What *Charter* proponents describe as an alternative to politics is in reality the entrenchment of one particular political vision. Furthermore, that vision looks backwards rather than forwards, grounded as it is in nineteenth-century legal norms.

Chapter 5, 'Rights in Conflict: The Dilemma of *Charter* Legitimacy' [*Rights in Conflict*], written in 1989, returns to the question raised in *Resistible Rise* concerning the legitimacy of *Charter* adjudication. Here, however, the focus is on justificatory theories advanced by Canadian scholars. While these theories vary, they share a commitment to justifying *Charter* decision making by reference to values said to characterize