Shaping the Constitutional Dialogue on Federalism: Canada’s Supreme Court as Meta-Political Actor

James B. Kelly
Concordia University

Michael Murphy
University of Otago

This article challenges the view that the Supreme Court has become the predominant authority on the constitutional distribution of rights and entitlements among governments in the Canadian federation. By assuming this position of constitutional supremacy, critics continue, the Court has usurped key policy functions that belong to political actors, a move that has undermined democratic governance in Canada. Against this view, we argue that the management of Canada’s federal constitutional architecture is a responsibility the courts share with key political actors. We describe the Court’s role as meta-political, whereby the Court’s federalism jurisprudence supplements rather than subverts the constitutional role of political actors. We develop our thesis in relation to two subnational constituencies with a distinctive constitutional status in Canada: the province of Quebec and Aboriginal First Nations.

A perennial theme in Canadian federalism is the struggle to balance the unity and integrity of the federation with the autonomy and diversity of its constituent governments and peoples. The Canadian Supreme Court has played a central role in this balancing act, a role that has generated increasing controversy, particularly following the introduction of the Canadian Charter of Rights and Freedoms and the constitutional entrenchment of Aboriginal rights in section 35 of the Constitution Act of 1982. Critics of these constitutional changes argue that they have helped establish the Supreme Court as the predominant authority on the constitutional distribution of rights and entitlements among Canada’s national and subnational governments. 1 By assuming this position of constitutional supremacy, critics continue, the Court has usurped key

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We argue that the Supreme Court’s role as a constitutional actor is more complex and less controversial than charged by its critics. Although the Court is undoubtedly a significant constitutional power broker, we caution against overestimating the impact of judicial decisions on Canada’s constitutional structure or underestimating the importance of political efforts to secure this same end. For example, the federal and provincial legislatures have guarded the essential elements of the Canadian constitution, which include federalism, parliamentary democracy, and entrenched rights, by reforming the policy process to ensure that entrenched rights are advanced during the prelegislative design of public policy.\(^2\) Representatives of Aboriginal First Nations play a similar role when they enter into dialogue with the federal and provincial governments over the implementation of section 35 Aboriginal rights.\(^3\) Therefore, the management of Canada’s constitutional architecture and the reconciliation of unity and diversity in the federation are responsibilities the courts share with actors such as legislatures and the representatives of Aboriginal First Nations.

We describe the Court’s role in this process as meta-political.\(^4\) By meta-political, we mean that the Supreme Court’s federalism jurisprudence supplements rather than subverts the constitutional role of political actors. The Court explicitly encourages political actors to assume the lead in defining and implementing fundamental constitutional rights and freedoms, seeing its own role as that of encouraging and reinforcing this constitutional dialogue or offering authoritative guidelines on constitutional controversies where political processes either fail to emerge or threaten to break down.

We develop our thesis by examining the Court’s jurisprudence in relation to two subnational constituencies with a distinctive constitutional status in Canada: (1) the province of Quebec, the center of Francophone language, culture, and identity, and (2) Aboriginal First Nations, which assert historic rights to land, resources, and self-government in areas throughout the country.\(^5\) Our analysis is limited to Charter cases involving Quebec, the Quebec Secession Reference, and section 35 Aboriginal rights cases. Although a fuller analysis would include a discussion of division-of-powers cases decided by the Judicial Committee of the Privy Council before


\(^3\) See, for example, Canada, the Nisga’a Nation, and British Columbia, *Nisga’a Final Agreement* (Ottawa: Federal Treaty Negotiation Office, 1998).

\(^4\) We thank one of the anonymous referees for suggesting this term to us.

\(^5\) We leave aside the objection that the 1982 Constitution does not legitimately apply to Quebec and First Nations, neither of whom explicitly consented to its terms. Although these claims have their merits, as a fact the Constitution does apply to both of these groups, and our purpose is to examine the Court’s specific role in this application.
1949 and the Supreme Court of Canada after 1949, an exclusive focus on Charter and Aboriginal rights cases can be justified in several ways. First, the dialogue metaphor and our understanding of the Supreme Court as a meta-political actor, which are central to this article, have been developed in relation to the Supreme Court’s Charter and Aboriginal rights jurisprudence, but not in relation to its division-of-powers jurisprudence. Second, the Charter has more serious implications for provincial autonomy, particularly that of Quebec. For example, the minority-language education rights in section 23 were drafted to challenge directly the constitutionality of the Charter of the French Language implemented by Quebec in 1977. More fundamentally, the issue of judicial power and its effect on the Canadian federation has focused almost exclusively on the Supreme Court’s interpretation of the Charter and Aboriginal rights, and this article seeks to engage this debate within these parameters.

The net impact of the Court’s jurisprudence in these cases has been the emergence of a constitutional dialogue on the meaning of rights and freedoms in the Canadian federation. Specifically, we suggest that judicial review in Canada has facilitated an interinstitutional dialogue between courts and legislatures in the case of Quebec, and intergovernmental dialogue among First Nations and Canadian governments over the implementation of section 35. The Supreme Court has generally established the framework within which policy remedies must be framed but has left substantive policy choices to the discretion of political actors. As such, there is not just one guardian but multiple guardians of the Canadian constitution, a finding that challenges the argument that judicial review represents the final word on the scope and content of constitutional provisions.

CONSTITUTIONAL DIALOGUE AND META-POLITICAL ACTORS

One key function of Canada’s Supreme Court is to ensure that political actors protect and advance the federal character of the constitution by achieving a balance between legitimately national interests and the autonomy and diversity of the federation’s various subnational constituencies. Achieving this constitutional balance takes on a particular flavor in a country such as Canada, which is both a federation of governments and a federation of distinct peoples or nations. The groups we have in mind are Canada’s historic nations—the Québécois and Aboriginal First Nations—both of which claim a unique constitutional relationship with the rest of Canada, as well as a special form of accommodation in the federation.

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essential to the preservation and promotion of their distinctive societies, economies, and cultures.

Arguably, the Canadian constitution, in both its written and unwritten terms, has attempted to reflect the distinct constitutional status of these two groups, for example through constitutional instruments such as the Royal Proclamation of 1763 and the Quebec Act of 1774.8 This status has also been reflected in the asymmetrical character of the institutions and governing practices of the federation, as exemplified by measures such as Quebec’s guaranteed representation on the Supreme Court, the quasi-constitutional role of Quebec in immigration to ensure that individuals from French-speaking nations emigrate to Quebec, and the existence of constitutionally protected Aboriginal land and self-governance agreements for groups such as the Nisga’a of British Columbia and the James Bay Cree of Northern Quebec. Even the Charter of Rights and Freedoms has an asymmetrical application, given that section 23(1)(a), which guarantees education rights based on residency, does not apply to Quebec, and only will if authorized by Quebec’s National Assembly. As a result, minority-language rights have a much narrower scope in Quebec, and the province retains greater control over education than any other province.9

In its role as a meta-political actor, one of the chief responsibilities of the Supreme Court is to interpret and apply the constitution as a framework of rules that balances a regard for the unity and integrity of the federation as a whole with a concern for the diversity of its constituent units.10 When the Court is called on to settle disputes regarding the character and limitations of constitutional rights, its primary role is to articulate an understanding of the broad principles governing the distribution of rights and authority among the actors in question, while leaving political actors as free as possible to negotiate or legislate specific solutions to these disputes that are consistent with these broad principles. We refer to these processes as constitutional dialogue.

The dialogue metaphor was developed by Peter Hogg and Allison Bushell, who argued that the invalidation of statutes by the Supreme Court is democratic because it begins a dialogue between courts and legislatures on the meaning of rights and “causes a public debate in which Charter values play a more prominent role than they would if there had been no judicial decision.”11 Further, they contend that the competent

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9Section 25 also partially shields the application of the Charter to section 35 Aboriginal rights.
11Peter W. Hogg and Allison A. Bushell, “The Charter Dialogue Between Courts and Legislatures,” Osgoode Hall Law Journal 35 (1997): 79. This metaphor was first used by the Supreme Court of Canada in Vriend v. Alberta in the decision by Justices Cory and Iacobucci that the underinclusion of sexual
parliamentary body is free to craft a legislative response “that is properly respectful of the Charter values that have been identified by the Court, but which accomplishes the social or economic objectives that the judicial decision has impeded.”

Although we agree that constitutional dialogue is an important framework for understanding the Supreme Court’s role in managing Canada’s federal diversity, there are limitations to Hogg and Bushell’s approach. First, as Christopher Manfredi and James Kelly argue, Hogg and Bushell assume that constitutional dialogue is initiated by the Supreme Court through activist decisions and that Parliament and the provinces simply react to this judicially initiated dialogue through legislative responses framed in the context of Charter values identified by the Court. As we argue below, this dialogical framework assigns much too passive a role to legislative actors. A second key criticism is that the constitutional dialogue that we describe between First Nations and Canadian governments, grounded in intergovernmental negotiation and consultation, is not captured by an approach such as Hogg and Bushell’s that emphasizes only interinstitutional dialogue between courts and legislatures.

Therefore, although the dialogue metaphor is an important analytical tool, its function in understanding the meta-political role performed by the Supreme Court and its contribution to interinstitutional and intergovernmental dialogue is broader and more sophisticated than Hogg and Bushell seem to suggest. As a matter of constitutional law, the Supreme Court is surely the preeminent actor, but this formal responsibility belies the much more complex reality that sees the Court share this role with key political actors in the federation. For example, through negotiated land-claims agreements, First Nations are active participants in the constitutional dialogue surrounding the meaning of Aboriginal rights; moreover, the Supreme Court has aided these processes via decisions that encourage negotiated settlements between First Nations and the federal and provincial governments. The complexity of constitutional dialogue is also evident within the parliamentary arena, where dialogue is initiated not by the Supreme Court, but through legislative efforts to create a more principled policy process that explicitly links constitutional values with
Managing policy diversity within a federal context has always been at the heart of the constitutional dialogue between courts and legislatures because section 1 of the Charter, which allows government to justify a rights limitation as reasonable in a free and democratic society, has functioned as a margin of appreciation for policy diversity between governments.16

In summary, the protection of federalism is not a court-centric process. Institutional reform of the machinery of government serves a dual purpose as it guards against judicial erosion of parliamentary democracy and protects federal diversity through a policy process that explicitly advances Charter values by parliamentary actors across Canada. Further, these changes in the legislative process demonstrate that the Supreme Court is a participant in a meta-constitutional dialogue that is initiated by the cabinet when it instructs the Department of Justice to ensure that its legislative agenda is consistent with the Charter and broader constitutional principles. Furthermore, even when the Court is required to resolve disagreements among political actors as to whether appropriate steps have been taken to safeguard rights and federalism, it studiously avoids imposing comprehensive solutions and instead articulates the constitutional bounds within which political actors can agree on such solutions through consultation or negotiation. In the remainder of this article, we consider the complexity of constitutional dialogue and the Court’s role as a meta-political actor in managing the diversity in Canada’s federation.

THE SUPREME COURT AND ABORIGINAL RIGHTS

The relationship between Aboriginal peoples and the Canadian constitutional order is both complex and contested. Indeed, the very legitimacy of the Canadian constitution as a framework within which Aboriginal rights are defined and circumscribed has been vigorously challenged.17 Similar objections have been mounted against the Supreme Court’s role in adjudicating Aboriginal rights. Many Aboriginal people wonder why they are required to justify themselves before a court whose authority they have never recognized, and why they must ask the Court to acknowledge rights that, in their view, they have always possessed and never voluntarily

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relinquished. 18 Without denying the significance of these challenges, we investigate a different set of issues. Our departure point is the observation that Aboriginal rights have become a fundamental part of the Canadian constitutional fabric, which in turn has meant that the Supreme Court has come to play a significant role in the adjudication of these rights and thereby in shaping the relationship between Aboriginal peoples and the Canadian federation. More than just a simple fact, however, the constitutionalization of Aboriginal rights is a goal that many Aboriginal peoples fought hard to achieve and that many Aboriginal people support. 19 Therefore, leaving the question of the legitimacy of the Court’s role aside, our goal is to investigate how the Court performs its role as an adjudicator of Aboriginal rights (and the Aboriginal-state relationship) and how effectively it performs this role. We begin by very briefly tracing the development of the doctrine of Aboriginal rights in the common law and then move to a more focused discussion of the Court’s role as a meta-political actor in the reconciliation of federation-Aboriginal interests.

Aboriginal rights gained their first major judicial foothold in Calder v. AG of British Columbia, a land-title case against the government of British Columbia brought to the high court by the Nisga’a people. Although the Nisga’a lost the case on a technicality, the broader legal and political impact of the case was substantial. In particular, the majority opinion that the rights of the Nisga’a derived not from Crown statute or constitutional instruments, but from Nisga’a occupation of their lands from time immemorial, generated significant legal uncertainty among federal and provincial governments about unextinguished Aboriginal land rights: enough uncertainty, in fact, to lead both federal and provincial officials to seek political resolutions of Aboriginal claims. Moreover, key aspects of the Calder decision were reaffirmed in later decisions, beginning an era wherein a more expansive judicial recognition of Aboriginal rights became the norm. 21 For example, in Guerin v. the Queen, the Court reaffirmed its conclusion in Calder that Aboriginal rights find their source in Aboriginal prior occupation rather than in Crown statutes, and that any such rights not explicitly extinguished by legislation would be considered to have survived the assertion of Crown sovereignty in Canada. In this case, the Court also outlined more explicitly its view of the historical relationship

19This support is often qualified. See, for example, the various essays in Walkem and Bruce, eds., Box of Treasures?
between Aboriginal peoples and the Crown, as inscribed in constitutional documents such as the Royal Proclamation of 1763. The Court described this relationship as fiduciary or trustlike rather than adversarial. More precisely, the Court recognized that the Crown, as the more powerful partner in this relationship, was responsible for safeguarding the rights of Aboriginal peoples and for seeking the best interests of their Aboriginal partners in all relations.

The entrenchment of an undefined bundle of Aboriginal rights in section 35 of the Constitution Act of 1982 was another key driver of this more generous and liberal judicial trend. Soon after a series of constitutional conferences among federal, provincial, and Aboriginal leaders failed to clarify the scope and content of section 35 (and the precise status of Aboriginal people in the federation), the Court was called upon to perform this function. It obliged with a number of interlinked decisions from the early 1990s onwards. The Court’s first direct foray into the constitutional space occupied by section 35 came in the matter of R. v. Sparrow, a decision that forms a key part of the legal architecture of Canadian Aboriginal rights. The case focused on the Aboriginal right to fish, but its more fundamental significance lies in the fact that, for the first time since the entrenchment of section 35, a more systematic judicial framework for understanding Aboriginal rights and the relationship between Aboriginal peoples and the Crown began to take shape. In deciding the case, the Supreme Court identified the source of Aboriginal rights as the fact that Aboriginal peoples had lived in organized societies and occupied their lands for generations before the assertion of European sovereignty. The Court went on to define “existing” Aboriginal rights as those rights not explicitly extinguished by Crown legislation before their constitutional entrenchment in 1982. Following the precedent set down in Calder, the Court also placed the onus on the Crown to prove that any such legislation contained a plain and clear intent to extinguish the Aboriginal right in question.

More important for our purposes, the Court defined more specifically the scope and strength of section 35 rights and the relationship between Aboriginal rights and the legislative authority of the federal government. In recognizing the terms of section 35 as the culmination of a long struggle by Aboriginal peoples for constitutional recognition of their rights, the Court concluded that these rights were to be given a “generous” and “liberal” interpretation; furthermore, referring back to the judgement in Guerin, the Court ruled that the terms “recognition” and “affirmation” incorporate the federal government’s fiduciary responsibility to Aboriginal peoples. Therefore, while recognizing federal legislative authority with reference to

Aboriginal peoples under section 91(24) of the Constitution Act 1867, the Court echoed Guerin in emphasizing that these powers must be read together with the federal government’s prior obligation to seek the best interests of its Aboriginal partners. 24 Aboriginal rights are not absolute or unrestricted, but a strong burden is placed on the federal government to justify legislation whose effect upon them is in any way adverse.25 The Court summarized the significance of section 35 as follows:

The constitutional recognition afforded by the provision therefore gives a measure of control over government conduct and a strong check on legislative power. While it does not promise immunity from government regulation in a society that, in the twentieth century, is increasingly more complex, interdependent and sophisticated, and where exhaustible resources need protection and management, it does hold the Crown to a substantive promise. The government is required to bear the burden of justifying any legislation that has some negative effect on any aboriginal right protected under s.35(1).26

In Sparrow, the Court articulated interconnected constitutional principles to govern the federation-Aboriginal relationship, principles that it clarified and refined in subsequent decisions. For one, the Court sought to define a constitutional framework that provides simultaneously for a measure of autonomous Aboriginal activity and a clear sense of the nature and bounds of legitimate and illegitimate government regulatory authority. Sparrow, for example, defines a sphere of autonomous activity for Aboriginal peoples within which government regulation or interference is to be tightly circumscribed, but by no means entirely prohibited. By way of illustration, the principle of resource conservation was identified by the justices as a legislative objective that might be used by government to regulate or limit the Aboriginal constitutional right to fish for food. In subsequent cases such as R. v. Gladstone27 and Delgamuukw v. British Columbia,28 the Court identified a broad variety of other “compelling and substantial” legislative objectives that might be invoked by government to justifiably infringe upon Aboriginal rights.29 The point to be taken here is that, although the Court seeks the protection of Aboriginal rights, it has attempted to do so in a way that leaves government free to pursue those objectives that serve the essential needs and interests of the broader society that it represents. Moreover, the underlying sovereignty of the Crown is explicitly affirmed by the Court’s Aboriginal rights jurisprudence. Granted, the Crown cannot act with impunity in the post-1982 period—it must meet

24Ibid., 1108–1110.
25Ibid., 1076–1080 and 1099–1122.
26Ibid., 1110.
29Delgamuukw, paras. 161 and 165.
the Sparrow test to justify its actions—but its ultimate sovereignty is not questioned by the Court.30

The foregoing discussion reveals a second constitutional principle that has guided the Court’s Aboriginal rights jurisprudence: its attempt to balance the rights and interests of Aboriginal and non-Aboriginal peoples. By balancing rights, it seeks a reconciliation of the unity and well-being of the federation with the constitutional protection of the distinctive needs and interests of Aboriginal communities. The Court outlined this objective most clearly in R. v. Van der Peet,31 where it described section 35 as the constitutional framework within which the preexistence of distinctive Aboriginal societies with their own traditions, practices, and cultures is acknowledged and reconciled with the sovereignty of the Crown. Within this framework of reconciliation, the Court sees its role as that of articulating the general constitutional contours of Aboriginal rights and the relationship between these rights and the legislative authority of federal and provincial governments. At the same time, it has refused to cross a line that would see it draw up the blueprints for comprehensive settlements of federation-Aboriginal disputes. Instead, the Court views its Aboriginal-rights jurisprudence as a kind of constitutional platform upon which the main actors—the Crown and Aboriginal peoples—play their role, which is to engage in political dialogue to agree on the precise bounds of their competing rights and interests.32 As a rule, although the Court has acknowledged its willingness to resolve points of conflict where the parties prove unwilling or unable to reach agreements,33 it has demonstrated a preference for playing a secondary or supportive role to a process of dialogue among government and Aboriginal representatives.34

Dialogue is, in fact, the third interconnected principle underpinning the Court’s Aboriginal-rights jurisprudence. Dialogue between representatives of government and Aboriginal peoples is essential to determine the precise content of Aboriginal rights and, more importantly, to ascertain how these rights are to be translated into specific regulations, public policies, and institutional designs. Time and again in its most important decisions on Aboriginal rights, the Court encourages the parties to seek a solution to their disagreements through dialogue rather than litigation.

30This was stated in the clearest of terms in Sparrow: “There was from the outset never any doubt that sovereignty and legislative power, and indeed the underlying title, to such lands vested in the Crown.” Sparrow, 1103.
32Sparrow, 1105.
34Borrows, “Uncertain Citizens,” 37. Reasons for this preference include the high cost of litigation, in both economic and human terms, and the sheer complexity of the issues and competing interests involved in Aboriginal rights cases, issues which the Court reasons (quite rightly) that it is not the most competent actor to resolve. For the Court’s articulation of these reasons see Delgamuukw, para. 186; Marshall (II), para. 22.
There are two distinct types of dialogue that figure prominently in the Aboriginal rights jurisprudence: consultation and negotiation. Consultation is generally a more limited form of dialogue, given that the Aboriginal participants are excluded from the agenda-setting phase of the policies or practices on which they are being consulted. Moreover, although in all cases the Crown is duty bound to consult in good faith and with the intention of addressing Aboriginal concerns as they are raised, there is no absolute requirement that Aboriginal input be taken into account or that their agreement be secured in order for government action to proceed. The scope and content of the duty to consult depend on the strength of the case in favor of a particular Aboriginal right and the seriousness of the potentially adverse effect of government action on the right in question. In *Haida Nation v. British Columbia (Minister of Forests)*, the Court applied these two criteria in defining a spectrum of consultation to govern specifically those cases where Aboriginal rights have been claimed but not yet proven. At one end of the spectrum, where rights claims are weak and the potential costs of infringement relatively low, the Crown’s duty to consult may be satisfied simply by giving notice, disclosing information, or discussing issues raised in relation to the notice. At the other end of the spectrum, where rights claims have a strong prima facie basis and the potential costs of infringement are serious, a much deeper level of consultation, aimed at finding an acceptable interim solution, is required. As examples of these deeper forms of consultation, the Court cited the participation of Aboriginal representatives in relevant decision-making processes and meditation, as well as referrals of complex and difficult cases to independent dispute-resolution bodies. In certain cases, meaningful consultation may even oblige governments to revise their policies or planned actions to accommodate Aboriginal concerns pending a final resolution of the rights claim in question. When an Aboriginal right has been established, government action may even require the full consent of the Aboriginal party—in other words, there is an Aboriginal veto on government policy.

The Court sometimes recommends both types of dialogue in the same case, and without clearly distinguishing one form from the other. See, for example, *Sparrow*, 1086, 1105, 1119; *Delgamuukw*, para. 168 and 186; *Marshall II*, para. 22.


One of the key dimensions of the Court’s jurisprudence on the duty to consult is that the Aboriginal parties are not required to prove that a right exists before consultation is required by the Crown—they need only make the case that there is some likelihood that such a right exists (indeed, the *Haida* decision was concerned exclusively with these types of cases). Nevertheless, as we discuss below, the strength of the prima facie case for the existence of a right will dictate the nature and extent of the consultation in which the Crown is obliged to engage.

Ibid., paras. 46–47.

Ibid., para. 48; *Delgamuukw*, para. 168. The Aboriginal parties are also held up to a certain standard of conduct in the consultation process. Specifically, “they must not frustrate the Crown’s reasonable good faith attempts, nor should they take unreasonable positions to thwart government
In *Haida*, as in previous cases, however, the Court is clear that its purpose is to outline the general legal architecture of the duty to consult, and that the specific method of consultation is to be decided by governments on a case-by-case basis and applied flexibly because the original choice of methods may need alteration as new information comes to light. Similarly, if accommodation or policy change is required, its substance is to be decided not by the Court but by governments on the basis of their consultations with the affected Aboriginal party.41

Negotiation is the second form of dialogue featured in the Court’s jurisprudence on Aboriginal rights. Negotiation first entered the Court’s parlance in the 1990 *Sparrow* decision, where the justices held that section 35 “provides a solid constitutional base upon which subsequent negotiations can take place.”42 A little less than a decade later, in *Delgamuukw*, the Court referred back to these comments in *Sparrow*, suggesting to the parties at trial that a negotiated solution to the land-title dispute would be preferable to further litigation.43 Unlike the duty to consult, negotiation is not a legally enforceable obligation on the Crown. It is at best a moral duty, a course of action in which the Crown is encouraged, though not required, to engage. This explains why the Court has very little to say about the specific forms negotiations may take, other than that if the Crown decides to negotiate, it “is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith.”44 Negotiation is perhaps best understood in terms of a spectrum of practices that begins where the deeper end of the consultation spectrum leaves off. That is, when consultation starts to require the full consent of the Aboriginal party, one begins to pass from consultation to negotiation. This represents a move away from a situation where Aboriginal peoples are informed about and perhaps permitted to comment on policies designed and driven exclusively by government toward a situation where they are included as active partners in the design and implementation of policies, regulatory practices, and governance regimes relating to their rights. Nevertheless, as in the realm of consultation, the Court sees itself in a role that is supportive of political action—leaving representatives of the Crown and Aboriginal peoples as free as possible to negotiate specific details of Aboriginal-rights settlements, and reinforcing or nudging that process along if and when it is called upon to do so. As Chief Justice Antonio Lamer concluded in an oft-cited passage from *Delgamuukw*, “Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, from making decisions or acting in cases where, despite meaningful consultation, agreement is not reached.” See *Haida*, para. 42.

41 *Haida*, paras. 43–47.
42 *Sparrow*, 1105.
43 *Delgamuukw*, para. 186.
44 Ibid.
reinforced by the judgments of this Court, that we will achieve...the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown.”\textsuperscript{45}

The constitutional case law on Aboriginal rights is a good illustration of both the potential and the limitations of the Court’s role in facilitating such dialogue. On the positive side of the ledger, the Court has played a significant role in kick-starting dialogue between Aboriginal representatives and their counterparts in federal and provincial governments. One of the best illustrations of the Court’s impact is the Calder decision. This decision helped set in motion a process which, though it took almost two decades, ultimately led to the negotiation and ratification of British Columbia’s first modern treaty by the governments of Canada, British Columbia, and the original plaintiffs in Calder, the Nisga’a Nation of British Columbia. Along the way, the legal uncertainty generated by this decision helped bring into existence a formal process at the federal level for negotiating Aboriginal claims to land and self-government, a process that has since yielded several comprehensive agreements across the country.\textsuperscript{46}

The creation of the British Columbia treaty process was aided by Calder, along with subsequent Court decisions in Guerin, and by the constitutional entrenchment of Aboriginal rights, Aboriginal activism, and growing public pressure.\textsuperscript{47} To cite a more recent example, in R. v. Marshall (II), a case on treaty fishing rights, the Court urged the two parties to reconcile their competing interests through the negotiation of a political agreement that would facilitate the participation of the Aboriginal party (the Mi’kmaq) in the fishery resource in question.\textsuperscript{48} In the wake of this decision, the federal government began formal negotiations, and, as of 17 December 2004, agreements had been signed with thirty-one of the thirty-four First Nations communities covered by the treaty.\textsuperscript{49}

The impact has been felt in the domain of consultation as well. In the aftermath of the Delgamuukw decision, for example, First Nations in British Columbia and other parts of the country began to assert more aggressively their right to be consulted and have their interests accommodated, and both governments and the natural-resource companies operating on

\textsuperscript{45}Ibid. emphasis added.

\textsuperscript{46}In addition to the Nisga’a Final Agreement, these include the Yukon First Nations Self-Government Agreements, the James Bay and Northern Quebec Agreement, and Nunavut. For details on these agreements, see Helena Catt and Michael Murphy, Sub-State Nationalism: A Comparative Analysis of Institutional Design (London and New York: Routledge, 2002).

\textsuperscript{47}See Christopher McKee, Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future (Vancouver: University of British Columbia Press, 2000), pp. 26–30. According to McKee (pp. 92–6), the Court’s later decision in Delgamuukw also helped breathe new life into the treaty process, which had until then been showing increasing signs of ill health.

\textsuperscript{48}Marshall (II), para. 22.

Aboriginal title lands have begun to respond.50 One of the clearest illustrations of this was British Columbia’s announcement in 2002 of its “Provincial Policy for Consultation With First Nations,” a direct response to Delgamuukw.51 The policy document, which applies to all government ministries, agencies, and Crown corporations, details a set of procedures to be followed in order to meet the Crown’s obligation to consult with and potentially accommodate First Nations when their rights and interests are likely to be affected by government policy. The bargaining power of First Nations in consultations has also been bolstered somewhat by the Supreme Court’s affirmation, in Haida, that in many cases the Crown has a duty to consult or accommodate Aboriginal interests before, not after, the existence of an asserted Aboriginal right has been proven.

In spite of this progress, many First Nations continue to be frustrated in their attempts to secure recognition of their rights and interests through dialogue with Canadian governments. Much of this frustration stems from the power imbalance that characterizes the relationship between First Nations and their federal and provincial negotiating partners. The federal government’s unilateral decision in November 2002 to shut down dozens of land and self-government negotiations over the strenuous objections of representatives of First Nations is an excellent illustration of the disadvantage faced by First Nations in the political domain.52 Furthermore, once negotiations begin, the Crown has a far greater ability than First Nations to determine which issues get to the table for discussion. For example, the Canadian government’s policy for negotiating the inherent right of Aboriginal self-government, announced in 1995, unilaterally stipulates the nature and scope of legislative jurisdictions available for negotiation, a subject that First Nations almost unanimously believe is one of the more fundamental matters for negotiation.53 Canadian governments have also been widely criticized for their domination of the procedural aspects of the negotiations, for their insistence on the extinguishment of Aboriginal rights over the strenuous objections of First Nations, and for their reluctance to cede real decision-making authority to First Nations governments.54 Moreover, as the Court itself has made clear, although

50McKee, Treaty Talks, pp. 93–94. For additional discussion of Delgamuukw’s policy impact outside of British Columbia see the various essays in Owen Lippert, ed., Beyond the Nass Valley: National Implications of the Supreme Court’s Delgamuukw Decision (Vancouver: The Fraser Institute, 2006).
federal and provincial governments are obligated to consult and negotiate in good faith, they are under no obligation to come to an agreement or to address Aboriginal grievances satisfactorily. In *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, for example, the Court ruled that the Crown had fulfilled its obligations to consult with and accommodate the Taku River Tlingit First Nation even though these measures ultimately did not achieve the First Nation’s objective, which was to force the relocation of a mining access road that crossed its traditional territory.

On one hand, the Supreme Court’s reluctance to demand specific outcomes from consultation and negotiation among the Crown and First Nations is understandable. This is a role that the Court has neither the expertise nor the legitimacy to occupy. From this perspective, the inability of First Nations to make concrete political gains from significant legal victories illustrates the necessary limitations of the Court’s function as a metapolitical actor facilitating and reinforcing processes of dialogue on Aboriginal rights, but leaving it up to the Aboriginal and non-Aboriginal political actors in the federation to determine the substantive content and outcomes of those discussions. On the other hand, the Court can be criticized for doing too little to empower the weaker Aboriginal parties in these dialogic processes and thereby failing to achieve its own stated objectives of reconciling and balancing Aboriginal and non-Aboriginal interests in the federation. Indeed, many of the Court’s recent decisions have had the effect of constricting the more generous and liberal interpretation of Aboriginal rights promised in *Sparrow*. Examples include tying the justification of Aboriginal rights to narrow and outdated notions of tradition and cultural distinctiveness (a reintroduction of the “frozen rights” approach rejected in *Sparrow*), the limitation of Aboriginal constitutional rights by certain nonconstitutional interests of the broader society, and the sheer multiplication of the grounds on which both federal and provincial governments may justifiably infringe Aboriginal rights. It is undoubtedly too much to expect the Court to overturn Crown sovereignty, a principle to which the Court has consistently shown deference, but at the end of the day, the Court must recognize that a

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58Following *Delgamuukw*, para. 165, these include “the development of agriculture, forestry, mining, and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of infrastructure and the settlement of foreign populations to support those aims.”
59See *Sparrow*, 1103; *Van der Peet*, para. 31; *Delgamuukw*, para. 186. For a somewhat different take on the question of Aboriginal and Crown sovereignty see *Mitchell v. Canada (MNR)*, 1 S.C.R. 911 (2001).
mutually beneficial process of dialogue is difficult to achieve when the power imbalance between the actors is so acute.

**QUEBEC AND THE CANADIAN CHARTER OF RIGHTS**

An important critic of the 1982 Constitutional accord is Guy Laforest, who contends that the Canadian Charter, with its emphasis on individual rights, is incompatible with the collective political project of the Québécois and the desire to preserve its distinct language and culture. According to Laforest, the “Charter directly challenged Quebec legislation by imposing national language standards.” With this in mind, Laforest concludes that the Canadian Charter should have no application in Quebec; instead, the quasi-constitutional Quebec Charter of Human Rights should take its place. This position is also advanced by Fernand Dumont, who views the nation-building objective of the Canadian Charter as a project in *anglo-conformité* that undermines Quebec’s distinctiveness and will likely erode the civil-law tradition that exists in Quebec.

Recent analyses by Quebec intellectuals have disputed the centralizing effect of the Charter, though they do acknowledge its centralizing potential through changes in civic culture. Jean-François Gaudreault-DesBiens argues that the recognition of minority-language education rights in the Charter is a direct challenge to Quebec’s French character. However, Gaudreault-DesBiens contends that if there is a decline of federalism, it is the result of a decline of the federal spirit among citizens that has been inspired by the Charter. This decline is illustrated by F. L. Morton and Rainer Knopff and their reference to the “Court Party,” namely, citizens who seek policy victories through the courts and not through parliamentary institutions and whose effect is to centralize public policy through its interpretation by a national institution, the Supreme Court of Canada.

A qualitative analysis would suggest that the Charter has had a substantively negative effect on Quebec as sections of the Charter of the French Language have been ruled unconstitutional in *Attorney General (Quebec) v. Protestant School Boards*, *Ford v. Quebec*, and *Devine*, and sections of the Referendum Act were held to be unconstitutional in *Libman*. Indeed,
the *Quebec Secession Reference* saw the Supreme Court challenge the constitutionality of the national project of the Québecois by arguing that a right to secession for Quebec was not available in either domestic or international law, though the Court qualified this decision by stating that the federal government would have to negotiate with Quebec regarding the terms of separation if a referendum on a clear question produced a clear mandate.

This analysis, however, neglects the interinstitutional dialogue between the Supreme Court of Canada and the Quebec National Assembly when statutes are reviewed for their constitutionality, plus the dialogue between the Quebec National Assembly, the Department of Justice, and the Quebec Human Rights Commission that occurs during the design of legislation. The limited number of Quebec statutes reviewed is evidence of the general success of the Supreme Court as a meta-political actor as the Quebec National Assembly retains substantial policy autonomy.\(^{66}\) Further, the limited number of invalidations cannot support the project of *anglo-conformité* attributed to the Supreme Court and the assumption that judicial decisions represent the last stage in the constitutionality of a statute.\(^{67}\)

Although quantitative analysis cannot on its own demonstrate the effect of the Charter on Quebec, because an invalidation involving the Charter of the French Language may have significant implications for safeguarding Quebec’s language and culture, the general effect has not been a substantive loss of policy autonomy for the Quebec National Assembly. Specifically, the National Assembly has been able to reverse judicial rulings invalidating sections of the Charter of the French Language in two cases by using the Charter’s notwithstanding clause (*Ford, Devine*) and has reversed the invalidation of sections of the Referendum Act through a minor legislative amendment of a spending restriction (*Libman*).\(^{68}\) The invalidation of restrictions on English education in Quebec in the aftermath of *Protestant School Boards* has not prevented Quebec from pursuing its policy of linguistic survival. In effect, through the structural features of the Charter, which facilitate constitutional dialogue and allow legislatures to respond to judicial rulings, the Quebec National Assembly retains sufficient autonomy to achieve its policy agenda.

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66 Between 1982 and 2003, a total of eleven Quebec statutes were reviewed by the Supreme Court, resulting in a finding of constitutionality of 55 per cent. Once the legislative responses in *Ford, Devine*, and *Libman* and the limited policy consequences of *Protestant School Boards* are considered, the National Assembly has retained policy autonomy in 91 percent of cases (ten out of eleven) reviewed by the Supreme Court of Canada.

67 A total of twenty-five provincial statutes were found to violate the Canadian Charter between 1982 and 2003. Quebec’s experience has been similar to other provinces: five statutes have been found unconstitutional in Quebec, British Columbia, and Alberta and four statutes in Ontario.

68 Section 33 applies only to fundamental freedoms, legal rights, and equality rights. It does not apply to section 6 (mobility rights), sections 16–22 (Official Languages), or section 23 (minority language education rights), exceptions considered indicative of the Canadian Charter’s asymmetrical threat to Quebec’s distinctive language and cultural policies.
Section 1 of the Charter warrants discussion because it is critical to the emergence of constitutional dialogue between courts and legislatures and clearly demonstrates the Supreme Court’s role as a meta-political actor that supplements rather than subverts the activities of political actors. Section 1 allows governments to justify a rights limitation as reasonable in a free and democratic society. The precise approach to section 1 was constructed by the Supreme Court in *R. v. Oakes*, and the *Oakes* test was originally a difficult standard for governments to satisfy as a limitation had to represent a minimal impairment on a Charter right for the Supreme Court to consider it reasonable. However, this restrictive approach was quickly abandoned by the Court once it recognized that its inflexibility robbed the Charter of its sensitivity to distinct policy contexts.

This contextual approach to section 1 coalesced in *RJR-Macdonald Inc. v. Canada*, when the Court acknowledged the difficult task facing governments in meeting the standard of minimal impairment: “The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement.” The acceptance of a range of possible legislative approaches is significant because it speaks directly to the principle of federal diversity and the Supreme Court’s recognition that the complexity of policy contexts requires some deference to parliamentary actors.

There are principally two constitutional dialogues that concern Quebec and demonstrate that fundamental political decisions remain the prerogative of legislative actors: the dialogue on the Canadian Charter and the one involving the province’s constitutional destiny in the *Quebec Secession Reference*. In *Attorney General (Quebec) v. Protestant School Boards*, sections of the Charter of the French Language (Bill 101), which restricted English education to the children of Anglophones educated in Quebec, were determined by the Supreme Court to infringe the Charter’s minority-language education rights. Quebec did not disagree that Bill 101 violated minority-language education rights but argued that it was a reasonable limitation because of the need to protect the French language and culture. As Switzerland and Belgium had adopted stricter language polices

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69 The second instrument would be the notwithstanding clause. However, it has been argued that a convention now exists that section 33 cannot be used and has fallen into disuse, similar to the power of disallowance. However, Quebec academics argue that section 33 is still operational in this province. See André Binette, “Le Pouvoir dérogatoire de l’article 33 de la Charte canadienne des droits et libertés et la structure de la Constitution du Canada,” *Revue du Barreau* (March 2000; special issue): 134–137.

70 *R. v. Oakes*.


subsequently upheld by the Swiss and European courts, Quebec reasoned that this policy would be upheld through section 1 of the Charter.74

In its section 1 analysis, the Supreme Court determined that denying English instruction to the children of Canadian citizens educated in English outside of Quebec was not a reasonable but rather a total limitation of section 23(1)(b). This invalidation does not confirm the hollowness of constitutional dialogue in Canada or the failure of the Supreme Court as a meta-political actor. The Court’s decision did not interfere with the policy of preserving the French language because it only privileged Canadian citizens educated outside Quebec who moved to Quebec. As there is a net outflow of anglophones from Quebec and this is the only group to benefit from the decision, the children of new immigrants to Quebec cannot access English education because the parents are neither Canadian citizens nor educated in English in Canada. As the demographic strength of francophones is not threatened by interprovincial immigration but bolstered by French-speaking emigrants from La Franchophonie, the partial invalidation of the Charter of the French Language has no practical impact beyond providing a strong rhetorical tool for the critics of the 1982 constitutional settlement.75 Indeed, this constitutional dialogue saw the Quebec government reestablish education to the anglophone community to the level that existed before Bill 101’s enactment in 1977. Thus, beyond the requirement to provide English educational services to a restricted part of the anglophone community, which is declining in the province, the Quebec National Assembly retains nearly complete autonomy over education policy, as 92 percent of the population does not benefit from Protestant School Boards.76

The best illustration of the complexity of constitutional dialogue and the ability of Quebec to protect its cultural identity is Ford v. Quebec, a decision involving the constitutionality of the Sign Law under Bill 101, which prohibits the use of languages other than French on public signs. The Quebec government conceded that sections 58 and 69 of the Charter of the French Language violated freedom of expression under section 2(b) of the Canadian Charter but represented a reasonable limitation. In its decision, the Court indicated that “requiring the predominant display of the French language, even its marked predominance, would be proportional to the goal of promoting and maintaining a French ’visage linguistique’ but a total restriction could not be justified.”77 Quebec’s language policy was reasonable in terms of majoritarian decision making

74Protestant School Boards, 78.
75Laforest, Trudeau, pp. 125–149.
76Between 1991 and 2001, a net outflow of 53,750 Quebec anglophones moved to other Canadian provinces, reducing this community to 8 percent of the Quebec population. In the same period, the allophone community increased to 10 percent of Quebec’s population. Statistics Canada, cited at http://www12.statcan.ca/english/census01/Products/Analytic/companion/lang/pdf/96F0030XIE2001005.pdf.
77Ford v. Quebec, para. 74.
but it was not a reasonable limitation in light of the Canadian Charter. Perhaps more significantly, the Sign Law was determined also to violate the Quebec Charter of Human Rights, which was enacted by the Parti Québécois before the 1982 Canadian Charter. In effect, the restrictions on languages other than French on public signs were not simply a violation of the national standards in the Canadian Charter but also of the values of the Québécois enshrined in the provincial Charter of Human Rights.78

In response to the invalidation of the Sign Law, the Quebec National Assembly invoked the Canadian Charter’s notwithstanding clause and suspended the Supreme Court’s declaration of invalidity for five years. In essence, a legitimate disagreement existed between the Quebec government and the Supreme Court on the reasonableness of the Sign Law, and the National Assembly invoked the legislative override of section 33 of the Canadian Charter. The use of the notwithstanding clause, however, was not the only legislative response to the Court’s decision in Ford, as the expiry of the legislative override in December 1993 did not see the National Assembly reinvoke section 33 for an additional five-year period but saw the Charter of the French Language amended to allow the display of languages other than French on public signs. As long as French is the predominant language on a public sign, defined as being at least twice as large as the other text and not being visually reduced by this text, the use of languages other than French is permitted.79

Although the second legislative response closely followed the Supreme Court’s suggestion in Ford, it occurred five years after the initial invalidation and once the constitutional crisis over the rejected Meech Lake Accord had passed. During this subsequent dialogue, the National Assembly amended the Charter of the French Language to establish its constitutionality with the Canadian Charter and the Quebec Charter of Human Rights. The decision by the National Assembly to amend the Sign Law consistent with the Supreme Court’s decision, however, is not an example of the hollowness of constitutional dialogue, because Quebec retained the discretion over how to respond. Clearly, the National Assembly determined that minor revisions to the Sign Law would still advance its policy objectives and ensure the survival of French. Otherwise, Quebec surely would have reinvoked the notwithstanding clause and would have had the broad support of its population in doing so.80

The temporary state of judicial invalidation also occurred in Libman v. Quebec, a constitutional challenge to the spending restrictions placed on third parties under Quebec’s Referendum Act. Next to the Charter of the

French Language, the Referendum Act can be considered central to the political destiny of Quebec, because it authorized the Quebec people to decide their constitutional future in 1980 and 1995. At issue was section 404, which limited third-party spending to $600 by individuals or groups not willing to be affiliated with an official committee. This spending limitation was challenged as an infringement of freedom of expression and association, both claims accepted by the Supreme Court. Turning to the section 1 analysis, the Court accepted that spending restrictions were necessary to ensure equality in the positions presented by the Yes and No committees but questioned the reasonableness of severe spending restrictions on third parties. The Court suggested that alternatives existed to advance the objectives of the Referendum Act and recommended a spending restriction of $1,000 as suggested by the Lortie Commission. However, the Court refrained from establishing the spending limit that could ensure the constitutionality of section 404, arguing that it “will be up to the legislature to make the appropriate amendments.”

The restrained remedy and the insistence that the National Assembly should decide appropriate spending restrictions reinforces the principle of constitutional dialogue that underlines much of the Supreme Court’s Charter jurisprudence. In addition, the narrow basis of the invalidation allowed the National Assembly to amend the Referendum Act. In the lead-up to the 1998 Quebec election, then Premier Lucien Bouchard recalled the National Assembly for one day to amend the Referendum Act to ensure its compliance with both the Canadian Charter and the Quebec Charter of Human Rights, as the Supreme Court determined the spending restrictions violated both documents.

While Libman dealt with a peripheral element of the Referendum Act, the Quebec Secession Reference of 1998 questioned the legality of the Quebec sovereignty debate. Following the near victory of the sovereignists in the 1995 referendum and their pledge to hold a subsequent referendum after the next provincial election, the federal government submitted three reference questions to the Supreme Court. The first question dealt with the legality of Quebec’s secession under the Constitution Act, which the Supreme Court found could only occur through formal amendment of the constitution. The Court determined that although a right existed in international law, it applied only in the context of colonial peoples exercising the right to self-determination against imperial powers or

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81 Under the Referendum Act, two official committees (Yes and No) are established and individuals or groups not willing to affiliate with an official committee are severally restricted in their ability to spend during the campaign.

82 Libman v. Quebec, paras. 76–78.

83 Ibid., para. 86.

internal minorities who had been exploited outside a colonial context, neither of which characterized Quebec. The Court did not answer the third question, which asked whether international or domestic law would have paramountcy in the case of a conflict.

The Court’s decision has been criticized because it went beyond the reference questions and outlined four underlying principles of the Canadian constitution (i.e., federalism, democracy, the rule of law, and the protection of minorities) that would determine the legality of secession. Based on these principles, the Court placed a constitutional obligation on the Canadian government to negotiate in the face of a successful referendum but also established the parameters of such a referendum. The reality is that the Canadian and Quebec governments had refused to begin such a dialogue since the election of the Parti Quebecois in 1976. The Canadian government argued it did not have a mandate to negotiate the secession of a province from the federation, and Quebec stated that sovereignty was an internal political debate based on the will of the people and not a legal decision that needed to be consistent with the Canadian constitution. Quebec’s position was reflected in its refusal to participate in the Quebec Secession Reference and the Supreme Court’s subsequent appointment of legal counsel to argue the province’s position.

Based on the principles of federalism and democracy, the Court reasoned that “the clear repudiation of the existing constitutional order and the clear expression of the desire to pursue secession by the population of a province would give rise to a reciprocal obligation on all parties to Confederation to negotiate constitutional changes to respond to that desire.” The Canadian government’s position was refuted as the Court stated that a clear mandate on a clear question created the constitutional duty to negotiate the terms of secession. However, the Court placed an obligation on Quebec to present a clear question resulting in a clear mandate; otherwise, there would be no duty on the federal government to negotiate the terms of secession. In effect, any future referendum question had to depart from the sovereignty-association question employed in the 1980 Quebec referendum or the ambiguous question in 1995 that sought a mandate for sovereignty if Quebec’s attempt at a new political and economic partnership with Canada failed after one year of negotiations.

This decision is an excellent illustration of constitutional dialogue and the Supreme Court as a meta-political actor. The Court established the parameters of a future referendum but refrained from determining the specific conditions of a successful referendum. On the question of a clear

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85Ibid., paras. 132–136.
87Reference Re Secession of Quebec, para. 88.
majority, the Court answered “whatever that may be” and left this issue to political actors to determine before a future referendum.88 The Court also indicated that a negotiated settlement would be an onerous task and involve a large number of issues, but refrained from establishing the parameters of these negotiations or the substantive issues to be discussed. The clearest evidence of the Quebec Secession Reference as constitutional dialogue are the legislative responses by the Canadian and Quebec governments. The Canadian government passed the Clarity Act, which authorized Parliament to review any referendum question and its result and to determine whether they meet the criteria of a clear question and a clear mandate. The Quebec National Assembly passed Bill 99 stipulating that a clear majority constitutes 50 percent plus one vote and rejected the idea that Parliament could review either the question or the result of a sovereignty referendum.89 The dialogue between Canada and Quebec on the conditions for a successful referendum has therefore begun as a result of the Quebec Secession Reference.

Constitutional dialogue, however, is not simply the result of legislative responses to judicial invalidation. It also occurs when the Court supports the constitutionality of challenged statutes by demonstrating a sensitivity to the policy context facing a particular province. This dimension of dialogue is evident in R. v. Advance Cutting and Coring Ltd., which involved a Charter challenge to the constitutionality of provisions of Quebec’s construction-labor legislation.90 Under the act, construction workers are required to be members of one of five listed union groups, and this was challenged as a violation of freedom of association, which is protected under section 2(d) of the Charter. The majority decision written by Justice Lebel defended the act as a legitimate response to the violent history of the labor industry in Quebec as the legislation was designed to ensure labor peace and a balance between workers and corporate interests.91 In finding that the act did not violate freedom of association, the Court indicated that the Quebec National Assembly—and not the Supreme Court—is the proper institution to address this issue because of its complexity: “The relevant political, social and economic considerations lie largely beyond the area of expertise of courts. This limited and prudent approach to court interventions in the field of labour relations reflects a proper understanding of the functions of courts and legislatures.”92 Sensitivity to the policy context clearly reveals

88Ibid., para. 93.
91Ibid., para. 118.
92Ibid., para. 239.
that the Supreme Court’s Charter jurisprudence can reconcile the Charter with provincial autonomy, as Gaudreault-DesBiens suggests in his analysis of *Advance Cutting*.  

This, however, is a meta-constitutional dialogue between the Supreme Court and the Quebec National Assembly. Earlier, we alluded to the limited number of Quebec statutes reviewed by the Supreme Court for their constitutionality on Charter grounds and to the fact that Quebec’s treatment under the Charter is similar to that of other provinces in purely empirical terms. This is surprising, given that Quebec has a unique legal system and develops public policy in a context quite different from the other provinces as the principle of La Survivance of the Québécois underscores many of its language, education, and social policies. The limited number of statutes reviewed is the result of the complexity of constitutional dialogue that occurs during the design of legislation. To relate this back to our earlier discussion, it is clear that Hogg and Bushell erred in suggesting that judicial activism initiates Charter dialogue as a far more robust dialogue within the legislative arena precedes and structures the dialogue between courts and legislatures when statutes are subjected to constitutional review.

Quebec has been treated as *une province comme les autres* because it has not acted like the other provinces in its attempts to design legislation that complies with constitutional and quasi-constitutional guarantees. Constitutional dialogue is more institutionalized owing to the quasi-constitutional status of the Quebec Charter of Human Rights and the significant role of the Quebec Human Rights Commission in the vetting of legislation. In certain respects, constitutional dialogue within the legislative process is no different in Quebec because all governments require their respective departments of justice to review the Cabinet’s legislative agenda to ensure that it is consistent with the Charter. A more complex vetting of legislation occurs in Quebec because all proposed bills are evaluated by the Quebec Ministry of Justice for their consistency with the Canadian Charter and the Quebec Charter. Indeed, only Quebec accords its provincial Human Rights Act a quasi-constitutional status, and this results in a more complex vetting of legislation and constitutional dialogue between the cabinet, the Department of Justice, and the sponsoring minister and department.  

Perhaps the most important institutional difference is the role of the Quebec Human Rights Commission, which participates in the vetting of legislation before statutes are proclaimed into law. When a bill is tabled in the Quebec National Assembly and a parliamentary committee is struck, a copy is sent to the Quebec Human Rights Commission, which then

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94Interview with departmental officials: Ministry of Justice, Government of Quebec (23 November 2003); Commission des Droits de la Personne et des Droits de al Jeunesse, Government of Quebec (3 November 2003).
prepares a brief outlining whether, in the commission’s opinion, the draft bill complies with the Canadian and Quebec Charters of Rights. This process generally sees the Quebec National Assembly accept the recommendations of the Quebec Human Rights Commission to better ensure that legislation complies with both charters.

The complexity of this constitutional dialogue may explain an important difference between Quebec and the other provinces regarding the notwithstanding clause. Quebec is more disposed to use section 33, not because the province has a lower regard for rights but because no other province goes to the same lengths to ensure that legislation is consistent with the Canadian and Quebec charters. Further, no other province subjects its legislation to external vetting by its human rights commission. Thus, when Quebec uses section 33, it is for principled reasons: the National Assembly genuinely disagrees with the Supreme Court’s assessment of its attempts to safeguard rights and freedoms during the design of legislation. In the case of Quebec, therefore, the notwithstanding clause is part of the constitutional dialogue between courts and legislatures.

**CONCLUSION: THE DILEMMAS OF DIALOGUE**

This article set out to demonstrate the nature and significance of the Canadian Supreme Court’s role as a meta-political actor in constitutional politics. In so doing, we also sought to respond to certain critics of the Court by demonstrating that the management of diversity is a role the Court shares with key political actors, such as federal and provincial governments and the representatives of Aboriginal First Nations. Where critics see a Court-centric monologue, we see a dialogue where in the Court is one of several guardians of Canada’s constitutional order. The Court itself has encouraged this constitutional dialogue by articulating the broad constitutional principles governing the distribution of rights and authority in the federation, while leaving political actors as free as possible to legislate on substantive issues of public policy, and by encouraging political actors to settle the precise details of their constitutional disputes through consultation and negotiation.

The most successful dialogue has been in relation to the Canadian Charter, where the Supreme Court has determined the parameters of constitutional action and adopted remedies that invite legislative responses to judicial invalidations. The ability of the Quebec National Assembly to

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95In 2003 the Quebec Human Rights Commission reviewed approximately 130 bills and presented 9 written briefs to the Quebec National Assembly. Officials indicated that approximately 60 percent of its recommendations were accepted by the National Assembly. Interview with departmental officials: Commission des Droits de la Personne et des Droits de al Jeunesse, Government of Quebec (3 November 2003).

96This is not a common practice. Provincial human rights commissions generally investigate complaints and perform an educational role.
retain autonomy over language and cultural policy is evidence of this. A less successful dialogue emerged from the *Quebec Secession Reference*, with the Canadian and Quebec governments generally engaged in a detached dialogue on the merits of their respective positions as legitimized in the Court’s decision but ignoring the need to discuss the legitimacy of this fundamental political issue. This illustrates the paradox of dialogue and the Court’s attempt to create reciprocal roles for managing Canadian federalism that require political and not judicial resolution. If the Court is too aggressive, it challenges the principle of constitutional supremacy and reveals the danger of judicial power in a complex federation. If the Court is too passive, it does not help marginalized groups overcome power imbalances with the very governments on whom it has placed a constitutional obligation to negotiate political outcomes.

The limitations of the Supreme Court’s approach to constitutional dialogue are most clearly revealed in the case of Aboriginal First Nations. There is much to commend in the Court’s Aboriginal rights jurisprudence, including its attempt to reconcile Crown sovereignty with the preexistence of distinctive Aboriginal societies, its desire to hold the Crown to a high standard of conduct in fulfilling its constitutional duty to Aboriginal peoples, and its consistent encouragement of government and the representatives of Aboriginal peoples to use the judgments of the Court as bases for political negotiations to determine the specific parameters of their political relationships. Indeed, in many cases, the Court’s efforts have helped kick-start political dialogue among government and First Nations, which has led to agreements to implement Aboriginal rights claims. Nevertheless, much of the substance of recent Aboriginal rights jurisprudence has been insufficiently attentive to the power imbalance between government and First Nations, and the resulting inability of Aboriginal representatives to make many concrete gains from consultation and negotiation. To reiterate a point made earlier, it is wrong to expect the Supreme Court to dictate specific outcomes from political dialogue on Aboriginal rights, but the Court can be criticized for its increasing restrictions on the more generous interpretation of Aboriginal rights promised in *Sparrow*. If the Court wishes to deliver on its mandate of balancing and reconciling the interests of Aboriginal and non-Aboriginal peoples in the federation, it must do more to redress the power imbalance that favors non-Aboriginal governments.

In the end, the Supreme Court’s attempt to ensure that Canada’s constitutional dialogue on diversity provides centre stage to political and democratic actors has yielded mixed results. Although part of the responsibility for this mixed outcome can be laid at the feet of the Court, much of the blame must be accepted by governments. The Court can work to improve its federalism jurisprudence, but it must discharge its role as a meta-political actor in tandem with governments and First Nations. Moving
beyond establishing the parameters of constitutional dialogue would question the legitimacy of the Supreme Court and its commitment to constitutional supremacy. Whether this constitutional dialogue produces honorable outcomes is ultimately subject to political decisions by the provincial governments and the parliament of Canada.