CHARTING THE CONSEQUENCES: THE IMPACT OF CHARTER RIGHTS ON CANADIAN LAW AND POLITICS, David Schneiderman and Kate Sutherland, eds., (Toronto: University of Toronto Press, 1997)

The temptation in reviewing a collection of essays on the *Charter*, such as *Charting the Consequences: The Impact of the Charter of Rights on Canadian Law and Politics*,[1] is to take the essays at face value and acquaint the reader with the perspectives of the twelve authors on the diversity of subjects between the volume's covers. That approach has its value, and it will crop up throughout this review. Another approach, simultaneously employed in the next few pages, is to step back and adopt a macroperspective, in which some of the particulars may fade from view, but larger themes may more readily emerge — themes which may help to respond to the subtitle — "The impact of *Charter* Rights on Canadian Law and Politics."

The composition of the authors, the chapters and their subjects tell part of the story about "Impact." Any collection of essays written between World War II and the mid-seventies on the pre-*Charter* written constitution would not have had five women authors out of twelve, nor an Aboriginal contributor. Subjects covered would have been unlikely to include women, sexual orientation, and Aboriginal nations; nor would the degree of groping for understanding, common among current *Charter* scholars trying to make sense of and influence an unfolding constitutional experiment in its early days, have struck the reader so forcibly. The *Charter*, therefore, has expanded the subject matter of constitutional discourse and, as a consequence, diversified the community of constitutional scholars. In pre-*Charter* days, constitutional scholars were classified in federalist terms as provincialist or centralist. In earlier eras, the federalist dichotomy would have been supplemented by whether the constitutional scholar was imperialist, with an interest in preserving the British link, or nationalist. Contemporary classification systems are more complex. Scholarly advocates cluster behind various *Charter* clauses and the additional Aboriginal clauses in the *Constitution Act, 1982*. Territorial identities no longer monopolize the stage for constitutional scholars. Further, support for the Canadian dimension of our existence now flows as frequently from support for the *Charter* as from support for the federal government.

The existence of this volume is part of the *Charter*'s impact. Its contents are not to be thought of as analyses by outside observers of the *Charter*'s impact on society, with the latter conceived of as an external object to be analyzed by the former, viewed as disinterested observers motivated by scientific dispassion. On the contrary, the authors themselves are part of the *Charter* experiment, and their contributions are attempts to influence the *Charter*'s future evolution. These essays, therefore, are part of our socialization to the new constitutional order generated by the *Charter*.

The scholarly stance of most of the legal contributions can best be described as interpretive activism. By this I refer to the link between the scholarly interpretation of some post-1982 *Charter*-linked development of law, and the authors' identification with

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[1] D. Schneiderman & K. Sutherland, eds., *Charting the Consequences: The Impact of the Charter of Rights on Canadian Law and Politics* (Toronto: University of Toronto Press, 1997).

a social movement, or policy goal. Kathleen Lahey[2] explicitly writes from a critical theory perspective, as she explores and deplores the limited impact of the *Charter* on the "fundamentally masculinist and hierarchical visions of women" expressed in the *Income Tax Act*.[3] Didi Herman[4] writes supportively of gays and lesbians and the gains they have made in *Charter* interpretation. John Borrows[5] writes from an Aboriginal perspective, exploring the impact of the *Charter* on First Nations politics, particularly the *Charter*'s possible contribution to the goal of self-government, and its positive contribution to the struggle of the Native Women's Association of Canada (NWAC) to overcome the marginalization of Aboriginal women. Mary Jane Mossman[6] analyzes the contribution of the *Charter* in accessing justice, finding its impact on legal aid to have been minimal, especially when contrasted with the its more visible and positive impact on access into the legal profession, including law schools. Her overall message, however, is that the road is long and the struggle for (access to) justice needs many willing hands. Kate Sutherland[7] finds that the impact of *Charter* equality principles on private law has been positive and significant, and that the role of the *Charter* in the pursuit of equality should not be restricted to constitutional litigation. Joel Bakan and Michael Smith, dealing with "Rights, Nationalism, and Social Movements in Canadian Constitutional Politics,"[8] are clearly purpose-driven. Their chapter, which focuses on the role of the National Action Committee on the Status of Women and NWAC in the leadup to the Charlottetown Accord referendum, is a servant of progressive politics — a politics not confined to liberal values, but encompassing socialist, nationalist and radical orientations which, they fear, may be marginalized by *Charter*-stimulated rights discourse. The chapter by Yves de Montigny[9] on the *Charter*'s impact on Quebec's legislative authority is a careful interpretation of the *Charter*'s impact on Quebec — less than many feared in terms of legislative encroachments — but still a threat because of its Trudeau-inspired Canadianizing message. For de Montigny, unlike most of the other authors, the *Charter* is not viewed as a potential instrument of liberation, that may or may not have delivered its promised goods, but as one that has delivered few of the 'bads,' — (which are Trudeau's 'goods') — that nationalists feared. (I do not wish to be misunderstood. De Montigny's article is an impressively nuanced, cool, incisive scholarly analysis). The final legal contribution by Richard W. Bauman,[10] unlike most

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2 "The Impact of the Canadian Charter of Rights and Freedoms on Income Tax Law and Policy" in D. Schneiderman & K. Sutherland, eds., *ibid.* at 109.

3 *Ibid.* at 111.

4 "The Good, the Bad, and the Smugly: Sexual Orientation and Perspectives on the Charter" in D. Schneiderman & K. Sutherland, eds., *supra* note 1 at 200.

5 "Contemporary Traditional Equality: The Effect of the Charter on First Nations Politics" in D. Schneiderman & K. Sutherland, eds., *supra* note 1 at 169.

6 "The Charter and Access to Justice in Canada" in D. Schneiderman & K. Sutherland, eds., *supra* note 1 at 271.

7 "The New Equality Paradigm: The Impact of Charter Equality Principles on Private Law Decisions" in D. Schneiderman & K. Sutherland, eds., *supra* note 1 at 245.

8 "Rights, Nationalism, and Social Movements in Canadian Constitutional Politics" in D. Schneiderman & K. Sutherland, eds., *supra* note 1 at 218.

9 "The Impact (Real or Apprehended) of the Canadian Charter of Rights and Freedoms on the Legislative Authority of Quebec" in D. Schneiderman & K. Sutherland, eds., *supra* note 1 at 3.

10 "Business, Economic Rights, and the *Charter*" in D. Schneiderman & K. Sutherland, eds., *supra* note 1 at 58.

of the preceding, which have an advocacy thrust, is not written as a sympathetic account by a supporter of a more positive pro-business interpretation of the *Charter* by the Courts. Bauman's concern is to explain, via public choice theory, and other approaches, why business has been a relative winner in Charterland. His goal is expository. He does not write as an insider or as a friendly observer offering support to the actors he studies. Indeed, after noting that a key issue of ordinary politics, the redistribution of wealth can be hampered by constitutional recognition of economic rights, Bauman concludes that "justice requires that economic rights continue to be left out of the *Charter*, and further, that the Supreme Court of Canada re-examine how its doctrines so far have distributed economic rights unequally,"[11] by being "less generous about recognizing the economic rights of organized labour or individual employees."[12]

The overall perspective of the legal articles in this volume, therefore, is one of a commitment to what its adherents define as a progressive agenda — sympathetic to Aboriginal and Quebec nationalism, to gay and lesbian rights, to the empowerment of women, to support for unions and workers (although they are not prominent in the analysis), to the diffusion of egalitarian values, to a justice system more open to and sympathetic to the disadvantaged — an agenda which is hostile to systemic factors which apportion opportunities unequally. Further, the implicit, sometimes explicit assumption is that the courts, while subject to the constraints of judicial office, should be servants of these objectives.[13]

Although the territory covered is impressive, it is not exhaustive. There is no exponent of the Knopff-Morton analysis and critique of the 'Court party,' the social interests and organizations that cluster around the *Charter* and seek gains in the judicial arena that, Morton and Knopff assert, could not be attained in democratic politics.[14] Business is included, but awkwardly, as if it did not belong in the company of the other chapters. Although business is recurrently cited as a beneficiary of the *Charter*,[15] the one article by Bauman is ambivalent — stating on the one hand that business has been well-served by the *Charter*[16] and on the other, that the *Charter* has been neither a boon nor a bane to business.[17] Still, the chapter and other references dealing with business lack the activist thrust of chapters focusing on women,[18] Aboriginal peoples,[19] and gays and lesbians.[20] Business is an uninvited participant at the *Charter* feast, treated as an outsider or intruder. This volume, therefore, was not designed to cover the spectrum of views on the *Charter* or on the role of courts in its interpretation.

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11 *Ibid.* at 97.

12 *Ibid.* at 96.

13 The two contributions by political scientists will be discussed later in this review.

14 Indeed, Morton and Knopff are identified as prime examples of the reactionaries seeking to defend a *Charter*-challenged status quo. *Supra* note 4 at 207-208, 212.

15 Schneiderman & Sutherland, *supra* note 1 at xiii, xiv and 346-47.

16 *Supra* note 10 at 59, 96.

17 *Ibid.* at 90.

18 Lahey, *supra* note 2.

19 Borrows, *supra* note 5.

20 Herman, *supra* note 4.

Seekers of a comprehensive view will have to look elsewhere to supplement the valuable contributions in this volume.

Although for many of the authors, the *Charter* has either been a disappointment or a threat to the integrity of the causes they espouse,[21] with the possible exception of the latter there is no wish to go back to pre-*Charter* days — possibly because baying for the moon is an undignified activity. In other words, this volume makes clear the depth of the *Charter*'s roots.[22] This reality is underlined by the conclusion reached by the editors, and described as paradoxical, that the social actors initially expected to be the main *Charter* beneficiaries, but who "may have gained the least and, perhaps, lost the most,"[23] are in many cases the "least willing to give up rights discourse and litigation strategies as a tool, albeit not the only one, in their social struggles."[24] To preface the preceding observations by "paradoxically" may be a veiled invitation for a successor volume, for it implicitly raises the question of why the editors should see this result as a paradox. Are these deluded social actors victimized by their own false consciousness? Are they so entranced by the symbolism of rights that they cannot see the lack of substance behind it? Or is the existence of the paradox falsely conceived by the editors?

A partial answer is that the *Charter* has insinuated itself into our consciousness. It has become a central component of the symbolic order. Herman notes that *Charter* values "filter through society symbolically,"[25] possibly changing the behaviour of private actors. Sutherland refers to "a ripple effect whereby *Charter* values exert an influence beyond constitutional litigation."[26] The *Charter*'s constitutionalizing of equality has been central "to the increasing emphasis on equality issues in private law."[27] Mossman, although she sees little *Charter* impact on the availability of legal aid, describes the *Charter* as a "symbolic catalyst for social justice goals,"[28] by encouraging the disadvantaged to challenge discrimination, armed with the new understanding of their legal equality rights. Further, the *Charter* has profoundly diversified the demography of the law student body, and the courses offered in law faculties, presumably with long-run effects on the culture of the legal profession, on legal discourse and, ultimately, on public opinion. The *Charter*'s impact on the latter is a concern to Quebec scholars. de Montigny, although he concludes that the *Charter* has not had the "devastating impact"[29] on Quebec's legislative authority feared by some, refers to the "risks of acculturation"[30] to pan-Canadian values as an ever-present

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21 J. Bakan & M. Smith, "Rights, Nationalism, and Social Movements in Canadian Constitutional Politics" in D. Schneiderman & K. Sutherland, eds., *supra* note 1 at 218.

22 See however, I. Urquhart, "Infertile Soil? Sowing the Charter in Alberta" in D. Schneiderman & K. Sutherland, eds., *supra* note 1 at 34.

23 *Supra* note 1 at 350.

24 *Supra* note 1 at 351, see also xiii.

25 *Supra* note 4 at 210.

26 *Supra* note 7 at 246.

27 *Ibid.* at 263. See also 249, 253.

28 *Supra* note 6 at 273, see also 288.

29 *Supra* note 9 at 21.

30 *Ibid.*

threat. Bakan and Smith describe and deplore the constricting effect of the rights ideology on progressive social movements, suggesting it may undermine movement goals by strengthening liberal and weakening radical and socialist strands in activist movements. Most of the authors, therefore, see the *Charter* not as a simple rearrangement of the externals of our environment, but as a powerful shaping force which works on our inner selves.

The *Charter*'s impact, however, is not to be thought of as an external force imprinting itself on the passive clay of a subject people. On the contrary, the *Charter* was intended to be, and has been, a massive change in the constitutional environment, which induces a host of actors to reposition themselves to achieve their goals, and to rethink their strategies. The many facets of society that pre-dated the *Charter* — the women's movement, Aboriginal peoples, business corporations, trade unions, ethnic heterogeneity, federal and provincial governments, linguistic duality, the Quebec-Canada disequilibrium, the accumulation of statutes and conventions of governance — were still there the day after the *Charter* was proclaimed, and are still there as the *Charter* approaches the end of its second decade. It is not, however, the same society. The social forces and interests that animate the latter could only remain as they were before the *Charter* at the price of their obsolescence.

We damage our understanding if we contrast social forces and institutions and if we imply that they belong to discrete realms that do not intersect. Further, to confer an *a priori* primacy on one or the other as the essential determinant of why we do what we do is to leap to a premature judgment. Such simplistic debating devices should be cast aside with the elementary recognition that society has no existence without institutions. A society without institutions is an oxymoron — an aggregation of isolates milling about on top of the ground affected by gravity and mortality and little else. A major new institution, such as the *Charter*, therefore, inaugurates a new experiment in social living. How that experiment turns out depends on the response of a multitude of actors — how they adapt themselves to the transformed situation of a constitution recently endowed with a *Charter*.

What follows 1982 is a multitude of discrete responses to the new constitutional world of the *Charter*. Courts, especially the Supreme Court, have to learn how to handle their new responsibilities in a constitutional climate in which the hegemony of federalism and parliamentary supremacy have been attenuated. The chapters in this volume document the courts' response to their new obligations. Governments learn how to *Charter*-proof their legislation, and that the notwithstanding clause is an instrument not to be lightly employed. Governments have also learned to their distress that the constitution is no longer theirs to transform by executive federalism. The *Charter* has generated non-deferential citizen stakeholders in what they view as their constitution.

A vast learning process develops outside of governments and courts. Business, which played a minimal role in the coming of the *Charter*, developed and applied the skills to mute what they saw as its negative consequences, and to maximize their exit from

restrictive legislation.[31] Gays and lesbians have turned the *Charter* to their advantage.[32] The Native Women's Association of Canada has employed the *Charter* to transform the debate about Aboriginal self-government, by insisting that self-government be subjected to the rights protection of the *Charter*. Although this is deprecated by Bakan and Smith[33] because of its disruptive effect on First Nations' solidarity, the *Charter*'s role in inserting women's issues into the debate is strongly defended by Borrows.[34] A comprehensive understanding of the *Charter*'s impact, therefore, requires us to study *Charter* and company. The latter directs us to a complex process of competitive learning as the plural interests of a disjointed modern society adapt to the incentives and disincentives of the modified Canadian constitutional world created by the *Charter*.

One of the central, possibly the key, educators in that social learning process is the academic (especially the legal) community. At one level, this volume takes its place as one of thousands of articles and books on the *Charter* that have appeared since 1982. In a broad sense, this book and its predecessors are integral to the *Charter* as an institution. They inform our understanding of the *Charter*, contribute to its intellectual evolution, find their way into court decisions, and inform thousands of students of the use, abuse, and role of the *Charter* in our collective life. The academic community is part of the infrastructure on which the *Charter* rests. The *Charter* could not function without the constant stream of commentary and analysis generated by court and *Charter* watchers.

The academic infrastructure, which in reality is an integral part of the institution of the *Charter*, is itself an assemblage of institutionally-structured academic disciplines which have their own distinct perspectives. In this volume, eight of the ten chapters — excluding the introduction and conclusion — are by law professors (one of which is coauthored by a geographer). Two chapters are written by political scientists, Ian Urquhart,[35] and Alexandra Dobrowolsky.[36] The coexistence of law and political science within the same volume informs us of the particularities of how each disciipline plays the *Charter* game. Although there is some overlap, the major impression left with the reader is that scholars of political science and law see the *Charter* world through different lenses, ask different questions, and debate with different "others." That disciplinary difference in interpreting the *Charter* was there at the creation, when political scientists quickly saw the nation-building purposes of Prime Minister Trudeau, while legal scholars tended to take the *Charter* at face value, concentrated on its capacity as a rights-protecting instrument and, at least relatively, overlooked its nation-building potential. That difference survives in this volume, with Urquhart[37] examining whether the *Charter*'s political purpose of building a stronger sense of Canadian

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31 Bauman, *supra* note 10.
32 Herman, *supra* note 4.
33 *Supra* note 8.
34 *Supra* note 5.
35 *Supra* note 22.
36 "The *Charter* and Mainstream Political Science: Waves of Political Contestation and Changing Theoretical Currents" in D. Schneiderman & K. Sutherland, eds., *supra* note 1 at 303.
37 *Supra* note 22.

citizenship has been met in Alberta (at best a qualified success, he concludes) — and Dobrowolsky[38] asking whether competing mainstream political science paradigms, which she characterizes as state-centric and society-centric, have met the challenge of incorporating the *Charter* into their analysis in a way that does justice to the pre-*Charter* history, pre-and post-*Charter* agency, and the interests that have pursued their objectives in both time periods. She concludes that "old habits, conventional paradigms, and traditional discourses die hard,"[39] and laments that "for decades, research into Canadian federalism/constitutionalism has been led by a few venerable interpreters and fuelled by even fewer interpretations."[40] As I am prominently identified as one of the former, and as responsible for a few of the latter, I would be taking unfair advantage of my position as a reviewer to do more than state that back in the mists of the past, I thought of myself as a young Turk attacking the citadels of conventional wisdom in several areas.

Nostalgia is best left for the rocking chair. However, it is impossible to read this volume without being struck, by analogy, by the considerable validity of state-centric analysis. Academic institutions — law faculties and departments of political science — are to their members as the *Charter* is to the citizenry who employ it. No one could sequentially visit pre and post-*Charter* Canada and fail to realize which was which. Analogously, the impact of institutional differentiation on scholarly activity is writ large on every page of this book. As a political scientist writing about other political scientists, in an effort to change the understandings of yet other political scientists, Dobrowolsky is operating within an institutionally-structured intellectual community. The latter's existence and importance is the necessary premise of her paper. All the contributors to this volume share the understanding that the passengers on a train and the audience at a baseball game — temporary aggregations brought together for a few hours — differ from the community of scholars institutionally organized into separate worlds by the fragmented structure of the academic community. This structuring does not deny the "agency of societal actors,"[41] in this case academics in different institutional environments, nor does it deny that they brought to their agency their varied pasts, nor their diverse political preferences; it does say, however, that it would be a grievous error to explain why and how they write and argue as they do as if the different institutional contexts of academic life were of minimal account. At the risk of oversimplification, it can be argued that there is a strong particularistic strain in legal writing on the *Charter* — the *Charter* goals of this social movement, the interpretation of this *Charter* clause, the 'correctness' or utility of that Supreme Court decision. Political scientists, by contrast, are more likely to fix their gaze on the constitutional order — on the *Charter* and citizenship[42] — on state-centric versus society-centric interpretations of our condition.[43] This contrast is vividly present in the extensive literature on Aboriginal futures. A host of prominent legal academics is in the vanguard

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38 *Supra* note 36.
39 *Ibid.* at 327.
40 *Ibid.*
41 *Ibid.* at 307.
42 *Supra* note 22.
43 *Supra* note 36.

of the move to Aboriginal self-government. Its advancement is their primary objective. They seldom raise the question that recurs in the political science literature dealing with the same subject — what will hold us together, what will sustain the empathy that makes us feel responsible for each other.

This volume, then, brings together the members of two different academic units — law faculties and political science departments — to analyze a constitutional policy instrument, the *Charter*, and report their different findings. In their introduction[44] and conclusion,[45] the editors define the task of the contributors as locating and evaluating the externalities of living with the *Charter*, of assessing its impact on various domains of Canadian life.[46] They conclude that the *Charter*'s impact varies among three sets of actors, depending on the "sum of their power and influence in Canadian society."[47] (1) The strong and powerful, — both orders of government, specifically including Quebec, and business enterprises — have effectively protected themselves against the *Charter*.[48] (2) The *Charter*'s impact on "middle-power actors" has been more noticeable — including the injection of equality values into the law of torts, the challenge to political scientists to rethink their paradigms, and the challenge to the legal profession and the law faculties to adapt to the *Charter*'s transformation of the constitutional order, including the new interests and social groups whose salience has been invigorated by the *Charter*.[49] (3) Finally, according to the editors, the "least powerful actors in society perhaps have been most profoundly affected and shaped by the existence of the Charter,"[50] including First Nations, and gay and lesbian communities, both of whom have had to grapple with *Charter*-induced internal tensions.

The utility and appropriateness of this breakdown into three categories is questionable. A comparison between the pressures on political science to readjust its paradigms to incorporate the *Charter* and the impact of the *Charter* on Quebec's jurisdictional powers, with the former being greater than the latter, strains the imagination. By this logic, political science could have joined the ranking of the least affected — apparently the category of the successful — by ignoring the *Charter* and risking irrelevance. Also, to put Quebec in the category of the "powerful and dominant ... [who] ... have been the most resilient to Charter influences"[51] because the province's jurisdiction has suffered little is to employ overly restrictive criteria which exclude the defeat of the Meech Lake Accord, often interpreted as the defeat of the distinct society by the *Charter*. The Belanger-Campeau committee identified the *Charter* and its equality assumptions as one of the central impediments to any constitutional recognition of asymmetrical status, and hence to the accommodation of Quebec within a renewed federalism.

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44 *Supra* note 1 at xi-xviii.
45 *Ibid.* at 343-55.
46 *Ibid.* at xi.
47 *Ibid.* at xii.
48 *Ibid.*
49 *Ibid.* at xii-xiii.
50 *Ibid.* at xiii.
51 *Ibid.* at xii.

The entrants in the "most affected" category listed by the editors are also problematic — particularly if "most affected" implies, as it seems, to be detrimentally affected. However, to imply that the support the *Charter* gave to NWAC is detrimental, because it led to "tensions within the First nations,"[52] minimizes the positive effect of that support. It overlooks the fact that Bill C-31, restoring Indian legal status to more than 100,000 individuals, would have been inconceivable without the *Charter*. Also, as Borrows[53] argues in his contribution, the *Charter* performed a socially valuable and necessary service for native women in constitutional politics by overcoming some of their marginalization. Borrows' careful arguments express considerable sympathy for the *Charter*, recognizing its affinity with aspects of traditional culture.[54] Further, to identify "conflicts over rights discourse in the gay and lesbian communities"[55] as an (apparently negative) additional confirmation that the most profound effects were visited on the least powerful actors is an odd classification. Herman asserts that the lesbian and gay rights movement has "achieved a certain measure of success in the *Charter* era."[56] More generally, she notes that "many rights activists ... do perceive themselves to have achieved a great deal in 'Charterland.'"[57] Gays and lesbians and rights activists are not reporting impacts they were unable to resist, but successes they were delighted to achieve. Here, as with NWAC, the *Charter* did its job.

In addition to the overall quality of the articles as justification for this volume — and while I have my favourites, I did not ask myself why one or other article was included — it has helped me to appreciate the complexity of the *Charter* as an institution. The *Charter* as an institution is more than the written document. It obviously includes the courts as they interpret its meanings. Less obviously, but undeniably, the *Charter* as an institution also includes the academic legal commentary on the desired direction of future *Charter* interpretation. Those who seek understanding of the *Charter* as institution need, therefore, to assess the *Charter* literature emanating from law faculties, not just for what this literature tells us about judicial decisions, but for what it tells about the nature of the influence on courts legal academics seek, and what it tells us about the interests and policy objectives with which they align themselves — more generally, what is the legal temperament of *Charter* scholars, to which spirit of the times are they responding? In making these assessments, it is helpful to remember not only that legal scholarship is the primary disciplinary influence on the judicial mind, but that other disciplines, and not only political science, ask different questions about the *Charter* which should not be put on the shelf. The juxtaposition of law and political

52 *Ibid.* at xiii.
53 *Supra* note 5.
54 *Ibid.* at 170.
55 *Supra* note 1 at xiii.
56 *Supra* note 4 at 201-202.
57 *Ibid.* at 209.

science in this volume is, therefore, to be welcomed. It brings together two of the academic components of the *Charter* as an institution that are domiciled in universities.

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