

Framework 2.2 – The Canadian Charter of Rights and Freedoms

The Evolution of Civil Rights in Canada

There have been three distinct time periods with respect to the primary source of civil rights in Canada; English common law and customs, the Canadian Bill of Rights, and the Canadian Charter of Rights and Freedoms.

English Common Law and Customs

We have already discussed how much of the law in Canada was inherited from the United Kingdom. English common law and customs therefore dictated civil rights in Canada prior to the passage of specific legislation.

The Canadian Bill of Rights

Following the atrocities of the Second World War there was a growing movement for the protection of individual rights in Canada. In 1960, the Progressive Conservative government under Prime Minister John Diefenbaker, introduced the Canadian Bill of Rights, which was then passed in the same year. Diefenbaker had led the charge toward such legislation since raising the issue as a Member of Parliament in 1945. In reality, the Bill created little change other than to bring attention to and codify the rights that were already protected by the common law. It was limited in scope as it applied only to areas of **federal jurisdiction**. It was also **not entrenched** in the constitution, so it did not take precedence over other federal statutes, and courts were reluctant to use it to strike down existing laws. In **R. v. Drybones** (1970), the Supreme Court of Canada finally decided that the Canadian Bill of Rights could be invoked to strike down legislation that violated its provisions. The Court held that certain provisions of the Indian Act were inoperative, as they unfairly imposed harsher penalties on Aboriginal peoples for public intoxication.

The Canadian Charter of Rights and Freedoms

In June of 1971, Prime Minister Trudeau met with the provincial premiers in Victoria, British Columbia to discuss a number of proposed changes to Canada's constitution. The package of proposals was referred to as the **Victoria Charter**. The Anglophone provinces were most interested in procedural amendments, such as the entrenchment of a charter of rights in the constitution, the patriation of the constitution from the United Kingdom to Canada which would allow future changes to be finalized on Canadian soil, and an amending formula for those future changes. Quebec, however, was more interested in substantive changes, such as expanding their provincial legislature and increasing their fiscal autonomy. These different motivations proved too difficult to overcome and no agreement was reached; the Victoria Charter lay dead on the negotiating table. Negotiations for constitutional reform resumed in 1980, and in late 1981 an agreement was reached on patriation and the entrenchment of a charter of rights by all provinces except Quebec; Premier René Lévesque had demanded stronger French-language rights. On April 17, 1982, legislation was passed that changed the name of the British North America Act to the Constitution Act, 1867 and annexed the Constitution Act, 1982 to it. The Constitution Act, 1982 included the amending formula and the Canadian Charter of Rights and Freedoms, which has been in force ever since.

Application of the Canadian Charter of Rights and Freedoms

The Charter basically sets out the rights and freedoms that we as Canadians feel are essential in a free and democratic society. As part of the constitution, it protects Canadians at all levels of government, so that they can seek redress in court if they feel that they are being treated unfairly by any government. Although the scope is comprehensive, the process of using the court system is expensive, and so we have typically seen Charter challenges being pursued by well-funded organizations, such as lobby groups with causes like the protection of the rights of persons with disabilities.

Section 52 of the Constitution Act, 1982

Section 52 of the Constitution Act, 1982 sets out the supremacy of the constitution:

Primacy of Constitution of Canada	52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
Constitution of Canada	(2) The Constitution of Canada includes (a) the <i>Canada Act 1982</i> , including this Act; (b) the Acts and orders referred to in the schedule; and (c) any amendment to any Act or order referred to in paragraph (a) or (b)
Amendments to Constitution of Canada	(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

Section 1 of the Canadian Charter of Rights and Freedoms

Section 1 of the Charter guarantees the individual rights and freedoms contained within it, but it is qualified with the possibility of limits imposed by legislation:

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

Examples of "reasonable limits prescribed by law" are laws against hate and pornography, which limit an individual's freedom of expression for the good of society as a whole.

The Oakes Test

In 1986, in their decision of **R v. Oakes**, the Supreme Court of Canada laid down a test to be used to determine whether a limit of a Charter right imposed by law is reasonable:

- Does the law enforce an **important** government objective?
- Is the limitation of individual rights or freedoms **minimal**?
- Is the law clearly written with **precise** standards?

Specific Rights and Freedoms Protected by the Charter

The rights and freedoms contained in the Charter fall into seven categories:

- 1) Fundamental freedoms
- 2) Democratic rights
- 3) Mobility rights
- 4) Legal Rights
- 5) Equality Rights
- 6) Official Language Rights
- 7) Minority Language Rights

Fundamental Freedoms (s.2)

The fundamental freedoms or “**civil liberties**” set out in section 2 allow for the operation of our “free society”. There are four fundamental freedoms:

- freedom of conscience and religion
- freedom of thought, belief, opinion, and expression
- freedom of peaceful assembly
- freedom of association

These civil liberties are considered essential for every citizen’s happiness, peace of mind, and participation in society. However, each of them may be limited by section 1, if necessary for the good of society as a whole. One landmark case involving the limiting of a fundamental freedom was **R v. Keegstra (1990)** wherein the Supreme Court of Canada upheld a section of the Criminal Code that prohibited the promotion of hatred; the limitation to the freedom of expression of the accused was found to be reasonable.

Democratic Rights (ss.3-5)

The democratic rights protected by the Charter include the rights to vote and to run for election. These sections also attempt to ensure the effectiveness of legislative bodies by limiting their duration and mandating that they sit at least once every 12 months.

Mobility Rights (s.6)

The mobility rights of citizens include their rights to leave and enter the country as they wish as well as their rights to travel, relocate, and seek employment among any of the provinces and territories.

Legal Rights (ss.7-14)

These sections provide protections that are needed when citizens become involved with the justice system. For example, section 7 guarantees “the right to life, liberty, and security of the person”, section 8 protects against unreasonable search and seizure, section 9 guarantees the right to not be “arbitrarily detained or imprisoned”, section 10 contains rights upon arrest, section 11 contains rights upon being charged, and section 12 contains a prohibition against “cruel and unusual treatment or punishment”.

Equality Rights (s.15)

The equality rights in section 15 of the Charter guarantee freedom from **discrimination**. This includes equal protection and benefits from the law regardless of race, national or ethnic origin, colour, religion, sex, mental or physical disability, or age. Again, some discriminatory legislation has been upheld as reasonable limits to these rights, such as age restrictions on voting, driving, drinking alcohol, and entering into a binding contract.

Official Languages Rights (ss.16-22)

These sections establish English and French as the two official languages of Canada and guarantee the rights of citizens to use either of them in certain situations, such as in any Parliamentary proceedings or dealings with any federal government office.

Minority Language Rights (s.23)

Section 23 entrenches the rights of citizens to have their children **educated** in either English or French, even if their choice is the minority language of the province or territory in which they reside.

Limits on Charter Application

The Charter is part of the constitution and thus the supreme law in Canada. However, there are three important limitations to its application; its **public scope** as defined by section 32, the "**reasonable limits**" qualifier contained in section 1, and the "**notwithstanding**" clause contained in section 33.

Public Scope

Section 32 makes it clear that the Charter only applies to dealings between citizens and the government. Private matters between citizens, such as landlord-tenant and employer-employee relationships are not covered.

32. (1) This Charter applies

a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

The Reasonable Limits Clause

As discussed previously, it is open to a court to decide that although a Charter right or freedom has been infringed by the operation of the law, the limit was reasonable and justifiable, as per section 1.

The Notwithstanding Clause

Section 33 contains the “notwithstanding clause” which allows governments to pass legislation regardless of the fact that it might infringe upon the rights and freedoms contained in sections 2 or 7-15. A government must make a **declaration** of such purposeful violations of the Charter every 5 years of the law’s operation.

33. (1) Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.
- (4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

The notwithstanding clause is understandably used very sparingly, as it is difficult for a government to justify to the voting public why it is deliberately violating their Charter rights. The five-year time limitation also ensures that governments must continually take responsibility for the legislation and face the consequences at the next election. The limited scope also leaves sections 3-6 and 16-23 free from violations legitimized by the notwithstanding clause.

The notwithstanding clause has been invoked seldomly, and never by the federal government. The most well-known of these uses occurred in 1988 when the Quebec government, led by Premier **Robert Bourassa** brought in legislation that prohibited the use of English on outdoor signs. They needed to rely on the notwithstanding clause since the Supreme Court of Canada had previously struck down similar legislation for being in violation of the Charter.

The Role of the Courts

Prior to the enactment of the Charter, the ability of the courts to find laws unconstitutional was based on sections 91 and 92 of the British North America Act which defined the respective jurisdictions of the federal and provincial governments. With the Charter now in place, courts and judges have a much larger role in deciding the constitutionality of laws. In addition to deciding whether legislation was passed by the proper level of government, they are now able to determine constitutionality based on compliance with the provisions of the Charter. Upon finding that a law violates the Charter and cannot be saved by s.1, the court may **strike down** part or all of it, or “**read down**” the legislation, determining that it does not apply in the case before the court. Courts also have the right to rule any **evidence inadmissible** if it was obtained by means that violated the Charter rights of an individual. The powers of the courts are found under ‘**Enforcement**’ in **section 24 of the Charter**:

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.
- (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

The Appointment of Judges

Section 92 of the Constitution Act, 1867 gives the provinces authority over the administration of justice, including the constitution, organization, and maintenance of provincial courts. Provincial court and small claims court judges are, in fact, appointed by **provincial governments**, but superior court judges in the provinces and territories, as well as federal judges and Supreme Court of Canada justices are all appointed by the **federal government**. Federal appointments to the Supreme Court of Canada, for example, make sense due to the fact that they carry such influence across the entire country; Supreme Court decisions are binding on all lower courts, and even minority or dissenting opinions released by the Court can be very influential as indicators of future directions that it might take. Appointments to the bench are made very carefully considering the power of judges and the length of their terms. Appointments are not time limited; judges serve until resignation, mandatory retirement at 75, or removal for cause. Due to the increased power of Supreme Court justices, there has been much debate about whether **appointment** is the proper method for their selection. Some people have suggested that the **election** of Supreme Court justices would be more fitting, since in their role they are essentially creating the law. The term '**judicial activism**' was coined to describe the perception that judges frequently draw upon personal values while essentially performing the legislative function of making law. One landmark case that illustrates the power of the Supreme Court of Canada to effect changes in our laws is **M. v. H. (1999)**. In that controversial decision, the court ruled that defining "spouse" in legislation to refer to a relationship between a man and a woman violated the s.15 equality rights of same-sex partners. Governments were left scrambling to rewrite numerous pieces of legislation to comply with this decision.