

# The Courts and the Charter

## Introduction

It is only since adopting a constitutional charter of rights that the study of judges and the courts has been broadly accepted as an important branch of Canadian political science. But the judiciary did play a significant role in Canadian political life well before the arrival of the Charter. Canada's highest court up to 1949 was a British court, the Judicial Committee of the Privy Council. The JCPC's decisions interpreting the federal division of powers in the Canadian Constitution had an important influence on the functioning of the Canadian federation.

The British judges who staffed the Judicial Committee of the Privy Council had their fans and their critics in Canada. Their vigorous protection of provincial rights found strong support in Quebec and among provincial premiers. But politicians and legal scholars in English Canada who favoured a strong central government were critical of the JCPC. Alan Cairns's classic overview of the decisions of the Judicial Committee as the judicial arbiter of Canada's federal system opens Part 5. Cairns's analysis of the JCPC's critics shows that, while the critics shared a common view about the need for a more centralist approach to constitutional interpretation, they lacked a coherent theory of how judges ought to interpret a constitution.

Though opinion in Canada was divided on the constitutional jurisprudence of the Judicial Committee, the debate had the effect of strengthening judicial nationalism in the country and lent support for abolishing appeals to the Judicial Committee and making the Supreme Court of Canada the country's highest court. In 1949, the Supreme Court of Canada became supreme in fact as well as in name.

The addition of the *Canadian Charter of Rights and Freedoms* to Canada's Constitution in 1982 (included as an addendum to this introduction) resulted in a quantum leap in the political prominence of the Supreme Court of Canada. As Peter Russell's essay "The Political Purposes of the Canadian Charter of Rights and Freedoms" points out, this was not one of the intended purposes of the Charter's political sponsors. A constitutional charter of rights and freedoms was Pierre Elliott Trudeau's top priority for constitutional reform. He saw the Charter as a necessary antidote to the centrifugal forces of Quebec nationalism and provincial government demands for more powers. By giving expression to the shared values of Canadians it would help to unify the country. But Russell argues that, while the Charter's capacity for unifying the country was dubious, its tendency to increase judicial power was much more certain. The chapters that follow in this section bear out Russell's prediction.

As the power of courts to make decisions on controversial and politically salient matters became apparent in the Charter era, a lively political debate arose on the democratic legitimacy of this expansion of judicial power. The article by Peter Hogg and A.A. Bushnell entitled “The Charter Dialogue Between Courts and Legislatures” was a seminal contribution to this debate. Hogg and Bushnell systematically examine the various ways in which the Charter provides for interaction between the courts and legislatures. They argue that the frequency of these interactions amounts to a continuing “dialogue” in which courts rarely have the final word in accommodating legislation to the requirements of the Charter.

In a later selection, Howard Leeson examines the background and operation of the Canadian Charter’s most distinctive feature, the notwithstanding clause, which permits legislatures to immunize legislation from Charter-based judicial review. Leeson explains how crucial this clause was in gaining support for the Charter from provincial premiers who were concerned about a constitutional charter empowering the courts to overturn the decisions of elected legislatures. Leeson also shows how infrequently the override clause is used. He suggests that one reason for this is politicians’ fear of the political consequences of reversing court decisions on rights and freedoms. If that fear is well-founded it may also mean that judicial decisions upholding Charter rights have generally not gone strongly against public opinion.

Even if there has been a considerable measure of public support for court decisions on the Charter, this has not blunted attacks on the Supreme Court of Canada by academics, journalists and right-of-centre politicians for the Court’s allegedly “activist” approach to the Charter. The intensity of these attacks is evident in Chief Justice Beverly McLachlin’s discussion of the role of courts, legislatures, and executives in the Charter era. The chief justice emphasizes the democratic process that produced the Charter and rejects the suggestion that in giving force and effect to it the judiciary are usurping power. The chief justice’s words would not persuade F.L. Morton and Rainer Knopff, the authors of a much-discussed book, *The Charter Revolution and the Court Party*. “Judges and the Charter Revolution,” the excerpted chapter from their book, addresses the many ways in which the Supreme Court has chosen approaches that give greater scope to the Charter’s impact. Morton and Knopff view the Supreme Court justices, together with Charter enthusiasts in the academic and legal community and organizations that support Charter litigation, as forming a “court party” which uses the Charter to promote an agenda of social reform.

In contrast to Knopff and Morton, Gregory Hein, the author of the final entry in Part 5, sees use of Charter litigation by marginalized groups who have relatively little influence on the institutions of democratic politics as enhancing democracy. Hein’s data show that interest group litigation is by no means the monopoly of groups with little economic or political power. Powerful corporate and economic groups will use Charter litigation if they see it as an effective way of protecting or advancing their interests. But for marginalized groups such as gays and the handicapped, Charter litigation provides exceptional opportunities for ensuring that their voice is heard in the formation of public policy.

Whether one sides with Knopff and Morton or with Hein, students of Canadian government and politics must recognize the validity of the old adage that going to court to vindicate rights, be they provincial rights, Aboriginal rights, or individual rights and freedoms, is “politics by other means.”

## Further Suggested Reading

- Thomas M.J. Bateman, Janet L. Hiebert, Rainer Knopff, and Peter H. Russell, *The Court and the Charter: Leading Cases*. Toronto: Emond Montgomery Publications, 2008.
- Government of Canada, *The Constitution Act, 1867*. <http://laws.justice.gc.ca/en/const/index.html>.
- Janet L. Hiebert, *Charter Conflicts: What Is Parliament's Role?* Montreal and Kingston: McGill-Queen's University Press, 2002.
- James B. Kelly, *Governing with the Charter: Legislative and Judicial Activism and Framers' Intent*. Vancouver: UBC Press, 2005.
- Guy Laforest, "The Internal Exile of Quebecers in the Canada of the Charter." In James B. Kelly and Christopher P. Manfredi, eds., *Contested Constitutionalism: Reflections on the Canadian Charter of Rights and Freedoms*. Vancouver: UBC Press, 2009.
- Christopher P. Manfredi, *Judicial Power and the Charter: Canada and the Paradox of Liberal Constitutionalism*, 2nd edition. Toronto: Oxford University Press, 2001.
- Peter H. Russell, Rainer Knopff, Thomas M.J. Bateman, and Janet L. Hiebert, *The Court and the Constitution: Leading Cases*. Toronto: Emond Montgomery Publications, 2008.
- John Saywell, *The Lawmakers: Judicial Power and the Shaping of Canadian Federalism*. Toronto: University of Toronto Press, 2002.
- Richard Sigurdson, "Left- and Right-Wing Charterphobia in Canada: A Critique of the Critics." *International Journal of Canadian Studies* 7-8, Spring-Fall 1993.
- James Snell and Frederick Vaughan, *The Supreme Court of Canada: History of the Institution*. Toronto: University of Toronto Press, 1985.
- Donald A. Songer, *The Transformation of the Supreme Court of Canada*. Toronto: University of Toronto Press, 2008.
- Various contributors, "Charter Dialogue: Ten Years Later." Special issue of *Osgoode Hall Law Journal* 45(1), Spring 2007.
- José Woehrling, "The Canadian Charter of Rights and Freedoms and Its Consequences for Political and Democratic Life and the Federal System." In Alain-G. Gagnon, ed., *Contemporary Canadian Federalism: Foundations, Traditions, Institutions*. Toronto, University of Toronto Press, 2009.

# Canadian Charter of Rights and Freedoms

## *Part I of the Constitution Act, 1982*

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

### *Guarantee of Rights and Freedoms*

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.

### *Fundamental Freedoms*

2. Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

### *Democratic Rights*

3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

4. (1) No House of Commons and no legislative assembly shall continue for longer than five years from the date fixed for the return of the writs of a general election of its members.

(2) In time of real or apprehended war, invasion or insurrection, a House of Commons may be continued by Parliament and a legislative assembly may be continued by the legislature beyond five years if such continuation is not opposed by the votes of more than one-third of the members of the House of Commons or the legislative assembly, as the case may be.

5. There shall be a sitting of Parliament and of each legislature at least once every twelve months.

### *Mobility Rights*

6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.

(2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right

- (a) to move to and take up residence in any province; and
- (b) to pursue the gaining of a livelihood in any province.

(3) The rights specified in subsection (2) are subject to

- (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
- (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.

(4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

### *Legal Rights*

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

8. Everyone has the right to be secure against unreasonable search or seizure.

9. Everyone has the right not to be arbitrarily detained or imprisoned.

10. Everyone has the right on arrest or detention

- (a) to be informed promptly of the reasons therefor;

(b) to retain and instruct counsel without delay and to be informed of that right; and

(c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful.

**11.** Any person charged with an offence has the right

(a) to be informed without unreasonable delay of the specific offence;

(b) to be tried within a reasonable time;

(c) not to be compelled to be a witness in proceedings against that person in respect of the offence;

(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

(e) not to be denied reasonable bail without just cause;

(f) except in the case of an offence under military law tried before a military tribunal, to the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

(g) not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;

(h) if finally acquitted of the offence, not to be tried for it again and, if finally found guilty and punished for the offence, not to be tried or punished for it again; and

(i) if found guilty of the offence and if the punishment for the offence has been varied between the time of commission and the time of sentencing, to the benefit of the lesser punishment.

**12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

**13.** A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

**14.** A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter.

#### *Equality Rights*

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

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

#### *Official Languages of Canada*

**16.** (1) English and French are the official languages of Canada and have equality of status and equal rights and privileges as to their use in all institutions of the Parliament and government of Canada.

(2) English and French are the official languages of New Brunswick and have equality of status and equal rights and privileges as to their use in all institutions of the legislature and government of New Brunswick.

(3) Nothing in this Charter limits the authority of Parliament or a legislature to advance the equality of status or use of English and French.

**16.1.** (1) The English linguistic community and the French linguistic community in New Brunswick have equality of status and equal rights and privileges, including the right to distinct educational institutions and such distinct cultural institutions as are necessary for the preservation and promotion of those communities.

(2) The role of the legislature and government of New Brunswick to preserve and promote the status, rights and privileges referred to in subsection (1) is affirmed.

17. (1) Everyone has the right to use English or French in any debates and other proceedings of Parliament.

(2) Everyone has the right to use English or French in any debates and other proceedings of the legislature of New Brunswick.

18. (1) The statutes, records and journals of Parliament shall be printed and published in English and French and both language versions are equally authoritative.

(2) The statutes, records and journals of the legislature of New Brunswick shall be printed and published in English and French and both language versions are equally authoritative.

19. (1) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court established by Parliament.

(2) Either English or French may be used by any person in, or in any pleading in or process issuing from, any court of New Brunswick.

20. (1) Any member of the public in Canada has the right to communicate with, and to receive available services from, any head or central office of an institution of the Parliament or government of Canada in English or French, and has the same right with respect to any other office of any such institution where

(a) there is a significant demand for communications with and services from that office in such language; or

(b) due to the nature of the office, it is reasonable that communications with and services from that office be available in both English and French.

(2) Any member of the public in New Brunswick has the right to communicate with, and to receive available services from, any office of an institution of the legislature or government of New Brunswick in English or French.

21. Nothing in sections 16 to 20 abrogates or derogates from any right, privilege or obligation with respect to the English and French languages, or either of them, that exists or is continued by virtue of any other provision of the Constitution of Canada.

22. Nothing in sections 16 to 20 abrogates or derogates from any legal or customary right or privilege acquired or enjoyed either before or

after the coming into force of this Charter with respect to any language that is not English or French.

#### *Minority Language Educational Rights*

23. (1) Citizens of Canada

(a) whose first language learned and still understood is that of the English or French linguistic minority population of the province in which they reside, or

(b) who have received their primary school instruction in Canada in English or French and reside in a province where the language in which they received that instruction is the language of the English or French linguistic minority population of the province, have the right to have their children receive primary and secondary school instruction in that language in that province.

(2) Citizens of Canada of whom any child has received or is receiving primary or secondary school instruction in English or French in Canada, have the right to have all their children receive primary and secondary school instruction in the same language.

(3) The right of citizens of Canada under subsections (1) and (2) to have their children receive primary and secondary school instruction in the language of the English or French linguistic minority population of a province

(a) applies wherever in the province the number of children of citizens who have such a right is sufficient to warrant the provision to them out of public funds of minority language instruction; and

(b) includes, where the number of those children so warrants, the right to have them receive that instruction in minority language educational facilities provided out of public funds.

#### *Enforcement*

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.

#### *General*

25. The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including

(a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

(b) any rights or freedoms that now exist by way of land claims agreements or may be so acquired.

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools.

30. A reference in this Charter to a Province or to the legislative assembly or legislature of a province shall be deemed to include a reference to the Yukon Territory and the Northwest Territories, or to the appropriate legislative authority thereof, as the case may be.

31. Nothing in this Charter extends the legislative powers of any body or authority.

#### *Application of Charter*

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.

(2) Notwithstanding subsection (1), section 15 shall not have effect until three years after this section comes into force.

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.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(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).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

#### *Citation*

34. This Part may be cited as the *Canadian Charter of Rights and Freedoms*.