

UNDERSTAND YOUR RIGHTS

AN ANNOTATED GUIDE TO
THE CANADIAN CHARTER OF
RIGHTS AND FREEDOMS



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SECTION 1: RIGHTS AND FREEDOMS IN CANADA

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.

Summary

The *Canadian Charter of Rights and Freedoms* guarantees the rights found in the *Charter*, but these rights are limited by laws, provided that those laws still promote a free and democratic society.

This limitation on freedoms was tested in the case of *R v Oakes* (*R v Oakes*, [1986] 1 SCR 103, 1986 CarswellOnt 1001), which created the “Oakes test.” This legal test states that in order to override a right protected by the *Charter*, four requirements must be met: it has to be important; it has to be connected to what it is trying to accomplish; it must interfere with the

right as little as possible; and the limit on the right must not be disproportional to the benefit of limiting that right.

Questions

Jeff was a single father of two kids and a delivery driver for a company who needed his driver's license to work. One night, after going out with his friends, he was arrested for driving under the influence and his license was suspended. Aside from this, Jeff had both a clean driving and criminal record. Jeff went to court to argue that his suspended license violated his section 12 right (the right to not be subjected to cruel and unusual treatment or punishment) because a suspended license meant that not only could he not work, but he could also not take his children to school and to their appointments. He felt that this infringement on his section 12 right could not be justified under section 1.

Q: Does Jeff have a case? What would be his remedy?

A: The judge felt that given Jeff's circumstances and the fact that he did not have a prior history of driving while under the influence, a suspended license was unreasonable. He sentenced Jeff to a rehabilitation program and gave him a fine (*R v Berg*).

Sarah was an owner of a travel agency with five employees working in her office. One day, the travel agency was raided by police officers who had received a tip that someone was trafficking narcotics out of the office. Since Sarah was the owner of the agency, she was arrested and tried for drug trafficking. At trial, Sarah stated that the charges against her, and the trial, violated her section 11(d) rights (the right to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal), because the officers had not connected the narcotics to her personally – just to her office. While she did not know who the narcotics belonged to, she stated that any of her employees could have left them in the office as they all had a key to the building and often worked when she was not around.

Q: Does Sarah have a case against the officers? What should happen if she does?

A: The judge might determine that the officers had not collected enough evidence to try her for trafficking narcotics. While the judge might recognize that the narcotics were found in her office, he may feel that the connection is not strong enough to try Sarah personally, and the arrest violated her section 1 rights.

Leading Cases

R v Berg, 2001 YKSC 528

In this case, a man with a history of chronic alcoholism was arrested for driving under the influence. At trial, it was established that if he could not drive, he would lose his job; however, the Court chose to give him a mandatory three-month probation on driving because this was the minimum penalty for this charge at the time. It was determined that the sentencing violated the accused's section 12 right. The Court then

had to determine whether this infringement of his rights was justified under section 1. The only way that the infringement would be justified is if it achieved the objective of rehabilitating the accused, protected the public, or was a minimal infringement. It was determined that the sentencing did not meet these requirements and was not a justified infringement under section 1. The judge decided that the probation could exist notwithstanding the requirements of his job.

R v Oakes, [1986] 1 SCR 103, 1986 CarswellOnt 1001

In December of 1971, Oakes was arrested for unlawful possession of a narcotic for the purpose of drug trafficking. Even though he denied that he was going to sell the drugs, section 8 of the *Narcotic Control Act* said that possession of a narcotic can infer plans to traffic a narcotic under a rational connection test. The accused claimed that this section of the act violated his right to the presumption of innocence until proven guilty under section 11(d). When the case went to trial, it was found that the rational connection test used in section 8 did violate section 11(d) in a way that was not justifiable and could not be saved under section 1.

SECTION 2: FUNDAMENTAL FREEDOMS

The Right

2. Everyone has the following fundamental rights and 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.

Summary

Section 2 of the *Charter* protects the individual liberty of Canadians. Section 2 grants Canadians the right to believe what they choose to believe, to safely express their values through media or other forms of expression, to hold peaceful assembly and to belong to associations. These freedoms allow people to create and express their own beliefs, gather to discuss these beliefs, and communicate these beliefs to others on a wider scale if they so choose. These fundamental freedoms are important in a democratic country like Canada, because they give people the opportunity to form and express their own ideas, criticisms, and solutions to social problems.

Section 2(a): Freedom of conscience and religion

Freedom of conscience and freedom of religion are closely related, so they are considered to

be one freedom in this section. Freedom of conscience, also known as freedom of thought, refers to the right of an individual to hold their own ideas no matter what other people think. Freedom of religion gives Canadians the right to decide for themselves what religion, if any, they wish to follow and to openly and without fear of being bothered or punished exercise this belief through worship, practice, teaching, and speech. As long as doing these things does not threaten public order, health, morals, or the fundamental rights and freedoms of others, nobody is forced to act in a way that goes against his or her thoughts or beliefs. This freedom also protects the public from being forced by the government to believe certain things.

Question

As part of the exercise of her faith, Gretchen does not wear any article of clothing that reveals any part of her legs above the ankle. Gretchen's public elementary school gym teacher, Mr. Bob, tells Gretchen that she has to wear shorts in gym class because pants are not considered athletic gear. Even though Gretchen wears track pants in gym, Mr. Bob insists that she wear shorts like all of the other students. Gretchen goes to the school principal, Ms. Finster, and tells her that the rule that she must wear shorts goes against her faith. Ms. Finster tells Gretchen that there is a rule in the school regarding gym clothing that states all students must wear appropriate gym clothes, which are defined as bottoms no longer than knee-length. Gretchen has to participate in gym in order to pass her grade, but the rule makes it so that she cannot participate in gym without acting against her faith.

Q: Would Gretchen be successful in a claim against the public school on the grounds that the school's rule conflicts with her freedom of religion?

A: Yes, she most likely would be successful in such a claim. The rule does not serve a purpose that would make it justifiable under section 1 of the *Charter*. Gretchen's wearing pants instead of shorts as an exercise of her religious belief does not harm the *Charter* rights of anyone else. The public school is run by the government, so the policies of the public school must be in accordance with the *Charter*.

Leading Cases

R v Big Drug Mart Ltd., 1985 CarswellAlta 316, [1985] 1 S.C.R. 295.

This case began when police officers saw the defendant, Big M Drug Mart Ltd., conducting sales on a Sunday, in 1984. At that time, a store being open and operating on a Sunday was against the law of the *Lord's Day Act* in Ontario. Because the store owners were not of the religious belief that Sundays are a day of rest, they argued that the Act was against their freedom of religion. On appeal of the criminal charges for disobeying the *Lord's Day Act*, the Court of Appeal decided that the Act violated religious freedom rights. The issue ended up in the Supreme Court of Canada, where the judges said that "freedom can primarily be characterized by the absence of coercion or constraint." This means that freedom of religion is not just the right to choose what to believe and how to practice that belief, but also the right not to be forced to act in a way that does not agree with a person's beliefs. So, if a person does not hold a religious belief that they should not work on Sunday, then they should be allowed to work on Sunday. The Court ruled that the government should not force people to take a day off from work on Sunday because doing so is against the freedom of religion. In the end, the Supreme Court found that the *Lord's Day Act* violated section 2(a) of the *Charter*, and Big M Drug Mart Ltd. was not charged.

R v Kerr, [1986] N.S.J. No. 321, 75 N.S.R. (2d) 305.

R v Kerr began as a criminal case that ended up in the Nova Scotia Supreme Court Appeal Division. Kerr had been convicted for growing marijuana, which is illegal according to the *Narcotics Control Act*. Kerr said that the marijuana that he was growing was for his own religious practice. He argued his conviction by saying that because the law made it illegal for him to practice his religion—which involves the use of marijuana—his freedom of religion had been violated. The court did not agree with Kerr, though, because there was no proof that marijuana was necessary for the practice of his sincere religion or belief. The Court noted that even if Kerr had been able to prove that his use of marijuana was rooted in a sincere religion, the law criminalizing the use of marijuana was protected under section 1 of the *Charter*, because the goal of the law is to protect public health and safety.

Section 2(b): Freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication

The purpose of this freedom is ensure the right to hold and express thoughts, beliefs, and opinions—even if they are not popular thoughts, beliefs, or opinions—and the right to communicate these thoughts to others without fear of getting in trouble with the law. This freedom applies to all forms of expression (except for violent forms), including newspapers, television broadcasts and radio programs, and other forms of expression, such as films, art, speeches, and books. However, this freedom does not protect all forms of communication expressed in any form. For example, hate speech is not protected under this freedom because it is a form of communication that can be harmful to a group or individual.

Question

Ronald is a host on a local radio station in Calgary. One day, Ronald, as part of his daily talk segment, discusses a number of the terrorist attacks that have occurred in various parts of the world in the past five years. He does not make any factual claims, he does not make any negative comments towards the government, and he does not make any claims about the terrorist groups responsible for the attacks. The government thinks that Ronald's discussion of terrorism will make the public fearful of future terrorist attacks and is successful in obtaining an injunction, which is an order to make him stop discussing any topics related to terrorist attacks. Ronald thinks this is a violation of his freedom of expression so appeals to a higher court.

Q: Is this a violation of Ronald's freedom of expression?

A: Yes.

Q: Is it likely that the violation will be allowed by the courts under section 1 of the *Charter*?

Leading Cases

Irwin Toy Ltd. v Québec (Attorney General), [1989] 1 S.C.R. 927, [1989] S.C.J. No. 36.

Irwin Toy Ltd. had been warned by the Consumer Protection Office that some of their television advertisements disobeyed a rule in the *Consumer Protection Act* prohibiting commercial advertising aimed at people thirteen years old and under. In court, Irwin Toy argued that this law violated the *Charter* right to freedom of expression. To determine if the law violated section 2(b) rights, the Court set a two-step test. The first step is to decide whether the activity—in this case, television advertisements—should

be protected by freedom of expression. If the activity tries to convey meaning to its audience, then it is expressive and is an activity that should be protected by section 2(b). The second step is to determine if the purpose or effect of the law is to restrict freedom of expression. If so, then section 2(b) has been violated. If the *purpose* of the law is not to restrict expression, then it must be proven that the *effect* of the law is restriction of expression. In this case, the Irwin Toy Ltd. television advertisements were determined to be a form of expression to tell the audience about an Irwin Toy product. Even though the purpose of the law was only meant to restrict certain kinds of advertising, the effect was that television advertisements aimed at kids under 13 were not allowed. As a result, Irwin Toy could not advertise many of their items to children, their target audience. The court determined that the law against advertising to people thirteen years and under violated the fundamental freedom of expression; however, the Court decided that the violation was allowed under section 1 of the *Charter*. This was because section 1 protects certain *Charter* violations if they are demonstrably justified, and the Court determined the *Consumer Protection Act* is a justifiable means to limit expression because the *Act* protects against potentially harmful expression.

Ford v Quebec (Procureur General), [1988] 2 S.C.R. 712, [1988] S.C.J. No. 88

The case of *Ford v Quebec (Procureur General)* came about in response to sections 58 and 69 of the Quebec *Charter* of the French Language. Section 58 made it an offence to use any language other than French in outdoor advertising, and section 69 made it an offence to display a company name in any language other than French. The Supreme Court of Canada said that this rule was a violation of section 2(b) of the *Charter* because it prevented many

people and businesses from advertising in their language of choice. The Court also ruled that the Quebec language law could not be allowed under section 1 of the *Charter*. Even though the goal of the rule—to preserve the French language—was legitimate, the exclusive use of French was not necessary to achieve the goal.

Section 2(c): Freedom of peaceful assembly

Freedom of peaceful assembly is closely tied to freedom of expression, since an assembly can be seen as one way of expressing beliefs. Freedom of peaceful assembly balances the right of all Canadians to freely express themselves with the need for public order. This freedom protects the right of people who have similar thoughts on an issue to join together to peacefully assemble, picket, or demonstrate. There are limits to this freedom, though, as assemblies that get out of hand, disturb the peace, or are formed to cause fear in others are not protected, and assemblies in the streets require a permit.

Question

Roman and a group of his friends met every Monday and Friday on the front porch of the local barbershop at 7:00 p.m. After weeks of watching the group of friends meet and hang out outside of his store, the owner became irritated and wrote the boys a letter banning them from his property. The group of friends believes that their being banned from the property is a violation of their *Charter* right to freedom of peaceful assembly, so they hired a lawyer to speak for them in court.

Q: Has the boys' right to freedom of peaceful assembly been violated?

A: No. The boys were loitering on private property. The barbershop owner does not have to respect the desire of the boys to assemble on his porch.

Leading Cases

R v Walker, [1985] 167 A.P.R. 280, 65 N.B.R. (2d) 280

One case dealing with the issue of freedom of peaceful assembly is *R v Walker*. In this case, three people were charged with violating a municipal by-law that said that no person was allowed to loiter unless they could provide a reason for doing so. The accused argued that this by-law violated their section 2(c) and 2(d) *Charter* right to freedom of peaceful assembly and freedom of association. The judge noted that if the purpose of any association is illegal, then the association is not protected by the section 2(c) *Charter* right to freedom of association. The judge also said that the right to assembly and association is not absolute, and that federal, provincial, or municipal laws might be used to limit such rights, as long as they do not prevent the general right, and that limiting laws are for the benefit of the community as a whole. In the case of this by-law, the general right to assemble was not taken away and people were allowed to assemble so long as they were not doing so for illegal, harmful, or otherwise purposeless reasons. In the end, the Court found that this by-law was not a violation of the *Charter* because the rule could be justified under section 1 of the *Charter*.

Section 2(d): Freedom of association

This freedom allows individuals to gather for the purposes of expressing themselves in a more formal manner than an assembly, which is generally a one-time or short-lived event. Freedom of association gives individuals the right to create, belong to, and act as a member of any sort of organization, as long as the organization is not illegal. It is important to note that freedom of association is a right only of the individuals forming associations, not the associations themselves.

Question

Marnie works for a sporting goods company in Saskatoon. She is required by the company to be a member of the "Local Sporting Good Store Employee Union". The Union, among other things, makes members pay a weekly fee of \$5.00 and attend a Union meeting every two weeks. Marnie does not want to be a member of the Union. She does not want \$5.00 a week to go to the Union because she is saving money to register her daughter in the local soccer league. She cannot attend the bi-weekly meetings because they are held on either Tuesdays or Thursdays, and she has to drive her son to guitar lessons those days. The Union ignores Marnie's request to be removed from the list of Union members, so Marnie brings her case to court.

Q: Has Marnie's *Charter* right to freedom of association been violated?

A: Yes. Forcing Marnie to be a part of the Union is forcing an association. Discuss whether you think the requirement of the Union would be justified under section 1 of the *Charter*.

Leading Cases

Lavigne v O.P.S.E.U., [1991] 2 S.C.R. 211, 126 N.R. 161

One case involving freedom of association is *Lavigne v O.P.S.E.U.*, an Ontario case that ended up in the Supreme Court of Canada in 1991. Lavigne was a teacher at a community college. Although he was not a member of the union, Lavigne was forced to have money taken off of each of his paycheques by the union (union dues). The issue in this case was that Lavigne was being forced into an association that he did not want to be a part of. The Court agreed that Lavigne's freedom of association had been

violated by the union rule that he pay union dues, but said that forced association in this case was allowed because the requirement to pay union dues was not a violation under section 1 of the *Charter*. While determining the outcome of this case, the Court made a very important claim: that the freedom of association should also include the freedom not to be associated and the freedom from forced association. To force a person to pay money to an organization is one way of forcing a person to be part of an association. Here, the Court said that Lavigne paying union dues did not imply that he supported any of the union's opinions or causes, and did not prevent Lavigne from expressing his own personal views.

SECTION 3: DEMOCRATIC RIGHTS OF CITIZENS

The Right

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.

Summary

In the Canadian *Charter of Rights and Freedoms*, this section can be found under the heading of "Democratic Rights", which describes the voting rights of the citizens of Canada. Every Canadian citizen over the age of 18 is able to vote in Canadian government elections. Also,

all Canadian citizens have the ability to run for a position in their provincial legislative assembly or in the House of Commons. The ability to vote in elections and take part in politics is a key element of the Canadian democratic system. In the past, before the *Charter*, not everyone had the right to vote. For example, women were unable to vote in federal elections until 1918.

Leading Cases

Sauve v Canada is a case regarding the voting rights of Canadians serving a sentence of two or more years in a correctional institution. In the case, the court was looking to see whether the law under section 51(e) of the *Canada Elections Act* was in violation of any sections in the Canadian *Charter*.

In court, the government agreed that section 51(e) of the *Canada Elections Act* did infringe on section 3 of the *Charter*. In order for the government to prove that this voting restriction is justifiable, they needed to prove that the restriction is reasonable under section 1 of the *Charter*. The government provided two reasons for denying these individuals the right to vote: (1) to enhance civic responsibility and respect for the rule of law; and (2) to provide additional punishment. These two objectives were checked to see if they had a “rational connection” to the case, and for whether they caused “minimal impairment” to individuals serving sentences in correctional institutions.

The court decided that the government was unable to provide valid reasons for how denying the right to vote supported their two objectives (i.e. they failed the rational connection test). Because of this finding, the second test (the minimal impairment test) was not needed. As a result, section 51(e) of the *Canada Elections Act* was found to infringe on section 3 of the *Charter*,

and that Canadians who are serving a sentence of two or more years in a correctional institution have the right to vote.

Reference re Provincial Electoral Boundaries, [1991] 2 SCR 158, 81 DLR (4th) 16

Reference re Provincial Electoral Boundaries was a case to determine whether the electoral boundaries created by the *Representation Act* of 1989 violated section 3 of the *Charter*. The issue with the electoral boundaries were that they did not have the same number of people in each area and consist of rural and urban areas.

In order to determine whether the electoral boundaries created by the *Representation Act* of 1989 violated section 3 of the *Charter*, the Court needed to: 1) define the right to vote in relation to section 3; and 2) check to see if the electoral boundaries did violate section 3 of the *Charter*. If there is a violation, they must determine whether the violation can be justified.

In this situation, the right to vote was defined as “guaranteeing the right to effective representation.” This means that each Canadian should have a voice in elections. In this case, the Court found that the electoral boundaries did not violate the *Charter* because the small differences in population between the rural and urban areas was expected, as rural areas generally have more difficulty with representation. Because *The Representation Act* of 1989 did not violate section 3 of the *Charter*, section 1 of the *Charter* did not need to be analyzed.

SECTION 4: DEMOCRATIC RIGHTS

The Right

- (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 at 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.

Summary

Section 4 of the Charter guarantees that there will be an election every five years at minimum, both federally and provincially. However, the elected party and Prime Minister or provincial leader may continue without an election past five years in a time of war.

SECTION 5: DEMOCRATIC RIGHTS

The Right

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

Summary

This right requires members of Parliament and each provincial and territorial legislative assembly to meet at least once a year.

SECTION 6: MOBILITY OF CITIZENS

The Right

- (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.

Summary

Mobility rights are the rights of citizens and permanent residents to travel into and out of the country, move freely within Canada, and live anywhere they choose. Also, provinces can require that someone live in a province for a certain amount of time before they can access publicly funded social services. Lastly, this section of the Charter allows provinces to establish affirmative action programs to help disadvantaged people find employment.

Questions

Q: A Canadian citizen with a valid passport and no criminal record wants to take a trip to France with their family. What should this person know about their right to travel to another country?

Q: A university student just graduated from Lakehead University in Thunder Bay, Ontario, and wants to move to Winnipeg, Manitoba, for work. What should this person know about their right to work in another province?

Leading Cases

Black v Law Society of Alberta, [1989] 1 S.C.R. 591

In this case, a group of lawyers wanted to set up a law firm in Alberta with lawyers that lived in Calgary, Alberta, and Toronto, Ontario. The Law Society of Alberta passed two rules to stop this law firm from establishing – a rule that required that Alberta lawyers that wanted to set up a law firm to only do so with lawyers that also lived in Alberta, and a rule that lawyers in Alberta could not be partners in more than one firm.

The Supreme Court of Canada was asked to determine if these rules went against section 6 of the *Charter*, because they prevented Canadian citizens from being able to live and work where they chose (in this case, live in Toronto and work in Alberta).

The Supreme Court of Canada held that both of the rules put in place by the Law Society of Alberta were unconstitutional, and could not be justified under section 1 of the *Charter*. While the Law Society of Alberta could regulate lawyers in Alberta, they could not do so in a way that would result in Canadian citizens and permanent residents from being treated differently because they lived in a different province. The Court stated:

A purposive approach to the *Charter* dictates a broad approach to mobility. Section 6(2) protects the right of a citizen (and of a permanent resident) to move about the

country, to reside where he or she wishes and to pursue his or her livelihood without regard to provincial boundaries. The provinces may regulate these rights but, subject to ss. 1 and 6 of the *Charter*, cannot do so in terms of provincial boundaries. That would derogate from the inherent rights of the citizen to be treated equally in his or her capacity as a citizen throughout Canada. This approach is consistent with the rights traditionally attributed to the citizen and with the language of the *Charter*. (headnote)

The ruling of this case is that any law that prevents a Canadian citizen or permanent resident from earning a living because they live in a certain province may infringe upon their mobility rights under section 6 of the *Charter*, even if that person is not physically moving to do that job.

United States of America v Cotroni; United States of America v El Zein, [1989] 1 SCR 1469, 1989 CanLII 106 (SCC)

These cases deal with a group of Canadian citizens who were caught on charges of trafficking heroin into the United States. Even though they were caught in Canada, the United States wanted the accused individuals transferred to the United States for a trial there under an agreement between the United States and Canada called an extradition treaty.

The Supreme Court of Canada was asked if extradition, or sending the accused, to the United States for trial violated the mobility of the accused under section 6 of the *Charter*, and if there was a violation, if the violation was acceptable.

The Supreme Court of Canada found that sending the accused individuals to United States for trial against their wishes does infringe on

their right to remain in Canada, under section 6 of the *Charter*. However, the Court stated that this infringement, or violation, of mobility rights in this case was acceptable under section 1 of the *Charter* because the goal of the Canadian government in extraditing these individuals was to maintain the safety of Canada as a free and democratic society.

As against this somewhat peripheral *Charter* infringement must be weighed the importance of the objectives sought by extradition – the investigation, prosecution, repression and punishment of both national and transnational crimes for the protection of the public. These objectives, we saw, are of pressing and substantial concern. They are, in fact, essential to the maintenance of a free and democratic society. In my view, they warrant the limited interference with the right guaranteed by s. 6(1) to remain in Canada. That right, it seems to me, is infringed as little as possible, or at the very least as little as reasonably possible. (at 1490)

The ruling of this case is that extradition of Canadian citizens accused of committing crimes so that they can be tried in another democratic country is an acceptable violation of mobility rights under section 6 of the *Charter*.

SECTION 7: LIFE, LIBERTY, AND SECURITY OF THE PERSON

The Right

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.

Summary

Section 7 of the *Charter* protects the physical body of every person and ensures that no one's life, liberty, or security of person is compromised in a way that is not in accordance with the fundamental principles of justice.

Life refers simply to human life. Human life is highly valued by the *Charter*, and so any acts that jeopardize life are potentially problematic.

Liberty means the right of Canadians to make decisions of importance in their private lives. This does not mean that the government must agree with personal decisions, but that the government must respect the ability of Canadians to make them (*R v O'Connor*, [1995] 4 SCR 411 at paras 111, 113).

Security of person is similar to life, in that it refers to respect for individual physical and psychological integrity (*R v O'Connor*, [1995] 4 SCR 411 at para 111).

The principles of fundamental justice refer to the core of what is considered to be so important

that nothing should compromise them. The courts have outlined what the principles of fundamental justice are in a number of different cases. They include:

- People accused of crimes are presumed innocent (contained in section 11(d) of the *Charter*).
- Innocent people should not be punished. A person accused of a crime has the right to make a full defence to prove their innocence.
- Decisions of the courts should not be shocking to the conscience of the public.
- Decisions of the courts should not be arbitrary.
- If a government creates a defence to a criminal charge, that defence must be real and not deceptive or practically deceptive.
- State interference with Canadians' physical bodies and serious psychological stress imposed by the government violate the security of persons. Stress, in this case, must be more than ordinary stress or anxiety.
- There must be a connection between the government infringing on a right and what the law is trying to achieve. In other words, if the government infringes on a right, they must prove that it is necessary for achieving the end goal. Also, the goal of government in a program or legislation cannot be vague, arbitrary, or overly broad.
- International human rights norms inform how the courts think about principles of fundamental justice.

This section of the *Charter* is most often used when the police detain someone that is accused of a crime, or when decisions are made to deny refugee status to someone applying to stay in Canada.

Questions

Q: A person is arrested for stealing \$100 worth of clothing from a department store. This is their first offence, and this person decided to plead guilty at the trial. At sentencing, the court sentences this person to life in prison. Can this person argue that their section 7 right to life, liberty, and security of the person is being infringed in a way that is not in line with the principles of fundamental justice?

Q: A driver who has a number of speeding tickets is stopped by police while driving. After speaking with police, the driver is told that they are guilty of driving with a suspended license. The driver has never been told that their license was suspended, and is now going to be fined and spend time in jail without having the ability to defend themselves in court. Were the driver's section 7 Charter rights infringed? See *Reference re Section 94(2) of the Motor Vehicle Act, 1983* CanLII 268 (BC CA).

Leading Cases

R v Stinchcombe, [1991] 3 SCR 326, 1991 CanLII 45 (SCC)

In this case, a lawyer, Mr. Stinchcombe, was charged with breach of trust, theft, and fraud. During his trial, he was made aware of statements made to the police by his former secretary, but was not told what these statements said. When his lawyers applied to have the former secretary appear as a witness, or to have the statements she gave police made available to them, the court dismissed their application. The Crown lawyers claimed that the statements made by the former secretary were not credible, and so did not need to be disclosed. In the end, the accused was found guilty for breach of trust and fraud.

The Supreme Court of Canada was asked to determine if Stinchcombe's section 7 Charter rights were violated because he was not able to make a full defence to prove his innocence without knowing all of the evidence against him. If there was a violation, was this violation in accordance with the principles of fundamental justice?

The Supreme Court found that Stinchcombe's section 7 Charter rights were compromised, because not knowing all of the evidence against him could result in Stinchcombe potentially being convicted for crimes he may not have committed. In other words, an accused person has the right to a fair defense to prove his innocence.

Here, the court stated:

The right to make full answer and defence is one of the pillars of criminal justice on which we heavily depend to ensure that innocent individuals are not convicted. Recent events have demonstrated that the erosion of this right due to non-disclosure was an important factor in the conviction and incarceration of an innocent person. In the *Royal Commission on the Donald Marshall, Jr., Prosecution, Vol. 1: Findings and Recommendations* (1989) (the "Marshall Commission Report"), the Commissioners found that prior inconsistent statements were not disclosed to the defence. This was an important contributing factor in the miscarriage of justice which occurred and led the Commission to state that "anything less than complete disclosure by the Crown falls short of decency and fair play" (Vol. 1 at p. 238). (page 336)

The ruling of this case is that people accused of crimes are entitled to full disclosure of the evidence against them so they can fully

defend themselves. This is referred to as the Stinchcombe level of disclosure.

Carter v Canada (Attorney General), [2015] 1 SCR 331, 2015 SCC 5 (CanLII)

Canada's *Criminal Code* includes provisions that make it illegal to help someone take their own life and make it impossible for anyone to consent to their own death. The Supreme Court of Canada was asked to determine if these provisions violate section 7 of the Charter because they prevent someone to choose to end their own life with the help of a physician.

The Supreme Court found that the *Criminal Code* provisions violated section 7 of the *Charter*, and that this violation was not in accordance with the principles of fundamental justice. The court stated:

The prohibition on physician-assisted dying infringes the right to life, liberty and security of the person in a manner that is not in accordance with the principles of fundamental justice. The object of the prohibition is not, broadly, to preserve life whatever the circumstances, but more specifically to protect vulnerable persons from being induced to commit suicide at a time of weakness. Since a total ban on assisted suicide clearly helps achieve this object, individuals' rights are not deprived arbitrarily. However, the prohibition catches people outside the class of protected persons. It follows that the limitation on their rights is in at least some cases not connected to the objective and that the prohibition is thus overbroad. It is unnecessary to decide whether the prohibition also violates the principle against gross disproportionality. (Preamble)

As a result of this case, the Supreme Court of Canada has stated that these *Criminal Code* provisions are of

no force or effect to the extent that they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition. (Preamble)

The government of Canada was directed to develop new legislation to regulate physician-assisted death as a result of this decision.

SECTION 8: LEGAL RIGHTS

The Right

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

Summary

This right guarantees a general right to unreasonable search or seizure. For a search or seizure to be reasonable it must be authorized by law and must be conducted in a reasonable way. This right guarantees a person's right to a reasonable expectation of privacy, as it is unreasonable to search without a warrant. What is considered reasonable has to be determined in light of all the surrounding circumstances.

Questions

Q: What kind of surrounding circumstances can the police use to determine what is a reasonable search or seizure?

Leading Cases

Hunter v Southam, [1984] 2 S.C.R. 145

Southam was a business that did not want to give the government their documents, but the government went ahead and examined their documents without a warrant. The company claimed that this violated their section 8 *Charter* right. The court said that section 8 is meant to protect a person's reasonable expectation of privacy and to stop the government from violating that expectation. What is reasonable is decided by balancing a person's privacy interests against the government's interest in enforcing the law.

R. v. Chehil, 2013 SCC 49

The police became suspicious of Mr. Chehil when he booked a last minute ticket from Vancouver to Halifax. They had a "reasonable suspicion" that he was taking drugs to Halifax, so they used a sniffer dog to search him. The dog indicated there were drugs in his presence and when his suitcase was opened, the police found them. The court said the police had a reasonable suspicion and that the search did not go against Mr. Chehil's *Charter* right. The evidence they had about his trip created a reasonable suspicion (he bought the ticket last minute, paid cash for a one-way ticket, etc.). As a result, the court determined that this was not an unreasonable search.

SECTION 9: LEGAL RIGHTS

The Right

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

Summary

This guarantees the right that no one will be arbitrarily detained or imprisoned. Arbitrarily means that the police cannot stop, question or arrest someone unless they have a good reason. This right is typically used in criminal law where a police officer detains or arrests someone.

Question

Q: If a police officer stops someone for a certain reason (e.g. matching the description of a shoplifter), can that person be detained for a different reason after the search?

Leading Cases

R v Grant, 2009 SCC 32

Grant was walking down the street when, based on a hunch, three police officers stopped and questioned him. They detained him and found a handgun and marijuana in his possession. The court acknowledged he was detained arbitrarily and that his section 9 rights had been breached. However, the court said the breach was not serious enough to dismiss the evidence in court. They also said that when someone is confronted by the police, they have the option to walk away, unless they are under arrest.

R v Mann, [2004] 3 S.C.R. 59

Police officers detained Mann because he matched the description of a burglary suspect. When they searched him, they found marijuana in his pocket. The police realized he was not connected to the break and enter, but they charged him for the possession of a drug. The court said that even though they detained him for a different reason, the search was justified because they were doing it for public safety. Therefore, the officers had reasonable grounds to detain Mann. The ruling was that an officer must have reasonable and probable ground to detain someone.

SECTION 10: LEGAL RIGHTS

The Right

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.

Summary

Section 10(a) guarantees that if someone is arrested they will be told why. This is based on the idea that no one should be placed under arrest if they don't know the reasons for the

arrest. Section 10(b) gives every person the right to hire a lawyer and seek legal advice as soon as possible. Section 10(c) means that a person has the right to challenge an arrest. If an arrest is determined to be unlawful, a person has a right to be released.

Habeas corpus is when a prisoner files a petition to be brought before the court to determine the grounds for their detention and whether it is lawful.

Questions

Q: When a police officer arrests someone, how long can they wait before informing the person of the reason for their arrest?

Leading Cases

R v Mian, 2014 SCC 54

Mr. Mian was arrested for the possession of drugs. He was not informed of the reason of his detention for 22 minutes and was not told of his right to have a lawyer for 25 minutes. The court found that Mr. Mian was deprived of his rights to be informed of the reason for his detention and the right to retain counsel. A person must be informed of the reason for their arrest and be given their right to retain counsel immediately after being arrested. Mr. Mian was found not guilty.

R v Bartle, [1994] 3 S.C.R. 173

Mr. Bartle was detained for being suspected of impaired driving. The police officers informed him of his right to counsel, but they didn't tell him the toll-free number that he could use to call a duty counsel lawyer. The court excluded the evidence against Mr. Bartle because the

police did not properly inform him of his section 10(b) right. They said that to fulfill the purpose of the *Charter* right, the police needed to fulfill the additional informational requirement of not only telling Mr. Bartle he could call a lawyer, but that one could be provided to him if he could not afford to hire one. A police officer must provide a person under arrest with the information to contact a duty counsel lawyer.

SECTION 11: LEGAL RIGHTS

The Right

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.

Leading Cases

R v Askov, [1990] 2 S.C.R. 1199

Askov argued that the criminal charges against him should stop because his trial was unreasonably delayed for nearly two years. He stated that it violated his section 11(b) right, and the court agreed because he was not tried within a reasonable time. The charges against Askov were stopped, and there were no more legal proceedings.

R v Oakes, [1986] 1 SCR 103

Oakes was charged with the possession of drugs for the purpose of trafficking. Section 8 of the *Narcotics Act* stated that possession of a narcotic implied an intent to traffic, unless the accused could prove otherwise. He argued that section 8 of the *Narcotics Act* violated his *Charter* right under section 11(d). The court found that it did violate section 11(d) of the *Charter*. This case established the Oakes test, a two-part test to determine if the law that violates the Charter must still be held valid.

SECTION 12: LEGAL RIGHTS

The Right

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

Summary

This right guarantees that a person will not be subject to a punishment that is too severe for the crime committed.

Leading Cases

R v Nur, 2012 ONSC 602

Mr. Smickle was charged with the possession of an illegal handgun. The police raided his cousin's house and they found Smickle holding the gun while taking pictures of himself. Before this incident he did not have a criminal record and there was no evidence of him participating in any illegal activity. He was convicted of possession of a loaded firearm, which had a minimum sentence of three years in prison. The judge said that in this circumstance a minimum sentence of three years would violate Smickle's section 12 *Charter* right. They determined the appropriate sentencing would be one year in prison. Depending on the circumstances, a "one-size-fits-all" sentence may violate section 12 of the *Charter*.

Questions

Q: What if a person is carrying narcotics in their luggage without any knowledge, can they be charged with smuggling drugs in to Canada?

R v Smith, [1987] 1 SCR 1045

At the time of this case, the law stated that anyone who imported or exported narcotics must be sentenced for a minimum of seven years, regardless of whether they were for personal use or trafficking. Smith returned to Canada with cocaine hidden on him and was sentenced to eight years in prison. The court subsequently said the sentence was disproportionate to the crime. Section 12 will be violated when the sentence is grossly disproportionate to the offence.

SECTION 13: LEGAL RIGHTS

The Right

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.

Summary

If a person is a witness, any evidence they give cannot be used against them in a different trial, unless they lie under oath.

Questions

Q: What if someone gave conflicting statements in two different court proceedings but it was by mistake, because they had forgotten certain details?

Leading Cases

R v Nedelcu, 2012 SCC 59

Mr. Nedelcu was convicted of dangerous driving causing bodily harm and at trial he gave inconsistent testimonies. In the civil trial, he said he had no memory of the accident, but in the criminal trial he gave a detailed explanation. In the criminal trial, the Court said the Crown was able to use the inconsistent testimony to question Nedelcu's credibility because it did not incriminate him, but only made him seem less believable. Therefore, it did not violate his section 13 *Charter* right.

SECTION 14: LEGAL RIGHTS

The Right

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.

Summary

Any party to a trial (e.g. plaintiff, defendant, witness, etc.) who does not understand or speak English or French, or is deaf, is allowed to use an interpreter.

Questions

Q: Does this *Charter* right require everything in court to be translated?

Leading Cases

R v Tran, [1994] 2 SCR 951

A Vietnamese man, Mr. Tran, was accused of sexual assault. He appealed the trial judge's decision because the interpreter only summarized the evidence in Vietnamese at the end of the direct examination and again after the cross-examination. Tran argued that his section 14 *Charter* right was violated because the interpreter did not fully translate all the evidence. The court decided that the translation must be consistent and unbiased, but not everything must be translated if it is not important. The party should have the same opportunity to understand and be understood as if they could speak the language of the court (English or French).

SECTION 15: EQUALITY RIGHTS

The Right

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.

Summary

Section 15 is divided into two subsections. The first subsection relates to equality, the justice system, and the law. The second subsection relates to programs that are aimed at providing opportunity to those who are or have been discriminated against in the past and are thus disadvantaged.

Section 15(1) is aimed at protecting human rights and freedoms from the harm that results when certain people or groups are treated differently because of stereotyping or political or social prejudices.¹ This right means that every individual is equal in regard to the law, but does not mean that all people in society have to treat every individual equally and without discrimination. It is only in the creation and use of law that the equal treatment of all people is expected and protected by section 15(1). Race, national or ethnic origin, colour, religion, sex, age or mental or physical disability are the protected characteristics listed in section 15(1), but other characteristics, such as sexual orientation,² pregnancy,³ and marital status⁴ are also considered by the courts to be protected under section 15(1). To determine whether a characteristic not listed under 15(1) should be protected by this section, the courts look at whether the characteristic by which an

individual or group is being discriminated against is one that they cannot change, or that they can change but only at an unacceptable cost to their personal identity.⁵

Section 15(2) is an exception to section 15(1). Section 15(2) states that laws, policies, programs, and activities that promote or enable the differential treatment of individuals or groups disadvantaged because of certain characteristics are allowed for the purpose of improving the conditions of disadvantaged persons or groups. The need for such laws, policies, programs, and activities is recognized as being important because these policies give people who have become disadvantaged as a result of negative differential treatment the opportunity to achieve equality with other people. The idea of giving extra opportunities to people who have been discriminated against is called affirmative action.

Equality is the idea that a law that is supposed to apply to everyone should not, because of unimportant differences, have a more negative or less positive impact on one person or group than it does on any other.⁶ Additionally, equality in this section means that all people, regardless of any personal characteristics, should be treated equally by the law, and that every person should have the same access to justice. Discrimination can be described as a rule or standard that, whether on purpose or not, has a negative effect on an individual or group—identified by personal characteristics including, but not limited to, those listed in section 15(1)—that is not experienced by others.⁷ A law that takes away or limits a person

¹ *Law v Canada (Minister of Employment)*, [1999] 1 S.C.R. 497, [1999] S.C.J. No. 12.

² *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609.

³ *Brooks v Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219, [1989] S.C.J. No. 42.

⁴ *Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693.

⁵ *Corbière v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203, 173 DLR (4th) 1.

⁶ *Andrews v Law Society of British Columbia*, [1989] 1 SCR 143, 56 DLR (4th) 1.

⁷ *Ontario (Human Rights Commission) v Simpsons-Sears Ltd.*, [1985] 2 SCR 536 at p.551 (in *Andrews* case).

or group's access to opportunities and benefits that are available to others is also discriminatory.

In a case called *Andrews v Law Society of British Columbia*, the Supreme Court of Canada created a three-part test to determine if a law or rule violates protected equality rights. In short, for a law to be considered a violation of equality rights, the law must promote or allow for a difference in treatment that results in placing negative responsibility or denial of a benefit on the basis of one of the characteristics listed in section 15(1) or any similar characteristics. The negative responsibility or denial of benefit must harm an individual's human dignity in a way that their sense of self-worth and self-respect are devalued or ignored.⁸

Questions

Martin is 18 years old, lives with his boyfriend Louis, and works for the Manitoba government. One day, Louis comes in to spend time with Martin during his break at work. One of Martin's coworkers, Abby, sees Martin and Louis leave the building together holding hands. Abby informs Greg that Martin is in a homosexual relationship. The next day, Martin's boss, Greg, fires Martin. Greg claims that he can fire anybody for whatever reason he wants. Martin, upset and unemployed, seeks legal help. His lawyer tells him that the government has a policy that people cannot be fired on the grounds of race, gender, or age, but no other grounds are listed.

Q: Can Martin claim that the government's policy that protects people from being fired on the grounds of race, gender, or age violates his *Charter* right because it does not protect him from wrongful termination on the basis of sexual orientation?

A: Yes, Martin can make this claim because section 15 aims to protect identifiable groups from discrimination by policies and laws. The policy that allowed for Martin's firing should include sexual orientation as one of the grounds for which a person cannot be fired if it is to comply with section 15 *Charter* rights.

Current Issue Discussion: After reading the grounds currently protected by section 15 of the *Charter*, what other similar characteristics do you think may become protected in the future?

Leading Cases

Discrimination Based on Age

Tetreault-Gadoury v Canada (Employment & Immigration Comm.), [1991] 2 S.C.R. 22, 126 N.R. 1.

In this case, the main issue was whether section 31 of the *Unemployment Insurance Act*, denied unemployment benefits to those over 65 years of age, violated section 15(1) of the *Charter*. Tetreault-Gadoury brought this case to court as a result of being denied unemployment benefits after she lost her job shortly after she had turned 65. The Supreme Court of Canada decided that the denial of unemployment benefits based on age is a form of discrimination that violates the right to equality laid out in section 15(1) of the *Charter*.

Discrimination Based on Physical Disability

Bahlsen v Canada (Minister of Transport), [1997] 1 FC 800, 141 DLR (4th) 712.

⁸ *Supra* note 16.

Ms Bahlsen brought this case to court when she was told that she would not be able to have a private pilot's license because section 3.18 of the *Personnel Licensing Handbook, Vol. 3, Medical Requirements* stated that people with diabetes could not hold any form of flight crew license. Bahlsen brought legal action against the government, claiming that this was discrimination based on a physical disability. The Court found that section 3.18 does violate equality rights named in section 15(1) of the *Charter*; however, the Court decided that the law was allowed because the purpose of the law is to protect general public safety in a way that minimally took away the rights of those with diabetes. As a result, the law was allowed by section 1 of the *Charter*.

Discrimination Based on Off-Reserve Status of Aboriginals

Bahlsen v Canada (Minister of Transport), [1997] 1 FC 800, 141 DLR (4th) 712.

Non-resident members of a native band brought an issue to court regarding section 77(1) of the *Indian Act*, which takes the right to vote in band elections away from band members who do not ordinarily live on the reserve. Even though the difference between the on-reserve and off-reserve status of an Indigenous person was not originally included in the list of characteristics protected by equality rights in section 15(1), it, along with a number of other characteristics not originally included, has been recognized as a reason for which discrimination is not allowed. By denying off-reserve band members the right to vote in band elections, the *Indian Act* took a fundamental right of societal importance away from off-reserve band members—the right to participate equally in democracy by voting. The Supreme Court of Canada ruled that section 77(1) of the *Indian Act* violated section 15(1) *Charter* rights and that band members who do

not ordinarily reside on the reserve of their band should have the right to vote in band elections.

Discrimination Based on Sexual Orientation

Vriend v Alberta, [1998] 1 SCR 493, [1998] SCJ No. 29.

In this case, the plaintiff had been fired from his work because of his homosexuality. After he was fired, he wanted to file a complaint with the Alberta Human Rights Commission, but was told by the Commission that the *Individual's Rights Protection Act* did not include sexual orientation as a prohibited ground of discrimination. Vriend brought the case to court, claiming that the *Act* violated his section 15 equality rights. The Supreme Court of Canada found that this law discriminated against homosexuals because they were denied the benefit of the law that helped members of other groups when they had been wronged. This case is important because the Supreme Court of Canada confirmed that section 15 of the *Charter* prohibits discrimination against people identifying as LGBTQ.

Discrimination of Disadvantaged Group

R v Morash, [1994] NSJ No. 53, 129 NSR (2d) 34.

Mr. Morash had been convicted of under the *Fisheries Regulations* for fishing with a gill net in a closed area. During the trial, Morash's lawyer claimed that Morash's section 15(1) equality rights were being violated because he did not have the right to fish in an area of the water called the "Shelburne Closed Box." According to the *Fishing Regulations*, only fishermen whose home port was in Shelburne County were allowed to fish in this closed area. The regulation was not aimed at a disadvantaged group; rather, it was aimed at any fisherman whose home port was not in Shelburne County. The court stated that this regulation was not a violation of section

15(1) equality rights because fishermen from Shelburne County belong to a group that has in the past, or continues to be, disadvantaged because of stereotypes or social or political discrimination. Morash's section 15(1) equality right had not been violated because he was not part of a group that had "analogous grounds" to be protected from discrimination under section 15.

Example of Affirmative Action Program – s.15(2)

In many countries there are affirmative action programs that help bring the members of groups that have typically been disadvantaged because of discrimination into equal standing with those who have not been discriminated against. One such program is a hiring policy that sets aside a certain number of places in the workplace for women, indigenous peoples, visible minorities, or people with mental or physical disabilities. In Canada, this program is called the *Employment Equity Act*.⁹

SECTION 16-20: OFFICIAL LANGUAGES IN CANADA

The Right

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.

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 proceedings of the legislature in 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 on 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

⁹ *Employment Equity Act*, S.C. 1995, c. 44, s. 2.

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 in French.

Summary

English and French are the official languages of Canada and have equal status, rights, and privileges in Parliament and the government of Canada. Nothing in the *Charter* limits Parliament and provincial or territorial legislature in making sure that English and French remain equal.

Everyone has the right to use English or French when appearing before Parliament. This gives all speakers in Parliament and in New Brunswick the right to speak in either language; however, it does not give them the right to be understood in either language.

All statutes, records, and journals of Parliament and the legislature of New Brunswick are printed and published in both English and French and both are equally authoritative. There is no difference between section 133 of the Constitution Act, 1867 and the *Charter's* section 18.

Either English or French can be used by someone in court in both oral and written submissions.

Any person in Canada has the right to communicate with, and receive communication in, French or English from any department or office of Parliament or the government of Canada. This right also includes institutions of the legislature or government where there is a demand for communications in both languages, or if it is reasonable that the communication from these offices be both in English and French. This right also exists in New Brunswick.

Questions

Jean, a Francophone, was pulled over by police officers in Alberta. The officers instructed him to take a breathalyzer test in English. When Jean appeared confused by the instructions, a French speaking officer was called to the scene to instruct him to take the breathalyzer in French. Jean blew over the legal limit and was taken to court, where the trial was in French, but all papers in the filing were in English. Jean's bilingual lawyers claimed that Jean's section 16 Charter rights were violated and the case should be thrown out.

Q: Do Jean's lawyers have a case against the police officers for violating his section 16 rights?

A: As the instructions for the breathalyzer were provided to Jean in both English and French, and the trial was in French, the courts determined that Jean's *Charter* rights were not violated.

Q: Dennis was an Anglophone working in Quebec who had a strong grasp of the French language. One day, he was arrested for shoplifting. As it was determined that Dennis spoken English, the officers conducted their arrest and questioning in English. At trial, Dennis' lawyers stated that

because he was not given the option to proceed in English or French, and because the officers assumed that they should proceed in English, Dennis' rights under section 17 were violated.

Q: Were Dennis' rights violated?

A: While the judge felt that Dennis should have been given the option to be arrested and questioned in French, he did not find a violation of Dennis' *Charter* Rights. This was due to the fact that Dennis was clearly an Anglophone.

Leading Cases

R v Pooran, 2011 ABPC 77, 2011 CarswellAlta 450

In this case, the accused were charged with offences under the *Traffic Safety Act* in Alberta and had to go to trial. Since they were more comfortable communicating in French, they requested to have their trials in French, to be prosecuted by a French-speaking prosecutor, and to be heard by a French-speaking judge. The Crown argued that while the accused had a right to a French interpreter, they did not have a right to a French trial. The judge found that since both English and French are given equal status under section 16, the accused's request had to be granted.

R v Bastarache (1992), 128 NBR (2d) 217, 1992 CarswellNB 106

The accused was a bilingual Francophone who was given a breathalyzer test. The police officers initially made their demand in English, but upon realizing that the accused appeared confused by the request, repeated it in French. The breathalyzer technician gave the instructions in English, and provided the printed instructions in English; however, the accused still felt that

his *Charter* rights were violated because the instructions were in English. At trial, the judge determined that since the demand for the breathalyzer test was given in both English and French, and that the accused chose which language to proceed in, there was no violation of *Charter* rights.

Questions

Margie is an employee of a government agency and only speaks English. While she has been working at a museum for several years and has scored well on employee performance reviews, she has often been passed up for promotions in favour of other, less experienced, employees. She feels that the difference between her and colleagues who have received promotions is that she does not speak French. She feels that this is discriminatory and takes the museum to court.

Q: Can the government agency discriminate against Margie for not being able to speak French?

A: The judge found that since the agency is a "federal institution" and a Crown corporation, it has a duty to ensure that people can communicate with the agency's staff and offices. Therefore, the museum is entitled to promote French speakers over those who cannot speak French.

Leading Cases

R v Deveaux [1999] NSJ 477, 181 NSR (2d) 81

The appellant in this case, a Francophone, appeared unrepresented by counsel in a provincial court where he was read the charge brought against him in English by a judge.

The judge then set a trial without advising the appellant of his right to a trial in either English or French. At trial, the appellant was represented by counsel. The appellant and his counsel appealed the fact that the judge did not advise the appellant of his right to a trial in French or English. The appeal court judge found that having a trial in either language is a mandatory provision in the *Criminal Code of Canada*, and the trial judge was obligated to tell the unrepresented appellant that he had a right to a trial in either or both official languages, particularly since his first language was French. This is a breach of sections 15, 16, and 19 of the *Charter*. A new trial was ordered by the appeal judge.

R v Vallieres (1993), 18 WCB (2d) 427, 1993 CarswelOnt 3612

The accused in this case was charged with committing a sexual assault. At the trial, the complainant, an English-speaking Francophone, elected to give her testimony in English; however, there were several instances where she spoke in French and an interpreter was used to translate for her. During the cross examination, the interpreter fell ill and was not able to complete their duties. As there was no need for an interpreter, and neither the complainant nor the Crown objected, a new interpreter was not sworn in and the trial continued. On appeal, it was found that the trial judge erred in law by continuing the proceedings without an interpreter for the complainant. However, it was determined that the lack of an interpreter did not impair the complainant's ability to express themselves and that, as a result of this lack of impairment, the complainant's section 19 Charter rights were not violated and the appeal was dismissed.

Seesahai v Via Rail Canada, 2009 FC 859 (see also *Temple v Vial Rail Canada*, 2009 FC 858, [2010] 4 FCR 80, and *Norton v Via Rail Canada*, 2009 FC 704)

The applicant in this case was challenging the legality of VIA Rail's bilingual requirements for Service Manager and Assistant Service Coordinator positions on routes that had not been designated as bilingual. As Via Rail is a crown corporation and a federal institution, it has a duty to uphold the *Charter* to ensure that members of the travelling public can communicate with, and obtain services, in their official language at their head office as well as in any local office, railway station, or train where there is a significant demand, or where it is reasonable due to the nature of the office. As a result, the application was dismissed.

SECTION 21: CONTINUATION OF EXISTING CONSTITUTIONAL PROVISIONS

The Right

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.

Summary

Nothing in sections 16 to 20 will completely or partially abolish the right to use either English or French or both that is established or exercised as a result of being under the Constitution of Canada.

Leading Cases

R v Pooran, 2011 ABPC 77, 2011 CarswellAlta 450

The accused were charged with offences under the *Traffic Safety Act* in Alberta and had to go to trial. Since they were more comfortable in French, they applied to have their trials in French, to be prosecuted by a French-speaking prosecutor, and to be heard by a French-speaking judge. The Crown argued that, while the accused had a right to a French interpreter, they did not have a right to a French trial. The judge found that since both English and French are given equal status under s.16, the accused's request had to be granted.

Alberta v Lefebvre, 76 Alta. L.R. (2d) 370, 100 DLR (4th) 591

The applicant was charged with a highway traffic offence and parking violation and attempted to file appeal documents in French before the date of the appeal trial. The Clerk of the Court rejected these documents because they were not in English. As a result, the applicant failed to appear at trial and a warrant was issued for his arrest. While the accused did submit English translations of the documents, it was found that he did have a right to submit the original documents in French. By refusing to accept the documents, the Clerk of the Court violated the applicant's *Charter* rights.

SECTION 22: RIGHTS AND PRIVILEGES PRESERVED

The Right

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.

Summary

Although sections 16 to 20 focus specifically on English and French, there is nothing in these sections that is intended to limit the use and enjoyment of other languages, either now or in the future.

Leading Case

R v MacKenzie, 2004 NSCA 10

In this case, the accused was charged with speeding and appeared without counsel in provincial court. The provincial court judge did not inform her of her right to apply for a French trial, and tried and convicted her in English. The accused appealed this decision to the Summary Conviction Appeal Court which ruled that there had been a serious violation of *Charter* rights. While the judge of the Appeal Court determined that the seriousness of the breach entitled the accused to a new trial, the breach was not intentional or discriminatory.

SECTION 23: MINORITY LANGUAGE EDUCATION RIGHTS

The Right

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.

Summary

The purpose of this section of the *Charter* is "to preserve and promote the two official languages of Canada, and their respective cultures, by ensuring that each language flourishes, as far as possible, in provinces where it is not spoken by the majority of the inhabitants."¹⁰ It is important to note that this right only applies to Canadian citizens and not to all people of Canada, as many of the other *Charter* provisions do. In this section, "minority languages" refers to either English in an area of French majority or French in an area of English majority, and not to unofficial minority languages such as Spanish, Mandarin, Arabic, or any other language that is not English or French.

The right to instruction in French or English, depending on the case, is guaranteed to be available in three instances: when the language requested is the mother tongue (first language) of the child; when the language requested is the language in which at least one of the parents was educated in; and when another child in the family is in the process of receiving or has already received an education in the requested language.

¹⁰ *Mahè v Alberta*, [1990] 1 SCR 342, 72 Alta LR (2d) 257.

The right to receive an education in the minority language is guaranteed as long as there are enough students to support the instruction of the minority language and, as the case may be, the minority language school. Communities with small populations may not have enough students eligible to warrant the government paying for instruction of the minority language. In larger communities, there may be enough eligible minority language-speaking students that the school must provide classrooms for minority language instruction. An even larger community may have so many minority language-speaking students that, using public funds, a new school must be built for minority language instruction. In communities with a high enough number of minority students, the minority language speakers have the right to manage and control the minority language schools and instruction. Section 93 of the Constitution Act 1987 states that it is up to the provincial government to provide the funds to the school.¹¹

Questions

Andrea's family recently moved from Winnipeg, Manitoba, to a small town in northern Alberta. Andrea's older brother, Malachi, attended a French school from kindergarten until grade 12, and is fluent in the French language. Andrea received her first four years of education in a French immersion school in Winnipeg, and is about to begin grade 4. Her parents are not French speakers, but want their children to be taught in French so that they can apply for jobs that solely English-speaking people cannot. Unfortunately, there is no French school in the new town, nor is there a separate class for French speaking students. At a meeting of French-speaking parents, a tally revealed that there were 72 school-aged Francophone children who

would prefer to be taught in French if that option was available. Up until this point, the parents of the French-speaking students had not asked for separate French instruction because they did not realize that section 23 of the *Charter* protected minority language rights. Now, with the arrival and demands of Andrea's parents, the other parents also want their children to be educated in French, and they plan on bringing a claim forward to the Alberta government.

Q: Is the right of Andrea's parents to have Andrea be educated in French protected by the *Charter*?

A: Yes, the right is protected. Even though Andrea's parents are not Francophone, her older brother was educated in French so she has the right to be educated in French as well.

Q: Do the parents of the French students in this small community have a *Charter*-protected right to have their children educated in French?

A: Yes, the Francophone parents do have the right to have their children educated in French. Where the parents were educated in French and/or French is the first language of the child, the right to French education is protected by the *Charter*.

What do you think the outcome will be when the French parent group brings forward their claim? Consider the "sliding-scale" developed in *Mahè* (below).

¹¹ *Constitution Act 1987*, R.S.C. 1985, App. II, No. 5, s. 93.

Leading Cases

Mahè v Alberta, [1990] 1 SCR 342, 72 Alta. LR (2d) 257.

In the *Mahè* case, the plaintiffs (the people bringing the claim against the province) claimed that the French school in Edmonton, Alberta, that was operated privately by the Edmonton Roman Catholic Separate School District had enough French speaking students enrolled (242 total) to warrant public funding, as guaranteed by section 23 of the *Charter*. The parents of the French-speaking children argued that their children should have the right to educational facilities just as English-speaking students do, and that parents of the French-speaking children should have management of the French instruction of their children, just as English-speaking parents have management of the English instruction of their children.

The court created what is called a “sliding-scale” of requirements that must be met in order to decide if a minority language school should be given public funding for its operation and whether the minority language parents should have management powers. On the lower end of the scale is the right to be educated in the minority language, a right that is guaranteed in a situation where there is a number of minority language students, but only a small number that justifies the right to instruction.

On the upper end of the scale is the right of the minority language group to be given public funds to pay for the construction or rental/ownership of its own educational facility and to hire instructors to educate the minority language students. In other words, section 23 guarantees a certain level of rights (to instruction, to public funds, to management) to minority language education groups for the purposes of minority language education based on the number of students involved.

In the *Mahè* case, the judge agreed with the French minority parents and decided that the number of French speaking students was large enough that the school should be publically funded and that the parents should have management and control powers over the school. One of the reasons for allowing the minority language parents the power to manage and control these publically funded minority language schools is to allow for minority groups to have control over their children’s best interests relating to education. This is important because in the past, the majority language group has not always done what is best for the minority.

SECTION 24: ENFORCEMENT

The Right

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.

Summary

This section is in the *Canadian Charter of Rights and Freedoms* to enforce one's rights. As one author writes, "Fundamental human rights and freedoms are meaningless absent effective means for their enforcement."¹² This essentially means that enforcement of rights is needed in order to guarantee them.

Section 24(1) states that if an individual's rights have been denied or infringed in a certain situation, that individual can present the situation to a court. The court will then look at the situation and decide what remedy should be given to the individual.

Section 24(2) states that the court can exclude evidence if it was gathered in a way that had a negative effect on freedoms and rights found in the *Charter*. However, the evidence can only be excluded if the way in which it was gathered would affect the administration of justice in a negative manner.

Question

Q: Can you describe a situation in which an infringement may occur and evidence is excluded?

Q: Can Nova Scotia's Supreme Court retain the ability to hear reports regarding the status of the Province's effort to build schools, under a remedy of section 24?

Leading Cases

Doucet-Boudreau v Nova Scotia (Minister of Education), [2003] 3 SCR 3, 2003 SCC 62, 232 DLR (4th) 17

Under their section 23 rights in the *Charter*, Francophone parents who lived in five Nova Scotia school districts applied for an order to get the French language school board and Nova Scotia to provide publicly funded French-language high school facilities and programs. The province delayed the creation of these schools, so section 24(1) of the *Charter* was applied. In the Nova Scotia Supreme Court, the remedy applied by the judge was to order the provincial government to use best efforts in building French language schools by specific dates. He also stated that the government had to provide him with reports on the progress in creating these schools to make sure they were complying with his order.

The most important result of this case is the five general principles to help determine what the meaning of "appropriate and just in the circumstances" is, and applies them to this case to solve the issue at hand.

1. The remedy to be issued must vindicate the rights of the individual. In this case, the remedy was appropriate because it could help move the building of the schools forward.
2. The remedy must be within the rules of the constitutional democracy. In this case, the remedy was within the rules of Canada's constitutional democracy.
3. The remedy must be within the power and the function of the court issuing the remedy. In this case, the remedy was within the court's power.

¹² Joel Bakan et al, *Canadian Constitutional Law*, 4th ed (Toronto: Emond Montgomery Publications Limited, 2010) at 1377.

4. The remedy must be fair to the party which the remedy is against.
5. The remedy must meet the specific and unique challenges that arise in each case, and this may require creativity. These last two principles were combined in the *Doucet-Boudreau v Nova Scotia* case. It was found that the remedy was fair to the other party, and met the specific and unique challenges that arose.

R v Grant, [2009] SCC 32, 309 DLR (4th) 1

In *R v Grant*, three police officers, one in uniform and the other two in plain clothes, were patrolling an area that had four high schools known for illegal activities. Two of the officers saw a suspicious looking 18-year-old man, so they sent the uniformed officer to go speak with him. The other two officers would eventually join the uniformed officer. The 18-year-old man admitted to the officers that he had a firearm and a small amount of marijuana on him. The 18-year-old-man was charged with offences.

Section 24(2) had a test established by a previous case regarding what evidence should be excluded; however, this case decided to alter that test. The new test created by this case has three steps:

1. Seriousness of the *Charter*-Infringing State Conduct: The court must look at how seriously the state's conduct infringed on *Charter* rights, and look to see whether allowing the evidence would present a negative view of the administration of justice to the public.
2. Impact on the *Charter*-Protected Interests of the Accused: The courts must look at how seriously an accused's *Charter*-protected interests were impacted.

3. Society's Interest in an Adjudication on the Merits: The courts must look to see whether including or excluding the evidence would better serve the process.

The evidence in this case was not excluded.

SECTION 25: ABORIGINAL RIGHTS AND FREEDOMS NOT AFFECTED BY THE CHARTER

The Right

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.

Summary

Canada has a number of treaties and agreements with Aboriginal peoples dating back to the *Royal Proclamation* of 1763 that recognize aboriginal,

treaty, and other rights and freedoms of Aboriginal peoples. These agreements and rights are unique, representing the good faith and special relationship between the Government of Canada and Canada's first peoples, and were created with the intention that these agreements are to last forever. Because of these agreements and the special nature of aboriginal and treaty rights and freedoms, it was important to explicitly include in the *Charter* a recognition that the *Charter* should not be interpreted in a way that would diminish these rights.

Leading Cases

Most aboriginal rights issues are dealt with by the courts under section 15 of the *Charter*, so there are few cases that look at section 25 specifically. However, in the preamble of *R v Kapp*, 2008 SCC 41, the court explained that:

Section 25 is not a mere canon of interpretation. It serves the purpose of protecting the rights of aboriginal peoples where the application of the *Charter* protections for individuals would diminish the distinctive, collective and cultural identity of an aboriginal group. This is consistent with the wording and history of the provision. The s. 25 shield against the intrusion of the *Charter* upon native rights or freedoms is restricted by s. 28 of the *Charter*, which provides for gender equality "[n]otwithstanding anything in this *Charter*". It is also restricted to its object, placing *Charter* rights and freedoms in juxtaposition to aboriginal rights and freedoms. This means in essence that only laws that actually impair native rights will be considered, not those that simply have incidental effects on natives.¹³

¹³ *R v Kapp*, 2008 SCC 41 at headnote.

In this case, the Supreme Court of Canada also outlined the test for determining if aboriginal rights and freedoms under section 25 are being violated:

There are three steps in the application of s. 25. The first step requires an evaluation of the claim in order to establish the nature of the substantive *Charter* right and whether the claim is made out, *prima facie*. The second step requires an evaluation of the native right to establish whether it falls under s. 25. The third step requires a determination of the existence of a true conflict between the *Charter* right and the native right.

If these three steps are followed and a conflict between the *Charter* and section 25 is found, the next step is to determine if this conflict can be justified under section 1 of the *Charter*.

In *R v Kapp*, non-Aboriginal fishermen were charged with fishing during a period of time reserved for three aboriginal bands. The non-Aboriginal fishermen claimed that the special fishing licenses given to these bands by the federal government were discriminatory under section 15 of the *Charter*.

The Supreme Court of Canada was asked if section 25 applied in this case, and if so, if it prevents a further section 15 claim of discrimination. The Supreme Court found that the section 25 test outlined above was met, and so section 25 applied. The Court also stated that a conflict between section 25 and the *Charter* prevents any further claims under section 15. In other words, because the *Charter* cannot be used to diminish the rights and freedoms of Aboriginal people protected in the *Charter*, if section 25 is used, any claims of discrimination under section 15 will not be accepted by the courts.

SECTIONS 26-31: GENERAL CHARTER RIGHTS

The Rights

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.

Summary

Because the *Charter* is viewed as living and dynamic, and not static, its interpretation is also somewhat fluid. This is referred to as the 'living tree' doctrine. As a result, these sections of the *Charter* serve to maintain certain fundamental principles for application of the *Charter*, and qualify the analysis of claims made under other sections of the *Charter*, such as sections 23, 2(a), and 15.

For example, section 28 ensures that the *Charter* applies equally to both sexes. Canada's commitment to multiculturalism is protected in section 27, and section 30 specifies that the *Charter* applies to all of the provinces and territories of Canada. Section 29 reaffirms the special rights of denominational schools and separate schools that predate the *Charter*.

Questions

How do you think section 27 impacts the court's interpretation of section 15? Consider the following statement from *R v S (RD)*, [1997] 3 SCR 484, 1997 CanLII 324 (SCC) at paragraph 95:

Canada is not an insular, homogeneous society. It is enriched by the presence and contributions of citizens of many different races, nationalities and ethnic origins. The multicultural nature of Canadian society has been recognized in s. 27 of the Charter. Section 27 provides that the Charter itself is to be interpreted in a manner that is consistent with the preservation and enhancement of the multicultural heritage of Canadians.

SECTION 32: APPLICATION OF CHARTER

The Right

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.

Summary

Section 32 of the *Charter* explains when the *Charter* can be applied. It is important to know when the *Charter* applies in order to understand when the *Charter* can be used and when it cannot be used.

Section 32(1a) explains that the *Charter* applies to everything that falls under the Parliament's authority, including Canada's territories. Section 32(1b) explains that the *Charter* applies to everything that falls under the authority of provincial legislatures. Section 32(2) simply states that section 15 could not be used until April 17, 1985, which was three years after the *Charter* came into force (on April 17, 1982).

Questions

Q: What other entities can be part of the government?

Q: Would a dispute between two private parties have the Charter applied to it?

Leading Cases

Retail Wholesale and Department Store Union Local 580 v Dolphin Delivery Ltd, [1986] 2 SCR 573, 33 DLR (4th) 174

In this case, the Retail Wholesale and Department Store Union was given a court order that restrained them from picketing at Dolphin Delivery's premises. The union argued that this court order violated freedom of expression. The court found that section 32 can be applied to common law; however, there are certain restrictions in relation to private parties. The *Charter is* applicable when there is government action involved and there are private parties, but the *Charter is not* applicable when private parties sue and there is no governmental action involved.

In this case, Supreme Court of Canada found that the *Charter* was not applicable because there were two private parties and no government action involved.

Eldridge v British Columbia (Attorney General), [1997] 3 SCR 624, 151 DLR (4th) 577

The plaintiffs in *Eldridge v British Columbia (Attorney General)* communicated through the use of sign language because they were deaf. They felt that they had been discriminated against when using hospital services because interpreters were not used. Not having

interpreters caused them to face unequal treatment in relation to people who could hear, and they believed their *Charter* rights under section 15(1) were affected. The Supreme Court of Canada found that section 15(1) was infringed upon, but the court also established two steps for considering whether the case met section 32 requirements:

1. The court first looks at how the *Charter* was infringed. Was it legislation or was it infringed by an entity that had authority for decision-making?
2. The court then checks to see whether that entity is part of the government.

First, the court found that in this case, the infringement was caused by an entity that had authority for decision-making. Second, the court found that the public institution that had authority for decision-making was part of government. As a result, the court found that the *Charter* did apply in this situation.

SECTION 33: EXCEPTION WHERE EXPRESS DECLARATION

The Right

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).

Summary

Section 33 of the *Charter* allows provincial and territorial legislatures and Parliament to pass laws or provisions that temporarily infringe on the fundamental rights contained in sections 2 and 7 to 15 of the *Charter*. A law declared under section 33 can only be in effect for a maximum of five years, but the law can be renewed for additional five-year periods.

Question

Q: Is the notwithstanding clause a good idea or a bad idea? Discuss.



The Manitoba Association for Rights & Liberties
Phone: (204)947-0213 | Fax: (204)946-0403
507-294 Portage Avenue
Winnipeg, Manitoba R3C 0B9