

Charter of Rights and Freedoms and the Bill of Rights: A Comparison

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CHARTER OF RIGHTS AND FREEDOMS AND THE BILL OF RIGHTS: A COMPARISON

INTRODUCTION

This paper compares various aspects of the 1960 Canadian Bill of Rights with the 1982 Charter of Rights and Freedoms. The paper discusses the sections of the Bill of Rights which still seem to be in effect and the role of the courts in relation to the legislatures in defining rights in Canada.

THE RIGHTS PROTECTED IN THE "BILL" AND THE "CHARTER"

A. Both Instruments in Force

The Canadian Charter of Rights and Freedoms became part of the Constitution of Canada by virtue of the enactment of the Canada Act, 1982 by the Parliament of the United Kingdom. However, the Constitution Act, 1982, which contains the Charter of Rights and Freedoms, does not expressly repeal the Canadian Bill of Rights.⁽¹⁾ Some authors have argued, however, that the terms of the Charter which are similar to the terms of the Bill of Rights impliedly repeal those similar portions of the Bill of Rights.

(1) Stat. Can. 1960, c. 44.

Section 26 of the Charter provides some guidance in dealing with this question of whether the Bill of Rights is still in effect. Section 26 provides:

The guarantees 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.

This provision makes clear that the Charter is not to be regarded as expressly repealing the Canadian Bill of Rights. To the extent that rights or freedoms other than those guaranteed by the new Charter are guaranteed by the Canadian Bill of Rights, those other rights or freedoms remain in force. In other words, a person would be entitled to invoke the provisions of the Canadian Bill of Rights were they more favourable to him than those of the Charter.

Most of the provisions of the Canadian Bill of Rights have been reproduced in similar or broader language in the Charter. A close study of the Charter and the Bill of Rights indicates that there are no instances of actual conflict between the two instruments. This is, of course, not surprising as their purposes are so similar.

The effect of section 26 of the Charter seems to be to render of no force and effect those provisions of the Canadian Bill of Rights which purport to guarantee rights or freedoms and which are also contained in the Charter of Rights and Freedoms.

B. Entrenchment

The Charter is part of the Constitution so that it can be repealed or amended only by the process of constitutional amendment. This is explicit in section 52(3) of the Constitution Act, 1982, which provides that "amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada." The Constitution of Canada is defined as including the Charter.

The effect of this is that the Charter may be amended only in accordance with the general amending procedure established by section 38(1), which requires resolutions by the federal Parliament and by the

legislatures of at least two-thirds of the provinces having a total of at least 50% of the population of the provinces.

The Canadian Bill of Rights, by contrast, was not entrenched in the Constitution. It was enacted by the federal Parliament in 1960, and can be repealed or amended in the same way as it was enacted, that is, by another ordinary federal statute.

C. Application to Levels of Government

A major difference between the Charter and the Bill of Rights is that the Charter is binding on both levels of government, whereas the Bill is binding only on the federal level. While the wording of the Charter makes it clear that it applies to both levels of government, it is difficult to tell from the wording of section 32(1) whether the references to "Parliament" and "legislature" suffice to make the Charter applicable to all bodies exercising statutory governmental authority. This may include, for example, ministers, officials, municipalities, school boards, universities and administrative tribunals. The courts, in their interpretation of the provisions of the Charter to this point in time, seem to have given a wide reading to this section so that the Charter does apply to these agencies exercising governmental power.

The Bill of Rights does not purport to apply to provincial legislatures or governments. Since it is only a federal statute, it could not in any case have been given much effect over provincial laws or practices. Also, the wording of the Bill makes it perfectly clear that private activity is excluded. This is not so with regard to the Charter of Rights. Court decisions in the main, however, have limited the application of the Charter to governmental activity.

D. Limitation Clause

The Charter, by section 1, provides as follows:

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.

This section enables Parliament or a legislature to enact a law which has the effect of limiting one of the guaranteed rights or freedoms, providing that the law is "reasonable" and can be "demonstrably justified in a free and democratic society." Only a judicial decision will settle conclusively whether a particular law has transgressed the Charter or was saved by the limitation clause. This clause is really directed to the courts, to aid them in formulating more precise definitions of the scope of the guaranteed rights and freedoms.

The Bill of Rights contains no limitation clause comparable to section 1 of the Charter. Most of the freedoms and, in particular, the guarantees of equality before the law, freedom of religion, freedom of speech, freedom of assembly and association, are expressed in unqualified terms. This follows the pattern of the American Bill of Rights, which also lacks an explicit limitation clause. But the courts did not interpret the guarantees of the Canadian Bill of Rights or the American Bill of Rights as absolutes. They recognized the necessity to limit them in pursuit of other widely shared values. Thus a guarantee of freedom of speech must be qualified to accommodate laws against sedition, obscenity, fraud, official secrecy, defamation, and the like. Therefore, the position without a limitation clause is not very different from the position with such a clause.

E. Override Power

The Charter, by section 33, expressly permits the federal Parliament or a provincial legislature to exempt a statute from compliance with certain provisions of the Charter. If the declaration as worded in the Charter is used in an Act, the Act operates free from the invalidating effect of that provision of the Charter referred to in the declaration. This has become known as the override power, as it overrides the Charter in the sense of exempting the Act containing the declaration from the provisions of the Charter referred to in the declaration. The existence of this power means that the government which wishes to enact a limit to a

guaranteed right or freedom has the power to do so. However, the section of the Charter giving the override power applies only to section 2, fundamental freedoms, and sections 7-15, legal rights and equality rights. As well, the declaration invoking the override power lasts for a period of only five years and would have to be renewed to continue in effect.

The Canadian Bill of Rights also provides an override power. The Bill, by section 2, applies "unless it is expressly declared by an Act of Parliament of Canada that it shall operate notwithstanding the Bill of Rights." This is a more wide-ranging override power as it applies to all the sections of the Bill and there is no need for Parliament to be specific as to the particular guarantees which are being overridden.

F. Contents (2)

1. Political Civil Liberties

The Charter, by section 2, guarantees: (a) "freedom of conscience and religion"; (b) "freedom of thought, belief, opinion and expression, including freedom of the press and media and other media of communication"; (c) "freedom of peaceful assembly"; and (d) "freedom of association." These provisions are more elaborately expressed than their counterparts in section 1 of the Canadian Bill of Rights, but they probably do not make any substantive change.

What is new in the Charter is a right of every citizen to vote in elections to the House of Commons and provincial legislative assemblies (section 3); a provision that no House of Commons and no legislative assembly shall continue for more than five years except in certain specified circumstances (section 4); and a provision that there must be a sitting of Parliament and of each legislature at least once every 12 months (section 5).

Also new to the Charter are the "mobility rights" of section 6 which provides: (1) a right of every citizen "to enter, remain in and to

(2) See Appendix A.

leave Canada"; (2) a heavily qualified right of every citizen "to move to and take up residence in any province" and "to pursue the gaining of a livelihood in any province."

The Canadian Bill of Rights, by section 1, guarantees freedom of religion; freedom of speech; freedom of assembly and association; and freedom of the press. These civil liberties appear to be fully covered by the new Charter so that there would be no occasion and probably no right to invoke the Bill for their protection. The Bill says nothing about "democratic rights" (voting and legislative bodies) or "mobility rights." These are fields which the Charter solely occupies.

2. Legal Civil Liberties

In the Charter, legal civil liberties are contained within sections 7 to 14. The Charter guarantees a long list of legal civil liberties, including protection from unreasonable search or seizure (section 8); protection from arbitrary detention or imprisonment (section 9); the right to fair procedures on arrest or detention (section 10) and of being charged with an offence (section 11); protection from cruel and unusual treatment or punishment (section 12) and from self-crimination (section 13); and of the right to an interpreter (section 14). Except for section 8, which is new, many of these provisions are similar to provisions in the Canadian Bill of Rights, and some of the Charter provisions relating to criminal procedure go farther than the Bill provisions.

The Bill of Rights, in section 2(a), contains a prohibition against the arbitrary "exile" of any person. The Charter contains no reference to exile. However, the Charter's mobility rights include the right of every citizen to enter, to remain in and to leave Canada. This provision would appear to preclude the exile of a citizen.

Section 2(e) of the Bill provides that no law of Canada shall:

deprive a person of the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations.

The Charter contains no general right to a fair hearing for the determination of a person's rights and obligations. Section 7 of the Charter provides "that life, liberty and security of the person" may not be taken away "except in accordance with the principles of fundamental justice," but this section has no application where only economic interests are at stake. The other legal rights guaranteed in sections 8 to 14 of the Charter are often addressed to some aspect of a fair hearing, but most of them are applicable to criminal trials. A civil proceeding before a court or administrative tribunal is not subject to the requirement of a "fair hearing" or the application of "fundamental justice." This is a gap in the Charter and is, therefore, an area where the continued existence of the Bill is important. An adjudication authorized by federal law of a person's rights and obligations will continue to be subject to the requirement of "a fair hearing in accordance with the principles of fundamental justice."

A third legal right which is included in the Canadian Bill of Rights but omitted from the Charter is a "due process" protection of property. Section 1(a) of the Canadian Bill of Rights states:

The right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof except by due process of law.

In a similar Charter provision (section 7), a reference to enjoyment of property has been omitted and the requirement of due process of law has been replaced by a requirement of the principles of fundamental justice.

The omission of property rights from the list of protected rights is significant. Aside from any guarantee in the Bill and the Charter, there is no requirement in Canadian constitutional law that compulsory taking of property be effected by a fair procedure or that it be accompanied by fair compensation to the owner. Section 1(a) of the Canadian Bill of Rights undoubtedly imposed a requirement of a fair procedure, and may also have imposed a requirement of fair compensation.

The due process clause in the 14th amendment of the United States Constitution, which protects "life, liberty or property" has been held to impose a requirement of fair compensation for property

expropriated. It is possible that Canadian courts would give the similar language of section 1(a) of the Bill a similar interpretation. The Charter, by contrast, provides no guarantee of even a fair procedure, let alone compensation, for the expropriation of property. This is another area where the continued existence of the Canadian Bill of Rights is important. It provides protection for property owners if property is to be taken or otherwise injuriously affected under the authority of federal law.

3. Egalitarian Civil Liberties

Both the Charter and the Bill contain equality rights sections. Section 15(1) of the Charter is more sweeping than section 1(b) of the Bill, as the Bill speaks only of equality before the law, whereas the Charter speaks of equality before and under the law, equal protection and equal benefit of the law. These various phrases have undoubtedly been included in the Charter to overcome restrictive interpretations placed upon the wording in the Bill of Rights by Canadian courts. Section 15(1) of the Charter also specifies more prohibited grounds of discrimination than section 1(b) of the Bill; such matters as age, and mental or physical disability are in the Charter but not in the Bill.

Section 15(2) of the Charter also explicitly recognizes that statutes can contain affirmative action clauses. The Bill of Rights makes no reference to affirmative action so that it is possible that certain kinds of affirmative action programs could have been held contrary to the Bill.

4. Language Rights

The Charter, in sections 16 to 23, protects the use of the English and French languages. These provisions make English and French the official languages of Canada and New Brunswick and provide for their use in institutions of the government of Canada and New Brunswick. A language provision which is of general application to all provinces is section 23, which confers upon the English and French linguistic minority in each province "the right to have their children receive primary and secondary

school instruction in that language in that province," provided that the numbers are sufficient to warrant the public provision of the instruction.

The Canadian Bill of Rights contains no language rights except for the right to an interpreter.

5. Scrutiny by the Minister of Justice

The Canadian Bill of Rights contains an interesting enforcement clause which has no counterpart in the Charter. Section 3 of the Bill requires the federal Minister of Justice to scrutinize all proposed federal statutes and regulations in order to ascertain whether any provision is inconsistent with the Bill, and it requires that "he shall report any such inconsistency to the House of Commons at the first convenient opportunity."

While only one report of inconsistency has ever been made, it can be assumed that legislative proposals were sometimes modified by the Department of Justice before they achieved their final form. The scrutiny of federal statutes and regulations by the Department of Justice will no doubt be one of the effects of the Canadian Bill of Rights which will survive the enactment of the Charter. Presumably, this scrutiny will be broadened to encompass possible violations of the Charter as well as the Bill, although there is no legal compulsion for this to be done.

G. Conclusion

As discussed above, the Charter leaves the Bill with very little work to do. However, in three respects, the Bill contains provisions which go beyond the Charter. These are:

- (1) the Bill's imposition of the duty on the Minister of Justice to scrutinize proposed regulations and statutes and to report on compliance with the Bill;
- (2) the Bill's requirement of a fair hearing for the determination of rights and obligations; and
- (3) the Bill's protection of property rights through a due process clause.

THE ROLE OF THE COURTS AND LEGISLATURES IN DEFINING RIGHTS

The question of definition of rights, either by the courts or by the legislatures, in reality deals with the effect of a constitutionally entrenched Charter of Rights and Freedoms on the doctrine of parliamentary supremacy.

The doctrine of parliamentary supremacy as it exists in Canada was imported through the Constitution from Great Britain. In relation to rights and freedoms, parliamentary supremacy means in Great Britain that individual liberty has no constitutional protection. There is no fundamental law and there are no rights which are fundamental in the sense that they enjoy special constitutional and legal protection against interference by Parliament. The Magna Carta, the Petition of Right, the Act of Settlement, and the Bill of Rights can be changed or abridged by Parliament even though they deal with important principles underpinning British institutions. The main safeguards against the abuse of power by the government and Parliament are really not legally enforceable. They are the constitutional conventions and understandings whose observance depends upon the sense of fair play of ministers, the vigilance of the opposition and individual members of Parliament, the influence of a free press and of an informed public and the periodic opportunity of changing the government through free and secret elections. Therefore, in theory, Parliament can make any law whatsoever, no matter how seriously it curtails a cherished civil liberty.(3)

In Canada, this doctrine, until the coming into force of the Charter, applied but with certain important limitations. As Canada is a federal state, its Supreme Court, unlike Britain's highest court, may disallow a federal or provincial statute on the grounds that it is outside the jurisdictional authority of the enacting legislative body, as set down in the Constitution Act, 1867. Therefore, in Canada, Parliament and the provincial legislatures are each supreme within their specified areas of

(3) Anthony Lester, "Fundamental Rights: The United Kingdom Isolated?" Public Law, 1984, p. 47.

jurisdiction. With the advent of the Charter, which applies to both orders of government, a further check on parliamentary supremacy resulted: both new and old laws would not only have to be checked against the authority of the enacting legislature, but also with respect to their constitutionality against the protections set out in the Charter of Rights and Freedoms. Therefore, the Charter, as well as placing the judiciary squarely in the field of the protection of rights, raises an important question regarding its effect on the doctrine of parliamentary supremacy.

This question has resulted in a most interesting debate. The Constitution Act, 1982 provides that any law which is found to be inconsistent with the Charter is, to the extent of that inconsistency, of no force or effect. This, it is argued, will transfer ultimate public policy-making authority from Parliament to the judiciary, whose task it is to determine the inconsistency of laws in relation to the Charter.

The framers of the Charter attempted to deal with this argument in two remarkable sections. Section 1 allows a legislature to impose reasonable limits upon rights and freedoms, while section 33 allows legislatures expressly to declare that a statute may operate notwithstanding certain sections of the Charter. These are obvious attempts to achieve a balance between parliamentary supremacy and supremacy of the judiciary.

There seem to be three schools of thought as to the effect of the Charter on parliamentary supremacy. First, there are those who maintain that the Charter will have little or no effect on the relative roles of the judiciary and Parliament.⁽⁴⁾ It is argued that the Supreme Court of Canada will not attempt to become involved in policy-making as the judges of that Court have consistently taken the position that it is more appropriate for the legislature to make ultimate policy choices. This conclusion is based on the reluctance of the Supreme Court of Canada to apply the "Bill of Rights" of 1960 to federal legislation. The Supreme Court attempted to justify its position by stating that the Bill should be

(4) Berend Hovius, "The Legacy of the Supreme Court of Canada's Approach to the Canadian Bill of Rights: Prospects for the Charter," McGill Law Journal, Vol. 28, 1982, p. 31.

given a narrow interpretation both because of its language and its status as a non-constitutional document. However, these reasons are simply seen as excuses for the non-interventionist role which the Court would have assumed in any event. Those who subscribe to this point of view contend that the judiciary, especially those judges who sit on the Supreme Court of Canada, view the legislature as the appropriate institution to make ultimate policy choices and to work out the necessary compromises between conflicting societal values. This attitude is generally consistent with the traditions of the Canadian legal system.

Professor William Lederman envisages a more activist view for the judiciary. He argues that the entrenchment of the Charter will result in independent courts and democratic legislatures becoming partners and not rivals as the primary decision-makers in a very complex process. This partnership is recognized by the placement of both sections 1 and 33 in the Charter. Together, the judiciary and the legislature will have essentially coordinate status and complementary functions. While Professor Lederman recognizes that the Charter will mean an increase in the power of the judiciary, he maintains that "these two institutions must continuously seek and find reasonable points of equilibrium between themselves in a spirit of partnership as they perform their respective functions."⁽⁵⁾

This thesis can be expressed in the following terms: the court's aim in statutory interpretation affecting the Charter will be "the ascertainment of the shared community experiences generated by the social policy prescribed as law by Parliament."⁽⁶⁾ The policy-making role performed by the courts should conform to the goals being sought by Parliament. If the court decisions are genuinely based upon factors indicative of legislative policy, the courts will remain subordinate to Parliament.

(5) William R. Lederman, "The Power of the Judges and the New Canadian Charter of Rights and Freedoms," U.B.C. Law Rev. Charter Edition, 1982, p. 10.

(6) Leo Barry, "Law, Policy and Statutory Interpretation Under a Constitutionally Entrenched Canadian Charter of Rights and Freedoms," Can. Bar. Rev., Vol. 60, 1982, p. 237.

Therefore, the entrenchment of a Charter aids the courts because it sets out the fundamental values of the Canadian people and provides criteria for resolving statutory ambiguities. It also requires judges to scrutinize legislation in terms of its compatibility with fundamental values. Parliament will actually exercise more immediate control over judicial discretion because the Charter sets out policies which are to be applied as law. In this view, the Charter, rather than being a threat to the supremacy of Parliament, actually strengthens the ability of Parliament to control the development of law in conjunction with the judiciary.

Professor Peter H. Russell of the University of Toronto is typical of a third group who see the entrenchment of the Charter as a golden opportunity for the courts to become even more involved in policy-making to the point where their activity may in some instances supplant legislative policy-making. He points out that judicial policy-making has always been a built-in feature of our system of government. Policy-making in Canada involves a complex set of interactions among three branches of government - the legislature, the executive, and the judiciary - whose roles cannot be accounted for adequately by the theory that the legislature makes the laws, the executive gives them practical effect, and the judiciary applies them to individual cases. In many areas, the real core of policy is shaped, not by a decisive act of Cabinet or by the legislature, but by the way in which administrators and judges gradually give substance to laws day-by-day and case-by-case.⁽⁷⁾ An entrenched Charter will result in a significant shift in policy-making authority from the other branches of government to the courts, and especially to the Supreme Court of Canada.

Professor Russell states that judicial interpretation of the Charter will have three distinct features of considerable political importance. First, definitive decisions on the application of the sections of the Charter by the Supreme Court of Canada could put certain policies

(7) Peter H. Russell, "The Effect of a Charter of Rights on the Policy-Making Role of the Courts," Can. Public Admin., Vol. 25, 1982, p. 14-15.

beyond the reach of both levels of government. Second, the Supreme Court's interpretation of the Charter will necessarily have a centralizing impact on public policy in Canada. When interpreting some of its clauses, especially those pertaining to equality, mobility rights and bilingual education, the Court will be establishing national standards in policy areas which are subject to provincial legislative jurisdiction. Third, enforcement of a Charter entails not only judicial vetoes of legislation and executive actions, but also judicial ordering of actions which governments must take to meet the Court's understanding of the Charter's requirements.

To date, it would seem that the last two theories of judicial involvement seem to be fairly accurate. The courts have not been reluctant to declare that laws passed either by the federal Parliament or by provincial legislatures are unconstitutional on the basis that they violate the Charter. It would, therefore, seem to be safe to conclude that both the legislatures and the courts are involved in defining and protecting the rights of Canadians.

APPENDIX A

Below is a chart which demonstrates some ways in which the Charter differs from the 1960 Bill of Rights:

Charter of Rights and Freedoms

- Expressly overrides inconsistent statutes (subject to s. 1 of the Charter).
- Applies to federal and provincial governments.
- No exceptions specified.
- Contains an enforcement clause.
- Contains non obstante clause, but only for sections 2 (fundamental freedoms) and 7-15 (legal and equality rights); in addition it must be reinvoked every five years.
- Guarantees democratic, mobility and language rights.
- Does not guarantee property rights.
- Expanded legal rights, especially for criminal defendants.
- Expanded equality rights

Bill of Rights

- Does not override them.
- Applies only to the federal government.
- Exceptions specified (e.g., War Measures Act).
- No enforcement clause.
- General non obstante clause.
- Does not guarantee them.
- Guarantees property rights.
- Provides some legal rights.
- Provides some equality rights.