

## **Law, State, & Citizen** **Class 6 - Lecture**

### **Scope and Interpretation of the Charter**

#### **Outline for Today:**

- Part 1: Administration
- Part 2: A Short History of the Canadian Constitution
- Part 3: Monahan on the Constitution
- Part 4: Who and What is Bound by the Charter?

#### **A short History of the Canadian Constitution:**

- Canada was 'born' on July 1, 1867
  - As a society 'Canada' had existed for thousands of years, since the first indigenous people lived together on the land.
  - Nation state was founded.
- Canada does not have a single document identifiable as "the Constitution"
  - Canada's constitution is a group of documents:
    - The Constitution Act 1867, the Constitution Act 1982 + 30 other documents.
    - S.52 Constitution Act 1982 itemises this list:
      - <https://www.justice.gc.ca/eng/csj-sjc/rfc-dlc/ccrf-ccdl/check/art521.htm>

#### art521.htm

- Not exhaustive: unwritten parts: conventions, principles (rule of law, democracy, federalism, judicial independence, protection of minorities).
  - You can thank the UK for that. They do not have a written constitution. They have a lot of written documents but its a bunch of Radom stuff. It is pretty messy. Elements of constitution not being written is something shared with the UK, things unwritten include conventions. It is more simple than the UK though.
    - This is flexible not having a written constitution, you get into trouble with constitutions like America when you are interpreting and figuring out what they meant 100s of years ago. The British seem implicitly have this understanding that things change and evolve. A constitution is like an unwritten code of conduct, where everyone knows the rules of conduct, once written you than have something less flexible and out of date.
    - If something is important, you will write it down.
- Generally, "Canadian Constitution" refers to the contents of the Constitution Act 1867 & the Constitution Act 1982.
- Convention and principles:
  - Rule of law
  - Democracy
  - Federalism
  - Judicial independence
  - Protection of minorities
  - These are not just written in our constitution. The entirety of the constitution is not written down.

#### **Confederation:**

- Federation: a political structure in which power is shared between central government and local (provincial) governments.
  - Canada is obviously a federal state.
- British North America (BNA) Act 1867: the law that created the country of Canada.
  - Not a colony but not fully independent.
    - Canada had an unusual status.
    - No such thing as Canadian citizenship.
  - "Dominion of Canada".

- No such things as Canadian citizenship, GB was still in charge of foreign affairs, no Supreme Court (Privy Council in London was supreme — decided last Canadian case in 1949).
  - That lasted a long time. The last case decided by Privy Council was 1949.
- Two dominant themes in Canadian constitutional history 1867 - 1917:
  - Division of powers between federal & provincial governments.
    - This theme, how do we balance the power between federal government and various provincial governments.
  - Increasing independence from GB (Great Britain).

### The Quest for 'Patriation' (1):

- 1931: Statute of Westminster
  - The UK would no longer pass laws for the 'dominions' unless the dominion requested and consented to the law.
    - This is some degree of autonomy but it is fragile. What happens if they request a law and UK decides not to pass it. UK is still top dog, this is not between equals.
    - Westminster does not give Canada a domestic amending formula.
- However, amending the BNA Act 1867 still required GB parliament to pass parliamentary legislation.
  - Need for a "domestic amending formula".
  - Canada is in no way independent in terms of laws it can create for itself.
- Canadian Bill of Rights Act, 1960:
  - Limited: not constitutional law, was it binding on future governments?
  - Only applied to the federal government, strengthened the case for a constitutional bill of rights.
    - All things missing from bill of rights became that much more obvious. Certain things were conspicuous by their absence.
- 1980 Quebec referendum on independence.
  - Pierre Trudeau's 'No' side done c. 60%-40%
  - Sparked intense period in constitutional negotiations and proposal.
    - It seemed like the state of affairs, and the on going dependence on Westminster was clearly unsatisfactory.

### The Quest for 'Patriation'(2):

- Following the 1980 Quebec independence referendum, Pierre Trudeau promised:
  1. 'Patriation' of the Canadian Constitution.
    - To bring the constitution home to Canada, sever the dependence on Westminster in London.
  2. A domestic amending formula.
    - No need for recourse to Westminster.
  3. A Charter of Rights and Freedoms.
    - In response to short coming of the bill of rights.
      - Have rights and they will be enshrined in a constitution.
- Trudeau proceeded unilaterally with opposition from provincial premiers.
  - <http://www.cbc.ca/archives/entry/trudeau-proceeding-unilaterally>
    - The relationship between federal government and provincial governments has been a fraught relationship. When Trudeau promises all this, the provinces are worried about having this imposed upon them unilaterally and Trudeau proceeds unilaterally.
- Joint Committee of the Senate and Commons worked furiously between November 1980 and February 1981.
  - **Process remarkable for citizen participation:** committee heard from nearly 100 witnesses, many special interest groups, televised hearings, received hundreds of written submissions.
    - Citizen participation is desired and encouraged.
    - There was an engaged, grassroots citizenry. The point is this was not just a top down process, it was not an elite process.
- However, Supreme Court ruled that **substantial consent** of the Provinces was required.

- If this went ahead, the substantial consent of the provinces was needed. It did not need to be unanimous.

### **Constitutional Reform Agreed (Nearly):**

- Following the Supreme Court's decision, the federal government and the provinces went back to the negotiating table.
- November 1981: Agreement reached between federal government and all the provinces except Quebec.
  - BUT all that was required was substantial consent not universal.
- Legally, Quebec's consent was not required so the Constitution applies equally in Quebec as in all other provinces.
- Constitutional reform package then sent to GB Parliament.
  - Canada Act 1982 receives royal assent.
  - The last time Westminster needed to be involved.

### **Canada Becomes A Sovereign Nation:**

- April 17, 1982 the Constitution Act 1982 came into effect.
  - Properly independent from Britain.
  - BNA renamed Constitution Act 1867.
  - First 34 sections of Constitution Act 1982 contain the Canadian Charter of Rights and Freedoms.
    - This is happening in a global context, where human rights are being protected by constitutions.
  - <http://www.cbc.ca/archives/entry/proclamation-of-canadas-constitution>
- Global context: post-World War 2 growing support for constitutionally protecting human rights.
  - Eg. UNDHR 1948, ECHR 1950, US Civil Rights Act 1964.

### **Monahan on the Charter:**

- Outlines ideological debate over the proposed charter in 1980–82: (pp.387–88).
  - Allan Blakeney, Premier of Saskatchewan
    - Believed the state was appropriate instrument for achieving social justice & equality.
      - Worried about judicial activism, anti democratic potential of justice.
      - Gives a critique of the charter from the left, thought charter would make it harder for governments to pursue progressive, redistributive policies.
      - Get in the way of redistribution.
  - Sterling Lyon, Premier of Manitoba
    - Feared Charter would undermine parliamentary sovereignty & the role of the monarchy in Canada.
      - Opposed to charter.
      - Parliamentary sovereignty is being undermined.
  - Peter Lougheed, Premier of Alberta
    - Feared Charter would undermine autonomy of Provinces.
      - Worried the charter would not be sufficiently sensitive to the differences of the provinces and the limitation clauses.
      - The charter is going to squish the provinces. Obviously Quebec didn't sign up and it was being imposed upon them.
- Provinces had concerns over appropriate balance between judicial and political power.
- On the other hand, interest groups and activists were not concerned by the potential increase in judicial power associated with entrenched charter of rights (389) – on the contrary they were enthusiastic.

### **The Charter's Objectives:**

- Monahan p.290
  - Nation-building.
    - Sense that Canada is truly one.

- Emphasised common values of citizenship.
- Entrenched rights belonging to all Canadians.
- Diminish provincial difference.
- Express idea that Canadians enjoy a collective political identity.
- Monahan argues that, on balance, the Charter has been a success.
  - These things have happened, the charter era is a success. The worries haven't transpired but goals have.

### **How does Monahan justify this view of the Charter as a success?**

- The Charter has not been used to justify dismantling or rolling back the welfare state as early critics had feared it might (394)
- Charter has not shackled government economic / social welfare policy.
  - Generally steered clear of socio-economic policy, but see *Chaoulli v. Quebec* [2005]
- Traditionally disadvantaged groups have been successful using the Charter
  - But critics have identified the Supreme Court as excessively liberal (396)
    - 49 out of 81 cases (at the time of Monahan's writing) found to be unconstitutional or inconsistent with Charter or s.35 for substantive (rather than procedural) reasons (399)
    - "undemocratic judicial activism" (396)
  - Monahan argues in response that the Charter was the product of a democratic process and that it has made Canadian society more democratic (397).

### **Monahan's Overview:**

- Charter = ss.1-34 of the Constitution Act 1982.
  - Charter of rights and freedoms.
  - Distinct from s.35 on Aboriginal Rights
    - Not part of the charter.
  - [http://laws.justice.gc.ca/eng/Const/Const\\_index.html](http://laws.justice.gc.ca/eng/Const/Const_index.html)
- S.32: Applies to all branches of government, federal, provincial, executive, administrative (405).
  - Important because its to whom the charter applies to.
  - But not private persons, private litigation, universities, hospitals.
  - But drawing the line can be complicated...
- S.1: Rights are not absolute (410).
  - Distinct about Canadian Charter.
  - Two steps: (1) Is there a violation? (2) Can it be justified?
    - Burden of proof that there is no violation rests with government (411).

### **Monahan: "The Override":**

- S.33: Key compromise that won over the provinces (417).
  - This is how provinces were connived into getting on board with the constitution.
  - A province override.
  - A key difference between Canadian Charter and US Constitution.
    - US does not have a state override.
  - Ordinary legislation can override ss. 2 & 7-15 of the Charter.
  - 5-year limit.
  - Not subject to judicial review.
  - Used very rarely.
    - Federal government never used the override.
    - Only Saskatchewan, Quebec, and Alberta had used it.
      - Quebec is the only one to use it where there was a consequence of doing it.
    - <https://www.lawnow.org/charter-notwithstanding-section-33/>
- Monahan argues:
  - "While the override is likely to continue to prove controversial [...] the fear of the critics may well have been overblown?" (420).
    - The over ride is only rarely threatened to be used, so he is pretty right.

- Do you agree? Would you like to see s.33 repealed or amended? If you would amend it, how would you do so?
- See: 417-421

### **Monahan: Categories of Rights:**

1. Fundamental Freedoms (s.2)
  - Freedom of thought, opinion, religion, association...etc.
2. Democratic Rights (ss. 3-5)
3. Mobility Rights (s.6)
  - The right of citizens to enter and remain in Canada, to move between provinces, and pursue livelihood in any provinces.
4. Legal Rights (ss.7-14)
5. Equality Rights (ss. 15 & 28)
6. Language Rights (ss.16-23)
  - (What is missing? Socio-economic rights)
    - Not a surprise, rights to food, shelter, employment... those rights are missing. Why? Well that's a whole other course and lecture. One way to understand why they are not here is to recognize that in 1882 of the cold war, socio economic rights sounded like socialism. Things liberal democracies were not about. Constitution in the soviet block you will find these kinds of rights codified.
    - (See: 421-437)

### **What and Who is Bound by the Charter?**

- See section 32 — Parliament, legislatures, government
- 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.

This is more complicated than it seems, no subject matter is automatically excluded from charter application. The charter can apply to universities and hospitals where a certain threshold is met.

- They are not automatically excluded and free from charter scrutiny....this is a grey area.

### **What and Who is Bound by the Charter?**

- Evolving picture, but generally s.32 seen as:
  - 1) No subject matter, such as policy or foreign affairs, is automatically excluded from Charter application
  - 2) Charter applies to executive branch of gov, including the administration, insofar as the institution is directly controlled by Cabinet or central government agencies
    - E.g. Charter can even apply to University and Hospital actions where above threshold is met.

### **What and Who is Bound by the Charter?**

- 3) Charter applies to bodies implementing specific government policies
- e.g. 1997 Eldridge v. BC: Charter applied to Medical Service Commission, a 9-member panel of gov and private reps created to administer benefits under BC health care legislation.
- Supreme Court held that failure to provide deaf people with interpreters as an insured benefit under provincial health care legislation violated their s. 15 right to equality.
- Legislation must thus be administered to provide free sign language interpreters for deaf people.
  - Bodies who have to implement policy are bound by the charter as well.

### **What and Who is Bound by the Charter?**

- 4) Charter applies to:
  - a) legislation, including legislation regulating private activity (e.g. Vriend v Alberta 1998 private religious college dismissed lab coordinator because he was gay)

- b) those functions of legislative assemblies that are not excluded by Parliamentary privilege.
- c) All bodies exercising coercive statutory powers.

The charter also applies to legislation that regulates private activities.

### **What and Who is Bound by the Charter?**

- 5) Charter applies to the courts when:
  - a) they issue public orders on their own initiative, and
  - b) their decisions involve the executive branch, including prerogative power (e.g. going to war), or the legislative branch.

### **When is Rights Restriction Justified?**

- See s. 1: The Charter 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.
  - Rights can be limited, and overridden but only to an extent that can be justified in a free and democratic society.
- Another key difference of Canadian Charter vs. other constitutional bills of rights
- Step 1: claimant shows Charter applies under s. 32
- Step 2: claimant shows Charter right violated
- Step 3: gov has to show violation justified (reasonable) under s. 1.

### **When is Rights Restriction Justified?**

- The more stringent the s. 1 requirement, the greater the force of Charter protections
- Key two-part s. 1 test is from R v. Oakes 1986:
  - 1) Is objective of the legislative provision breaching the Charter sufficiently important to justify breach?
    - Usually, answer is yes.
    - Is it important enough to breach a charter right, usually yes.
  - 2) Are means implementing objective proportional?
    - Harder to answer

### **When is Rights Restriction Justified?**

- 2) Are means implementing objective proportional?
- Three-part test here:
  - A) Are means chosen by legislature rationally connected to objective?
    - Usually, answer is yes.
  - B) Do means infringe Charter right as little as reasonably possible?
    - Harder to answer.
  - C) Do benefits of objective outweigh costs of harm caused by Charter breach? (e.g. collective safety vs. individual fair trial rights).
    - Harder to answer.
    - Courts have to quantify these things.

### **How are Remedies Enforced?**

- S. 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.
  - Sets out how remedies will be enforced.

### **How are Remedies Enforced?**

- If provision is ambiguous, court may give it an interpretation that is consistent with Charter:
- But if court can't do that, remedies include:
  - Declare provisions invalid.
  - Declare it invalid, but give government time to fix it.
  - Sever unconstitutional portion.
  - Read in provision that was unconstitutionally omitted.
  - Declare exemption (hasn't happened yet).

- Award other remedies, where s.24 is invoked.

**Monahan's Conclusion:**

- Charter era in "relative infancy" (437).
  - Canada is very young too.
- The enactment of the Charter represents one of the most significant developments in Canada in the 20C." (437)
- "Canadian courts have thus far largely escaped the kinds of controversies that have surrounded the constitutional role of the US Supreme Court."
  - Attributes this to the fact that the Court has "carefully balanced competing interests in difficult cases [...] to arrive at compromise results"(437)
  - Will this remain the case?