

IN BRIEF

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

STUDENT HANDOUT

THE CANADIAN CONSTITUTION AND THE CHARTER

The *Canadian Constitution* sets out the fundamental rules and principles of Canadian society, including how the country will be governed, processes for making and changing laws, how resources and political power will be shared and even how the *Constitution* itself can be amended. It is the most powerful law in Canada, and apart from very specific exceptions (see below), all other laws must be consistent with these principles. It also sets out the fundamental rights and freedoms enjoyed by persons in Canada in a special section called the *Canadian Charter of Rights and Freedoms*.

The *Charter* was enshrined in the *Constitution* with the passage of the *Constitution Act, 1982*. It governs the relationship between individuals and the government, ensuring that governments cannot pass laws or enact policies that infringe unfairly upon our rights and freedoms. Issues dealing with rights and freedoms in relationships between individuals – for example, in the workplace – are often protected by separate legislation, such as provincial human rights codes. In this sense, it acts as a restraint upon government power. Prior to the *Charter*, there was no guarantee in

Canada that rights and freedoms would not be taken away by legislation. We had the *Canadian Bill of Rights*, but as a statute, it could be amended or repealed by Parliament. In other words, if a given government was opposed to a particular right or freedom, it could simply vote in Parliament to have it changed or removed. By enshrining these rights and freedoms in the *Constitution*, they cannot simply be repealed by ordinary acts of Parliament or provincial legislatures.

RIGHTS AND FREEDOMS

Different rights and freedoms are set out in different sections of the *Charter*. Some of the key areas they address are as follows:

S. 2 - Fundamental Freedoms

Fundamental freedoms can be understood as rights so basic and essential to the quality of life that they can only be infringed upon by government in the most dire of circumstances, or when their exercise threatens the fundamental freedoms of others. This section protects:

- Freedom of conscience and religion (s. 2(a));
- Freedom of thought, belief, opinion and expression (s. 2(b));
- Freedom of peaceful assembly (s. 2(c)); and
- Freedom of association (s. 2(d)).

Ss. 3-5 – Democratic Rights

These sections set out the rights and provisions concerning the Canadian political process and the exercise of democracy for Canadian citizens. These include:

- The right of citizens to vote and run for government office (s. 3);
- The guarantee that no legislative body or House of Commons will be in power for more than five years without a democratic election, except in very limited circumstances (s. 4); and
- The guarantee that Parliament and every other legislature will be working for a set period (a “sitting”) out of every 12 months (s. 5).

S. 6 – Mobility Rights

Mobility rights concern the freedom of Canadian citizens to be, and move within, Canada. Citizens have the right to:

- Travel in any province or territory;
- Work in any province or territory; and
- Enter, remain in, and leave Canada.

Note that while the latter applies only to Canadian citizens, the provisions for travelling and working in Canada also apply to permanent residents. In some professions, such as teaching and practicing law, provincial standards and certifications vary, and individuals must meet these to work in these jurisdictions.

Ss. 7-14 – Legal Rights

Legal rights refer to the ways in which persons in Canada are protected in encounters with

the justice system. Covering eight individual sections of the *Charter*, these are multifaceted and complex. Among other protections, everyone has the right:

- To life, liberty and security of the person, and to not be deprived of these except under special circumstances (s. 7);
- To be secure against unreasonable search or seizure (s. 8);
- To not be arbitrarily detained or imprisoned (s. 9);
- To retain and instruct a lawyer to represent them in justice proceedings (s. 10);
- To have a trial within a reasonable time period (s. 11(b));
- To be innocent until proven guilty (s. 11(d));
- To not be subjected to any cruel or unusual treatment or punishment (s. 12).

S. 15 – Equality Rights

Individuals in Canada have a right not to be discriminated against by the government or government agents based on a set of grounds that relate to being members of certain communities and social identity groups. Many of these groups were originally included in this section (enumerated grounds), while others that have since been added by the courts (analogous grounds).

- **Enumerated grounds** include race, national or ethnic origin, colour, religion, sex, age and mental or physical disability.
- **Analogous grounds** currently include sexual orientation, marital status, citizenship and Aboriginality-residence.

Ss. 16-22 – Official Languages

These sections guarantee the use of both English and French in federal government institutions and set out special provisions relating to the use of both official languages in New Brunswick, Canada's only officially bilingual province.

S. 23 – Minority Language Education Rights

This provides a right for speakers of either official language to have their children receive primary and secondary instruction in that language, even if they are a linguistic minority in their community. Furthermore, wherever an official linguistic minority community comprises a large enough proportion of students, that community has the right to have that education paid for by public funds.

Ss. 24 and 52 – Enforcement of Guaranteed Rights and Freedoms

Section 24 allows parties to bring forward a claim to the courts when they feel their rights are being violated, and s. 52 states that the *Constitution* of Canada is the supreme law of the land, meaning that "any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect". These enforcement provisions are discussed in greater detail below.

APPLICATION OF THE CHARTER

Section 32 of the *Charter* states that the *Charter* applies to "the Parliament of Canada in respect of all matters within the authority of Parliament..." and "to the legislature and government of each province in respect of all the matters within the authority of the legislature of each province."

In the early years of the *Charter*, there was considerable debate about how to interpret the wording of s. 32. In the case of *RWDSU, Local 580 v Dolphin Delivery Ltd*, the SCC laid the matter to rest by confirming that the *Charter* applies only to government action and not to disputes between private individuals. In particular, the *Charter* applies to:

- **Governmental actors** – this includes entities controlled by the government and those that exercise governmental functions (e.g. police).
- **Governmental acts** – this includes entities implementing government programs and those exercising statutory powers (e.g. law societies, provincial human rights commissions). The *Charter* also applies to governmental *inaction* wherein a government is required to act and fails to do so.
- **Legislation** – the *Charter* applies to all laws and regulations including federal and provincial statutes, municipal bylaws and other delegated legislation that is authorized by law (e.g. rules of professional conduct).

While the *Charter* does not apply to actions between private individuals, the Court ruled in *Dolphin Delivery* that the common law should be developed in a manner consistent with the fundamental values enshrined in the *Constitution*, and it is therefore still relevant to private litigation.

Furthermore, there are territorial limits on the application of the *Charter*. International law prohibits the extraterritorial application or enforcement of domestic laws and therefore foreign governments are not bound to comply with the *Charter*. For example, a Canadian charged with a criminal offence in a foreign country cannot complain that the manner in which foreign police officers gathered evidence did not comply with the *Charter*. However, the *Charter* does apply to the actions of Canadian government officials and police conducting investigations outside of the country.

CLAIMING CHARTER RIGHTS

Another significant issue with respect to application of the *Charter* is who can invoke the rights and freedoms protected in the *Charter*. In order to determine who is included in a particular right or freedom, it is important to read the *Charter* provision carefully because the rights and freedoms do not apply equally to all persons. Some *Charter* rights such as freedom of religion under s. 2(a), freedom of expression under s. 2(b), and the right to life, liberty and security of the person under s. 7 are framed as “everyone has the right...”. Others, such

as the legal rights in criminal and penal matters under s. 11, are available to “any person”, or to “an individual,” as in the equality guarantee in s. 15. Some rights are only available to Canadian “citizens” such as the mobility rights protected under s. 6 of the *Charter*.

Corporations can also invoke *Charter* rights that are deemed appropriate for corporate entities, such as freedom of expression. However, the equality rights in s. 15 and the right to life, liberty and security of the person under s. 7 have been held to be only available to human beings.

LIMITATIONS: SECTION 1 AND THE OAKES TEST

Section 1 holds that the rights enshrined in the *Charter* are not absolute. It states:

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.

If a court finds that a piece of legislation or government conduct infringes a *Charter*-protected right, it must carry out an analysis to determine whether that infringement is justifiable. The legal questions through which this determination is made is called the ‘*Oakes test*’. The key question is whether the infringement is a “reasonable limit prescribed

by law” that is “demonstrably justified in a free and democratic society”. If the infringement is a reasonable limit, the legislation or conduct is “saved” under s. 1.

The government has the burden of proof to show that the violation is justified under this section in order to have the law, statute or action in question upheld by the courts. If it cannot prove that the law, statute or action in question is justified under s. 1, the courts will strike it down, or read down the statute or law so that it complies with the *Charter*. For example, hate speech is currently restricted or regulated by both federal and provincial laws. Although the restriction on hate speech violates s. 2(b) of the *Charter*, it is saved under s. 1 as a reasonable limit in a free and democratic society.

For further discussion of s. 1, see the OJEN resource, *In Brief: Section 1 of the Charter and the Oakes Test*, available here: <http://ojen.ca/resource/980>.

NOTWITHSTANDING CLAUSE

One unique and controversial aspect of the *Charter* is s. 33 – the ‘notwithstanding clause’. It reads:

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.

Section 33, therefore, allows Parliament or provincial legislatures to override some *Charter*-protected rights. It can only be used to override rights found in s. 2 (fundamental freedoms), and ss. 7-15 (legal rights and equality rights). It cannot be used to override any other sections.

This clause gives Parliament and the provinces a limited ability to pass laws that conflict with particular *Charter*-protected rights and freedoms. Parliament or provincial legislatures relying on this clause must expressly declare that it will override the *Charter* and renew this declaration at least once every five years if they intend for it to remain in force.

Despite the potential for this clause to limit the extent of Canadian rights and freedoms, outside of Quebec, the clause has only been relied upon on three occasions since the *Charter* was enacted in 1982. In the Yukon Territory in 1982, it was used in the *Land Planning and Development Act*, but this statute was never brought into force. In 1988, the Saskatchewan legislature used it in a law that forced striking workers back to work, but this legislation was later found not to violate workers’ freedom of association, so the use of s. 33 had been unnecessary. Finally, it was used by the provincial government of Alberta in 2000 in an attempt to amend that province’s *Marriage Act* to limit the definition of marriage to opposite-sex couples. This attempt failed, however, when the Supreme Court of Canada ruled that the definition of marriage is within federal, not provincial, jurisdiction.

ENFORCEMENT OF RIGHTS

There are two provisions in the *Charter* which deal with the enforcement of rights: s. 24 and s. 52.

Section 24 of the *Charter* gives people the power to apply to courts whenever they feel their rights are being infringed or denied and ask for a remedy. It states:

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.

Section 24(1) allows courts to grant any remedy the judge considers “appropriate and just” in the circumstances of a case. Section 24(2) specifies when trial judges can or should exclude evidence that was obtained (normally by the police) in violation of an individual’s *Charter* rights. For example, if the police violate an accused person’s right to be free

from unreasonable search and seizure, the accused person can ask a judge to exclude any evidence found during the search.

Section 52 of the *Charter* is the second remedial section. It states:

The *Constitution* of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the *Constitution* is, to the extent of the inconsistency, of no force or effect.

Because the *Charter* is a part of the Canadian *Constitution*, it is more powerful than any federal or provincial statute. As a result, if a court finds that a particular statute is in conflict with the *Charter* or violates a *Charter* right, the statute (either in whole or in part) could be declared invalid. It is also possible for the courts to ‘read down’ the statute. ‘Reading down’ simply means that if there are multiple ways in which to interpret the meaning of a statute, the court will interpret the statute according to the meaning that is not in violation with the *Charter*. In some circumstances, courts can also ‘read in’ words to the legislation to make it consistent with the *Charter* rather than striking it down.

Sometimes, the court will issue a ‘suspended declaration of invalidity’. When this happens, although the court has found the statute, or a provision in it, to be invalid, the law nevertheless remains in force for a set period of time to allow the relevant legislature to change the law to bring it into compliance with the *Charter*.

AMENDING THE CHARTER

Despite being enshrined in the *Constitution*, the *Charter* can be modified. However, the rights and freedoms it guarantees were considered so vital to the fabric of Canadian society that its authors created a strict rule that governments must follow in order to do so. Often called the “amending formula”, changes to the *Charter* require the federal government and seven of the ten provincial legislatures to approve of the change, and these provinces must account for 50% of the total Canadian population.

DISCUSSION QUESTIONS

1. When was the *Canadian Charter of Rights and Freedoms* made law in Canada?
2. Which section of the *Charter* guarantees the right of Canadians to gather with others in peaceful protest?
3. True or false: the *Charter* protects the right to not face racial discrimination when seeking an apartment.
4. What is the most significant difference between the *Canadian Bill of Rights* and the *Charter*?
5. What is the main difference between an ‘individual’ and a ‘citizen’?
6. Why do you think the authors of the *Charter* included the category ‘analogous grounds’ in the section on equality rights?

7. The *Charter* specifically prohibits government discrimination on the basis of age, yet there are laws against drinking, driving and voting that clearly discriminate against young people.

- a. Under what section of the *Charter* is this infringement saved?
- b. Is this discrimination justifiable in your opinion?

8. In your opinion, is it a threat to rights and freedoms that the *Charter* can still be overridden via s. 33? Explain.

9. Why is it significant that s. 33 cannot ever apply to democratic rights, such as the right to vote in a democratic election, at least once every five years?

10. Review the formula for amending the *Charter*. Does it do enough to ensure that a proposed amendment has the support of the Canadian public?

TOP FIVE 2009

CANADIAN FEDERATION OF STUDENTS v GREATER VANCOUVER TRANSPORTATION AUTHORITY, 2009 SCC 31

Date Released: July 10, 2009 <http://scc.lexum.org/en/2009/2009scc31/2009scc31.html>

This case dealt with whether a regulation banning “political” advertisements on buses violated freedom of expression under s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

Facts

The public transportation authorities in British Columbia permit and generate revenue from commercial advertisements placed on the inside and outside of buses that operate in the province. The policies prohibit advertising that presents politically-oriented viewpoints, meetings, or organizations.

Transit Authorities’ Advertising Policies

2. Advertisements, to be accepted, shall be limited to those which communicate information concerning goods, services, public service announcements and public events.

7. No advertisement will be accepted which is likely, in the light of prevailing community standards, to cause offence to any person or group of persons or create controversy.

9. No advertisement will be accepted which advocates or opposes any ideology or political philosophy, point of view, policy or action, or which conveys

information about a political meeting, gathering or event, a political party or the candidacy of any person for a political position or public office.

In the summer and fall of 2004 the Canadian Federation of Students, British Columbia Component (CFS) and the British Columbia Teachers’ Federation (BCTF) attempted to purchase advertising space on the sides of buses operated by the transit authorities. The CFS wanted to encourage more young people to vote in a provincial election scheduled for May 17, 2005 by posting ads about the election on buses. In accordance with their advertising policies, the transit authorities refused to post the advertisements of the CFS and BCTF, which promoted an upcoming provincial election. The CFS and BCTF challenged the advertising policies on the grounds that articles 2, 7 and 9 violated their freedom of expression as protected under s. 2(b) of the *Canadian Charter of Rights and Freedoms*.

Canadian Charter of Rights and Freedoms

2. Everyone has the following fundamental freedoms:

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

The trial judge dismissed the action, finding that the plaintiffs' right to freedom of expression had not been infringed. The majority of the Court of Appeal for British Columbia reversed the judgment and declared the relevant sections of the advertising policies to be of no force or effect. The decision was appealed to the Supreme Court of Canada (SCC).

Decision

Whether the *Charter* Applies to the Transit Authorities

The first issue addressed by the SCC was whether the transit authorities should be considered "government" within the context of the *Charter*. In order to make a claim under the *Charter*, the infringing body or organization must be considered part of the government.

Canadian Charter of Rights and Freedoms

32. (1) This *Charter* applies

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

The Court held that the *Charter* applies to government in all of its activities, as well as the activities of all agencies that are controlled by government. Additionally, the *Charter* applies to organizations that are controlled by government if their activities are "governmental in nature." Here, the transit authorities were considered "government" because the day-to-day operations were controlled by government; thus, the transit authorities had to act in accordance with the *Charter*.

Whether Freedom of Expression is Infringed

The Court then assessed whether the expression on the sides of buses should be protected by s. 2(b) of the *Charter*. Canadian courts have held that not all methods or locations of expression enjoy protection under s. 2(b); however, the courts have also recognized that s. 2(b) protects an individual's right to express him or herself in certain public places.

The Court held that buses are used for commercial expression and that the advertisements do not impede the primary function of the bus as a vehicle for public transportation. The Court held that the bus is a public place and passengers are exposed to the messages on the sides of a bus in the same way as a message on a utility pole or in any public space in the city. Therefore, advertisements on public buses are expressions protected by s. 2(b) of the *Charter* and the transit authority policies limited freedom of expression, contrary to s. 2(b).

Whether Transit Policies Reasonably Limit Freedom of Expression

The Court also assessed whether the limit on freedom of expression was justified under s. 1 of the *Charter*, as an infringement that is reasonable in a free and democratic society.

Canadian Charter of Rights and Freedoms

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

In determining whether the infringement of s. 2(b) was justified under s. 1 of the *Charter*, the court applied the *Oakes* test, which is used to weigh whether a particular limitation on an individual's rights and freedoms should be allowed in a free and democratic society. It seeks to balance the benefits of the purpose of the law with the harmful effects of the infringement. The *Oakes* test requires the government to convince the court that the law is justified:

- (1) There is a "pressing and substantial" objective that justifies infringement of the right;
- (2) The way it has chosen to obtain the objective is reasonable, which involves a three-step "proportionality test":
 - a. The measure used must be carefully designed, or "rationally connected", to achieve the objective;

- b. The measure used should impair the right as minimally as possible; and
- c. The negative effects of the measure must be balanced by the actual benefits of that result from it.

In applying the *Oakes* test, the Court ruled that while the stated purpose of providing "a safe, welcoming public transit system" is a sufficiently important public purpose to allow for limits on freedom of expression, the limits imposed by the regulations are not rationally connected to that purpose. The Court found that the transit authorities' policies set out a blanket exclusion of political advertising, and held that this exclusion was so wide that it did not minimally impair the right to freedom of expression. In other words, the court found that the infringement on freedom of expression was not justified under s. 1 of the *Charter*.

Therefore, the advertisement policies were not a justifiable limit and, as a result of the violation of s. 2(b), the policies were struck down as invalid. This meant that the political advertisements qualified as a constitutionally protected form of expression and were therefore allowed on the buses.

DISCUSSION ISSUES

1. Writing for the majority, Justice Deschamps noted that the ban on political advertising was not rationally connected to the aim of providing a “safe, welcoming public transport system”:

“It is not the political nature of an advertisement that creates a dangerous or hostile environment. Rather, it is only if the advertisement is offensive in that, for example, its content is discriminatory or advocates violence or terrorism – regardless of whether it is commercial or political in nature – that the object of providing a safe and welcoming transit system will be undermined.”

Do you agree or disagree with her statements? Why or why not? Can you think of examples where the government could reasonably limit bus advertisements?

2. The courts have progressively recognized more public places as having protection under s. 2(b) of the *Charter*, including utility poles, town squares and the sides of buses. What implications do you think this ruling will have for expression in other public places? Can you think of examples of public places where freedom of expression might come into play?

3. In examining freedom of expression under the *Charter*, the location where the expressive activity takes place matters. Does the audience matter? Does it make a difference that bus riders are a captive audience and may have difficulty avoiding the advertising? Consider the demographic of bus passengers and the ability to choose whether to take public transportation or not.

4. Discuss whether a commercial aspect to freedom of expression exists? In this case, removing the political ban will likely increase the advertising revenues for the public transit authorities.

5. Why is freedom of expression so sacred in contemporary society?