

OVERVIEW OF THE CHARTER

AN ANALYTICAL FRAMEWORK

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OUTLINE

- Structure of the Charter and nature of Charter Rights and Freedoms
- Interpretation
- Limitation of Rights and Freedoms
- Illustration: *Ford v. Quebec*

Structure of the *Charter*

- Rights and Freedoms: ss. 2 - 23
- Guaranteed and Limited: s. 1
- Application: s. 32
- Supremacy clause: s. 52
- Notwithstanding clause: s. 33
- Remedies clause: s. 24
- Interpretive provisions: ss. 25 - 31

Catalogue of Rights and Freedoms

- Fundamental freedoms: s. 2
- Democratic rights: ss. 3 - 5
- Mobility rights: s. 6
- Legal rights: ss. 7-14
- Equality rights: s. 15
- Language rights: ss. 16 - 23
- (Aboriginal rights) s. 35

Nature of Charter Rights

- Negative rights
- Positive rights
 - language rights
 - equality
 - duty to facilitate enjoyment of negative rights?
- Individual and group rights
- Social and economic rights

Interpretation: Charter Provisions

- limitation provisions ss. 1 and 33
- aboriginal rights s. 25
- multiculturalism s. 27
- gender equality s. 28

Interpretation: Judicial Approach

- Rejection of “original intent”
- adoption of “organic” or “living tree” theory: the constitution is “a living tree capable of growth and expansion within its natural limits.”

Interpretation: Purposive Method

- ... the purpose of the right or freedom ... is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be... a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection. At the same time it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.
 - -Dickson J. in *R. v. Big M Drug Mart Ltd.*

Illustration: *Ford v. Quebec*

- Law prohibits display of commercial signs in English
- does “freedom of expression” protect commercial speech?
- does “freedom of expression” protect choice of language?

Limitation of Charter Rights: Interpretation

- Internal limits
 - s. 8 unreasonable search and seizure
 - s. 9 cruel and unusual punishment
- Interpretation
 - s. 2(d) freedom of association
 - s. 7 life, liberty and security of the person
 - s. 15 equality

Limitation of Charter Rights: Reasonable limits

- s. 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.

Reasonable Limits

- Burden of proof on the party seeking to justify a limit on a Charter right or freedom
- Prescribed by law
 - police powers
 - exercise of discretion
 - common law
- Proportionality test

The *Oakes* Proportionality Test

- Legislative Objective “of sufficient importance to warrant overriding a constitutionally protected right or freedom”
- Rational Connection
- Minimal Impairment
- Proportionality between and the salutary effects of implementing the objective and the deleterious effect on the right or freedom

Illustration: *Ford v. Quebec*

- Objective: enhancement of French language in Quebec
- Rational Connection: “visage linguistique”
- minimal impairment: total ban or marked predominance

Factors influencing the strictness of the *Oakes* test

- Supreme Court tends to be more deferential where:
- Broad issues of social or economic policy
- Protection of vulnerable groups
- Definitional limits

Limitation of Charter Rights: The “notwithstanding clause”

- s. 33
- Parliament or a legislature “may expressly declare...that an Act or provision “shall operate notwithstanding” the Charter
- only applies to s. 2 or ss. 7 -15
- renewable five year sunset clause

Illustration: *Ford v. Quebec*

- “omnibus override”
- Supreme Court refuses substantive review
- no retrospective effect
- specific override enacted
- expired after five years
- new law corresponds with *Ford* ruling

Illustration: *Ford v. Quebec*

- Freedom of expression prevails
- but ss. 1 and 33 allow room for protection of important interests
- but s. 33 limited
 - political cost
 - five year sunset
- democratic values enhanced through dialogue