

CHAPTER 3

CONSTITUTIONAL LAW OF CANADA

3.1 INTRODUCTION

3.2 THE HISTORICAL CONTEXT

3.2.1 Pre-colonial times

3.2.2 Colonial settlement and governance

3.2.2.1 A summarised history

3.2.2.2 Early colonial influences

3.2.3 The formation of the Canadian federation

3.2.4 The Constitution Act, 1867

3.2.5 The period after 1867 up to the 1950s

3.2.6 The 1950s - Judicial activism

3.2.6.1 General

3.2.6.2 "Criminal law" and "implied liberties" as approach

3.2.6.3 Criticism of approaches

3.2.7 Adoption of Bill of Rights - 1960

3.2.7.1 General

3.2.7.2 Impact of Bill of Rights on non-legislative matters

3.2.7.3 Impact of Bill of Rights on legislation

3.2.7.3.a General

3.2.7.3.b Pre-Bill legislation

3.2.7.3.c Post-Bill legislation

3.2.7.4 Contents of Bill: Frozen rights?

3.2.8 The period 1960 up to 1980

3.2.8.1 Loss of enthusiasm by judiciary

3.2.8.2 Libertarian initiatives by politicians

3.2.8.2.a Adoption of human rights legislation

3.2.8.2.b The initiatives in adopting a charter

3.2.9 The period 1980 to 1982

3.2.10 The Constitution Act, 1982

3.2.11 1982 up to the end of June 1999

3.2.11.1 The judiciary

3.2.11.2 On the political front

3.3 THE JUDICIAL SYSTEM OF CANADA

3.3.1 Introduction

3.3.2 Federal courts

3.3.2.1 General

3.3.2.2 Supreme Court of Canada

3.3.2.3 Federal Court of Canada

3.3.3 Provincial courts

3.3.3.1 General

3.3.3.2 Federally appointed judges

3.3.3.3 Provincially appointed judges

3.4 CONCLUSION

3.1 INTRODUCTION

The study of Canadian history is important, if not essential, to understand contemporary political and constitutional issues in Canada. If you want to know where you are going it helps to know where you have been. The Canadian Charter did not arrive suddenly or unexpectedly in Canada on 17 April 1982.¹ It

¹ By way of the Constitution Act, 1982.

was the product of a complex history and political forces that must be kept in mind by those who wish to understand its meaning.

In this chapter a historical overview of the development of Canadian society up to the present constitutional dispensation is given. In particular, the factors, influences and process that resulted in the imposition of protected fundamental rights are highlighted. The chapter shows why there is a need for the constitutional protection of a threshold right to bail. It confirms that it was wise to have borrowed from Canadian law when the Bill of Rights was drafted, and that Charter jurisprudence can be relied on with confidence.

This chapter also describes the court structure so that the importance of a specific decision can be ascertained.

3.2 THE HISTORICAL CONTEXT

The periods of importance to the development of the Constitution, including human rights, in Canadian history are as follows:²

3.2.1 Pre-colonial times

The Aboriginal people lived in "Canada" under an Aboriginal government when the Settlers came in 1497. They were organised in societies and lived as they had done for centuries.³

² See Funston & Meehan (1994) 12 and further; Hogg (1992) 27 and further; Scott (1977) 3 and further; Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 5 and further; Whyte, Lederman & Bur (1992) 2 - 2 and further, for constitutional histories of Canada.

³ See *Calder v British Columbia (Attorney-General)* [1973] SCR 313 328 (Can) per Judson J.

3.2.2 Colonial settlement and governance

3.2.2.1 A summarised history

Between 1497 and 1535 Europeans explored and settled in the Atlantic Provinces, Eastern Arctic and St Lawrence Valley and the eastern United States. From 1535 to 1663 outposts of the European nations evolved in New France⁴ and in the valley of the St Lawrence River.⁵ The period 1663 to 1702 saw the emergence of colonial governments as a Royal government emerged in New France. The Hudson's Bay Company started and England's commercial interests emerged. Alliances were forged with the Aboriginal peoples.⁶

After this and up to 1763, the French and the British Empires struggled with their Aboriginal allies on the military and the commercial front for control of North America. In the years that followed, dissatisfaction grew among the parties and under the Royal Proclamation of 1763 the British North American Policy came into being. A change in British policy took place by way of the Quebec Act of 1774. An independent United States of America emerged with

⁴ The territory now comprising Ontario and Quebec was part of the colony of New France. In 1763 after the British victory over France on the Plains of Abraham the whole of New France was ceded to Great Britain by way of the Treaty of Paris. See Hogg (1992) 33.

⁵ See Funston & Meehan (1994) 13. It seems that the first Europeans were of French origin. The British traders only came to Hudson Bay in the seventeenth century. See Scott (1977) 14. The chief source of immigration was from England and France. Most European emigrants left their homelands for greater economic opportunity. This urge was frequently reinforced by a yearning for religious freedom or a determination to flee from political oppression.

⁶ The Aboriginal population was Indian and Eskimo. See Scott (1977) 14.

the Declaration of Independence adopted on July 4 1776. A first attempt to form a Canadian union was made with the Constitutional Act of 1791.

The attempts by the English and the French settlers in Canada during 1791 to 1860 to reconcile their differences saw the emergence of responsible government in the provinces and colonies that would eventually form Canada. The American civil war between 1861 and 1867 and economic advantages of a common market giving increased wealth to undertake large public projects formed an impetus for the Canadian union.⁷

3.2.2.2 Early colonial influences

The organisation of the political and legal systems of Canada according to a constitution is a relatively recent development. Today Canadian society is governed by elected representatives operating in democratically sanctioned institutions. In the early years the colonies were by contrast governed by the prerogative of the Crown.⁸ The laws were made and enforced in the name of the Monarch and even where provision was made for the election of assemblies the governor was not bound to follow their advice.

Many of the rights that Canadians now possess can be traced to the legal system Canada inherited from Great Britain.⁹ In terms of section 11(f) of the Canadian Charter, for example, trial must be by jury. This existed in at least rudimentary form as early as the Norman Conquest.¹⁰ Many other fundamental

⁷ See Hogg (1992) 36.

⁸ Read (1948) 26 *Can Bar Rev* 621. See also Mewett & Manning (1994) 3.

⁹ Although Quebec did not inherit the common law with regard to civil matters, it did with regard to public law.

¹⁰ See Walker (1980) 1238.

rights and liberties initiated from epochal manifestos like the Magna Carta,¹¹ the English Bill of Rights, the Habeas Corpus Acts, and the Act of Settlement¹² to the gradual case by case decision making of the common law courts.¹³ There seems to be wide agreement that the British common law was retained for criminal matters, where many rights disputes arise.¹⁴ Despite ambiguity in the wording of the Quebec Act, British law was inherited by Quebec with respect to Crown law, constitutional law, and probably public law in general.¹⁵ Quebec's civil law also contained many provisions protective of civil liberties.¹⁶

There is a vast and important body of inherited and judicially developed protections of civil liberties in Canadian law. It may be said that there are significant differences between the law of Quebec and the law of the common law provinces, but judicially developed protections of fundamental rights prevail throughout Canada.¹⁷

¹¹ This was the first time in English history that there had been a written organic instrument exacted from a sovereign ruler which purports to lay down binding rules of law that the ruler himself may not violate. In 1215 at Runnymede, King John was forced to agree to abide by "the law of the land" in his dealings with his subjects. Also see Gora (1978) 1 and further.

¹² See Pound (1957) 61 - 63.

¹³ This inheritance should not be regarded as a body of static principles because the Canadian courts have both refined and added substantially to the principles since 1867.

¹⁴ See for example MacIntosh (1995) 1 and Gibson (1986) 2.

¹⁵ See Cote (1977) 15 *Alta L Rev* 29 41 - 42.

¹⁶ Scott (1959) 37 *Can Bar Rev* 135.

¹⁷ Gibson (1986) 3.

However, the significance of this inheritance should not be overstated. According to Scott one fundamental principle that was inherited from the United Kingdom, was parliamentary supremacy.¹⁸ This meant that whatever the elected legislators decided to enact no matter how inconsistent it was with traditional liberties, it is the law of the land until legislatively repealed, and must be enforced by the courts.¹⁹ Even guarantees as sacrosanct as those contained in the Magna Carta have been abrogated by statute in Canada.²⁰

3.2.3 The formation of the Canadian federation

A series of colonial conferences that were held between 1864 and 1867 in Charlotte Town, Quebec City and London, lead to the implementation of a confederation and the self-governing Dominion of Canada.²¹ It did not create an independent country and the federating provinces were all British colonies. However, the provinces did achieve a large measure of self-government.²²

¹⁸ (1977) 212. However, the various Parliaments were not sovereign in all respects. They had to stay within the scheme of federalism. See Hogg (1992) 303. The principle of parliamentary sovereignty (or so-called Westminster constitutional system) was also inherited from Britain into the South African law in 1910 when the British Parliament passed the South Africa Act, 1909. In 1994 the Interim Constitution replaced this system with a system of constitutional supremacy. In the Final Constitution the supremacy of the constitution is primarily reflected in section 2 which determines that the constitution is the supreme law of the land. See Burns (1999) 4 & 8 and Basson (1994) 16 & 59.

¹⁹ Gibson (1986) 4.

²⁰ See Thomas (1969) 12 *Can Bar J* 234. Lord Chancellor Gerald Gardner stated in 1969 that 27 of the articles had already been repealed.

²¹ By way of the British North America Act, 1867. Section 3 created "one Dominion under the name of Canada". The confederation scheme was settled at the conferences mentioned. See Hogg (1992) 36 & 104.

²² Hogg *ibid* 45.

The delegates' instructions at the conferences were to work out the plans for a new union.²³ From these conferences a set of 72 resolutions was eventually adopted at the Quebec City conference. It turned out that some of the provinces were not convinced of the idea of a union and the Quebec City Agreement proved difficult to implement. The plan was nearly abandoned. A slightly revised agreement was finally adopted by Upper and Lower Canada, Nova Scotia and New Brunswick in London on 4 December 1866.²⁴

Paragraph 2 of the revised agreement proposed a general government charged with matters of common interest to the whole country and local governments for each of Upper and Lower Canada, and for the provinces of Nova Scotia and New Brunswick, charged with the control of local matters in their respective sections. It was seen to be the system of government best adapted under existing circumstances to protect the diversified interests of the various provinces and secure efficiency, harmony and permanence in the working of the Union.²⁵

The Resolutions in paragraph 2 acted as the drafting instructions for the preparation of the British North America Act of 1867. The Act was passed by the British Parliament and came into force on 1 July 1867.²⁶

²³ According to Funston & Meehan (1994) 10 the blueprint for Canada did not stem directly from the demands of the people but rather from the aspirations of colonial government leaders.

²⁴ The agreement comprised of 69 numbered paragraphs. See Funston & Meehan *ibid.*

²⁵ Provision was also made for the admission into the Confederation on equitable terms of New Foundland, Prince Edward Island, the North West Territory, and British Columbia.

²⁶ Funston & Meehan (1994) 10.

3.2.4 The Constitution Act, 1867²⁷

In the preamble to the Act it is indicated without further explanation that the new dominion would have “a Constitution similar in principle to that of the United Kingdom”. The Constitution Act of 1867²⁸ therefore built on traditions and already-existing colonial constitutions.²⁹ However, even though the preamble recites a desire for “a Constitution similar in principle to that of the United Kingdom” it also indicated the wish of the founding colonies “to be federally united into one dominion”.

Federalism as a form of government is very different from the unitary structure of the United Kingdom Constitution and it implies the need for judicial review of legislative actions in order to ensure legislators’ compliance with their constitutional obligations.³⁰

Morton did not see the Resolutions in paragraph 2³¹ as professing to enshrine an ideal or claiming to advance a principle.³² The purpose was therefore not to achieve sought-after privileges and liberties, but to preserve an inheritance of freedom long enjoyed and a tradition of life valued beyond any promise of profit or of demagoguery. Confederation was to preserve by union the constitutional

²⁷ (UK) 30 & 31 Vict, c 3 (now RSC 1985, App ii).

²⁸ The British North America Act, 1867 was renamed the Constitution Act, 1867 in 1982.

²⁹ Funston & Meehan (1994) 11.

³⁰ Strayer (1988) 1 - 2.

³¹ See par 3.2.3.

³² Morton (1969) 320.

heritage of Canadians from the Magna Carta of the barons to the responsible Government of Baldwin and Lafontaine and, no less, the French and Catholic culture of St Louis and Laval.³³

The formula in the Constitution Act of 1867 thus provided for a division of powers. The main role of the original Constitution was to facilitate and supervise the distribution of lawmaking and governmental powers between the provinces and the federal authorities.³⁴ The people of a particular province or territory decide what happens in that area unless it directly affects another province or territory or the people in it. Being democratic, the occupants of all the provinces or territories together elect a federal government to attend to matters that generally affect the whole country and its occupants. The structure has for the most part stayed unchanged.

But the original constitution also had to enforce a few constitutional provisions concerning fundamental rights.³⁵ From the “Confederation debate” of the

³³ The motivating factors to the 1867 Act was described by George Brown as:

- the civil war ... in the neighbouring republic,
- the possibility of war between Great Britain and the United States,
- the threatened repeal of the Reciprocity Treaty;
- the threatened abolition of the American bonding system for goods in transit to and from these provinces;
- the unsettled position of the Hudson’s Bay Company; and
- the changed feeling of England as to the relation of great colonies to the parent state.

See Funston & Meehan (1994) 12. George Brown was alive in 1867 and played a significant role in Canada’s formation. He indicates that these factors brought earnest attention to the gravity of the situation, and united all in one vigorous effort to meet the emergency. See Funston & Meehan (1994) 11.

³⁴ See Hogg (1992) 36 - 37; Scott (1977) vii & 37 and further; Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 5.

³⁵ Gibson (1986) 6.

legislator of the united Canada's in 1865 it is clear that it was the intention of the "Fathers of the Confederation" to remove from the reach of the elected lawmakers certain constitutional rights.³⁶

There was still a long way to go but the Constitution Act of 1867 at least advanced the legal protection of fundamental rights and freedoms in two ways:

- it established for Canada the legitimacy of constitutionally entrenched, judicially enforceable rights; and
- it accorded such protection to a handful of rights that were regarded at the time as particularly important.³⁷

But only a few rights were entrenched,³⁸ and the attitudes of lawyers and judges trained in the British tradition of legislative supremacy were not yet receptive to the idea of entrenchment.³⁹

³⁶ See the *Parliamentary debates on the subject of the confederation of the British North American Provinces* (1865) as cited by Gibson (1986) 7. But, not all the parties were in favour of the constitutional protection of rights. One JS McDonald argued that entrenching rights was not democratic. In argument he indicated that it was not his wish to interfere with the rights and privileges of minorities or any other denomination. However, he pointed to the experience that has been had in Canada that denial of the right of the majority to legislate on any given matter, has always led to grave consequences. He voiced his astonishment not to trust the judgment of the majority adding that in all countries the majority controlled affairs and the minority had to submit. However, the amendment proposed by McDonald was defeated by a very large margin. (*Parliamentary debates ibid* 1025 & 1026.)

³⁷ Viscount Haldane pointed this out to counsel during the argument of *Toronto Electric Commissioners v Snider* [1925] AC 396 (PC). Also see Brown (1967) 34.

³⁸ See Scott (1977) 213.

³⁹ Gibson (1986) 8.

It has been indicated by Whyte that “laws and constitutions are not so much extracted from ideal forms, but chosen to accommodate interests”.⁴⁰ This is particularly true as far as the 1867 Constitution is concerned. The 1867 Constitution is the result of the management of relationships. These relationships had been developing for 200 years and shaped the events leading up to 1867.⁴¹ These relationships included:

- the early relationships between French and British settlers and Aboriginal peoples in North America;
- the relationships among Britain, France, Aboriginal peoples and American colonists resulting from their respective commercial and military policies in North America;
- the relationship between British colonies and what would become the United States and those in what would become Canada;
- the relationship of Canadian and American colonies to the imperial governments in London, England; and
- the relationships between Francophones and Anglophones⁴² and between Catholics and Protestants.

From time to time there has been some impressive ideas about major constitutional amendments but the basic structure remained for the biggest

⁴⁰ (1993) vol 2:10.

⁴¹ Funston & Meehan (1994) 9.

⁴² It seems that these terms refer to the French and Anglo-Saxon “founding peoples”. See Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 604.

part. However, in 1982 the citizens of Canada were reminded by the Canadian Charter⁴³ that they too have rights.

3.2.5 The period after 1867 up to the 1950s

Between 1868 and 1912 the Canadian federation extended east, west and north with the acquisition of territories, settlements and the admission or creation of new provinces. The end of Canada's status as a "colony"⁴⁴ was formally recognised by the British Statute of Westminster in 1931.⁴⁵ Canada became an independent nation within the British Commonwealth. In the period 1931 to 1949 Canada experienced the great depression, the emergence of fiscal federalism and World War II. In 1949 Newfoundland and Labrador joined the federation.

The relationships that were central to the dynamics of evolving Canadian nationhood after 1867 can be briefly stated:

- a new relationship among former colonial governments (that is, provinces) and a new national government in Ottawa;
- the relationship between Canadian citizens and their two levels (federal, provincial) of government (Canada's federation was unique being based on the supremacy of Parliament's within defined spheres of power, unlike the

⁴³ Part 1 of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK) 1982, c 11.

⁴⁴ The term colony does not seem completely appropriate for Canada which had already achieved a substantial degree of self-government. See Hogg (1992) 45.

⁴⁵ The Statute provided that no new British statute would apply to Canada unless enacted at the request and with the consent of Canada. See Hogg *ibid* 48; Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 6; Whyte, Lederman & Bur (1992) 3 - 13.

- American republic which was based on sovereignty of the people, who delegated power to the state and federal governments to exercise subject to a system of checks and balances that governed the exercise of authority);
- the relationship between French-speaking and English-speaking residents of the new country;
 - the relationships between the regions and their different economic, social, cultural and linguistic circumstances;
 - the relationship between Canada and other nations, particularly the United States of America and the United Kingdom; and
 - the relationship between the emerging Canadian society and the Aboriginal peoples.

However, the 75 years from 1867 until approximately 1950 saw little improvement in the legal protection of civil liberties. The fundamental rights and freedoms of Canadians were frequently disregarded.⁴⁶ In Canada, as in South Africa, there are many indications that treatment was based on race. The Chinese and Japanese immigrants were subjected to intolerable discrimination from the beginning of oriental immigration to Canada in the 1850s.⁴⁷ In 1914 the Supreme Court of Canada held, that as long as treatment was based on race rather than on alien or naturalised status it was constitutionally permissible.⁴⁸ During World War II a curfew was at first imposed on Japanese-Canadians. Later they were evacuated, interned and frequently forced to work

⁴⁶ Scott (1977) 209.

⁴⁷ Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 560.

⁴⁸ *Quong Wing v The King* (1914) 18 DLR 121 129 (SCC). On 19 May 1914 leave to appeal to PC was refused. In Walter Tarnopolsky's book, *Discrimination and the law* (1982) 1 - 25 as cited by Gibson (1986) 5, the court's failure to provide effective safeguards against discrimination in the provision of public services can be seen.

in labour camps. Their property was also confiscated.⁴⁹ Scott reminds of the deportation of Japanese-Canadians after World War II.⁵⁰

In the matter of religion there was similar intolerance. This is exemplified by the persecution of Jehovah's Witnesses by the government of Quebec.⁵¹ Another distressing example of the fragility of rights can be seen in the British Columbia Law Society's refusal to grant practising privileges to an otherwise qualified lawyer who acknowledged a belief in democratic Marxism. The courts approved this refusal and it does seem that unpopular minorities could not rely on the protection from actions of an inflamed majority, even in the hands of professed champions of liberty like O'Halloran J who presided.⁵² The disregard for human rights can also be seen from the fact that in Quebec women did not have the right to vote until 1941.⁵³

The history of Canada's courts show a non-recognition of the native peoples' rights and the excessive deference with which Canadian courts have customarily treated political matters. This is illustrated by the refusal of the Supreme Court of Canada in 1943 to order a provincial government to obey its own statute requiring that an election had to be held in a vacant consistency.⁵⁴ In 1946 a Royal Commission on Espionage sat which was widely condemned

⁴⁹ Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 569.

⁵⁰ (1977) 190.

⁵¹ *Ibid* 193.

⁵² *Martin v Law Society of British Columbia* (1950) 3 DLR 173 (BCCA) 178 - 86.

⁵³ Scott (1977) 320.

⁵⁴ *Temple v Bulmer* (1943) 3 DLR 649 (SCC).

for its curtailment of the civil rights of individuals who were being investigated.⁵⁵

3.2.6 The 1950s - Judicial activism

3.2.6.1 General

The period from 1950 saw the strengthening of the provincial governments and can be referred to as the modern era, with Canada searching for prosperity and unity. Many atrocities were committed against certain groups and classes of people during World War II. This abuse of the power of government led to a growing awareness of the need for the protection of human rights.⁵⁶ The universal recognition of human rights set the stage for a deeper commitment to guaranteeing human rights in Canada.⁵⁷

In 1949 another badge of colonial status was removed when the Judicial Committee of the British Privy Council was replaced by the Supreme Court of Canada as Canada's court of last resort.⁵⁸ A new type of activism developed among the judges of the Supreme Court and some landmark rulings on civil

⁵⁵ Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 589. The judges that presided were Robert Taschereau and Roy Kellock. Commission counsel were G erald Fauteux, a future judge of the Supreme Court and EK Williams president of the Canadian Bar Association and soon to be appointed Chief Justice of the Manitoba Court of Queen's Bench. See also Gibson (1986) 5.

⁵⁶ For example the Universal Declaration of Human Rights (1948), the European Convention on Human Rights (1950) and the International Covenant on Civil and Political Rights (1966).

⁵⁷ See Black-Branch (1997) 4 and further.

⁵⁸ Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 6.

liberties were made during the 1950s.⁵⁹ In *Smith & Rhuland Ltd v The Queen ex rel Andrews*⁶⁰ it was for example found to be unlawful for the Nova Scotia Labour Board to refuse to certify a trade union because one of its officers was a communist.

3.2.6.2 “Criminal law” and “implied liberties” as approach

An unusual Supreme Court ruling of the 1930s formed the prototype and inspiration for the libertarian judicial activism of the 1950s.⁶¹ In 1935 the Social Credit government of Alberta came to power and passed legislation designed to create a social credit monetary system within the province. Because this legislation and the government’s theories came under heavy ridicule, an accompanying Act popularly known as the Press Act was passed to regulate criticism. The entire package of legislation was referred to the Supreme Court of Canada for a ruling on its constitutionality. The Supreme Court and later the Judicial Committee of the Privy Council⁶² found the package of legislation to be unconstitutional because it invaded the federal fields of money and banking. It was therefore not in the power of a province to regulate these fields.

However, half of the panel of six judges in the Supreme Court offered two additional reasons for the striking down of the Press Act. The judges held that the curtailment of freedom of expression in the public interest is a question of “criminal law”. This fell under the exclusive jurisdiction of the Parliament of

⁵⁹ *Boucher v R* (1951) 2 DLR 369 (SCC); *Roncarelli v Duplessis* (1959) 16 DLR (2d) 689 (SCC); *Noble and Wolf v Alley* (1951) 1 DLR 321 (SCC).

⁶⁰ (1953) 3 DLR 690 (SCC).

⁶¹ *Reference re Alberta Legislation* [1938], SCR 100, (1938) 2 DLR 81 (SCC).

⁶² *Attorney-General for Alberta v Attorney-General for Canada* [1939] AC 117 (PC).

Canada under the Constitution Act, 1867⁶³ and meant that repressive provincial legislation was invalidated on the ground that it constituted “criminal law”.⁶⁴ The distribution of powers approach became the basis of many of the rulings in the 1950s.⁶⁵

The court stating the second additional reason for striking down the Press Act propounded a novel idea subsequently labelled the “implied bill of rights”. The “implied bill of rights” had its roots in the preamble to the Constitution Act, which describes the Canadian Constitution as “similar in principle to that of the United Kingdom”. The Preamble was not seen as having legal force on its own, but was used as an aid to the interpretation of operative provisions.⁶⁶ The three judges held that section 17 of the Constitution Act called for the existence of a “Parliament of Canada”. When interpreted in light of the British experience it meant a legislative body working under the influence of public opinion and public discussion. The Constitution thus by implication prohibited abolition of public debate.

The “implied bill of rights” approach, although adopted and approved by the judiciary, and extra-judicially by a number of prominent authorities, was never invoked in a conclusive manner.⁶⁷

⁶³ Section 91(27).

⁶⁴ Only the federal government could therefore enact criminal law.

⁶⁵ See for example *Henry Birks & Sons (Montreal) Ltd v Montreal and Attorney-General of Quebec* (1955) 5 DLR 321 (SCC); *Switzman v Elbling and Attorney-General of Quebec* (1957) 7 DLR (2d) 337 (SCC).

⁶⁶ Gibson (1986) 10.

⁶⁷ *Switzman v Elbling and Attorney-General of Quebec* (1957) 7 DLR (2d) 337 (SCC).

3.2.6.3 Criticism of approaches

However, criticism can be levelled at both the “criminal law” and “implied liberties” approaches.

The “criminal law” method that became the basis for many of the libertarian decisions of the 1950s entangled issues of freedom with issues of federalism. Decisions that should have been decided on whether it was desirable from a libertarian point of view was instead based on whether the federal or provincial order of government is the more appropriate body to regulate a particular activity in question. Since “criminal law” was the constitutional responsibility of the Parliament of Canada, this process also tended to amplify federal power, which some proponents of balanced federalism found disturbing.⁶⁸ This approach also offered no relief against repressive laws at federal level.

The “implied bill of rights” theory addressed the principle issues and it avoided the difficulties just mentioned. It applied both federally and provincially.⁶⁹ This also meant that the federal provincial division of powers was not under threat, but it involved a degree of judicial activism that some thought excessive.⁷⁰ According to Gibson this also required an uncommon level of creative imagination on the part of the courts.⁷¹

⁶⁸ Weiler P, *The Supreme Court and the law of Canadian federalism* (1973) 23 *U Toronto LJ* 307 as cited by Gibson (1986) 10.

⁶⁹ See *Switzman v Elbling and Attorney-General of Quebec* (1957) 7 DLR (2d) 337 (SCC) 368 where Abbott J commented on its applicability to federal laws.

⁷⁰ Gibson (1986) 10.

⁷¹ (1986) 11.

3.2.7 Adoption of Bill of Rights - 1960

3.2.7.1 General

The idealism of the 1950s was echoed in the Canadian Bill of Rights of 1960.⁷² This Act was the most notable civil liberties development of the 1960s and recognised Canada's commitment to human rights under federal legislation.⁷³ The Bill was essentially the result of the work of Prime Minister John G Diefenbaker, who had campaigned for protected rights from as early as 1945 when he became a member of Parliament.⁷⁴

The Bill was introduced into Parliament on September 1958 and the Canadian Bill of Rights was enacted in a revised form in August 1960. However, the enthusiasm for protected rights had by then cooled down, and the Canadian Bill of Rights was not constitutionally entrenched. It applied only to matters within the federal sphere of jurisdiction and was an ordinary statute of the Parliament

⁷² Canadian Bill of Rights, SC 1960, c 44. See Tarnopolsky (1975) 12 - 14 for a legislative history.

⁷³ Black-Branch (1997) 9.

⁷⁴ See Hansard (1945), 2455. See also Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 589. In 1938 the Manitoba legislator passed an almost unanimous resolution to this effect (Winnipeg Tribune, 5 February 1938). The resolution was introduced by a prominent independent MLA, Lewis St George Stubs. In 1945 Co-operative Commonwealth representative Alistar Stuart and John Diefenbaker of the Conservatives motioned similar resolutions in the Federal House of Commons. During 1950 a special senate committee on human rights and fundamental freedoms approved a constitutionally entrenched guarantee of rights. The special senate committee acknowledged that such a step would have to await agreement on the deadlock question of an all-Canadian formula for constitutional amendments. See Gibson (1986) 30. However, Black-Branch (1997) 8 indicates that Alistar Stuart was the first to motion a Bill of Rights in the Federal House of Commons in 1945. The author contends that John Diefenbaker only stressed the need for a federal Bill of Rights to protect Canadians in 1946.

of Canada.⁷⁵ It could therefore be altered by the normal legislative process. The reach of the Bill was also weakened by the fact that other Acts of Parliament could potentially ignore the primacy provision of the Bill⁷⁶ and in addition there were questions with regards to protection of newly acquired rights under the Bill.⁷⁷

Gibson gives two explanations for this limited scope:⁷⁸

- Canadian politicians were still years away from agreeing on a formula to amend the constitution (in a way that such an important innovation could be achieved in a matter befitting an independent nation).
- There was intense disagreement among influential Canadian politicians as to the desirability of giving constitutional status to additional categories of rights.

Even though the scope was limited, the Canadian Bill of Rights contained a fuller declaration of fundamental rights and freedoms than ever before in legislative form.⁷⁹

⁷⁵ Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 591.

⁷⁶ See section 2, Annexure A.

⁷⁷ It became known as the “frozen concepts” interpretation. See par 3.2.7.4. See Black-Branch (1997) 10.

⁷⁸ (1986) 12.

⁷⁹ See Annexure A for selected provisions, which I deem of relevance for this study.

3.2.7.2 Impact of Bill of Rights on non-legislative matters

The Canadian Bill of Rights had a minimal impact on the Canadian legal system.⁸⁰ It was infrequently used as a basis for ensuring that police, courts or administrators observed elementary forms of fairness, such as

- the right to telephone a lawyer, before complying with a Police request for a breath sample;⁸¹ or
- the opportunity of a convicted person to make representations to the court before sentence was passed.⁸² Successful applications usually involved some independent basis for the asserted right and the Bill was used as a mere makeweight or interpretative aid.⁸³

3.2.7.3 Impact of Bill of Rights on legislation

3.2.7.3.a General

It was an even more rare occurrence that legislation was invalidated because of inconsistency with the Bill. However, this little-used remedy has on occasion been implemented by the Supreme Court,⁸⁴ but judgments were difficult to

⁸⁰ Tarnopolsky (1975) 53 *Can Bar Rev* 649.

⁸¹ *Brownridge v The Queen* (1972) 28 DLR (3d) 1 (SCC).

⁸² *Lowry and Lepper v The Queen* (1972) 26 DLR (3d) 224 (SCC).

⁸³ Gibson (1986) 14.

⁸⁴ See *R v Drybones* (1969) 9 DLR (3d) 473 (SCC). In *Re Singh and Minister of Employment and Emigration and 6 other appeals* (1985), 17 DLR (4th) 422, [1985] 1 SCR 177 (SCC); Beetz J held that for the purposes of the seven cases at bar, part of section 71(1) of the Immigration Act, 1976 was inoperative.

reconcile and much uncertainty remained. The origin of the uncertainty was twofold:

- The legal status or effect of the Bill was uncertain.
- Its content was uncertain.⁸⁵

As to the status or effect of the Bill with regards to other legislation the Bill itself stated in section 5(2) that it applied only to federal legislation enacted before or after the coming into effect of this Act. However, it was asked by lawyers how a statute lacking constitutional status could be given supremacy over other legislation in a constitutional system that respects the principle of parliamentary supremacy. The principle of parliamentary supremacy, even in the restricted form in which it applied in Canada, dictates that the Bill, unlike the Charter, must yield to new legislation of different intent.⁸⁶ The Supreme Court of Canada nonetheless made it clear that it did not prevent the subjection of federal statutes and regulations to the Bill's requirements in appropriate circumstances. However, a distinction must be made between laws passed before the Bill came into force, and those subsequently enacted. These two categories are now discussed in greater detail.

3.2.7.3.b Pre-Bill legislation

Legislation can be affected by a statute like the Bill of Rights in two different ways. In the first instance the Bill may act as an "Interpretation Statute" when the language of legislation is ambiguous. It is thus an interpretative aid directing the courts to adopt a more libertarian construction. It could go even further in

⁸⁵ Gibson (1986) 14 is of the opinion that much of the confusion resulted from a failure to distinguish clearly between these two matters.

⁸⁶ Gibson *ibid* 14 -15.

that it could invalidate pre-Bill legislation where no interpretation can be found that is compatible with the Bill. The concept of parliamentary supremacy demands this for new legislation because it by implication amends or repeals inconsistent previous laws.⁸⁷ It is widely accepted that as far as the Canadian Bill of Rights contradicted pre-Bill federal statutes and regulations, it repealed or amended those laws.

However, there was difference of opinion among legal scholars as regards the meaning of the Bill itself. The argument of some, that it was not intended to do more than provide a guide to interpretation, was based on the wording of the principal operative provision: "Every law of Canada shall ... be so construed and applied as not to abrogate, abridge or infringe ... any of the rights and freedoms herein recognised and declared."⁸⁸

According to these scholars "construed and applied" meant that the Bill was only intended to facilitate interpretation. The courts should therefore attempt to find interpretations compatible with the Bill and should stop short of declaring incompatible legislation to be inoperative. This was said to be the only purpose of the Bill of Rights, and it was contended that laws which abrogate rights and freedoms unequivocally, cannot be affected by the Bill.⁸⁹

⁸⁷ The accompanying principle is that subsequent general legislation should not be construed to derogate from previous specific legislation. This is a guide to determine whether the subsequent law is really inconsistent with the earlier one. The legislator's manifest intentions as to the script of the new law is of equal or greater importance.

⁸⁸ Section 2.

⁸⁹ The "interpretation" theory. In *R v Gonzales* (1962) 32 DLR (2d) 290 292 this viewpoint was expressed by the British Columbia Court of Appeal. The view was further approved by Cartwright CJC in a dissenting judgement in *R v Drybones* (1969) 9 DLR (3d) 473 476 - 477 (SCC). However, the same passage was rejected by the Chief Justice in *Robertson and Rosetanni v The Queen*

However, the legal and political context within which the Bill was created has to be kept in mind. At the time the Canadian common law principles of interpretation already had two presumptions that would achieve virtually everything that could be accomplished legally by a libertarian interpretation statute:

- Legislation must be interpreted for the benefit of the subject. Penal laws must therefore be constructed narrowly.
- If there is an ambiguity, the interpretation that is more consistent with the liberties of the subject, must be followed.⁹⁰

This matter was finally resolved by the Supreme Court of Canada in *R v Drybones*.⁹¹ In this matter the court held a pre-Bill provision to be inoperative "because it conflicted with the right of individuals under Section 1 of the Bill to 'equality before the law', without discrimination by reason of race". The

(1963) 41 DLR (2d) 485 489 (SCC) which contributed to the confusion.

⁹⁰ Interpretation Act, RSC 1970 c 1 - 23, section 11.

From statements by the architects of the Bill it was clear that they intended more than to simply provide a fresh articulation of the well-established presumptions mentioned. Fulton J in his testimony before the House of Commons Special Committee that examined the proposed bill in 1960, said: "In my view you cannot enshrine a Bill of Rights which would be anymore sacrosanct" by constitutional amendment than by the legislative methods proposed. "If there is a violation by a legislative body the courts will not enforce or give effect to the violation." Fulton J added that if Parliament wished to continue the impugned law it could be "sanctioned anew" by means of a statutory declaration under section 2 of the Bill that the law would operate "notwithstanding the Bill". In removing any doubt as to the government's intention in this matter he added "we are creating, or are declaring substantive law". Gibson (1986) 16.

⁹¹ (1969) 9 DLR (3d) 473 (SCC).

majority judgement was delivered by Ritchie J who rejected the “interpretation” theory.⁹²

3.2.7.3.c Post-Bill legislation

When we turn to the effect of the Canadian Bill of Rights on federal statutes passed after its enactment, there are different legal considerations to take into account. The Bill can always be used to interpret future legislation, because that is precisely what interpretation Acts do. The question is whether the future statute can be rendered inoperative if there is no interpretation, by which it can be reconciled with the Bill. If one applies the same principle of legislative supremacy that supports the implied repeal or amendment by the Bill of inconsistent pre-existing laws, it might seem to suggest that incompatible post-1960 statutes operate as implied repeals or amendments of the Bill.⁹³ However, there are two legal arguments upon which the Bill of Rights can be accorded primacy over inconsistent subsequent legislation. The first of these countervailing principles is the “manner and form” theory and the other is the principle that requires legislation dealing with fundamental rights to be repealed expressly rather than by implication.

The manner and form theory is based in the notion of rule of law.⁹⁴ The rule of law theory entails that even though Parliament has the power to change the law

⁹² A Native Indian was charged with being “unlawfully intoxicated of a reserve” contrary to a provision of the Federal Indian Act. This provision applied only to Indians and was significantly more stringent than any applicable to non-Indian citizens.

⁹³ Gibson (1986) 17.

⁹⁴ The rule of law principle that the constraints of the law are applicable to all Canadians, high or low, private or governmental was a well established principle in Canadian jurisprudence before the Canadian Bill of Rights was enacted. See

it must abide by the existing law until it has been changed. Parliament is subject to the rule of law and if the Parliament of Canada for example enacted that future statutes of a certain type would require two-thirds majorities in the Commons and Senate, and that amendments to that requirement must be made in the same manner, this new method will be binding until altered by the new method itself.⁹⁵ This obligation then forms the constraint on legislative supremacy.⁹⁶

The Canadian Bill of Rights thus established a “manner and form” by which the rights and freedoms it declares may be abrogated or infringed upon by future legislation: The “notwithstanding” clause in section 2. If a future law is therefore intended to abrogate a protection in the Bill, it has to follow the procedure set out in the Bill itself. The future statute will have to make an express statutory declaration that the law in question “shall operate notwithstanding the Canadian Bill of Rights”.⁹⁷ Gibson is of the opinion that

Roncarelli v Duplessis (1959) 16 DLR (2d) 689 706 - 707 (SCC). See also *Reference re Language Rights under the Manitoba Act, 1870* (1985) 19 DLR (4th) 1 (SCC).

⁹⁵ Gibson (1986) 18 indicates that there is considerable judicial and academic support for the view that where such a manner and form is lawfully established for the exercise of legislative powers, it must be observed.

⁹⁶ Tarnopolsky (1975) 110 - 112. Although Acts of Parliament could not be tested under South African law before the Interim Constitution, the supreme court had so-called procedural testing rights in terms of which the court could investigate whether constitutionally prescribed procedures had been followed when an Act of Parliament was passed. See *Harris v Minister of the Interior* 1952 (2) SA 428 (A) and *Collins v Minister of the Interior* 1957 (1) SA 552 (A).

⁹⁷ A similar conclusion was reached in *Winnipeg School Division 1 v Craton* (1985) 6 WWR 166 (SCC). However, Gibson (1986) 19 argues that neither the doctrinal basis of this ruling nor the full extent of its operation is clear. According to him it may simply be treated as a special principle of statutory interpretation or it may be viewed as a judicially created “manner and form” requiring an express statutory “opt out” before legislation concerning fundamental rights can be restricted by subsequent amendment. He also finds

although it is not explicitly stated that amendments to the procedure require the same method, it is implied.⁹⁸

It is clear that the Canadian Bill of Rights is not susceptible to implied repeal and it is “fundamental” enough to have prospective and retrospective effect.⁹⁹

In *Curr v The Queen*¹⁰⁰ the Supreme Court of Canada acknowledged the prospective reach of the Bill. In this decision and also other decisions by the Supreme Court of Canada it is not indicated whether this is the result of the “manner and form” doctrine, or the principle invoked in the *Craton* case.

Laskin J on behalf of the court suggested that the court’s power to declare a statute inoperative, should in the case of the Bill of Rights be exercised more cautiously and on the basis of more compelling evidence of incompatibility, than in the case of a constitutional guarantee.¹⁰¹

The court seems to indicate that post-1960 federal statutes that are not compatible with the Bill can be “sterilised” but it requires a higher level of persuasion as to incompatibility that would be required in the case of a constitutionally infringed guarantee. However, from this judgement it is clear

the scope not altogether clear. It may be limited to a narrow range of statutes or may apply to any of the rights or freedoms listed in the Universal Declaration of Human Rights (1948).

⁹⁸ (1986) 19.

⁹⁹ The Quebec Superior Court reached a similar conclusion with respect to the Quebec Charter of Human Rights and Freedoms in *Ford v Attorney-General of Quebec* (1984) 18 DLR (4th) 711 (QUE SC).

¹⁰⁰ (1972), 26 DLR (3d) 603 (SCC); See also *Re Singh v Minister of Employment and Emigration and 6 other appeals* (1985) 17 DLR (4th) 422 (SCC).

¹⁰¹ *Curr v The Queen* *ibid* 613 - 614.

that federal legislation that cannot be construed in a manner compatible with the Canadian Bill of Rights, and does not contain a “notwithstanding clause” opting out of the Bill, is to be declared inoperative, whether it was enacted before or after the Bill came into force. As was discussed, the Supreme Court of Canada has been relatively forthcoming as to the general effect of the Canadian Bill of Rights. It is thus disappointing to note that it has not been so bold in determining the content of the rights and freedoms it protects.

3.2.7.4 Contents of Bill: Frozen rights?

Section 1 of the Bill recognises and declares the rights and freedoms that “have existed and shall continue to exist” and the Bill does not “enact” the various rights and freedoms but merely “recognises and declares”.¹⁰² This invites the conclusion that the Bill merely reiterates the pre-1960 legal status quo. However, the “frozen rights” theory has been the source of much confusion and has been accepted by the Supreme Court in some cases and rejected in others.

The confusion can only be swept away by recognising that there are two different “frozen rights” theories, one which the Supreme Court has denounced, and one which it appears to have accepted.¹⁰³ Both these theories are based on section 1 of the Bill.

In terms of the one “frozen rights” theory no pre-Bill restriction on rights should be regarded as affected by the Bill, because Parliament, by declaring that the protected rights “have existed” in the past, must not have regarded any existing

¹⁰² The Charter is different, in that it has no enacting clause itself. The Constitution Act, 1982 says “enacted” and “shall come into force”, and particular rights are expressed in the present tense.

¹⁰³ Gibson (1986) 21.

restrictions as inconsistent with such rights.¹⁰⁴ In the *Drybones* case Richie J held that the rights protected by the Bill are not to be held “circumscribed by the laws of Canada as they existed on August 19, 1960”.¹⁰⁵ It does seem that this was the last knell for the extreme “frozen rights” notion.

However, what the Supreme Court of Canada seems to have accepted in two judgments after the *Drybones* case, namely *R v Burnshine*¹⁰⁶ and *R v Miller and Cockriell*,¹⁰⁷ was the view that the Canadian Bill of Rights applies only to rights of the same general type as existed prior to the Bill’s enactment.

¹⁰⁴ It seems that this is the gist of the remarks made by Richie J in *Robertson and Rosetanni v The Queen* (1963), 41 DLR (2d) 485 (SCC). However, this approach was rejected by Ritchie J again on behalf of the majority in the *Drybones* case.

¹⁰⁵ 482 - 483 DLR.

¹⁰⁶ (1974) 44 DLR (3d) 584 (SCC). The court by way of Martland J at 590 - 592 made some general remarks about the rights protected by the Canadian Bill of Rights. Section 1 of the Bill was said to declare that six defined human rights and freedoms “have existed” and that they should “continue to exist”. All of them had existed and were protected under the common law. The Bill did not purport to define new rights and freedoms. What it did was to declare their existence in a statute, and, further, by section 2, to protect them from infringement by any federal statute.

The court found that, in 1960, when the Bill of Rights was enacted, the concept of “equality before the Law” did not and could not include the right of each individual to insist that no statute could be enacted which did not have application to everyone and in all areas of Canada. Such a right would have involved a substantial impairment of the sovereignty of Parliament in the exercise of its legislative powers under section 91 of the British North America Act, 1867, and could only have been created by constitutional amendment or by statute. The wording of the Bill of Rights did not do this, because the express wording declared and continued existing rights and freedoms. It was those existing rights and freedoms, which were not to be infringed by any federal statute. Section 2 did not create new rights. Its purpose was to prevent infringement of existing rights.

¹⁰⁷ (1976) 70 DLR (3d) 324 (SCC). Ritchie J at 329 based his decision in part on the “frozen rights” notion. He subscribed to the analysis of the meaning and effect of sections 1 and 2 of the Bill of Rights to be found in the reasons for

The Bill of Rights is still in force.¹⁰⁸ It does seem that the Bill's capacity for the protection of rights and freedoms is considerable. Although most of its protections have been supplanted by the stronger provisions of the Charter, it embodies a few rights not expressly duplicated in the Charter.¹⁰⁹ What has been decided on the status and scope of the Bill is also useful by way of analogy to the interpretation and application of similar bills and charters of rights that have been adopted by some of the provinces.¹¹⁰

Having said this, the Bill has produced few tangible results, and because of the restrictive interpretations the courts gave to the particular rights and freedoms, the Canadian citizens' rights have only been minimally advanced since the Bill's introduction. Tarnopolsky said the following about the first 15 years of the Supreme Court of Canada's application of the Bill: "My answer to the question ... how civil libertarian was the Supreme Court in interpreting the Canadian Bill of Rights? Must be: with few exceptions, hardly at all."¹¹¹

judgement of Martland J, speaking for the majority of the same Court in *R v Burnshine*. However, Laskin CJ in the same case took direct issue with the "frozen rights" theory. See also Gibson (1986) 25 for an analysis of the meaning and effect of section 1 and 2 of the Bill of Rights.

¹⁰⁸ See *Re Singh v Minister of Employment and Emigration and 6 other appeals* (1985) 17 DLR (4th) 422 (SCC).

¹⁰⁹ Tarnopolsky & Beaudoin (1982) 1.

¹¹⁰ For example the Saskatchewan Bill of Rights, SS 1947, c 35 (Now the Saskatchewan Human Rights Code SS 1979, c S- 24.1); Charter of Human Rights and Freedoms SQ 1975, c 6; Alberta Bill of Rights, RSA, 1980, c A - 16.

¹¹¹ Tarnopolsky (1975) 53 *Can Bar Rev* 649 671.

The interpretation of provincial bills and charters has proved even more disappointing.¹¹² Although it may still have theoretical potential, it seems that the experiment with a statutory bill of rights largely failed with the Bill of Rights of 1960.¹¹³

3.2.8 The period 1960 up to 1980

3.2.8.1 Loss of enthusiasm by judiciary

During the 1960s and 1970s, just as the rest of North American society, including the United States Supreme Court, was being caught up in the great libertarian tidal wave of the 1960s, the Canadian judiciary seemed to lose its enthusiasm for civil liberties. The Canadian courts seemed to take a more restrained approach to the protection of fundamental freedoms.¹¹⁴ The idealism of the 1950s faded and a marked change of attitude by Canadian judges was obvious. The “implied bill of rights” and “criminal law” techniques for protecting civil liberties were gradually abandoned.

¹¹² See for example *Re Martin and Department of Social Services* (1980) 108 DLR (3d) 765 (Sask CA); *Reference re Legislative Assembly and Executive Council Act* (1981) 128 DLR (3d) 561 (Sask CA).

¹¹³ It is possible that the failure can be attributed to the peculiar manner in which the Bill was drafted. Narrower constructions were invited by terms like “recognised and declare”, “have existed”, and “construed and applied”. It is clear that the Bill of Rights was too restrictively worded to have any effective long-term guarantee of rights. However, it does seem that the major proportion of the blame must be directed towards the judiciary. The judges were not sure that the politicians and voters they represented wanted them to be more active in the enforcement of individual rights. This resulted in non-action.

¹¹⁴ Gibson (1975) 53 *Can Bar Rev* 621.

In 1969 both these techniques were finally buried with the decision of *Attorney-General of Canada v Dupond*.¹¹⁵ This case dealt with the validity of a controversial ban on public assemblies by the City of Montreal. Because of political unrest in Quebec in the late 1960s numerous and often violent street demonstrations were held. Montreal passed a by-law prohibiting public demonstrations that endanger tranquillity, safety, peace, or public order. Furthermore all public assemblies (even peaceful ones) could be temporarily prohibited if recommended by law enforcement authorities. In November 1969 such an ordinance suspended all public assemblies, parades and gatherings in Montreal for a period of 30 days. The validity of the ordinance was challenged on the following constitutional grounds:

- It invaded the federal domain of “criminal law”.
- It abrogated the “right of public debate ... in public meetings”.

These arguments were rejected by Beetz J, on behalf of the majority of the Supreme Court of Canada.¹¹⁶ The court referred to the “criminal law” argument and held that the by-law constituted valid “regulations of a merely local character”.¹¹⁷ With regards to the “implied bill of rights” argument the court rejected it outright, saying that none of the freedoms referred to is so enshrined in the Constitution as to be above the reach of competent legislation.¹¹⁸

¹¹⁵ (1978) 84 DLR (3d) 420 (SCC). See Swinton’s comment (1979) 57 *Can Bar Rev* 326.

¹¹⁶ Laskin CJ and two other justices dissented.

¹¹⁷ In *Re Nova Scotia Board of Censors v McNeil* (1978) 84 DLR (3d) 1 (SCC) on the same day the court upheld a provincial film censorship statute also denying that it involved criminal law. However, the Supreme Court did find that one severable provision involved criminal law, as it appeared to duplicate a section of the Criminal Code of Canada.

¹¹⁸ This statement was again approved by the Supreme Court of Canada in *Attorney-General of Canada v Law Society of British Columbia; Jabour v Law*

3.2.8.2 Libertarian initiatives by politicians

3.2.8.2.a Adoption of human rights legislation

The traditional deference of Canadian judges to elected authorities and their instinctive diffidence concerning social or political controversy during the 1960s and 1970s stood in sharp contrast to the libertarian activism of politicians during the same period. While the judges were hesitant to protect civil liberties, new forms of human rights legislation bloomed across the country.¹¹⁹

The most important of the new statutes dealt with the problem of discrimination.¹²⁰ Although some anti-discrimination measures had been introduced as early as the 1930s and 1940s, it was not until 1962 when the Ontario Human Rights Code¹²¹ was passed that an attempt was made to deal comprehensively with anti-discrimination measures. The other provinces soon followed. By 1977 when the Parliament of Canada enacted a Canadian Human Rights Act, all eleven sovereign legislators had passed similar (though not identical) legislation.¹²²

Society of British Columbia (1982) 137 DLR (3d) 1 (SCC).

Hogg (1985) 638 suggests that the “implied bill of rights” notion may still have a future role to play in situations where Parliament or a provincial legislator has “opted out” of the Canadian Charter. Gibson (1986) 12 stresses that this argument has little, if any, current judicial support.

¹¹⁹ Gibson (1986) 28.

¹²⁰ A more comprehensive discussion on this topic can be found in Gibson *ibid.*

¹²¹ SO 1961 - 62 c 93.

¹²² Although it is not appropriate to review this jurisprudence it must be borne in mind that it may contain material of use in the interpretation of the Charter of Rights and Freedoms.

At about the same time most provincial legislators created the office of the ombudsman.¹²³ The ombudsman operated largely without judicial assistance and many of these reforms bypassed the judiciary. The human rights violations, although not susceptible to conciliation, were carried out by specialist tribunals with the courts playing a supervisory role.¹²⁴

¹²³ See Alberta: SA 1967, c 59; New Brunswick: SNB 1967, c 18; Quebec SQ 1968, c 11; Manitoba: SM 1969 (2nd SESS), c 26; Nova Scotia: SNS 1970 - 71, c 3; Saskatchewan: SS 1972, c 87; British Columbia: SBC 1977, c 58; Newfoundland: RSN 1970, c 285; Ontario: SO 1975, c 42. See Gibson (1986) 28.

This office of the independent overseer was borrowed from Scandinavia after its successful transplantation to both New Zealand and the United Kingdom. By investigating complaints about administrative actions it oversaw government administrators. The ombudsman tried to resolve by conciliation the complaints, but normally had no legal powers other than those that are necessary to carry out investigations. The ombudsman published reports and the potential impact thereof on the public, and the prestige of the office, proved to be reasonable effective in persuading governments to remedy administrative blunders and abuses.

¹²⁴ Under South African law the Final Constitution makes provision for a public protector (sections 181 - 183). The Interim Constitution also made provision for the appointment of provincial public protectors which could in no way derogate from the functions and powers of the national public protector (section 114). However, it seems that the legislative powers of the provinces under the Final Constitution include the power to make such appointments. The powers of the public protector is regulated by the Public Protector Act 23 of 1994 (as amended) and includes the authority to:

- Investigate any conduct in the public administration in any sphere of government, or state affairs, that is alleged or suspected to be improper or may result in impropriety or prejudice.
- Report on the conduct and take remedial action.

See Burns (1999) 234.

During the same two decades other legislative initiatives strengthened the rights and freedoms of Canadians.¹²⁵ However, legislation that did not favour the rights and freedoms of Canadians still found its way onto the statute books. In response to the “October crisis” of 1970, the Public Order (Temporary Measures) Act of 1970¹²⁶ was passed. This Act which empowered the attorney-general to detain accused persons for prolonged periods, caused much concern.¹²⁷

¹²⁵ Privacy Acts were for example adopted by several provinces. See Gibson (1980) 73 and 111. For other examples and a more thorough discussion see Gibson (1986) 29.

¹²⁶ SC 1970 - 71 - 72, c 2.

¹²⁷ During October 1970 the *Front de Libération du Québec*, a violent Quebec separatist organisation, kidnapped a British diplomat and a Quebec cabinet minister (who was later killed by his abductors). The separatist organisation made various demands on condition of their release. In response the federal government proclaimed that an “apprehended insurrection exists” in terms of the War Measures Act of 1914 bringing the Act into force. The government then issued Public Order Regulations in terms of the Act. The regulations outlawed the FLQ and conferred new powers of search, seizure, arrest and detention on the police. 497 people were arrested in terms of these powers of which only 62 were charged. Of the 62 charged less than one third were convicted. From the facts that emerged during the trials of the kidnappers it became evident that there was never any possibility of an insurrection from the small and ill-organised FLQ. The reaction by the federal government to the “October crisis” showed a remarkable suspension of civil liberties. These unnecessary and abusive detentions became contentious and contributed towards the desire for a Bill of Rights with universal values that stood above the government of the day. The proclamation of the War Measures Act and the Public Order Regulations were revoked on December 3, 1970 by the Public Order (Temporary Measures) Act. However, the latter Act provided for a more limited version of the laws previously contained in the regulations. See Hogg (1992) 458.

3.2.8.2.b The initiatives in adopting a Charter

It became apparent to the politicians that the Canadian judiciary was hesitant to protect civil liberties. Judges clung to restrictive precedents¹²⁸ and if they came across more liberal precedents they tended to ignore it. The politicians realised that if they wanted the judges to play an active role in meeting the public demand for improved and expanded rights and freedoms, they would require a constitutionally expressed invitation.

However, prominent Canadians of most political persuasions have for many years before the introduction of the Charter proposed a constitutionally entrenched, judicially enforced guarantee of individual rights and freedoms.¹²⁹

After the Confederation of Tomorrow Conference in 1967 the government of Quebec had been pushing for constitutional change, giving Quebec more recognition and power as the French Canadian homeland. The Canadian government countered these demands by proposing entrenched rights and freedoms designed to unify the provinces of Canada.¹³⁰ In 1968 the Canadian government published a white paper entitled *A Canadian Charter of Human*

¹²⁸ Such as the rule that the admissibility of evidence was not effected by the fact that it was obtained illegally.

¹²⁹ For earlier initiatives see footnote 74. The move towards protected rights was assisted by the erosion of the connection between the United Kingdom and Canada. In addition many of the post-war immigrants came to Canada from countries where there was not the same trusting attitude towards the state implicit in British parliamentary supremacy. British parliamentary supremacy no longer seemed central to Canadian identity and an interest and positive appraisal of American constitutional theory developed. In the late 1960s and 1970s support for the Charter was driven by the need to contain centrifugal pressures. See Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 603 - 604.

¹³⁰ *Ibid* 606 - 607.

Rights.¹³¹ However, this paper only supported the idea in principle and did not discuss in specific terms the form to be taken by such a charter. In February 1968 at the constitutional conference the Canadian government took the position that first priority should be given to that part of the Constitution that deals with the rights of the individual. This included the individual's rights as a citizen of a democratic federal state and as a member of the linguistic community in which he has chosen to live.¹³² Because of Quebec's reluctance to proceed without agreement on some important amendments, a number of possible substantive changes were proposed including the addition to the Constitution of an entrenched Charter of Rights.¹³³

By the time of the second constitutional conference in February 1969 the government had drawn up a paper entitled, *The Constitution and the People of Canada*.¹³⁴ The paper repeated the Charter of Rights as the first priority in constitutional change.¹³⁵ Although the paper mostly referred to provisions that it "should" contain, some rights and freedoms were drafted in precisely the same language as in the Canadian Bill of Rights. It seems that an attempt had been made to preserve as much of the Bill's text as possible.¹³⁶ The variations that were thought necessary to achieve constitutional entrenchment and to avoid perceived problems in the interpretation of the Charter were included. Some

¹³¹ Hansard (1968) 6233.

¹³² Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 607.

¹³³ The Fulton-Favreau amending formula. See Gibson (1986) 30.

¹³⁴ Ottawa: Queens Printer, 1969. See Gibson (1986) 31.

¹³⁵ Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 607.

¹³⁶ Gibson (1986) 31.

new rights were also included.¹³⁷ It was also no longer possible to employ a “notwithstanding” clause.¹³⁸

The proposals did not meet wide acceptance at the conference. A decision was made to refer some of the rights to committees. The “fundamental” rights were studied by one of the committees and at the third constitutional conference in February 1971 tentative agreement was reached on entrenching two groups of rights. Several alterations were made and new rights were added.¹³⁹

Of importance is that it was agreed to qualify all the “political” rights.¹⁴⁰ They were made subject to “such limitations as are prescribed by law and as are reasonably justified in a democratic society in the interests of national security, public safety, health or morals, or the fundamental rights or freedoms of others”.¹⁴¹

A “Canadian Constitutional Charter” was prepared for the fourth and final constitutional conference held at Victoria in June 1971. However, it seems that

¹³⁷ For example freedom of conscience was added to religion (section 1(a)); protection was added against “unreasonable searches and seizures” (section 2(a)); protection was added against retroactive penal laws (section 2(g)). Remembering previous problems, no specific reference was made to rights having existed in the past. A specific provision was included calling for “past or future” laws interfering with protected rights and freedoms to be “invalid” to the extent of the interference (section 5). See Gibson (1986) 31.

¹³⁸ See my discussion of the Bill of Rights, 1960 (especially par 3.2.7.3.c) for the effect and function of a “notwithstanding” clause.

¹³⁹ Gibson (1986) 31.

¹⁴⁰ The fundamental rights of the Charter were referred to as “political” rights.

¹⁴¹ The “reasonable limits” concept referred to borrowed greatly from the European Convention on Human Rights (1950) and evolved into section 1 of the present Charter. See Gibson (1986) 32.

the spirit had dissipated by June and an agreement was only reached (subject to ratification) on a modest group of amendments known as the Victoria Charter. In the end the accord failed because the government of Quebec refused to ratify it.¹⁴²

In 1972 the final report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada appeared, being the only event of significance for the next seven years concerning the entrenchment of rights and freedoms.¹⁴³ Immediate developments after the report seem to indicate that the energy and optimism of the report did not persist. However, several new features were proposed which found their way into the Charter. From the Victoria Charter were removed the references to “public safety, order, health or morals ... national security or ... the rights and freedoms of others”. The phrase “due process of law” that caused so much trouble under the Canadian Bill of Rights was proposed to be replaced by “principles of fundamental Justice”.¹⁴⁴

During 1974 the Trudeau government pressed for provincial acceptance of the Victoria proposals, or something similar.¹⁴⁵ The efforts did not impress the provinces. In April 1976 Trudeau sent a letter to the provinces indicating three possible ways of achieving patriation. He also indicated that the federal

¹⁴² Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 610.

¹⁴³ This report was referred to as the “Molgat-MacGuigan Report” in honour of its joint chairmen. See Gibson (1986) 32; Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 611.

¹⁴⁴ Record 16 of the report of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada (4th Session, 28th Parliament, 1972, App B, 106. See Gibson (1986) 32.

¹⁴⁵ See the *Winnipeg Tribune* of 3 October 1974 page 8.

government would proceed unilaterally if provincial accord could not be reached.¹⁴⁶ This “threat” caused a flurry of activity during the summer but by the scheduled federal-provincial meeting of mid-December an agreement had not been reached. The election of the separatist *Parti Quebecois* government in Quebec on 15 November changed everything and the plans by the federal government fell by the wayside.¹⁴⁷

After these unsuccessful attempts to achieve patriation the Trudeau government in June 1978 introduced the Constitutional Amendment Bill.¹⁴⁸ The Bill was designed with eventual entrenchment in mind but was described as an interim measure. It was to be applicable at federal level only, until constitutional entrenchment became possible. The text took the 1972 Special Joint Committee Report to heart and expanded upon the rights embodied in the Victoria Charter.¹⁴⁹ For the first time an enforcement provision was expressly included, empowering courts “of competent jurisdiction” to grant relief by means of declaration, injunction, or “similar relief”.¹⁵⁰

¹⁴⁶ *Winnipeg Free Press*, 6 April 1976 at page 4; See also Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 609.

¹⁴⁷ *Winnipeg Free Press*, 4 December 1976. A softer “Draft Resolution” was circulated in January 1977. See also (1978) *Proposals on the Constitution 1971 - 1978* 14 as cited by Gibson (1986) 33.

¹⁴⁸ Bill C - 60. See Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 611. It had been preceded by a white paper called “A Time for Action”. See *House of Commons, Debates*, 30th Parliament, 3rd Session, 121: 6278, 12 June 1978. See Gibson (1986) 33.

¹⁴⁹ Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 611.

¹⁵⁰ Section 24. However, this power was not available with respect to certain rights that would involve the prerogatives of Parliament or legislators (section 27). Also see Gibson (1979) 9 *Man LJ* 363 388 - 391.

Bill C-60 led to considerable controversy and much discussion. The government of Canada referred the Bill to another special committee of the senate and house of commons. On 10 October 1978 after 35 meetings, the committee’s interim

The provincial leaders resented the ultimatum that was put to them in April 1976 and also disagreed on some of the substantive provisions of the proposal, including the basic principle of constitutionally entrenching rights and freedoms.¹⁵¹ This resentment led to the provincial premiers opposing the proposal made at a meeting in Regina in August 1978. This was followed (and not surprising) by a failure to achieve an accord on constitutional revision in the Federal Provincial First Ministers Meetings, in October 1978 and February 1979.

However, some good came from the controversy and the discussions. A “best efforts” draft was released in early 1979 by the Continuing Committee of Ministers on the Constitution. Some progress was made but floundered on the concept of entrenchment due to the opposition of several provincial leaders. One of the co-chairmen of the Continuing Committee of Ministers on the Constitution stated the problem as follows: “The largest continuing obstacle to full agreement remains the fundamental difference between those who favoured the principle of entrenchment and those who supported the status quo.”¹⁵²

The idea of a legislative “notwithstanding clause” capable of overriding a Charter, was introduced to the debate by Saskatchewan as a possible compromise. However, the gulf between the participants on the fundamental question of entrenchment was too wide, and grew wider with each attempt to expand the scope of the Charter.

report (see the Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, Issue 20, 10th October, 1978) was submitted containing several suggestions for improvement. See Gibson (1986) 34.

¹⁵¹ Romanow, White & Leeson (1984) 12.

¹⁵² Romanow, White & Leeson *ibid* 45.

In spite of the serious disagreement by the provinces several new ideas were introduced at this stage that later found their way into the final Charter.¹⁵³

3.2.9 The period 1980 to 1982

During 1980 to 1982 the patriation of Canada's Constitution took place.¹⁵⁴ A new Charter and a new amending formula emerged. The momentum in the quest for a charter was re-established by two events of early 1980: The re-election of Trudeau's Liberals federally and the defeat of the *Parti Quebecois`* proposal for "sovereignty association" in a Quebec referendum. On the back of this the federal government took the initiative and sent a new set of proposals to the provincial governments. The new federal proposals was a thoroughly revised edition of previous versions and in style much closer to the final Charter than the Canadian Bill of Rights.¹⁵⁵

The new federal draft of the Charter went further than any previous proposal. Its sweep was made wider by expressly stating that the draft was binding on both federal and provincial orders of government and it was now furthermore unequivocally designed to be entrenched. The draft stated that law and administrative acts inconsistent with the Charter would be "inoperative and of no force or effect to the extent of the inconsistency".¹⁵⁶

¹⁵³ For a discussion on these ideas see Gibson (1986) 35.

¹⁵⁴ The "patriation" of the Canadian Constitution means bringing it home to Canada. Because the British North America Act has never been a Canadian Act it can not be "repatriated". Although the term is widely accepted by Canadians the exact meaning thereof is still unclear. See Hogg (1992) 53.

¹⁵⁵ Federal Draft of the Charter - Document No 830 - 81/027, 4 July 1980 as cited by Gibson (1986) 35.

¹⁵⁶ Section 18.

In September 1980 a revised federal draft was presented by the Continuing Committee of Ministers on the Constitution which brought the draft much closer to the final form.¹⁵⁷ In this revised draft the “reasonable limits” clause was for the first time inserted at the beginning of the document and a specific list of purposes for such limits was eliminated where they had been retained in the last few drafts.¹⁵⁸ The principle of “due process” also seen in recent drafts was rejected in favour of “principles of fundamental justice” and this provision was no longer grammatically linked to more specific legal rights.¹⁵⁹

In October 1980 the federal government could wait no longer and on the back of the minister’s failure to achieve consensus they announced their intention to proceed unilaterally to obtain patriation and an entrenched charter from the British Government.¹⁶⁰ The document discussed at the first ministers conference, having been slightly rearranged and modified, was included in the resolution placed before Parliament.¹⁶¹

This unilateral initiative by the federal government was followed by rancorous debate on many fronts. The constitutionality of the action was challenged in Newfoundland, Manitoba and Quebec.¹⁶²

¹⁵⁷ Document No 800 - 14/064, 3 September 1980 as cited by Gibson (1986) 36.

¹⁵⁸ Section 1.

¹⁵⁹ Section 6.

¹⁶⁰ *The Canadian Constitution 1980: Proposed Resolution Respecting the Constitution of Canada* (1980). See Gibson (1986) 36.

¹⁶¹ The only major difference was that a section was included which explicitly stated that the Charter applied to the Parliaments, legislators, and the governments of Canada and the provinces, and to “all matters within the authority” of those bodies (section 29(1)).

¹⁶² The initiative was opposed in first six and ultimately eight provincial

The issue was once again referred to yet another joint parliamentary committee after a vicious debate in Parliament.¹⁶³ A sense of urgency and vigour saw the committee meet 106 times between 6 November 1980 and 13 February 1981.¹⁶⁴ A great number of comments, presentations and briefs were received from most of the principal political parties as well as a large number of individuals and groups from the general public.¹⁶⁵ From the comments received approximately two thirds favoured constitutional entrenchment.¹⁶⁶ The committee's hearings resulted in a total of 76 amendments being recommended.¹⁶⁷

Important alterations were made to the proposed Charter on the lines of these amendments:

- The "reasonable limits" clause took its final form with the elimination of the reference to parliamentary government, and the addition of the requirement

governments. See *Reference re Amendment of the Constitution of Canada* (1981) 117 DLR (3d) 1 (Man CA); *Reference re Amendment of the Constitution of Canada (No 2)* (1981) 118 DLR (3d) 1 (Nfld CA); *Reference re Amendment of the Constitution of Canada (No 3)* (1981) 120 DLR (3d) 385 (Que CA). The idea was apparently that the actions would be consolidated in a final appeal before the Supreme Court of Canada.

¹⁶³ See Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada, issue 57, 13 February 1981 as cited by Gibson (1986) 37.

¹⁶⁴ See Gibson (1986) 37.

¹⁶⁵ *Ibid.*

¹⁶⁶ Minutes *ibid* 92.

¹⁶⁷ *Ibid* 6.

that the reasonableness of limits be capable of being “demonstrably justified”.¹⁶⁸

- The enforcement provision was reinstated after having been dropped from the previous version.¹⁶⁹
- The draft also contained a declaration that the Constitution “is the Supreme Law of Canada”, making inconsistent laws “of no force or effect”.¹⁷⁰

In April 1981 the parliamentary committee reported back and two further amendments were made in Parliament: The preamble was added recognising the supremacy of God and the Rule of Law.¹⁷¹ A statement, now found in section 28, was added that the Charter’s rights and freedoms “are guaranteed equally to male and female persons”.¹⁷²

In September 1981 the Supreme Court of Canada delivered its judgement on the constitutional challenge to unilateral patriation. The Supreme Court ruled that Canada would defy constitutional convention if it proceeded unilaterally but added that it had a distinct legal right to do so.¹⁷³ The judgment was followed by intense negotiations between the federal government and the nine provinces on a package of constitutional reforms that included patriation, an amending formula, and an entrenched charter of rights. However, the government of

¹⁶⁸ Section 1.

¹⁶⁹ Section 24(1).

¹⁷⁰ Section 58. Changes were also made to many of the rights and freedoms. Native rights were also strengthened. See Gibson (1986) 37 - 38.

¹⁷¹ See Elliot R, *Interpreting the Charter - Use of the earlier versions as an aid* 15 and 23 as cited by Gibson (1986) 38.

¹⁷² Elliot *ibid* 15 and 52.

¹⁷³ *Reference re Amendment of the Constitution of Canada (Nos 1, 2 & 3)* (1981) 125 DLR (3d) 1 (SCC).

Quebec was left out of these discussions and consequently refused to accept the compromise.¹⁷⁴

Although it was agreed that fundamental rights and freedoms should be entrenched, the cost of an agreement was the shrinkage of some of its protections. The “opt out” clause again came to the fore and was included by section 33 which permitted Parliament or a provincial legislator to opt out of many of the Charter’s most fundamental guarantees with respect to particular legislation, for renewable five year periods. The federal or provincial legislator could therefore enact legislation that shall operate “notwithstanding” the provisions of the Charter.¹⁷⁵

The resolution received final approval from the House of Commons on 2 December 1981, and from the Senate on 8 December 1981. The United Kingdom Parliament acting upon the joint address contained in the resolution, enacted the Canada Act 1982, which received royal assent on 29 March 1982. The Canada Act brought into existence the Constitution Act, 1982, part 1 of which is the Canadian Charter of Rights and Freedoms. The Constitution Act, 1982 was proclaimed in force on 17 April 1982 and the Charter came into effect on the same date with the exception of the equality rights section, section 15, which took effect on 17 April 1985.¹⁷⁶

¹⁷⁴ Romanow, White & Leeson (1984) 209 - 210.

¹⁷⁵ See also chapter 7 footnote 1 and par 11.3.1.

¹⁷⁶ Section 32(2) postponed the commencement of section 15 to enable federal and provincial governments to put their houses in order. It gave them three years to study their statute books, policies and practices to pre-emptively deal with any equality violations rather than waiting for challenges to be raised in court. See Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 987.

3.2.10 The Constitution Act, 1982

Some of the main features of Canada's Constitution are that it:

- Establishes a political and economic union based on federal and democratic principles;
- Outlines a framework for the machinery of government and establishes governmental institutions (for example Parliament, courts);
- Distributes legislative and executive powers between the provincial and national levels of government, thereby imposing legal limits on what a particular level of government can do and not do in relation to other governments;
- Provides the rules and procedures for changing the Constitution itself.¹⁷⁷

Since 1982 it also guarantees certain individual and collective rights and places limits on the powers of governments and legislators respecting these matters by way of the Charter. Because this constitutional renovation is extremely relevant for this study and some sections will be frequently referred to and discussed, I will give an overview of the Charter.

Section 1 guarantees the rights and freedoms contained in the Charter "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This section recognises that rights and freedoms are not absolute. Section 2 guarantees certain fundamental freedoms such as conscience and religion. Sections 3, 4 and 5 entrench democratic rights. Section 6 provides for mobility rights of citizens. Sections 7 to 14 of the Charter outline a series of constitutionally entrenched legal rights

¹⁷⁷ Funston & Meehan (1994) 8.

primarily designed to protect persons subject to the criminal process.¹⁷⁸ Section 15 guarantees equality rights. Sections 16 to 22 concern language rights. Section 23 provides for “Minority Language Educational Rights”. Section 24 makes it clear that the enforcement of the Charter rights is the responsibility of the judiciary. Sections 25 through 31 provide interpretative tools for Charter analysis. Section 32 provides that the Charter applies to the Parliament and government of Canada and to the legislature and government of each province and territory. Section 33 provides for an override of some Charter rights including the legal rights contained in sections 7 to 14.¹⁷⁹

Section 52, although not actually part of the Charter, states that the Constitution (of which the Charter is part) is the supreme law of Canada and that “any law that is inconsistent with the provisions of the constitution is, to the extent of the inconsistency, of no force or effect”.

3.2.11 1982 up to the end of June 1999

3.2.11.1 The judiciary

The early Charter judgments by the Supreme Court exuded confidence in the court’s new role. The Canadian judges seemed to accept that they were being called upon by the Constitution to play a major new socio-political role and the complacency and diffidence referred to earlier were, for the greater part, put aside. However, the courts did not set out on a novel venture in applying the

¹⁷⁸ See Annexure B.

¹⁷⁹ See also chapter 7 footnote 1 and par 11.3.1.

Charter. There were other instruments that shared certain features and therefore the courts had developed bodies of principles to rely on.¹⁸⁰

As can be expected there were also exceptions to the rule. Scollin J in *Re Balderstone and The Queen* observed that the “Charter did not repeal yesterday and did not abolish reality”.¹⁸¹ Scollin J also warned that the Charter should not be understood as being a warrant for rule by a judicial oligarchy.¹⁸²

In the first Charter case heard by the Supreme Court of Canada in *Law Society of Upper Canada v Skapinker*¹⁸³ Estey J on behalf of the court said the following:¹⁸⁴

We are here engaged in a new task. ... The Charter comes from neither level of the legislative branches of government but from the Constitution itself. It is part of the fabric of Canadian Law. Indeed, it ‘is the supreme law of Canada’. ... It cannot be readily amended. The fine and constant adjustment process of these constitutional provisions is left by a tradition of necessity to the judicial branch. ... With the Constitution Act, 1982 comes a new dimension, a new yardstick of reconciliation between the individual and the community and their respective rights, a dimension which, like the balance of the Constitution, remains to be interpreted and applied by the Court.

In *Hunter v Southam Inc*¹⁸⁵ Dickson J pointed out on behalf of the entire court that the function of a constitutional Charter of Rights is to provide a framework

¹⁸⁰ For example the American Bill of Rights and the International Covenant on Civil and Political Rights (1966). See Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 627.

¹⁸¹ (1983) 143 DLR (3d) 671 680 (Man QB), affirmed 4 DLR (4th) 162 (Man CA), leave to appeal to SCC refused 4 DLR (4th) 162n.

¹⁸² *Ibid.*

¹⁸³ (1984) 9 DLR (4th) 161 (SCC).

¹⁸⁴ At 167 - 168.

¹⁸⁵ (1984) 11 DLR (4th) 641 (SCC).

for “the unremitting protection of individual rights and liberties”, and that “the judiciary is the guardian of the Constitution ...”.¹⁸⁶

In February 1985, after Dickson J became Chief Justice of Canada, he discussed the difference in approach by the courts to the Charter and the Canadian Bill of Rights to an audience of Alberta lawyers.¹⁸⁷ Dickson CJ expressed his belief that the experience of the Canadian Bill of Rights would not be repeated. He also mentioned that it was often said that, when dealing with the Bill of Rights, the Canadian judiciary were indecisive and unadventurous, and that they “sapped the Bill of Rights of necessary potential for protection against government heavy-handedness”.¹⁸⁸ However, he did not think that the same accusation could be levelled against the judiciary in dealing with Canadian Charter cases. He said:

Canadian courts, including the Supreme Court of Canada, had accepted the new responsibility which has been thrust upon them by the Parliamentarians. They recognise the vital role they will play in determining the kind of society Canada is and will become under the Charter. I expect that in our Court we will proceed with the Charter cases one by one in a reasonable and principled way, guarding against excessive enthusiasm in light of the various and serious implications of striking down otherwise valid legislation, but willing to impose limits upon governmental action when warranted by the dictates of the Charter.

Dickson CJ underlined the incremental nature of the process. He added that a charter must be capable of growth and development over time to meet new social, political and historical realities, often recognised by its framers.

¹⁸⁶ At 649.

¹⁸⁷ Address to mid-winter meeting of the Alberta Section, Canadian Bar Association, Edmonton, 2 February 1985 as cited by Gibson (1986) 41.

¹⁸⁸ *Ibid.*

However, the framework within which the Supreme Court operates seems to have evolved. The Supreme Court early on seemed to suggest that its role as the guardian of the Constitution dictated its interpretative choice. The court understood its mandate as measuring all other laws against the supreme law of the Constitution and adopted a purposive approach looking for the purpose underlying the guarantee from the view of the holder of the guarantee. The court understood that it had to constrain governmental action inconsistent with those rights and freedoms. The court also accepted the generality of the formulation of the rights, as an invitation to a liberal interpretation of the guarantees. The early cases seemed to hold the view that rights were the norm and limits the exception. The limits were subject to stringent principled justification by their proponents.¹⁸⁹

This trend towards a relatively stringent view, which only cedes the protection of rights and freedoms in rare instances, culminated in *R v Oakes*.¹⁹⁰ While the *Oakes* case has become a paradigm for constitutional interpretation there has been a movement towards a more deferential, flexible, “reasonableness-based” approach to the *Oakes* test. The Supreme Court seems to hold the view that its initial approach had been too stringent and mechanistic. A less stringent view on justification was taken where the court tried to balance the competing interests.¹⁹¹

¹⁸⁹ The Supreme Court held that administrative expediency often relied on by governments would only be allowed to justify a rights infringement in exceptional circumstances such as in an emergency (see *Reference re section 94(2) of the Motor Vehicle Act* [1985] 2 SCR 486 (Can)) or where protection of the right would entail prohibitive costs (see *Re Singh v Minister of Employment and Emigration and 6 other appeals* (1985), 17 DLR (4th) 422, [1985] 1 SCR 177 (SCC)).

¹⁹⁰ [1986] 1 SCR 103; 26 DLR (4th) 200. See the discussion of *Oakes* in chapter 8 footnote 164.

¹⁹¹ See chapter 8 footnote 166.

3.2.11.2 On the political front

Since 1983 there has been a search for a new federation. Much constitutional debate has taken place. Aboriginal rights were discussed and treaties were concluded. Quebec demanded further reforms and in 1987 the provincial premiers and the Prime Minister agreed on the Meech Lake Accord.¹⁹² Due to pressure from Quebec (disappointed with the failure of the Meech Lake Accord) and the Aboriginal peoples, Canada also saw the multilateral “Canada Round” of negotiations and the Charlottetown Accord was drawn up.¹⁹³ Growing concerns with fiscal federation brewed and there was the threat of a Quebec separation.¹⁹⁴

On the political front another development occurred which does not favour libertarian views.¹⁹⁵ Stuart explains that the recent disdainful attitude by the Parliament and Ministers of Justice of Canada to Supreme Court decisions pose a serious threat to the standards set by the Supreme Court.¹⁹⁶ Parliament has

¹⁹² The government of Quebec did not agree to the 1982 reforms because the reforms failed to address controls on the federal spending power and increased powers of the Quebec legislature. The accord was a set of proposed constitutional amendments *inter alia* dealing with these matters. The accord died in 1990 because it did not have the required support in all the provincial legislatures at the end of the three-year time limit set by the amending formula. See Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 7.

¹⁹³ This Accord consisted of a more comprehensive set of principles. However, the Accord was rejected in a national referendum in 1992.

¹⁹⁴ See Funston & Meehan (1994) 14 and Macklem, Swinton, Risk, Rogerson, Weinrib & Whyte (1997) 7.

¹⁹⁵ As recently as 1997. The less stringent approach by the courts had already been adopted by the Supreme Court after *Oakes* in 1986. See chapter 8 footnotes 164 & 166.

¹⁹⁶ (1998) 11 *SACJ* 325 335.

succumbed to the popular concern that criminals have too many rights at the expense of victims and the constant calls in the media to toughen up the criminal law.¹⁹⁷ On a few recent occasions Parliament has enacted amendments to the Criminal Code to achieve positions already declared unconstitutional by the majority of the Supreme Court.¹⁹⁸

3.3 THE JUDICIAL SYSTEM OF CANADA

3.3.1 Introduction

The legal rules of the Constitution are modified in the course of interpretation by the courts and therefore the accepted rules and principles that underline the Constitution present a moving target.

Due to the principle of precedent, judge-made decisions as in South Africa thus became a major source of law. The doctrine of precedent (*stare decisis*) directs the court to follow the precedent set by case law when adjudicating future cases with similar facts. The decision of a higher court acts as binding authority on a lower court within the same jurisdiction.¹⁹⁹ A court's decision in another jurisdiction acts as persuasive authority. However, judges can distinguish cases in order to avoid the binding or persuasive nature of *stare decisis*. As in South

¹⁹⁷ *Ibid* 325 & 326.

¹⁹⁸ For example Parliament's:

- adoption of the minority position of the Supreme court which afford very limited access to the medical and therapeutic records of complainants in sexual assault cases (Bill C - 46), and
- exclusion of the extreme intoxication defence to sexual assault and other general intent crimes (Bill C - 77). See Stuart (1998) 11 *SACJ* 325 335.

¹⁹⁹ Gall (1983) 220. See also MacIntosh (1995) 2.

Africa, the various provinces sometimes differ in their interpretation of the law until the difference is settled by the Supreme Court of Canada.

With regard to Charter litigation, few Canadian cases decided before 1982 will be applicable when applying the doctrine of precedent. However, the cases arising out of the Canadian Bill of Rights will be more relevant but not compelling.²⁰⁰

In view of this I deem it necessary to give a brief outline of the court system so that the prominence and importance of a specific decision can be ascertained.

The judicial system in Canada consists of federally²⁰¹ and provincially²⁰² constituted courts.²⁰³

3.3.2 Federal courts

3.3.2.1 General

The federal government was granted the authority to establish and maintain the courts required to administer the laws of Canada.²⁰⁴ Pursuant to this the Parliament of Canada created by statute the Supreme Court of Canada,²⁰⁵ the

²⁰⁰ Hogg PW, (1992) *Constitutional law of Canada* third edition (supp) Carswell vol 1 8 - 19 as cited by Funston & Meehan (1994) 53.

²⁰¹ Section 101.

²⁰² Section 92(14).

²⁰³ The Constitution Act, 1867.

²⁰⁴ Section 101 of the Constitution Act, 1867.

²⁰⁵ Supreme Court Act, RSC 1985, c S - 26.

Federal Court of Canada²⁰⁶ and the Tax Court of Canada.²⁰⁷ The enabling statutes specify the functions of these courts and other federal statutes may define them further.²⁰⁸

The federal government has the power to appoint judges to these federally constituted courts.²⁰⁹ The Judges Act²¹⁰ determine the salaries of the judges who are paid by the federal government.

3.3.2.2 Supreme Court of Canada²¹¹

Although the Constitution Act, 1867 did not provide for this court the federal government relied on its authority under section 101 to enact the Supreme Court Act, which established this court.²¹²

Appeals from the provincial courts in both criminal and civil matters are heard by this court composed of one Chief Justice and eight other justices who together exercise jurisdiction. The Supreme Court will also hear cases where

²⁰⁶ Federal Court Act, RSC 1985, c F - 7.

²⁰⁷ Tax Court of Canada Act, RSC 1985, c T - 2. As this court only hears appeals regarding assessments made under the Income Tax Act RSC 1952 c 148 and the Canada Pension Plan Act RSC 1985 c C - 8, this court is not discussed.

²⁰⁸ Gall (1990) 149.

²⁰⁹ See section 101.

²¹⁰ RSC 1985, c J - 1; Gall (1990) 106.

²¹¹ The composition, authority, functions and jurisdiction of the court is governed by the Supreme Court Act.

²¹² The Supreme Court was therefore enacted by ordinary statute but the amending formula in sections 41 and 42 of the Constitution Act, 1982 gave some status to some aspects of this court. See Gall (1990) 82.

issues of national importance or appeals on issues of law are raised.²¹³ Constitutional or other outlined cases can also be referred to the Supreme Court by the federal government for adjudication.

An accused whose acquittal on an indictable offence has been set aside by a provincial court of appeal has an automatic right of appeal to the Supreme Court of Canada. The Supreme Court of Canada will also hear an appeal in a criminal case where a judge in a provincial court of appeal has given a dissenting judgement on a question of law or where leave to appeal is granted by the Supreme Court.²¹⁴

3.3.2.3 Federal Court of Canada²¹⁵

In terms of section 101 of the Constitution Act, 1867 a Federal Court was also established. The Federal Court is divided into a trial division and an appellate division.²¹⁶

The trial division has exclusive jurisdiction over some areas of intellectual property,²¹⁷ certain actions concerning members of the Canadian armed forces, and actions for equitable relief against any federal board, commission or

²¹³ *Ibid* 107.

²¹⁴ MacIntosh (1995) 14.

²¹⁵ Hogg (1992) 173 and further indicates that the establishment of a Federal Court over and beyond the provincial courts and the Supreme Court of Canada is an unwarranted step in the direction of the dual court system of the United States. Hogg cautions that the existence of a parallel hierarchy would give rise to wasteful jurisdictional disputes and multiple proceedings.

²¹⁶ Federal Court Act, RSC 1985, c F - 7 section 4.

²¹⁷ *Ibid* section 20.

tribunal.²¹⁸ It also shares jurisdiction with other courts on specific matters such as aeronautics, inter-provincial works and undertakings²¹⁹ and has original concurrent jurisdiction over claims against the federal Crown.²²⁰ It furthermore adjudicates over disputes between provincial legislators or between provincial and federal legislators.²²¹

The appellate division hears appeals from the trial division,²²² appeals by way of certain federal statutes, and applications regarding decisions of federal boards, commissions or tribunals on specific grounds.²²³ Matters can also be referred to this court by these federal boards, commissions and tribunals.

Not more than 29 judges, one Associate Chief Justice and one Chief Justice are provided for by the Federal Court Act.²²⁴

3.3.3 Provincial courts

3.3.3.1 General

The Constitution Act, 1867 empowers the provinces to establish “superior courts” for the “administration of justice”.²²⁵ The functions and powers of the

²¹⁸ *Ibid* section 18.

²¹⁹ *Ibid* section 23.

²²⁰ *Ibid* section 17.

²²¹ *Ibid* section 19.

²²² *Ibid* section 27.

²²³ *Ibid* section 28.

²²⁴ *Ibid* section 5.

provincial courts are described by statutes such as the Provincial Judicature Acts and by the Rules of Court, or Rules of Practice within each province.²²⁶ However, the power to regulate criminal laws including criminal procedure is reserved for Parliament.²²⁷ As the question of bail is a criminal justice issue the same principles have to be applied throughout all the provinces. Strong evidence can be found that the “Fathers of the Federation” sought to avoid the United States experience when they gave Parliament the exclusive power to legislate in the field of criminal law.²²⁸ In the United States, the states have the

²²⁵ Section 92(14).

²²⁶ Funston & Meehan (1994) 39.

²²⁷ By way of section 91. Sir John A Macdonald (who was then Attorney-General of Canada) in a debate in the House of Commons argued that criminal law should be under federal jurisdiction: (See MacIntosh (1995) 11)

The criminal law too - the determination of what is a crime and what is not, and how crime shall be punished - is left to the General Government. This is a matter almost of necessity. It is of great importance that we should have the same criminal law throughout the provinces - that what is crime in one part of British America, should be crime in every part - that there should be the same protection of life and property as in another.

²²⁸ Sir John A Macdonald in the same debate *ibid* criticised the drafters of the US Constitution for giving the states the power to decide criminal law :

It is one of the defects of the United States system, that each separate state has or may have a criminal code of its own – that what may be a capital offence in one state may be a venial offence, punishable slightly, in another. But under our Constitution we shall have one body of criminal law, based on the criminal law of England, and operating equally throughout British America, so that a British American, belonging to what province he may, going to any part of the Confederation, knows what his rights are in that respect, and what his punishment will be if an offender against the laws of the land. I think this is one of the most marked instances in which we take advantage of the experience derived from our observations of the defects in the Constitution of the neighbouring Republic.

exclusive power to pass criminal law and as a result criminal laws frequently differ from state to state.

Generally speaking the provincial court system is a three-tiered system consisting of the following:

- The superior court which includes a court of appeal as well as a trial division.
- The county or district courts.
- The inferior courts which in most provinces are now called “Provincial Courts”.

3.3.3.2 Federally appointed judges

The federal government is vested with the power to appoint the judges to the latter courts which include the district and county courts in the province.²²⁹ This is so even although the superior courts are established and administered by the provinces.²³⁰ The judges are to be selected from lawyers practising in the province where the judge is to preside.²³¹

The superior courts established in each province consist of a trial division or court of Queen’s bench, and the appellate division or court of appeal. Federally appointed judges preside over the intermediate and highest trial courts and courts of appeal of the provinces and territories.²³²

²²⁹ Pursuant to section 96 of the Constitution Act, 1867.

²³⁰ Gall (1990) 154.

²³¹ Sections 97 to 100 of the Constitution Act, 1867.

²³² Funston & Meehan (1994) 39.

The highest superior courts of each province (going from west to east) are the British Columbia Supreme Court, the Alberta Court of Queen's Bench, Saskatchewan Court of Queen's Bench, Manitoba Court of Queen's Bench, Ontario Court of Justice (General Division), Quebec Superior Court, New Brunswick Court of Queen's Bench, Prince Edward Island Supreme Court, Nova Scotia Supreme Court, Newfoundland Supreme Court, and in the territories, the Yukon Supreme Court and North West Territories Supreme Court.²³³

The trial division of these provincially and territorially constituted courts has a very wide jurisdiction that includes most criminal matters, appeals from summary offences, civil matters above a certain monetary amount, divorces, separations and certain administrative law matters.²³⁴ The appellate division hears appeals from the trial division.²³⁵

3.3.3.3 Provincially appointed judges

Each province is granted the exclusive legislative power over the administration of justice in the province, including the constitution, maintenance and organisation of provincial courts.²³⁶ The provinces may also appoint judges but they are appointed to a lower level of court. These courts have jurisdiction over civil matters as well as criminal matters. They are constituted under provincial statutes and the judges within these courts are appointed by their respective provincial governments. The judges are paid by their respective provincial

²³³ *Ibid* 40.

²³⁴ Gall (1990) 154.

²³⁵ *Ibid*.

²³⁶ Pursuant to section 92(14) of the Constitution Act 1867. See Funston & Meehan (1994) 40.

governments and their salaries are set by the enabling provincial statute.²³⁷ However, these judges cannot perform the same functions as federally appointed judges.²³⁸ The two territories have similarly established territorial courts and their governments have appointed judges to those courts.²³⁹

The jurisdiction of the provincially appointed judges is limited and consists of the small claims court or provincial court (civil division), the provincial court (criminal division), the family court or provincial court (family division) and the youth court or provincial court (youth division). The small claims court handles the smallest civil cases²⁴⁰ and the statutory or monetary jurisdiction varies in respect of each province.²⁴¹ The provincial court (criminal division) has jurisdiction over specified and less serious criminal cases, all preliminary hearings and all summary convictions. Some criminal offences are also heard in the family court along with others matters relating to children, maintenance and custody under provincial statutes.²⁴² Youth offenders as well as other matters involving children and welfare are dealt with by the youth court.²⁴³

Because these courts are established by the authority of each province the court structures of the provinces may vary.²⁴⁴

²³⁷ *Ibid.*

²³⁸ Gall (1990) 147.

²³⁹ Funston & Meehan (1994) 40.

²⁴⁰ As in South Africa.

²⁴¹ Gall (1990) 155

²⁴² *Ibid.*

²⁴³ *Ibid.*

²⁴⁴ *Ibid* 151.

3.4 CONCLUSION

Canada evolved from the early years of the Aboriginal societies through the early years of the colonies where the government was the prerogative of the Crown, to a federal state with democratically elected institutions based on a constitution. The present Constitution includes guarantees of certain individual and collective rights such as the legal rights in sections 7 to 14 and the language rights in sections 16 to 22, and places limits on the powers of governments and legislators in respect of these rights.

However, the development of constitutionally protected rights under Canadian law did not happen by chance. It resulted from the balancing of interests between different groupings and an understanding that the individual's rights had to be protected. Before 1982 the citizens and politicians tried to harmonise the interests of different groupings by way of federalism. The protection afforded proved to be insufficient, especially for those individuals that did not agree with the policy of the rulers of the day. Massive violations of individuals' rights took place especially where race, religion and communism played a role. This led to an extended bout of introspection and the development of new divisions relating for example to ethnicity, sex and to people experiencing some situation particular to themselves. These new divisions joined the traditional divisions of federalism that required the constitution to fashion harmonious coexistence between the federal and provincial spheres. The protection of group interests seem to have moved to newly politicised social categories. The constitutional identities of Canadians have therefore for some time not been restricted to their membership in Canadian and provincial governments. These rights and freedoms give Canadians a legitimate basis for making constitutional claims.

But constitutionally protected rights did not come easily. The inheritance of the principle of parliamentary supremacy from the British Empire initially formed the catalyst for the denial of such rights. Later on tentative protection was afforded by the Bill of Rights, 1960 and human rights legislation. Eventually formal entrenched guarantees saw the light in the Charter.

The Canadian Charter is an excellent model to learn from. Some of the fundamental rights and liberties date from as far back as manifestos like the Magna Carta, the English Bill of Rights, the Habeas Corpus Acts and the Act of Settlement. The need for and scope of constitutional rights that are immune to the lawmakers have been debated from as far back as 1865 at the "Confederation debate". As a result of the management of relationships we already see the constitutional protection of a limited amount of rights in the Constitution Act of 1867. The balancing of interests has therefore for a very long time formed part of Canadian law.

It is especially the serious and sometimes frantic debate among legal scholars and especially politicians from the 1950s up to 1982 when the Charter commenced that is invaluable. As far back as 1960 the Canadian Bill of Rights already contained a declaration of fundamental rights and freedoms which contributed to the development of a human rights culture. Although the rights in the Bill, including the right to bail, were not entrenched, it ensured their scrutiny, especially by the courts, as both legislative and non-legislative matters had to be construed in light of the Bill. It so also happens that some of these rights, including the right to bail, were duplicated in the Charter. In the 1960s and 70s there were also many other legislative initiatives mainly dealing with discrimination that strengthened the rights of Canadians.

Of utmost importance is the clarifying role that the Canadian courts have played after the advent of the Canadian Charter. The Canadian courts in accepting their new socio-political role to reconcile the individual and the community, interpreted and applied the Charter and thereby built up a substantial body of judicially developed protections. The Canadian courts not only show the experience that has been gained but point to the kind of society that Canada is and wishes to be. It is not surprising that there is a wide perception that as far as human rights are concerned, Canada is the best country to live in.²⁴⁵

²⁴⁵ See for example the United Nations Human Development Report 2000. According to the "Human Development Index" taken up in this report Canada is ranked number 1 as far as any country's achievements in terms of "life expectancy, educational attainment and adjusted real income" are concerned. On the same index South Africa is ranked number 103.