

## INTRODUCTION:

→ Different public opinions in a free and democratic society, and public opinion is formed from majority and minority

→ Trying to balance the principles of majority rules, societal objectives and individual rights

Three important documents whose purpose is protection of individual and minority rights (and to balance):

1) Canadian Charter of Rights and Freedoms

2) Quebec Charter of Human Rights and Freedoms

3) Book on Person of the Civil Code of Quebec: covers everything in daily life, including money and contracting matters (example: mortgages, loans, contracts, civil responsibility, adoption, how to dispose of a corpse).

## CANADIAN CHARTER OF RIGHTS AND FREEDOMS

### Entrenched Rights:

→ Canadian Charter of Rights and Freedoms – 1982

Before that, Canadians didn't have much protection guaranteed against the gov't encroachment on their freedoms.

→ Canada founded on parliament supremacy, did not include the BNA Act, Charter or Bill protecting individual rights

- Believed an elected gov't composed of common citizens was more legitimate and better suited for making laws that would protect their citizens (since they're citizens themselves) than unelected judges – they could use constitutional Charter to make laws they deemed fit through judicial activism

→ Many argued that a Charter was not necessary.

- People could rely on statutes (i.e. Criminal Code of Canada, Civil Code, Canadian Bill of Rights (1960), or provincial and federal labour codes) to protect their rights

→ However, STATUTES NOT ENOUGH TO PROTECT CITIZENS from having their rights violated or diminished by local, provincial and federal gov't agencies.

→ Statutes could be easily changed

Changes came in 1982 with the Constitutional Act that contained the Canadian Charter of Rights and Freedom as its central part.

Canadian Charter of Rights and Freedom: Entrenches (firmly establish) and protects the basic rights which are guaranteed to every Canadian.

The Seven Fifty Formula: Seven provinces containing 50% of the population of Canada need to approve the amendment for it to pass. Needs at least Québec and Ontario to agree since almost 55% of the pop.

→ Procedure provides a stronger guarantee for these rights and freedoms (as opposed to if it was the federal parliament or Quebec legislature that passed the law)

“Rights are *entrenched* in the Constitution” meaning?

- Can only be changed/amended in the same way a Constitution can be changed/amended = by an agreement between provincial and federal government. Neither level of government can change it alone

### *Application*

→ Federal and Provincial legislatures need to adhere to the *Canadian Charter of Rights and Freedoms* (section 32)

“All matters within authority” = all levels of government (regardless of importance, geographic location) meaning police, schools, municipal gov’t, hospitals, and any other institution/person agent of government are NOT ALLOWED to violate the *Canadian Charter of Rights and Freedoms*

### Examples:

- Lifeguard: denies access to individual because of ethnicity is violating the Charter (him and the municipal authority is liable for his actions)
- Employee wearing religious ornament: fired at private business because they refused to remove it even though they were warned is NOT ALLOWED TO INVOKE THE CHARTER for DISCRIMINATION. Violation between private individuals is not protected by the Charter.
  - ❖ Canadian Charter of Rights and Freedoms applies to matters of government
  - ❖ Canadian Charter of Rights and Freedoms’ adherence is to two levels of government and more (Unlike previous provincial human rights statute or the federal Bill of Rights)
  - ❖ Canadian Charter of Rights and Freedoms has limited application to the actions of government and its agents

Violation between private individuals are not protected under this charter.

Functions:

- Invalidation of laws.
- Criminal Procedure (judicial rights): protects the rights of the accused.
- Litigation: around behavior and discrimination. The Charter can be used to sue or change the behavior of that institution (example: racial profiling by the police).

### ***Protected Rights***

Rights and Freedom protected by the Canadian Charter of Rights and Freedoms:

#### **1. Fundamental Freedoms**

These basic freedoms include freedom of religion, thought and expression, freedom of the press and other media, and the right to assemble and associate.

- These are considered the basic minimum needs for every citizen of a democracy to develop and flourish.
- Examples: publishing information critical of the government, associating and protesting government decisions, joining unions and striking, religious practice.

#### **2. Democratic Rights (s.3-5)**

The right to vote if over 18 years old for elected members of the house of Commons or the National Assembly, and the right to stand up for election

- Supreme Court – every citizen is allowed to “play a meaningful role” during election process. Judges are now allowed to vote

#### **3. Mobility Rights (s.6)**

The right to move to, live in any part of Canada, or look for work anywhere in the country, and even leave Canada assured under the Canadian Charter

#### **4. Legal Rights (s.7-14)**

Every person has the right to life, liberty, security, but not the right to euthanasia or assisted suicide

- Includes protections against unreasonable search or detention and cruel and unusual punishment (non-citizens in Canada)
- Someone who is arrested has the right to consult a lawyer, to be informed promptly of the reasons for the arrest, and to be presumed innocent until proven guilty.

#### **5. Equality Rights (s.15)**

Every Canadian is allowed equal treatment in law and protection against discrimination

Supreme Court of Canada says discrimination exists when a law meet the following criteria:

- It causes a differential treatment based on a personal characteristic or doesn't consider the characteristic.
- It is described or associated to what is listed in section 15.
- It imposes an unnecessary burden on the person or perpetuates a stereotype.

### **6. Official Languages of Canada (s. 16-22)**

Charter states that English and French are the official languages of Canada. Applies to areas where federal government has authority under the Constitution Act (i.e. post office, employment offices, and the military)

- Every Canadian has right to communicate with federal government/departments in either English or French

### **7. Minority Language Education Rights (s.23)**

Three criteria determining the right of children to be educated in either English/French in any province:

- Mother tongue of the parents
- Language in which parents were educated in Canada
- Language in which other kids in the family received education in Canada

#### ***3.2.4 – Limitations***

→ Government and provincial cannot opt out from the Charter

→ However, Government can adopt laws that limit individual's rights and freedoms (sections 1 and 33)

#### ***The Notwithstanding Clause – Section 33***

- Section 33 – empowering fed and pro gov't to pass laws “notwithstanding” some rules from the Charter
- Government can adopt a statute that is protected from a court striking it down, even though it violates Charter right (i.e. Gov't passing law banning certain religious practices)

in public, make sure it isn't declared unconstitutional, include within the statute the notwithstanding clause)

Restrictions:

- Can only be used to limit rights set out in sections 2 and 7 – 15 of the Charter. All other rights are protected from the notwithstanding clause
- Sunset Clause: once section 33 is used, it will operate for no more than 5 years. Once 5 years expire = so does limitation.
  1. Government then forced to reintroduce the statute through the legislative process and face public scrutiny again

### ***The Oakes Test – Section 1***

→ Section 1 can be used to limit rights/freedoms as well, but is different from section 33 in two ways (if it can demonstrate that):

- 1) Section 1 imposes the obligation on government to explain why a statute infringing a Charter protection should be maintained. That is, the government must show why rights should be diminished in favor of societal objectives
- 2) Section 1 has a broader reach (unlike section 33, limited to sections 7-15), the government can attempt to make laws limiting any section of the Charter.

Reverse Onus: a provision within a statute that shifts the burden of proof onto the individual specified to disprove an element of the information.

Oakes Test:

- Part 1: verifies that the limitation has “an objective related to concerns which are pressing and substantial in a free and democratic society.” (Must prove that its important)
- Part 2: verifies that the means chosen to limit the right are “reasonable and demonstrably justified.” It must be the least restrictive way to achieve that policy's goal. (Must prove that the limitation is reasonable)

FACTS ABOUT OAKES:

**Oakes Case Fact**

- Oakes, was charged with possession of a narcotic for the purpose of trafficking
- Oakes argued he had bought the ten vials of hashish oil for his own use
- Oakes challenged the validity of s. 8 of the *Narcotic Control Act*, which imposed a burden on an accused to prove that he was not intending to traffic (prove that it's for personal consumption).
- Argued that this s. 8 <sup>↳ distribution.</sup> reverse onus violates the presumption of innocence contained in s. 11(d) of the *Charter*
- You be the judge. Apply the test: (Oakes test).  
 1st: it's imp. Drugs are not good.  
 2nd: Not reasonable. Should take into consideration type of drug & quantity.

Quebec Charter of Rights and Freedom:

1975: Quebec Charter of Human Rights and Freedoms – Quebec government

Every province in Canada has a *Bill of Rights*. In Quebec, there is the Quebec Charter of Rights and Freedom of the Person and of Youth.

<u>Canadian Charter</u>	<u>Quebec Charter</u>
Applies only to government infringement of citizens' rights and freedoms.	Applies to both government matters and the actions of private citizens towards each other.
Is entrenched – cannot be changed without a complex process of approval by both federal and provincial governments.	Can be changed at any time by the provincial government of the day without notice. (Special Approval: 2/3 of National Assembly)

	vote is required to change it rather than simple majority)
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Function: litigation (one can only sue).

- A plaintiff can sue for 3 things: damages, an injunction, or punitive damages (example: discrimination against pregnant women).

Human Rights Commission: investigates human rights violations and approaches violators in an effort to amicably come to an agreement. If the other side refuses to comply on a voluntary basis, the commission can take the case to court.

- Created by the Quebec Charter.
- One must write to this commission, which then decides whether this case falls within their jurisdiction. If it does, they investigate and determine whether discrimination has occurred. If there has been discrimination, they call in both parties for mediation.
- Litigation on your behalf or authorize you to litigate at Human Rights Tribunal.

### ***Protected Rights***

→ The rights and freedoms protected by the Quebec Charter:

#### 1. Fundamental Freedoms and Rights (s. 1 – 9)

- The right to one’s own physical protection and integrity over one’s own body, life & property, to make their own choices free of others or government influence. Does not include euthanasia or assisted suicide. If a person’s life is in peril, there is an obligation of the society to come to their assistance (right to assistance).
- The freedom to believe in any religion or hold any opinion and to express them within any lawful means through public expressions, association and assembly. Not absolute rights (respect other’s rights), expression is limited in hate, libel, public images, religion is also limited for security, order and other’s rights.
- Protection of reputation and privacy. (i.e. private information given under confidence to government agency or person bound by secrecy to law cannot be disclosed w/o authorization)
- A person’s property is protected; one can peacefully enjoy their property within the law and it is protected against encroachment by others.

#### 2. Right to Equal Recognition and Exercise of Rights and Freedoms (s. 10 – 20.1)

→ These sections focus on discrimination.

- Discrimination (as section 10 describes it): an act based on “distinction, exclusion or preference” that causes a right to be nullified or diminished.
- Under section 10, no one may harass or incite discrimination against a person. They may not prohibit a person from entering into a judicial act (exception: insurance or pension contracts). Refusing to rent an apartment to someone with kids is discrimination under s.10 but included a clause in a lease prohibiting pets is not
- A person may not be restricted from accessing public transportation or a public place.
- No discriminatory symbols or signs/ contracts under discriminations
- All employment related activities, such as application forms, interviews, hiring, training, compensation and dismissals, must not violate the section 10 list. (but you can hire at different wage levels based on person’s aptitudes or qualifications (better qualified/based on pay equity plans (plan to rebalance pay discrepancy)), if criminal record not related to job and obtained pardon)
- If non-for-profit, community or religious, insurance/retirement plans, then its not discriminatory.

### 3. Political Rights (s. 21 – 22)

- The right of every person to be heard by their legislators in matters of concern. Also includes the right to vote and present one’s self for election to public office.

### 4. Judicial Rights (s. 23 – 38)

- Every person accused of illegal activity has the right to a fair and impartial hearing by a tribunal. No one must be detained except as provided by law and they must be treated with humanity. All are protected from unreasonable search and seizure of property.

### 5. Economic and Social Rights (s. 39 – 48)

- Quebec Charter provides economic and social protections for various members of the community, unlike the Canadian Charter.

- For children, it provides protection, security and free public education.
- For employees, it offers reasonable and safe working conditions.
- For spouses, it confirms their equal authority and obligations to each other.
- For aged persons, it offers security and protection from exploitation.

### **3.3.3 Enforcement of Rights and Freedoms**

→ If any of these rights and freedoms are infringed, the victim has several legal resources under section 49.

1. Asking the court to issue an injunction ordering the offending party to stop an ongoing violation.
2. The victim can receive compensation for possible moral or material damages.
3. If the infringement was intentional, the victim can request punitive damages.

**Punitive Damages:** granted by a court as a means punishing the defendant to teach them a lesson, so they don't do it again in the future.

- It also has a preventative objective to discourage others from acting in such a manner.
- If the defendant pleads or is found guilty of a criminal charge, the plaintiff may have no right to punitive damages in a civil trial.

(check book for police officer and pregnant woman example)

### **3.3.4 Limitations**

Section 9.1 allows the legislature to limit any of the Fundamental Freedoms and Rights found between sections 1 and 9, but under a legal challenge it would have to justify any such limit using the principles of the Oakes Test.

## The Quebec Charter of Human Rights and Freedoms

Multani vs. Commission scolaire Marguerite-Bourgeoys

Legal Issue: s.3 and 9.1 Que. Charter, s. 1 Cdn. Charter

Case facts? → Gurtej Singh (12 yr old Sikh student) to wear his kirpan to school. He was in school yard & kirpan fell on the floor.

Superior Court  
→ declaratory judgment allowing kirpan with conditions.

Court of Appeal  
→ Religion neither unique nor capricious.

→ but not absolute.  
→ Applied s. 1 Canadian charter and art. 9.1 Que Charter.

→ Provide safe environment.  
→ Administrative Law.

→ School board must educate but also ensure security.

## The Quebec Charter of Human Rights and Freedoms

Syndicat Northcrest vs. Amselem → Jews set up "succahs" on their balconies for religious reasons → violation of law that prohibits decorations, alterations and constructions on balconies.  
Legal Issue: s.3 and 9.1 Que. Charter

Case facts?

→ Setting up succahs on balconies for 9 days.

→ Northcrest claimed danger & property values.  
→ fire danger.

→ Northcrest proposed common succah.  
→ Northcrest claimed signing building by-laws equal to waiving rights.

Supreme Court (5 vs. 4 judges):

→ If you limit someone's rights in a contract it must be clear to them (in this case: it said that balconies are common property).

## The Quebec Charter of Human Rights and Freedoms

Multani vs. Commission scolaire Marguerite-Bourgeoys

Supreme Court

→ Administrative law not relevant bc violation of charter.

→ Appeal court made mistake in applying reasonableness standard.

→ Religious tolerance important Canadian value.

→ Safety facts + conditions = reasonable limits.

→ Kirpan was never used to stab someone. In school, more dangerous stuff (knives, pencils). → not completely safe.

→ conclusion: allowed to have the kirpan (risk isn't high enough).

## The Quebec Charter of Human Rights and Freedoms

R. v. Kapp [2008] → Fishers claim that the fishing license discriminated against them on the basis of race. (aboriginal).  
Legal Issue: s. 15(2) Cdn. Charter "amelioration of conditions"

Case facts?

→ Communal fishing license to 3 aboriginal bands.

→ Exclusive right to fish for 24 hours in the Fraser River. → Appellants argued discrimination under s.15. for 1 day.

Decision?

→ Not every distinction is discriminatory.

→ Programs designed to ameliorate the disadvantaged doesn't mean reverse discrimination.

## The Quebec Charter of Human Rights and Freedoms

**Therrien vs. The Minister of Justice** → im prisonment for 1 year for unlawfully giving assistance to 4 members of the Front de liberation du Qc. → he continued his legal studies → his candidacy was rejected bc of his criminal record. He didn't disclose his criminal record.  
Legal Issue: s.18.1 and 18.2 Que. Charter

Case facts?

- 1970 Therrien sentenced to one year in prison for assisting 4 FLQ members.
- Practiced law btw 1976 & 1996.
- Pardoned in 1987.
- tried 5 times btw 1989-1996 to be appointed judge.
- the 5th time, he didn't say he had a criminal record. → Appointed judge in 1996.
- record discovered & removal process started.

## The Quebec Charter of Human Rights and Freedoms

**British Columbia vs. BCGSEU** → Tauney Meiron was hired as a forest fire-fighter. She lost her job 3 yrs later bc the govt adopted fitness tests (she passed 3/4 → failed one).  
Legal Issue: s.20 Que. Charter

Case facts?

- 7 yrs ago Meiron was hired BC forest fire-fighter.
- was fired 3 yrs later due to new fitness tests.
- she passed 3 of the tests but failed the run by 49.4 seconds.
- issue: aerobic standard & discrimination.

## The Quebec Charter of Human Rights and Freedoms

Therrien vs. The Minister of Justice

Legal Issue: s.18.1 and 18.2 Que. Charter

Case facts?

- Therrien argued violation of s.18.1 and 18.2.
- can't ask questions which can be discriminatory.
- court found s.18.1 not valid bc criminal record is not in art.10 list
- court found 18.2 not valid bc of "the nature, characteristics and requirements of the office". → the job is related to criminal record (both have to do w/laws).
- court also found non-discrimination via art. 20.

## The Quebec Charter of Human Rights and Freedoms

British Columbia vs. BCGSEU

Case facts?

- court found need for a 3 step test to determine a discriminatory standard is a bona fide occupational requirements (BFOR) standard
- BFOR Test:
  - step 1) Is the standard rationally connected to the job performance.
  - step 2) Was it adopted in good faith, (honest, good intent).
  - step 3) Demonstrate the standard is reasonably necessary.
- accommodations individual would impose undue hardship upon the employer.