

Supremacy of Parliament and the Canadian Charter of Rights and Freedoms

Supremacy of Parliament was one of the main characteristics of the British constitution applicable to Canada. Parliament was deemed to have sovereign and uncontrollable authority in the making, amending and repealing of laws. Nothing was beyond its capacity to legislate upon. Parliament was the place where absolute legislative power resided. It could do everything that is not naturally impossible. Strictly speaking, in a country of supremacy of Parliament, Parliament cannot issue an unconstitutional law since there are no bounds to its authority.

Supremacy of Parliament to 1982

This feature of the British constitution was transferred to Canada when legislatures were first created in the period after the conquest. The only restrictions that applied were those connected to the colonial status of the various provinces, the British Parliament having reserved for itself some of the legislative powers appertaining to sovereign authority. The preamble to the Constitution Act, 1867, stated that Canada was to have a constitution "similar in principle to that of the United Kingdom". Through this, it confirmed that supremacy of Parliament also applied to Canada. The full extent of the supremacy, save for the part that touched upon the amendment to the constitution, was transferred to Canada by the Statute of Westminster in 1931.

However, while it is clear that supremacy of Parliament applied to Canada, partly before and entirely after 1931, the supremacy must be understood in Canada in the context of the federal system. What was supreme in Canada was Parliament, understood as the sum total of all the legislative bodies of the country, provincial and federal, each in their sphere of jurisdiction. Thus, it was possible for a legislative body to enact legislation deemed unconstitutional if it had acted beyond its legislative authority, if it had not legislated within its sphere of jurisdiction. Evidently, the courts would strike down legislation that was beyond the legislative powers of the federal Parliament, if it invaded provincial jurisdiction, or of the provincial legislatures, if it invaded federal jurisdiction.

To sum up, before 1982, one could always be certain that the legislative bodies of Canada could adopt laws, even of the most oppressive nature, as long as they acted within their fields of jurisdiction, that they did not invade the jurisdiction of the other level of government. This is why citizens facing repressive legislation rarely argued before the courts that such legislation could not be issued; rather, they would claim that the legislative body had acted beyond its power, such power residing only in the other level of government. It would be admitted that some level of government could adopt repressive legislation; however, it was frequently claimed that it was only the other level of government that could do it. Such was the nature of constitutional contestations in

Canada regarding the Supremacy of Parliament before 1982.

Supremacy of Parliament under the Canadian Charter of Rights

At that point, with the Constitutional Act, 1982, Canada diverted from a strict regime of Supremacy of Parliament. By including a *Charter of Rights and Freedoms* in the Constitutional Act, 1982, Canada appeared to end Supremacy of Parliament. The Charter is clear on this point : it is stated in s. 32 (1) that it applies, or binds, the federal Parliament and the legislatures of the provinces. Thus, legislation not conforming to the Charter is unconstitutional. Supremacy has been shifted, or so it would appear, from Parliament to the Constitution and thus to the people. One should not be surprised at this outcome: why else would a Charter of Rights and Freedoms be issued if not to restrict the legislative powers of those that govern us? The prime purpose of a Charter of Rights is to affirm that some rights and freedoms are so important, and so dear to individuals and the democratic process, that never should they be infringed upon, even should a large number of people so wish it to be. Its purpose is to protect individual and minority rights against the "tyranny of the majority" as expressed by the majority in the legislative bodies.

However, in the Canada of 1982, many were weary of departing completely from a regime of Supremacy of Parliament to jump into an American-style regime of

Supremacy of the Constitution, of the supremacy of a Charter of Rights. Some argued that a country should not turn so clearly its back on its historical experience. Others claimed, not without validity, that Canada had been served well by a regime of Supremacy of Parliament, that our record on human rights with such a regime was probably better than that achieved by the United States under a Bill of Rights, better than a country under which slavery and segregation were permitted and lawful even when it had affirmed that "all men were born equal" and "with inalienable rights". In any case, some of the champions of the principle of Supremacy of Parliament would have opposed the Charter altogether if concessions to the principle of Supremacy of Parliament were not made. As the November 1981 constitutional conference between the provinces and the Trudeau government made it clear, the latter had either to accept concessions and maintain a measure of supremacy in the legislatures or else there would be no Charter of Rights. These factors explain why some restrictions were written into the Charter of Rights.

Three types of restrictions on individual rights were written into the Canadian Charter of Rights and Freedoms: first, there is a **general restriction** in s. 1; secondly there are several **specific restrictions** in a number of individual articles; lastly there is the **notwithstanding clause** found in s. 33. These are explained and discussed briefly below.

1. The general restriction of s. 1

Section 1 makes it clear that the rights defined in the 34 articles that the Charter contains are not absolutely guaranteed, that they can be infringed upon by Parliament and the provincial legislatures. It states that the rights of the Charter are subjected "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". The language used is very clear: a legislative body may issue a law, though it infringes upon the rights defined in the Charter, if this law merely just "limits" the right (presumably it could not abolish it), if such limits may be deemed reasonable in a free and democratic society. Thus, any legislature that enacts laws of a restrictive nature is *bound to show up before the courts to argue that their "restriction" is justified to protect a free and democratic society*. To use examples: in the Second World War, newspapers were suppressed to protect our society and it was argued that Japanese Canadians were interned for the same reason. Would a Charter with a s. 1 have made a difference? In 1970, the Trudeau government adopted the War Measures Act, and many innocent people went to jail because of it. Would they have been saved this ordeal had a Charter of Rights with a s. 1 existed? Supporters of the clause argue that it is necessary to protect minorities from hate literature, children from exploiters, the people from powerful lobbies etc. Still, it is clear that Canada does not consider that rights are absolutes.

2. Specific restrictions

Several articles of the Charter are written with a qualifier that restricts the generality of the rights defined. The net effect is to narrow significantly the range of rights and freedoms granted. For example: s. 2 declares that there is a right to peaceful assembly; s. 8 guarantees against unreasonable searches and seizure; s. 11 provides that upon arrest the accused must be informed of the charge not immediately but without unreasonable delay; an individual may not be denied reasonable bail without just cause; s. 12 provides guarantees against cruel and unusual treatment; s. 23 guarantees that minority language people have access to minority language schools but only where the number of such children warrants it; evidence improperly obtained will only be excluded from the court if such evidence "would bring the administration of justice into disrepute" (s. 24), etc.

3. The notwithstanding clause

Although frequently not well understood, the best known restriction written into the Charter of Rights and Freedoms is the notwithstanding clause found in s. 33 of the Charter. The article stipulates that a law that infringes upon the Charter may still apply if such a law specified that it is enacted notwithstanding (regardless of) the provisions of the Charter. Thus, s. 33 clearly reintroduces the notion of Supremacy of Parliament. The legislative bodies of Canada can have the last word on a number of issues.

S. 33 does not apply to the whole of the Charter. It can be used to derogate from ss. 2 (fundamental freedoms), 7-14 (legal rights) and 15 (equality rights, the non-discrimination clauses). It cannot be applied to the following category of rights: democratic rights (ss. 3-5), mobility rights (s. 6), official languages (ss. 16-22), minority language rights (s.23) and aboriginal rights (s. 35; this section is not specifically in the Charter of Rights). In general, the legislative bodies can legislate notwithstanding individual rights but not collective rights.

The notwithstanding declaration only has validity for five years (s. 33 – 3) after which it dies unless it is reissued. It can never apply to gender rights (equality of male and female persons) as s. 28, with a notwithstanding clause of its own, forbids it.

Some have argued that the notwithstanding clause renders the Charter "not worth the paper it is written on". Such views are exaggerated as the right is restricted in scope and time. It has rarely been used and might be used to actually enhance rights of some individuals or groups. I am convinced that its presence, by allowing that democratically elected individuals can have the last word, has had a beneficial effect on rights in Canada. The Supreme Court of Canada, generally a liberal court in any case, has not had to exercise judicial restraint in interpreting rights, as is customary in such situations, since it can leave the legislative bodies with the last word. The

parliamentarians have rarely dared curtail the liberal interpretations of the Court.

Conclusion

The introduction of the Charter of Rights and Freedoms has curtailed, to some extent, the principle of Supremacy of Parliament in Canada. It cannot be said that the legislative bodies in Canada can do as they please as was the case once upon a time. They have been restricted by specific provisions of the Charter. Neither can it be said that Canada has moved into a system of unfettered Supremacy of the Constitution (Charter). The restrictions of the Charter are too considerable not to recognize them. Thus, Canada has created a mixed system. In a country that prides itself to be reasonable and to govern by compromise, the Charter may be said to be typically Canadian.

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Questions

1. After reading the first paragraph, explain in your own words what supremacy of parliament means.
2. Before 1982 what seemed to be the only thing stopping governments from passing oppressive laws?
3. What event seemed to mark the end of supremacy of parliament?
4. According to the article what is the prime purpose of a Charter of rights? What do you think the author means by the phrase “tyranny of the majority”?
5. Why were some reluctant to give up on the idea of supremacy of parliament?
6. How did Trudeau have to compromise?
7. What might the author mean that no rights are absolute?
8. Name the three types of restrictions on individual rights written into the CORF.

9. In your own words explain the meaning of S.1, otherwise known as the **reasonable limits** clause.
10. What effect does the use of qualifying terms have on rights? (see specific restrictions)
- 11 a. How does section 33 reintroduce the idea of Supremacy of Parliament?
- b. What sections does it apply to?
- c. What sections doesn't it apply to?
- d. What is the time limit on the clause?
12. Why does the author feel that the notwithstanding clause benefits our rights?
13. The author concludes that Canada has created a mixed system. Explain.