

Mr. Aldunate

The Impact of the Charter

Over the last twenty years, the Charter has had a large impact on government and politics in Canada.

The following examines some important impacts and issues of the Charter.

Rights and Freedoms in Canada

One of the primary impacts of the Charter is the entrenchment of rights and freedoms in Canada. This doesn't mean that rights and freedoms were not protected before the Charter. Indeed, several civil liberties were protected by convention and common law rules. However, the Charter has enabled the Supreme Court to interpret previous rights and freedoms more liberally than before.

In addition, unlike the Canadian Bill of Rights, the Charter is entrenched in the constitution as the highest law in the land. This has enabled the Supreme Court of Canada to be more active in protecting rights and freedoms and infringing on legislative objectives in doing so. Finally, the Charter has created new rights that did not previously exist in convention or common law. For example, equality rights under section 15 and the minority language rights in sections 16 to 23.

Judicial Activism

As the Charter's interpreter, the Supreme Court has taken on a more active role in Canadian politics. No longer is the principle of legislative supremacy absolute. As former Chief Justice Lamer stated. "Our decisions hit harder because they hit wider." "It's not for me or any judge to decide which laws should be passed, but if legislatures choose not to legislate, where else can people go except the courts?"

For many, this judicial activism represents an attack on Canadian democracy and its replacement with judicial supremacy. Laws are no longer made just by elected, accountable and representative bodies (politicians and legislatures); instead, they are increasingly being made by non-elected and unaccountable lawyers and judges.

However, this characterization is not completely true. The Charter has not resulted in judicial supremacy in Canada, but a dialogue between the courts and the legislature (Hogg, P & Bushell, A. The Charter Dialogue the Courts and the Legislatures). In this dialogue, the courts generally leave room for legislative responses to their decisions. If important enough, legislative objectives will be accomplished, although with court imposed safeguards to protect individual rights and liberties.

According to Hogg and Bushell, this dialogue is facilitated by specific clauses in the Charter itself:

- **Section 1 of the Charter**
When there is a Charter violation, the courts must examine whether the violation is justifiable as a reasonable limit under s. 1 of the Charter. In doing

so, the court takes into account the government's legislative objectives and examines alternative means of accomplishing this objective that would impair the right or freedom to a lesser degree. This provides the legislature with a framework for revising a law that has been struck down, and represents a dialogue between the courts and legislature.

- **Section 33 of the Charter**

The legislative over-ride clause allows legislatures to enact legislation that is beyond the review of ss. 2 and 7 to 15 of the Charter. However, the over-riding clause is only good for five years, upon which time the legislation must be re-enacted (generally after a general election). This allows the legislature to revisit the issue and possible court interpretations, and represents a dialogue between the courts and legislature.

- **Qualified Charter rights**

Through qualified Charter rights (such as sections 7 or 8 of the Charter), the courts have forced the state to change its relations with persons under the law. For example, through section 8 of the Charter, the courts have made it more difficult for the state to use electronic surveillance on persons. In doing so, the courts have not taken this power away from the state, but have simply made the government respect individual rights and liberties when they use it. This represents a dialogue between the courts and legislatures.

- **Equality rights**

Under section 15 of the Charter, the courts may strike down discriminatory legislation. However, the legislature has several responses to such court action. It may revise the legislation or revoke it completely. This interaction represents dialogue between the courts and legislature.

Accessibility

In the Charter's early years, some critics argued that only the rich would be able to have access to the Charter. Only big corporations and wealthy private individuals would have the money to fund expensive Charter litigation all the way to the Supreme Court.

However, statistics have shown that other groups have also seized opportunities to bring Charter litigation before the Supreme Court. These groups include charities, aboriginal groups, women's groups, and other non-profit organizations. This is generally due to the Court's willingness to allow these groups to be "interveners" in litigation. As "interveners" these groups may attach themselves to and offer arguments in litigation that began without them.