

Public Law II

AK/POLS 3136

Agenda

- Defining Civil Liberties
- A Brief History of Civil Liberties in Canada
- Implied Bill of Rights
- Canadian Bill of Rights
- Universal Declaration of Human Rights (handout)

Civil Liberties

- Freedoms that protect the individual from the government.
- Civil liberties set limits for government so that it cannot abuse its power.
- The protection of civil liberties is a key feature of democratic states, as distinct from authoritarian states.
- The Constitution of Canada includes the Canadian Charter of Rights and Freedoms

Brief History of Civil Liberties in Canada

Brief History

- No Bill of Rights ??
- Implied Bill of Rights
- Bill of Rights
- Charter of Rights & Freedoms

- In 1867, the British North American colonies after confederation did not include a bill of rights in their constitution.
- English Common Law inherited by Canada included rules that are protective of civil liberties but does not provide any guarantee for their continued recognition.

Implications

- In the absence of a bill of rights, when a law abridging a civil liberty is challenged, the issue is that of jurisdiction, not whether the injustice should be prohibited completely.
- In other words, if the courts were faced with a law passed by a province that placed restrictions on civil liberties, the responsibility of the court was not to state whether or not the law violated a civil liberty or freedom but if the law fell under the province's jurisdiction under the constitution.

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Implications

- In Canada's Parliamentary system of government, inherited from Britain, the courts did not invalidate legislation which violated a delineated set of basic rights.
- Instead, Parliament was the ultimate arbiter of what was a legitimate limit on individual rights.

Canada Government's Record on Civil Liberties

- A head tax of \$50 on all Chinese immigrants; this tax would expand to \$500 in 1900 and would remain until 1923.
- Chinese were also denied the provincial franchise and, while they had the right to vote nationally, the federal government's dependence on provincial voting lists effectively denied all voting privileges to Chinese in British Columbia.

Canada Government's Record on Civil Liberties (contd...)

- Once the Japanese population began exceeding Chinese in the 1930s, legislators directed their efforts towards limiting the influence of the former in the province.
- A partial success in 1931 gave Japanese veterans of WWI the vote, but wishing to avoid providing the Japanese with a claim to vote after WWII, the King government exempted all citizens of Japanese descent from military service.
- These developments set the context for one of the most infamous incidents in Canadian history.

Canada Government's Record on Civil Liberties (contd...)

- One of the most notable legacies of the war was the forcible relocation of 22 000 men, women and children of Japanese descent from the Pacific coast to the interior.
- Under “wartime powers, these citizens were forcibly relocated to camps in the interior, had their property confiscated, and were seriously threatened with mass deportation to Japan (including Canadian-born among them) at war’s end. All of this was done without proof of a single case of espionage or sabotage by a Japanese Canadian.

Canada Government's Record on Civil Liberties (contd...)

- The Quebec government introduced An Act to Protect the Province Against Communist Propaganda (Padlock Act) in 1937.
- The Padlock Act empowered local sheriffs (under the authority of the provincial Attorney-General) to close down meeting places suspected of promoting communism or Bolshevism (the terms were not defined in the statute). The "Padlock Act" is a reference to the practice of placing a padlock on a door to prevent use a building.
- The legislation gave the Attorney General such widespread powers that it was used to persecute suspected communists and various other suspected 'subversives.'

Canada Government's Record on Civil Liberties (contd...)

- The law became a rallying point for civil libertarians who considered the Act one of the most repressive pieces of legislation in Canadian history.
- The legislation did not reach the Supreme Court until 1957. The only issue for the court was whether or not the legislation fell within the proper jurisdiction of the province.

Canada Government's Record on Civil Liberties (contd...)

- The 'Great War'. For recent immigrants and political radicals in Canada, the war was a time of censorship, repression and, for many, life in an internment camp. During the war, the federal government waged its own internal conflict against potential subversives through the registration and internment of enemy aliens.
- In total, 80 000 enemy aliens were registered and 8579 men, 81 women and 156 children had been interned during the war. Many of those interned were mostly 'foreign aliens' with radical political ideas and found guilty of possessing prohibited literature, attending illegal meetings, or being a member of an illegal group.

Canada Government's Record on Civil Liberties (contd...)

- Six reported cases of individuals tried for sedition during the war resulted in four convictions for expressing pro-German sentiments.
- Censorship was initially limited to two items in 1914 and sixteen in 1915, jumping to a total of 184 bans by 1918.
- Rather than ending with the war, the powers of Canada's chief censor increased, allowing him to ban any publication in an enemy language. PC 2381 was passed on 25 September 1918 with the attendant penalties of \$5000 and/or five years imprisonment for distributing banned publications. Rooted in concerns over the implications of the Bolshevik revolution and support for socialism at home, the legislation had more to do with suppressing socialism than dealing with the exigencies of war.

Canada Government's Record on Civil Liberties (contd...)

- Political and labour groups were also outlawed through PC 2384 which effectively banned freedom of association, assembly, and speech for a select group of Canadians, most of whom were recent immigrants.
- Perhaps the greatest legacy of the war for the human rights movement was the War Measures Act. In 1914 the War Measures Act was created and passed by the Conservative government of Robert Borden. It would later be invoked again in 1939 to deal with the Second World War

Canada Government's Record on Civil Liberties (contd...)

- In the fight against discrimination, the courts had historically proven to be a poor forum for defending individuals. A decision by the Supreme Court in 1939, for instance, *Christie v York*, exemplified this trend. A black man was denied service in York Tavern in Halifax because of the corporation's policy of not serving negroes. When Fred Christie called in the police to challenge such a blatant discriminatory practice, the officers claimed they could do nothing. With no statutory claim in 1939 to bans on discrimination, Christie's defence lawyers were forced to argue in court the common law rule of innkeeper's not being allowed to refuse service unless under exceptional conditions. His opponent, York Corporation, argued freedom of contract and the right of a merchant to arbitrarily refuse service. Confronted with a choice between freedom of contract and the right of individuals to be served equally, the Supreme Court chose the former.

Canada Government's Record on Civil Liberties (contd...)

- The Liberal government of World War Two was far more repressive than the Conservative government had been in World War One.
- King and his cabinet were responsible for censoring 325 newspapers and periodicals in the first years of the war (compared to a total of 184 under Borden).
- More than thirty political, social, religious and ethnic organizations were banned and internment camps housed approximately 2 423 Canadians during the war.

Canada Government's Record on Civil Liberties (contd...)

- Habeas corpus and many of the rights designed to protect citizens from arbitrary state action were suspended.
- One of the most notable legacies of the war was the forcible relocation of 22 000 men, women and children of Japanese descent from the Pacific coast to the interior.
- Under “wartime powers, these citizens were forcibly relocated to camps in the interior, had their property confiscated, and were seriously threatened with mass deportation to Japan (including Canadian-born among them) at war’s end.

Canada Government's Record on Civil Liberties (contd...)

- Thus, in defending the actions of his government in suspending habeas corpus and other civil liberties in 1946, Minister of Justice J.L. Ilsey claimed that
“those principles resulting from Magna Carta, from the Petition of Rights, the Bill of Settlement and Habeas Corpus Act, are great and glorious privileges; but they are privileges which can be and which unfortunately sometimes have to be interfered with by the actions of Parliament or actions under the authority of Parliament.”

Canada Government's Record on Civil Liberties (contd...)

- The federal government invoked wartime powers to detain, interrogate and prosecute several suspected communist spies.
- Habeas corpus was suspended; people were arrested and interrogated by the police for weeks without access to legal counsel;
- suspects were trapped in tiny cells and held under suicide watch by an RCMP guard at all times;
- The episode was one of the most (in)famous violations of civil liberties in Canadian history.

Implied Bill of Rights

- The **Implied Bill of Rights** is a judicial theory in Canadian jurisprudence that recognizes that certain basic principles are underlying the Constitution of Canada. Invoked more often before the Canadian Charter of Rights and Freedoms was enacted it is nonetheless important when questions of parliamentary supremacy and the override power come into play.
- Some constitutional scholars focus on the preamble of the Constitution Act, 1867 as providing the underlying reasons for an implied bill of rights. The relevant part of the preamble reads:

Implied Bill of Rights (contd..)

- *Whereas the Provinces of Canada, Nova Scotia and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that of the United Kingdom [...]*
- Some authors have taken the view that the words "similar in principle" means that in Canada there must be a parliamentary system of government, acting under the influence of public opinion, of a free press, with free speech. Thus legislation which destroyed the citizen's ability to debate, to assemble or to associate freely would be contrary to Canada's democratic parliamentary system of government. This provides an additional underpinning for the claim of an implied bill of rights in Canada's Constitution.

Towards the Bill of Rights

- Canadians had been debating the viability of a constitutional bill of rights long before the entrenchment of the Charter of Rights and Freedoms in 1982.
- In 1867 the founding fathers had rejected a bill of rights and the only real limits on governments were their jurisdiction of powers as defined by the constitution.

Bill of Rights

- The **Canadian Bill of Rights** is a federal statute and bill of rights enacted by Prime Minister John Diefenbaker's government on 1960. It provides Canadians with certain rights in relation to other federal statutes.
- It was the earliest expression of human rights law at the federal level in Canada.
- The Canadian Bill of Rights remains in effect, but its widely acknowledged ineffectiveness was the main reason that the Canadian Charter of Rights and Freedoms was adopted in 1982.

Bill of Rights (contd..)

- The *Canadian Bill of Rights* protects numerous rights, most of which were later included in the *Charter*. Examples include:
- Freedom of speech and freedom of religion (now in Section 2 of the *Charter*)
- Limited equality rights (more complete rights are contained in Section 15 of the *Charter*)
- The right to life, liberty and security of the person, and in another section, rights to fundamental justice (the *Charter* combines those rights in Section 7)
- The right to enjoyment of property, which is not enshrined in the *Charter*
- The right to counsel (now in Section 10 of the *Charter*).

Bill of Rights (contd..)

- Criticism of the 1960 Bill of Rights has mostly centred on its limited effect.
- It did not explicitly amend any conflicting statutes, either to remove conflicts or to insert explicit allowances for the statutes to operate notwithstanding the Bill of Rights. When called upon to apply conflicting laws, the courts typically sought to interpret a later statute as creating a minimal disturbance of earlier law. In practise this meant that the courts relied on Parliament to repeal or amend any laws contrary to the Bill of Rights.

Bill of Rights (contd..)

- Since the *Bill of Rights* was not a constitutional amendment, there was some debate as to whether it was binding on future Parliaments.
- Another criticism of the 1960 Act is that its authority is limited to matters set out in Section 91 of the *BNA Act* (the *Constitution Act, 1867*), *i.e.* powers of the federal government, and not those of the provincial governments.

Towards The Charter

- Under the leadership of Pierre Elliot Trudeau, the Liberals' position on a bill of rights shifted towards favouring a constitutional amendment.
- Trudeau's campaign to lead the Liberals in patriating the constitution and entrenching a Charter of Rights and Freedoms began in 1968 with his first official speech on constitutional rights as Minister of Justice. In a speech before a conference of Federal-Provincial First Ministers in the year of the anniversary of the UDHR, Trudeau called for a constitutionally entrenched bill of rights to "identify clearly the various rights to be protected, and remove them henceforth from governmental interference."

Towards The Charter (contd..)

- In 1982, after extensive negotiations between the federal and provincial governments, and a massive consultation with Canadians on the constitution the federal government alongside 9 of the 10 provinces (except Quebec), called on the British Parliament to patriate the constitution to Canada.
- Simultaneously, an amending formula was added to the constitution and a Charter of Rights and Freedoms was also added to the constitution.

The Canadian Charter of Rights and Freedoms

- A bill of rights entrenched in the Constitution of Canada.
- Guarantees certain political and civil rights of people in Canada from the policies and actions of all levels of government.
- Greatly expands the scope of judicial review.

Impact of the Charter

- More explicit with respect to the guarantee of rights and the role of judges in enforcing them than was the Bill of Rights.
- The courts when confronted with violations of Charter rights, have struck down unconstitutional federal and provincial statutes and regulations or parts of statutes and regulations.
- Before the Charter, courts were primarily concerned with resolving issues of federalism.
- Applies directly to government laws and actions (including the laws and actions of federal, provincial, and municipal governments).