

Observations: The New Canadian Constitution

Constitutional law has now spread North even beyond Minnesota. In 1982, Canada adopted a Charter of Rights and Freedoms. It makes interesting reading.

In drafting the Charter, the Canadians have taken the experience of the United States to heart. Several questions that have vexed American courts and commentators are neatly disposed of in the new Charter. For example, while constitutional law classes in the United States are obliged to begin with a lengthy discussion of whether judicial review is legitimate, § 24(1) of the Charter disposes of the problem in a few words:

Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

The following subsection provides an exclusionary rule requiring evidence to be excluded "if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

In recent times, courts in the United States have found the problem of applying the equal protection clause especially difficult. The Canadian Charter resolves many of these disputes. For example, rather than leaving the matter to judicial interpretation, the Charter contains a list of "suspect classes" which cannot be used as a basis for discrimination. The list includes race, national or ethnic origin, sex, age, and mental or physical disability. (Section 15(1)). The following subsection, disposing of one of our thorniest issues, allows affirmative action programs.

Other provisions spell out the right of Canadian citizens to travel freely, specify in some detail the rights of criminal defendants, and establish bilingualism as a constitutional right. The Charter also provides a general test for application to particular statutes. Under § 1, the rights set out in the Charter are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

The most intriguing provision is found in § 33, which permits Parliament or the legislature of a province to override most of the provisions of the Charter. To do so, it must expressly declare in a statute that the statute shall operate notwithstanding a provision

of the Charter. Such declarations are effective only for five years unless renewed. The apparent purpose is to force legislatures to admit publicly that they plan to violate the rights of their citizens and take the resulting political heat.

There are two exceptions to this provision. For reasons which presumably relate largely to the special problems posed by Quebec, neither freedom of travel nor the right to speak French may be abridged under the notwithstanding clause. The result, however, seems a little peculiar. Apparently, under the Charter, Parliament can authorize torture, but cannot abridge the victim's right to confess in French.

On the whole, the largest difference between the Canadian Charter and the United States Constitution is like that between the King James and modern versions of the Bible. The United States Constitution sounds better, but the Canadian Charter is more comprehensible.

The Canadian constitutional experience promises to be an interesting one, and we look forward to following further developments in later articles.