2
The Canadian Charter of Rights and Freedoms

What You Should Know

- What are your rights and freedoms under the Charter of Rights and Freedoms?
- Are there limits to your rights and freedoms under the Charter?
- What happens if your rights are violated under the Charter?
- Has the Charter given the courts too much power?

Chapter at a Glance

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Selected Key Terms

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Police and activists clash at the Québec City Summit of the Americas in April 2001. Should police be allowed to use force during demonstrations? How do you respect both the rights of delegates and the rights of protesters during talks?
2.1 Introduction

Imagine if you were arrested and not given an opportunity to contact a lawyer. What if you were thrown in jail and never told the reason. Fortunately, Canadians live in a society where rights and freedoms are guaranteed under the Charter of Rights and Freedoms. Your rights can be described as what you are entitled to expect from the government. For example, you have legal rights that must be respected if you are arrested or charged with an offence. Your freedoms (s.7 right to liberty) involve your ability to conduct your affairs without government interference. You have various fundamental freedoms, including freedom of expression and freedom of religion. Since April 17, 1982, your rights and freedoms have been entrenched (safeguarded) in the Canadian Constitution. In other words, your rights and freedoms are protected in the Constitution, and they can only be changed by an amendment to it, which is very difficult to do. In this chapter, you will explore the meaning of these rights and freedoms and discover cases where Charter rights and freedoms have been infringed (violated).

While your rights and freedoms are guaranteed in the Constitution, definitions are not provided; the courts have interpreted the meaning of the words used in the Charter. For example, you are protected against unreasonable search and seizure. Does this mean that police cannot use sniffer dogs to conduct random searches in schools and other public places, such as malls and sports arenas? Is it constitutional for the police to use helicopter fly-overs to determine whether someone is running an illegal marijuana-growing operation? What does “unreasonable” really mean in law?

A cornerstone of the Charter of Rights and Freedoms is the reasonable limits clause (s.1). Your rights and freedoms are not absolute; they can be limited if it can be justified in our free and democratic society. Further, in some situations, the federal, provincial, or territorial governments can use the notwithstanding clause (s.33) to pass laws that override certain rights and freedoms in the Charter. (See Appendix A.)

What can you do if you think that your rights or freedoms have been infringed? First, you go to court to see if a judge agrees with you. Then, you can figure out a way to have your rights enforced. In law, this is known as a remedy.

As a helpful four-step guide to exploring Charter cases in this chapter, refer to the figure and guide on the next page. To better understand Charter cases, follow the guide and ask the four questions in sequence.
Can you say anything you want? No, because your ability to say whatever you want might harm others. For example, writing racist or sexist comments that promote hatred on an Internet blog is not only against the law, but it also results in harm to the specific group targeted by the comment.

Section 1 of the Charter contains a reasonable limits clause, which guarantees your rights and freedoms subject only to “reasonable limits.” Simply put, this means that your rights and freedoms are limited in certain situations. Unfortunately, the Charter does not define the term “reasonable.” Therefore, the courts have had to interpret the meaning. Read the landmark case of R. v. Oakes, 1986, on the next page, and learn about the test involving the burden of proof used by the courts to limit rights and freedoms under the Charter.
In 1982, David Oakes was charged with unlawful possession of a narcotic for the purpose of trafficking under section 8 of the Narcotic Control Act (now referred to as the Controlled Drugs and Substances Act.) It was the job of the Crown attorney to prove that Mr. Oakes had the drugs in his possession. Once that was done, it was up to Mr. Oakes to prove that he did not have them for the purpose of trafficking. Mr. Oakes argued that it should not be his responsibility to prove himself innocent of trafficking. In legal tradition, the accused is presumed innocent until proven guilty. The Crown attorney generally has the responsibility of proving the case against the accused. This is known as the burden of proof. Oakes argued that when the burden of proof switched to him, his legal right under section 11(d) of the Charter, the right to be presumed innocent until proven guilty, was violated. At trial and later at appeal, the courts accepted Mr. Oakes’s argument that “reverse burden of proof” was unconstitutional. The Crown appealed to the Supreme Court of Canada.

In 1986, the Supreme Court of Canada accepted the argument that Mr. Oakes’s legal right to be presumed innocent until proven guilty was violated. In its reasoning, the Supreme Court set out a test to determine how section 1 of the Charter, the reasonable limits clause, should be interpreted. First, the court asked whether the law enforced an important government objective. Society is concerned about drug trafficking, so the federal government has enacted laws against it. The court must then perform a balancing test. In this proportionality test, the courts must balance individual rights against the rights of society. The proportionality test consists of three questions:

1. Is there a rational connection between limiting an individual’s rights and the objective of the law in question? (The objective of the law is to reduce drug trafficking.)
2. Does the law or government action interfere with rights and freedoms as little as possible?
3. Are the effects of the limitation proportional to the objective? (Is there a balance between meeting the objective of the law and limiting individual rights?)

The court ruled that just because the accused had a small quantity of narcotics, that was no reason to assume that he intended to traffic it. The appeal was dismissed, and section 8 of the Narcotic Control Act was declared unconstitutional.

For Discussion

1. What was the charge against David Oakes?
2. Why did he argue that his Charter rights were violated?
3. Explain the four parts used in the Oakes test to limit Charter rights.
4. Why do you think the presumption of innocence is so highly valued in Canadian society?
Negotiations for the Constitution Act, 1982, were very intense. Several provinces feared that the Constitution would give the federal government too much power over provincial matters. They also worried that the Charter would allow courts to change provincial laws. At the last minute, the federal government and the provinces agreed to the notwithstanding clause. It became section 33 of the Charter. The clause applies only to the fundamental freedoms (section 2), legal rights (sections 7–14), and equality rights (section 15) aspects of the Charter. It allows governments to enact legislation in spite of the fact (notwithstanding) that it may violate those rights and freedoms. As a safety feature, the law must be reviewed every five years.

The notwithstanding clause is sometimes referred to as the override clause or the opt-out clause. It has rarely been used. In one significant case, Ford v. Québec (Attorney General), 1988, the Québec government passed Bill 101, requiring all public signs to be only in French. That same year, the Supreme Court of Canada ruled that Québec’s Bill 101 violated the Charter’s guarantees of freedom of expression. The government of Québec argued that the law was necessary to protect the survival of the French language. Using the notwithstanding clause, the Québec government passed Bill C-178, which allowed Québec’s French-only law on public signs to stay in effect.

Today, signs in Québec can include English, but at only half the size of the French. Do you agree with this law? Justify your answer.

Review Your Understanding

1. What is the purpose of the reasonable limits clause?
2. When can freedom of expression be limited? Provide an example.
3. Our rights and freedoms can be limited if it is “demonstrably justified.” What do you think these words mean?
4. Explain the purpose of the notwithstanding clause.
5. What rights and freedoms apply under section 33?
2.3 Fundamental Freedoms

Section 2 of the Charter lists the basic freedoms of all people in Canada. These are called the fundamental freedoms: freedom of conscience and religion; freedom of thought, belief, opinion, and expression; freedom of peaceful assembly; and freedom of association. As previously mentioned, these freedoms are not absolute and can be subject to reasonable limits.

Freedom of Conscience and Religion

Freedom of conscience and religion means that, in Canada, you are free to practise your religion. You cannot be forced to act in a way that goes against your beliefs or conscience. The courts have ruled on many significant cases involving freedom of religion. For example, Canada used to have a law called the Lord’s Day Act, dating from 1906. It prohibited businesses from opening on Sundays. In the case of R. v. Big M Drug Mart, 1985, the Supreme Court of Canada declared the act to be in conflict with section 2(a) of the Charter. Compelling everyone to observe Sunday as a day of rest violated freedom of religion, since Canada is a nation of many faiths.

Sometimes legal conflicts arise because basic beliefs of a religion may conflict with other rights and freedoms. In one case, the Supreme Court upheld the right of a practising Sikh to wear a kirpan on school property. The case was Multani v. Commission scolaire Marguerite-Bourgeoys, 2006.

Wearing a kirpan (a ceremonial dagger) is part of the Sikh religion. Why do you think allowing practising Sikhs to wear a kirpan is such a controversial issue?

Case

Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6 (CanLII)

Gurbaj Singh Multani immigrated to Canada from Pakistan in 2000. He attended a francophone school in LaSalle, Québec. In November 2001, the school administration became aware that Multani had been carrying a metal ceremonial dagger that is part of his religious faith. It is known as a kirpan. He had dropped it in the schoolyard. At first, school authorities decided to prohibit Multani from attending school if he carried his kirpan. He had dropped it in the schoolyard. At first, school authorities decided to prohibit Multani from attending school if he carried his kirpan. In December 2001, the school board proposed a compromise: he would be allowed to wear his kirpan as long as it was wrapped and sealed under his clothing, in order to protect school security.

In February 2002, Multani and his family agreed to the conditions. Then, the school board backed out. It refused to allow the agreement, stating that the school code of conduct prohibited carrying weapons and dangerous objects. The board informed Multani and his family that a symbolic kirpan in the form of a harmless pendant, for example, would be acceptable in place of the metal kirpan. Multani and his father argued that the ban went against the freedom of religion and freedom of equality guarantees under Québec’s human rights laws. It also went against the freedom of conscience and religion guaranteed in section 2(a) of the Charter.

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Multani v. Commission scolaire Marguerite-Bourgeoys, 2006 SCC 6 (CanLII)

In May 2002, the Québec Superior Court ruled that Multani be allowed to wear the kirpan to school. However, it had to be wrapped in cloth and a wooden sheath and concealed under his clothes. School officials could conduct reasonable inspections to ensure conditions were being followed. Failure to follow these conditions would result in the loss of the right to wear the kirpan.

The case was appealed to the Québec Court of Appeal. The court unanimously ruled that while freedom of religion had been infringed, it was not possible to accommodate Mr. Multani reasonably without compromising the school board’s security rules. The Québec Court of Appeal upheld the ban on kirpans in schools.

The Multani family appealed the case to the Supreme Court of Canada. In March 2006, the Supreme Court of Canada set out a two-part test for determining whether freedom of religion had been violated. The appellant (the person seeking a remedy in court) must establish the following:
1. that he or she sincerely believes in the practice or belief that has a connection with religion;
2. that his or her ability with the practice or religious belief is being interfered with.

The court held that Multani sincerely believed that his faith required him to wear the kirpan at all times. For Orthodox Sikhs, the kirpan is a religious symbol; Multani genuinely believed that he would not be complying with the requirements of his religion if he wore a plastic or wooden kirpan. The judgment was unanimous. The court stated that the school board’s policy on banning the kirpan clearly violated Multani’s freedom of religion under section 2(a) of the Charter.

For Discussion

1. What is the two-part test used by the Supreme Court of Canada to determine whether freedom of religion is violated?
2. Why did the Québec Superior Court allow Multani to wear the kirpan?
3. What was the decision of the Québec Court of Appeal? Why did they arrive at that decision?
4. The Supreme Court commented in its decision that allowing Multani to wear his kirpan under certain conditions demonstrates the importance that our society attaches to protecting freedom of religion and to showing respect for its minorities. Do you agree with this statement? Why or why not?
Freedom of Thought, Belief, Opinion, and Expression

The Charter covers all forms of communication and expression, including the mass media, writing, painting, sculpture, and film. However, there are limits on your freedom of expression. For example, it is illegal to target groups because of their colour, race, religion, or ethnic origin and to spread hate. Governments also ban material they consider to be obscene to protect people.

In R. v. Keegstra, 1990, James Keegstra was convicted of wilfully promoting hatred. He taught his Alberta high school students that the Holocaust, in which 6 million Jews were killed during World War II, had never happened. His case went to the Supreme Court of Canada. The court agreed that Canada’s hate laws did infringe on the Charter guarantee of freedom of expression. However, the majority of the court believed that the infringement could be justified. It would protect people from hate propaganda.

In the case of R. v. Butler, 1992, the Supreme Court agreed to limit freedom of expression. Butler was charged with over 200 crimes, involving possessing, selling, and exposing obscene material. The court agreed that Canada’s obscenity laws did infringe the freedom of expression under the Charter. It also felt that it was reasonable for the government to impose those laws out of concern for possible victims (see Chapter 7 for more information).

The courts have often agreed to limit freedom of expression in the area of advertising. See the case on the next page of Canada (Attorney General) v. JTI-Macdonald Corp., 2007. The Supreme Court of Canada placed limits on tobacco advertising and promotion by tobacco manufacturers.
In 1997, the federal government changed the laws governing tobacco. The law forbade certain types of advertising, such as lifestyle ads appealing to young persons. It also banned sponsorship promotion. The tobacco manufacturers argued against the limits imposed on tobacco advertising. They claimed they violated their freedom of expression under the Charter. The initial trial found the new laws to be constitutional. Then, the Québec Court of Appeal ruled some parts to be unconstitutional. Both the attorney general and the tobacco manufacturers appealed.

In 2007, the Supreme Court of Canada ruled that the ban on promotion clearly infringed freedom of expression. However, the ban on misleading advertising was justified. The government was concerned with promoting health, protecting consumers, and preventing young people from smoking. The court agreed that the ban on lifestyle advertising was justified. It linked a product with a lifestyle to create an image that might lead more people to smoke. The court spoke about sponsorship promotion being lifestyle advertising in disguise. It upheld the ban on using corporate names in sponsorship promotion. Finally, the requirement that the government health warning occupy at least half of the package display surface did infringe freedom of expression. However, it met the government’s objective of reminding people about the health hazards.

**For Discussion**

1. What restrictions were placed on tobacco advertising under the legislation?
2. Why did the tobacco manufacturers challenge the ruling?
3. In a unanimous 9–0 judgment, the Supreme Court upheld the bans on advertising. Why did they rule that the limits on tobacco advertising and promotion were justified under section 1 of the Charter?
4. Do you think that warning labels will discourage people from consuming tobacco or prevent young smokers from taking up the habit? Explain your reasoning.

**Freedom of Peaceful Assembly**

The freedom of peaceful assembly is usually associated with the right to participate in a public demonstration. Examples might include the following:

- environmental protesters condemning logging of old-growth forests or the use of pesticides in lawn fertilizers
workers protesting their working conditions

social justice activists protesting international trade issues

community residents protesting the site of a new dump in their community

The key word is “peaceful.” If a public display threatens to turn violent, the police may charge the participants with unlawful assembly. If things get disorderly or chaotic, police may charge participants with rioting.

**Freedom of Association**

Freedom of association refers to the right of individuals to join together in groups. These can include sports clubs, cultural organizations, or trade unions. The Supreme Court of Canada has expanded the interpretation of freedom of association. It recognizes workers’ rights to collective bargaining. They have the right to be represented by a union. The union negotiates with employers on behalf of its members. Any law or government action that interferes with collective bargaining violates freedom of association under the Charter. The case was *Health Services and Support-Facilities Subsector Bargaining Assn. v. British Columbia*, 2007. (This case will be discussed further in Chapter 16.)

Your freedom of association can also be limited. For example, if a youth criminal is arrested and charged with assaulting people, the court may issue an order preventing the youth from associating with the victims of the assaults or with any co-accused or other gang members.
2.4 Democratic and Mobility Rights

Sections 3, 4, and 5 of the Charter guarantee the democratic rights of Canadians. For example, every Canadian citizen over the age of 18 has the right to vote. In addition to voting rights, the Charter guarantees that an election will be held every five years. It further provides that the federal Parliament and provincial legislatures must sit at least once every 12 months.

Before 1982, the right to vote was included in various election acts. Since these were ordinary statutes, they could be changed at any time by Parliament or provincial legislatures. Today, the democratic right to vote is entrenched in the Charter. That means that it cannot be removed without an amendment to the Constitution. Many people—women, Aboriginal peoples, Chinese Canadians, and Japanese Canadians—have fought long, hard battles over the years to get the right to vote in Canada. For example, inmates in federal prisons have won the right to vote in federal elections.

Even so, many people do not take advantage of their right to vote. Voter turnout for Canada’s federal elections has dropped steadily. In 1979, 75.7 percent of those qualified voted. In the January 2006 election, just 64.7 percent did so.

**Did You Know?**
The federal government, British Columbia, Ontario, and Newfoundland and Labrador have all adopted fixed election dates.

**Voter Turnout at Canada’s Federal Elections, 1979–2006**

Why do you suppose voter turnout has been dwindling over the past 20 years?
You Be the Judge

Sauvé v. Canada (Chief Electoral Officer), 2002 SCC 68 (CanLII)

Richard Sauvé, an inmate of a federal prison, challenged a section of the Canada Elections Act that denied federal inmates serving a sentence of more than two years the right to vote in federal elections. The Supreme Court of Canada ruled that the law violated Sauvé’s democratic rights (s.3 right to vote) and could not be justified by section 1 of the Charter.

- Do you agree with the court’s decision? Why or why not?

This inmate casts his ballot for the federal election at the Montréal Detention Centre. All inmates in federal and provincial institutions now have the right to vote in federal elections. Should they be allowed to vote? Explain your reasoning.

Section 6 of the Charter guarantees your right to move freely inside and outside of Canada. This is known as mobility rights. The Charter guarantees the right of every citizen to enter, leave, or remain in Canada. It also allows Canadian citizens and permanent residents to live and work in any province. (Permanent residents have the right to enter or remain in Canada as long as Canada’s immigration laws are followed. They are not Canadian citizens.) The Charter does allow provincial governments to impose restrictions on mobility rights. Provinces with lower than average employment rates can prevent citizens from other provinces coming to look for work. This would protect the province’s citizens from losing their jobs to outsiders.

Review Your Understanding

1. Explain your democratic rights under the Charter.
2. When are you eligible to vote in Canada?
3. What are mobility rights?
4. Summarize the exception to being able to seek employment in any province.
5. How do mobility rights apply to permanent residents of Canada?
2.5 Legal Rights

The legal rights section of the Charter provides legal safeguards to ensure that proper procedures are followed in the criminal justice system in areas such as searches, arrests, detention, and interrogation. For example, police cannot randomly stop you in a mall and proceed with a physical body search. The police must be able to justify a search by providing a legally valid reason for conducting it. Further, if you are being arrested, police must tell you immediately the reason for the arrest and not wait until they have brought you to the police station. You must also be notified of your right to a lawyer. Such safeguards are designed to protect you from being unfairly treated by our criminal justice system. If police do not follow proper procedure and provide an accused with his or her Charter rights, they run the risk of having their actions challenged in a court. If the rights of the accused are violated, the accused may seek a remedy, such as applying to the court to have the evidence thrown out. Without the evidence, there may not be a case against the accused. You will learn more about your legal rights in Chapter 5.

Life, Liberty, and Security of the Person

The Crown is required by law to tell an accused and his or her lawyer what evidence and other information they have against that person. For example, say you decide to go for a ride with your friend. Your friend is driving his car when he is stopped by a police officer during a roadside

Do you think this person’s rights are being violated? Under what circumstances would it be justified to conduct a search?
check for alcohol. The police officer notices drugs on the car dashboard, and your friend confesses that the drugs are his. You are sitting immediately beside your friend in the passenger seat. Despite your friend’s confession, you are both charged with possession of narcotics. During the trial, the Crown attorney neglects to tell your lawyer about the driver’s confession. If a Crown attorney withholds key information from an accused and his or her lawyer, it may prevent the accused from making a full defence to the charges. In the case of R. v. Stinchcombe, 1991, a witness questioned by the Crown made statements that were favourable to the defence, but during the trial, the Crown did not call that witness, nor did it disclose the statements to the defence. Stinchcombe argued that, because of this failure, he was denied his rights to life, liberty, and security of the person under section 7 of the Charter. The court ruled that it is a duty of the Crown to disclose all relevant information it has in its possession before the case goes to trial to allow the defence to answer charges in full.

In R. v. Morgentaler, 1988, the Supreme Court declared Canada’s abortion laws unconstitutional. It ruled that they violated section 7 of the Charter. This guaranteed the security of the person. As a result, Canada’s abortion laws are no longer in effect.

You Be the Judge


Sue Rodriguez was a victim of a terminal disease that would soon leave her helpless. She was told that she had no more than three years to live. Once she was unable to enjoy life, she hoped that someone would be able to help her end her life. In Canada, it is not illegal to commit suicide. However, it is illegal for anyone to assist in a suicide.

Rodriguez argued that the law denying assisted suicide violated her right to life, liberty, and security of the person. The Supreme Court disagreed with Rodriguez. It kept the law on assisted suicide in the Criminal Code. The court commented that the objective of the law was to preserve life and protect the vulnerable in society.

On February 12, 1994, Rodriguez committed suicide with the help of an anonymous doctor.

- Do you agree with the Supreme Court’s decision in this case? Do you think the assisted suicide law should still be in the Criminal Code? Justify your answer.

Did You Know?

In Chaoulli v. Québec (Attorney General), 2005, in a 4–3 decision, the Supreme Court ruled that failing to provide public health care of a reasonable standard within a reasonable time violated section 7 of the Charter.

Did You Know?

On July 1, 2008, Henry Morgentaler was awarded the Order of Canada. It was a controversial appointment.
Search and Seizure Laws

Many criminal cases involve section 8 of the Charter: “Everyone has the right to be secure against an unreasonable search and seizure.” Police must have a good reason for searching your person, your home, or your possessions, and they must also be able to justify the taking of any evidence from these locations. What if police pulled your vehicle over during a RIDE (Reduce Impaired Driving Everywhere) spot check and began searching for drugs? Would that search be considered unreasonable if it were challenged in court? By law, the police must have reasonable grounds to search the vehicle, such as seeing the drugs in plain view or receiving a tip that this vehicle may have been involved in drug trafficking. They also must act fairly while conducting searches. Evidence obtained during an illegal search may be thrown out under section 24(2) of the Charter, as you read on page 26.

You Be the Judge

R. v. A.M., 2008 SCC 19 (CanLII)

In 2006, the Ontario Court of Appeal ruled that police officers had conducted an unreasonable search and seizure when they entered a high school with a sniffer dog and conducted a warrantless and random search for drugs. The case was appealed to the Supreme Court of Canada, and the court ruled that completely random drug searches violate privacy rights.

- Do you agree with the court’s decision? Why or why not?

Police often use dogs to assist in drug searches.

We are not surprised when police officers search someone they have arrested. They must make sure that she or he has no weapons. See the case on the next page of R. v. Mann, 2004. Searches can be reasonable even prior to an arrest. However, the individual must be detained on reasonable grounds. Also, the searches must be part of a justified investigation to ensure police safety.
In December 2000, as Philip Mann was walking near the site of a reported break and enter, two police officers asked him to identify himself because he matched the description of the suspect. He complied, gave his name and date of birth, and consented to a pat-down search in which police officers searched for weapons. During the search, one police officer felt a soft object in Mann’s sweater pocket. The officer reached in Mann’s pocket and discovered a small bag containing marijuana. The officer continued the search and found further marijuana and two valium pills.

Mann was arrested and charged with possession of marijuana for the purpose of trafficking. The trial judge concluded that there was no evidence to suggest that it was reasonable for the officer to search Mann’s pocket for security reasons. Therefore, the evidence was excluded under section 24(2) of the Charter. Mann was acquitted.

The Crown appealed to the Manitoba Court of Appeal, which ordered a new trial. The Court of Appeal was concerned with creating a safe environment for police officers and did not want to restrict police officers from carrying out pat-down searches in the course of exercising their police duties. Mann appealed to the Supreme Court of Canada.

In its 2004 decision, the Supreme Court held that the search was a violation of section 8 of the Charter. The court ruled that Mann was detained as the police officers began their investigation into the reported break and enter. Common law allows police to detain someone and then to search him or her for the purposes of protection. However, the Supreme Court held that the police officers did not have the right to search for anything other than weapons. When the officer reached into the pocket of Mann’s sweater, he actually shifted the purpose of the pat-down search from ensuring safety to detecting and collecting evidence.

Two of the seven judges dissented. They agreed that the search was a violation of section 8 of the Charter. Still, they argued that the evidence need not be excluded. They did not accept the argument that allowing the drug evidence would bring the administration of justice into disrepute and make the trial unfair.

For Discussion

1. Pat-down searches are often used by police officers to ensure that the suspect is not carrying a weapon. Do you think a pat-down search was reasonable in this case? Explain why or why not.
2. Why did the Supreme Court rule in Mann’s favour?
3. How was section 24(2) used in the Mann case?
4. Do you think the evidence should be excluded in this case? Explain.

In Chapter 5, you will learn more about the authority of police officers to conduct searches. That chapter also discusses the need for search warrants. If police showed up at your door and wanted to search your home without a warrant, you might see this as a violation of your privacy rights.

Television shows such as CSI and Law and Order have also taught us to expect police to look for physical evidence such as weapons or hair, blood, or fibre samples.
For example, suppose police use a heat-sensing device to uncover a suspected illegal marijuana-growing operation. Could the recorded heat pattern images be enough evidence for a judge to grant a search warrant? Would the use of the helicopter fly-over be an invasion of privacy? The case below of R. v. Tessling, 2004, will tell you more about your privacy rights.

**Case**

**R. v. Tessling**, 2004 SCC 67 (CanLII)

In February 1999, police got a tip about a possible marijuana-growing operation. It was on the property of Walter Tessling in Windsor, Ontario. The lights used in growing marijuana use great amounts of electricity. The police asked Ontario Hydro to check Tessling’s electrical meter. It showed no unusual electricity usage. However, it is common for criminals to bypass the hydro meters. They do this to hide high electricity readings.

Marijuana-growing usually requires large amounts of heat. So, the police decided to use heat sensors to see the heat patterns at Tessling’s home. This technology is known as forward-looking infrared (FLIR). The police were hoping to find evidence of a marijuana-growing operation. In April 1999, the RCMP did a helicopter fly-over above Tessling’s home.

The heat image data and the information from the informants were used to obtain a search warrant, which the police used to enter Tessling’s home. They found marijuana worth between $15,000 and $22,500. They also found scales, freezer bags, and some guns. Tessling was charged with trafficking marijuana and possession of weapons.

continues…
Case (continued)

**R. v. Tessling**, 2004 SCC 67 (CanLII)

Tessling was convicted in December 2000. He appealed. In January 2003, the Ontario Court of Appeal held that the helicopter fly-over had violated Tessling’s privacy rights. These are defined in section 8 of the Charter. The court also concluded that the search was illegal. The marijuana evidence was excluded under section 24(2) of the Charter. Tessling was acquitted.

The Crown appealed the case. In a unanimous verdict, the Supreme Court of Canada held that the evidence from the RCMP fly-over was admissible. It was not unreasonable under section 8 of the Charter, nor did it infringe on Tessling’s privacy rights. Tessling’s conviction was restored. He was sentenced to 18 months for trafficking in marijuana and possessing weapons.

**For Discussion**

1. What was the decision at trial?
2. What was the decision of the Ontario Court of Appeal?
3. Why did the Supreme Court of Canada restore Tessling’s conviction?
4. Mr. Justice Ian Binnie commented: “The respondent had no reasonable expectation of privacy in the heat distribution information.” What do you think Mr. Justice Binnie meant by “reasonable expectation of privacy”?

In Canada, illegal marijuana-growing operations have become a significant problem. Here, an RCMP officer investigates a marijuana-growing operation in the basement of a Moncton, New Brunswick, house on July 27, 2004. The RCMP executed search warrants at 14 homes in the greater Moncton area as part of an organized crime investigation into commercial marijuana-growing operations.
Detention and Arrest

Section 9 of the Charter guarantees that "everyone has the right not to be arbitrarily detained or imprisoned." In this case, "arbitrarily" means not having a sufficient legal reason for stopping or restricting someone’s movement or putting him or her in jail. To detain someone does not necessarily mean to imprison or put him or her in jail. When your liberty is restricted, you are detained. For example, if you were stopped by police for questioning and believed you had no choice but to comply, then you could be detained within the meaning of the law. A detention could become an arrest once police establish reasonable and probable grounds for the arrest.

Section 10 of the Charter guarantees that everyone has the right to be informed "promptly" of the reasons for the arrest or the detention. In Canada, this is known as a police caution. Furthermore, the accused must be told of the right in a manner that he or she can understand. For example, if you do not speak English, an officer can arrange for an interpreter. Another legal right is the right to consult a lawyer—known in legal terms as the right to retain and instruct counsel—in a reasonable amount of time. Also, the accused has the right to be informed of that right. This right to counsel includes the right to be informed about legal aid. Legal aid is available to help people who do not have enough money to pay for a lawyer. A person seeking legal aid may apply for a certificate through a local legal aid office in his or her community. This certificate is awarded based on financial need and allows the holder of the certificate to hire a legal aid lawyer of her or his choice. Often, legal aid cases deal with criminal law or family law matters, such as family violence.

Did You Know?

It is technically legal, within the meaning of the law, for police to stop drivers to check for sobriety as part of a RIDE program. The courts have held this detention to be a reasonable limit on a person's rights to protect society from harm caused by drunk drivers. The precedent case on this issue is R. v. Hufsky, 1988.

Do you think it is reasonable for police officers to stop drivers randomly to check for driving under the influence of alcohol or drugs? Justify your response.

Review Your Understanding

1. How has section 7 of the Charter, the right to life, liberty, and security of the person, been used to support proper disclosure during a criminal trial?
2. What type of information could give the police reasonable and probable grounds for a search?
3. When is a search reasonable?
4. If evidence is obtained and the search is declared unreasonable under section 8 of the Charter, what Charter remedy is available to challenge whether the drug evidence can be admitted in court?
5. Should police be allowed to conduct pat-down searches? Explain.
as child custody and access and support payment issues. The third component of section 10 allows a court to determine if a person was held in custody legally. In legal terms, this is called lawful detention.

The Charter sections on detention and arrest have also been used to challenge aspects of Canada’s anti-terrorism legislation. See the case of Charkaoui v. Canada, 2007. There, the Supreme Court struck down portions of the Immigration and Refugee Protection Act. These dealt with security certificates. It gave the government one year to write a new law. This case provides an excellent example of how the courts try to balance individual rights against national security.

Case

Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9 (CanLII)

For more information, Go to Nelson Social Studies

In May 2003, Adil Charkaoui, a Moroccan citizen, was arrested. He was detained for two and a half years on a security certificate under the Immigration and Refugee Protection Act. Security certificates are used to detain individuals who are considered to be threats to national security. Charkaoui, along with Algerian Mohamed Harkat and Syrian Hassan Almrei, were detained under security certificates. The three men were never charged with criminal offences. They did not have any connection to each other. They were all accused, however, of having ties to al Qaeda and other terrorist groups. They were believed to be a threat to Canada’s security.

A security certificate must be signed by two cabinet ministers. A judge of the Federal Court must decide if the certificate is “reasonable.” The hearings to determine this are held in secret. Only the judge, government lawyers, and witnesses are present. The detainees and their lawyers are given only a summary of the allegations. They are not given any specific details of the government’s case against them. They are also not allowed to be present at the hearing. Once the security certificate is declared reasonable by the Federal Court judge, the detainee can be deported from Canada on the grounds of being a danger to the security of Canada. The decision of the Federal Court judge is final and cannot be appealed.

Charkaoui, Harkat, and Almrei argued that they should be charged with a crime if they are to be detained. Once charged, they should be brought to trial. They challenged the validity of the secret hearings. They also questioned the fact that they were not allowed to have someone present to represent their interests. In December 2003, the Federal Court of Canada declared security certificates lawful. The men appealed to the Federal Court of Appeal. The court was concerned that information released might harm national security. That is why it also upheld the secret process of reviewing the security certificates.

The men appealed to the Supreme Court of Canada. In the interim, Charkaoui was freed on bail in February 2005 but placed under strict house arrest. Harkat, who had been detained for three and a half years, was freed on bail under strict conditions in June 2006. Almrei, who had been detained since October 2001, was held at an immigration holding centre and not granted bail.

In 2007, the Supreme Court of Canada struck down parts of the Immigration and Refugee Protection Act. The process for reviewing the validity of a security certificate violated section 7 of the Charter. So did the procedures for reviewing the detention. The act permitted the use of evidence that was not disclosed to the detainees during secret hearings. That meant that the detainees were not given the opportunity for a fair hearing. The detainees were also denied the right to know the full case against them. Thus, they were not able to make a full defence to the charges. Under the law, foreign nationals could be detained without a review.

continues…
Case (continued)

Charkaoui v. Canada (Citizenship and Immigration), 2007 SCC 9 (CanLII)

until 120 days after the security certificate was deemed reasonable. Permanent resident detainees had a review within 48 hours. The court determined that the time limits in the provisions for continuing detention of a foreign national violated sections 9 and 10(c) of the Charter because they were arbitrary. While the detentions were not arbitrary when they were first applied, the court considered it arbitrary to continue the detention without a process of review. The security certificate and detention system was held to be unconstitutional. The court gave the federal government one year to write a new law.

Adil Charkaoui holds the security certificate that was found to be unconstitutional.

For Discussion

1. What is the purpose of a security certificate?
2. What section of the Charter did the detainees allege was violated by the security certificate system?
3. Why did the detention review procedure violate the Charter?
4. Do you think a government-appointed lawyer would fairly represent a suspected terrorist’s interests? Explain.

Review Your Understanding

1. Explain your rights under section 9 of the Charter.
2. In your own words, what does “arbitrarily” mean?
3. Why are your section 9 rights limited during a random police stop that checks for the sobriety of drivers?
4. Identify three rights everyone has on arrest.
5. Distinguish between a detention and an arrest.
Rights on Being Charged with an Offence

Section 11 of the Charter — Rights at Trial — provides specific rights for any person charged with an offence. These rights include the right to be told what the specific offence is without an unreasonable delay and the right to be tried within a reasonable time. In the *R. v. Askov*, 1990, case, the accused was charged with conspiracy to commit extortion. But two years later, his trial date had still not been set. The accused argued that his right to be tried within a reasonable time was violated. The court agreed to a *stay of proceedings*. In other words, the proceedings in court were stopped, and no further action was taken against the accused. It effectively halted the case. After the *R. v. Askov* ruling, the Ontario court system stayed over 50 000 cases on the basis of unreasonable delay. (See Chapter 6, page 186, for more about this case.)

Under section 11 of the Charter, an accused cannot be forced to testify. He or she may discuss the pros and cons of testifying with his or her lawyer. However, no one can be forced to take the witness stand. Furthermore, under section 11, anyone charged cannot be denied reasonable bail without good reason. Also, everybody has the right to a trial by jury if the case involves serious criminal charges.

Cruel and Unusual Treatment or Punishment

Section 12 of the Charter outlaws “cruel and unusual” punishment. Generally, our criminal laws set limits on penalties. For example, the maximum sentence for arson (intentionally causing fires) is 14 years in jail. Assault causing bodily harm carries a maximum of 10 years. However, the *Criminal Code* also includes mandatory minimum punishments. For example, there is a minimum term of 4 years for weapons-related offences and a 10-year minimum sentence for second-degree murder. First-degree murder has a minimum term of 25 years. Chapter 9 discusses the topic of sentencing in greater detail.

<table>
<thead>
<tr>
<th>Criminal Code Offences and Maximum Penalties</th>
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<tbody>
<tr>
<td><strong>Sample Criminal Code of Canada Offences</strong></td>
</tr>
<tr>
<td><strong>Maximum Penalties</strong></td>
</tr>
<tr>
<td>Murder</td>
</tr>
<tr>
<td>Kidnapping</td>
</tr>
<tr>
<td>Sexual assault using a weapon, causing bodily harm</td>
</tr>
<tr>
<td>Assault causing bodily harm</td>
</tr>
<tr>
<td>Uttering threats</td>
</tr>
</tbody>
</table>

This table shows various Criminal Code offences and their maximum penalties. These offences and others will be discussed in Chapter 7.
Looking Back

The Charter Since 1982

When the Charter of Rights and Freedoms was proclaimed in 1982, the winds of change were rustling through the Canadian justice system. It was a bold new statement of rights and freedoms that became entrenched in our Constitution. Chief Justice Beverley McLachlin has referred to the passing of our Charter as Canada’s legal coming of age. The Charter was created through a hands-on, made-in-Canada process. The Charter acted as an expression of who we are as a people.

With the proclamation of the Charter in 1982, Canadians could now challenge laws and government actions that violated Charter rights and freedoms.

Section 24 of the Charter details the enforcement of guaranteed rights and freedoms. It states that anyone whose Charter rights have been infringed (violated) may seek a “remedy” in court. For example, evidence must be gathered in a way that respects Charter rights and freedoms. Under section 24(2), anyone can apply to the court to have evidence excluded if that person’s rights have been violated. In making such decisions, judges must consider the circumstances of the case. They have to decide whether allowing the evidence in would make the trial unfair.

Some significant challenges lay on the road ahead as the courts struggled with interpreting the Charter. What is a “reasonable limit”? What is freedom of religion and expression? What constitutes an “unreasonable search and seizure”? These and other questions had to be answered.

Since 1982, the Supreme Court of Canada has issued many landmark decisions based on the Charter. Some of the rulings have been controversial. This is particularly true in cases where rulings changed existing laws. Several cases that have changed the legal landscape in Canada are summarized below.

R. v. Oakes, 1986: David Oakes was charged with possession of a narcotic for the purpose of trafficking. He challenged a law requiring him to prove he was not trafficking drugs. He argued that this reverse burden of proof, requiring him to prove himself innocent of trafficking, violated his right under the Charter to be presumed innocent until proven guilty. The court agreed and declared the law to be unconstitutional. The Oakes case is regularly used in courts as a precedent because it sets out the test—often referred to as the “Oakes test”—in deciding when your rights and freedoms can be limited under the Charter.

R. v. Morgentaler, 1988: The Supreme Court entered a legal, moral, and ethical debate when Dr. Henry Morgentaler challenged Canada’s abortion law. The court struck down Canada’s abortion law because it violated section 7 of the Charter. That section confirms everyone’s right to life, liberty, and security of the person. Since the abortion law restricted a woman’s ability and right to obtain an abortion legally, it was struck down. The case created controversy. People debated whether the Supreme Court had too much power in interpreting laws.

R. v. Collins, 1987: Undercover police officers used a choke hold to search Ruby Collins for drugs. It turned out that she did not have any drugs in her mouth, although she did have some in her hand. Collins argued that the search and seizure violated section 8 of the Charter. The Supreme Court ruling established a test for a reasonable search. The police must have reasonable grounds for carrying out a search and must act fairly while conducting it. The court also declared that evidence obtained in an unreasonable manner cannot be used in court if it would interfere with the fairness of the trial.

Irwin Toy Ltd. v. Québec (Attorney General), 1989: Irwin Toy challenged a Québec law that banned television advertising to children under the age...
Looking Back (continued)

The Charter Since 1982

Perhaps the same comments made by Chief Justice Beverley McLachlin on the twentieth anniversary of the Charter hold true today: “While the Charter is no longer in its infancy, these are still early years in its life. The Charter is still a work in progress, an unfinished project. Perhaps, it will always be. Future generations will have a great role to play in shaping it.” It remains to be seen what new cases will come before the courts and what effect they will have on our rights and freedoms.

**For Discussion**

1. In which of the cases were fundamental freedoms denied?
2. In which of the cases was the law held to be a reasonable limit on individual rights?
3. What is the test for a reasonable search under the R. v. Collins case?
4. What step did the court take in the Vriend v. Alberta case to uphold the human rights law?

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**Vriend v. Alberta, 1998:** Delwin Vriend was an Alberta Christian college teacher. He was fired because he was gay. Vriend wanted to challenge his dismissal as discrimination under provincial human rights legislation. However, Alberta’s Human Rights, Citizenship, and Multiculturalism Act only recognized discrimination on the basis of sex, not sexual orientation. Vriend argued at the Supreme Court that the act violated his equality rights. It did not protect him from discrimination on the basis of his sexual orientation. The court agreed. However, it did not rule that the human rights law was unconstitutional. Instead, the court ordered the Alberta government to include sexual orientation as a prohibited ground of discrimination under the law. The Alberta government complied.

**R. v. Keegstra, 1990:** James Keegstra was an Alberta high school teacher. He was charged with promoting hatred toward an identifiable group—in this case, Jewish people. He argued that his freedom of expression was violated. However, the court allowed section 1 of the Charter to limit freedom of expression. Canada’s hate-crime laws are a reasonable limit on our freedom of expression. They protect groups from hate speech.
Self-Incrimination and Interpreter Rights

Section 13 of the Charter protects witnesses who testify in court from having the evidence used against them in later court proceedings. In other words, they cannot incriminate themselves by such testimony. This is known legally as self-incrimination. This right is suspended if witnesses lie while giving evidence. Lying under oath is known as perjury. If they are charged with perjury, the testimony they gave could be used against them.

Anyone involved in a proceeding who does not understand or speak the language of the court has the right to an interpreter. This is guaranteed in section 14 of the Charter. This section also applies to persons who are hearing impaired. In the case of R. v. Tran, 1994, an interpreter gave the accused a summary of the testimony and did not translate all of it. Therefore, the accused was not given a full opportunity to respond to the case against him. The Supreme Court held that the interpretation does not have to be perfect, but it must be continuous, precise, impartial, competent, and occur at the same time as the proceeding.

Did You Know?

In April 2007, in Wynberg v. Ontario, 2006, the Supreme Court of Canada refused to hear an appeal in a case that involved 28 families wanting the Ontario government to pay for expensive treatment for their autistic children. The original court had ruled that the government was violating Charter equality rights by not providing the treatment. The Ontario Court of Appeal reversed the decision and denied the funding.

Review Your Understanding

1. Summarize five of your rights when charged with an offence.
2. For what types of offences does Canada have a mandatory minimum sentence?
3. What protection do witnesses have in court?
4. When can the evidence given by a witness be used against him or her in court?
5. Summarize your rights under section 14 of the Charter.

2.6 Equality Rights

Section 15 of the Charter provides equality rights to every individual. The specific grounds for discrimination include race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. The courts have added citizenship, marital status, and sexual orientation. For example, the courts held that a provincial law that allowed only Canadian citizens to practise law in British Columbia violated equality rights. The case was Andrews v. Law Society of BC, 1989. Ontario family law did not give same-sex couples the right to claim spousal support from each other when they split up. The court ruled this to be discrimination under section 15 of the Charter. The case was M. v. H., 1999. As we saw above, in the case of Vriend v. Alberta, 1998, the Supreme Court required the Alberta government to include “sexual orientation” as grounds for discrimination. However, not all cases arguing for equality rights have been successful.
Language and General Rights

Language Rights

The Charter guarantees language rights. It proclaims that English and French are Canada’s two official languages. The Charter’s official language sections, 16 to 22, provide that both languages have equal importance in Parliament and in all of Canada’s institutions. The laws of Canada must be printed in English and French. Either language can be used in federal courts. Canadians also have the right to use either language when dealing with federal government offices where there is sufficient demand for bilingual services.

Did You Know?

Equality is understood to have four meanings:
1. Equal before the law
2. Equal under the law
3. Equal benefit
4. Equal protection

Section 15 of the Charter provides equality rights to every individual without discrimination.

Did You Know?

Equality is understood to have four meanings:
1. Equal before the law
2. Equal under the law
3. Equal benefit
4. Equal protection

Review Your Understanding

1. In what four ways is equality guaranteed under section 15 of the Charter?
2. List the grounds of discrimination that are covered by section 15 of the Charter.
3. What additional grounds of discrimination have been considered by the courts because they are related to those grounds of discrimination listed under section 15?
4. The courts often speak of the concept of “human dignity” when they are ruling on discrimination cases. What qualities would you associate with the concept of human dignity?
5. Is it a good idea to help groups that have historically been discriminated against by using a quota system for government jobs? Why or why not?
Section 23 of the Charter guarantees rights for minority language education. These rights apply only to Canada’s official languages (English and French). Also, they only apply to Canadian citizens. Education is a provincial matter. That means that each province decides whether to provide education in a language other than English or French.

You Be the Judge

Arsenault-Cameron v. Prince Edward Island, 2000 SCC 1 (CanLII)

A group of parents in Summerside, Prince Edward Island, argued that they were entitled to have their children educated in French. As there were enough students in the area to justify setting up a French school using public funds, they applied to the French Language School Board to establish a French school for Grades 1 to 6. The minister of education refused to set up the school but agreed to bus students to an existing school an hour’s drive away. The parents took legal action against the provincial government, arguing that they had the right under the Charter to have their children educated in French.

- How do you think the Supreme Court of Canada decided the case?
Aboriginal and Multicultural Rights

Section 25 of the Charter guarantees the existing rights of Aboriginal peoples. In other words, the rights and freedoms in the Charter cannot interfere with any Aboriginal rights, treaty rights, or other rights of the Aboriginal peoples of Canada. Section 35 of the Constitution Act, 1982 recognizes existing Aboriginal and treaty rights. However, it does not define these rights. The courts have the task of interpreting the meaning of the law. These constitutional protections set the stage for a variety of cases to be heard on the nature and scope of Aboriginal rights. These include such issues as the Aboriginal right to hunt and fish. Other important areas are Aboriginal land claims and self-government. Chapter 3 deals with the legal issues of Aboriginal peoples in greater detail.

Aboriginal rights the guarantee of the rights and freedoms of the Aboriginal peoples of Canada, entrenched in the Charter

Section 27 of the Charter recognizes the multicultural nature of Canada. Canadians come from many ethnic backgrounds and have a variety of needs. Courts and governments must consider these varying cultural backgrounds at all times.

In 2000, after a struggle of more than 100 years, a land claims treaty with the Pacific coast Nisga’a people was signed. Indian Affairs Minister Jane Stewart, Tribal Council President Joe Gosnell, and British Columbia Premier Glen Clark celebrate the signing of the Nisga’a Treaty.
2.8 Remedies

There are two methods of enforcing rights and freedoms guaranteed by the Charter:

1. using the authority under section 52 of the Constitution Act, 1982
2. seeking a remedy under section 24 of the Charter of Rights and Freedoms

Under section 52 of the Constitution Act, 1982, the Constitution is set out as the most powerful law in Canada. If a law is passed in Canada, and all or part of the law goes against the Constitution, the entire law or part of it can be declared unconstitutional. The courts have the option to strike down a law, which means that the law is no longer in effect. They can also read down a law, which means that the law is generally acceptable, but a specific part of the law is invalid and thus removed. The courts can also read in a term that changes the law, but still allows the law to be upheld as constitutional and does not need to be struck down. (See the case of Vriend v. Alberta, 1998, on page 59.)

**Review Your Understanding**

1. Explain the purpose of section 25 of the Charter.
2. What groups are included as Aboriginal peoples in Canada under the Charter?
3. How does the Constitution Act, 1982, recognize Aboriginal rights?
4. Why do existing Aboriginal and treaty rights have to be interpreted by the courts?
5. How does the Charter respect multicultural rights?

**strike down** to rule in court that a law is invalid and no longer in effect

**read down** to rule in court that a law is generally acceptable, but a specific part of the law is invalid and thus removed

**read in** to add a term to a law that changes the law, but still allows the law to be upheld as constitutional
The second method of enforcing rights allows anyone who thinks his or her rights and freedoms have been infringed to apply to a court for a remedy under section 24 of the Charter. For example, a court may decide that your right to a trial within a reasonable time was violated. The court may then order a stop to the criminal proceedings. This order would prevent a Crown attorney from taking any additional steps against you. In another case, police may have searched your home and gathered evidence without a proper search warrant. The courts may find the search unreasonable. Then, you could apply to have the evidence thrown out under section 24(2) of the Charter. The courts must decide whether allowing the evidence would make the trial unfair, or whether it would make the justice system look bad. In legal terms, would allowing the evidence bring the administration of justice into disrepute?

**Review Your Understanding**

1. What is a remedy?
2. What remedy is provided under section 52 of the Constitution Act, 1982?
3. Distinguish between “striking down” and “reading down” a law.
4. Explain the remedy provided under section 24 of the Charter.
5. What is the meaning of “to bring the administration of justice into disrepute?”

2.9 **The Courts and the Legislature**

You have already learned in Chapter 1 that the legislatures of the federal, provincial, and territorial governments have the power to make laws. Those bodies also have the power to change laws. Under the Constitution Act, 1867, the courts decided who had the power to enforce the laws. This depended on the division of powers by level of government. Since the Charter, the courts also decide whether or not these laws or government actions are unconstitutional.

We elect politicians to represent our interests at the various levels of government. We expect politicians to make the laws. However, our Charter allows our courts to interpret these same laws. Sometimes the courts have been accused of taking too much power away from the legislatures. The courts have sometimes been accused of taking over the lawmaking power and putting their own personal viewpoints and values into their court judgments. This is known as judicial activism. Others argue that the elected governments are avoiding controversial issues, forcing the courts to protect basic rights. Read the Issue on pages 66–67 to gain a better understanding of the role of courts and legislatures in making Canadian law.
ISSUE

Do the Courts Have Too Much Power Compared to Legislatures?

The Charter of Rights and Freedoms gave courts broad new powers. It means that if a court finds that any provincial, territorial, or federal law trespasses on rights protected in the Charter, it can declare the law unconstitutional and no longer in effect. This has made the Supreme Court very powerful. The Supreme Court of Canada decisions below have been very controversial because of the social and moral issues relating to the cases.

R. v. Morgentaler, 1988: The Supreme Court struck down Canada’s abortion law on the grounds that it violated a woman’s right to control her own body. The government chose not to create a new abortion law.

R. v. Butler, 1992: The Supreme Court upheld Canada’s obscenity laws but allowed the defence of artistic merit to be used in some cases where freedom of expression is being challenged (for example, a justification that material in question may have some artistic purpose).

R. v. Daviault, 1994: The court ruled that extreme drunkness may be a defence in rape (now sexual assault). According to that decision, convicting someone who did not know what he or she was doing is a violation of his or her Charter rights.

In Doucet-Boudreau v. Nova Scotia (Minister of Education), 2003, a group of francophone parents wanted to educate their children in French. They claimed that the Nova Scotia government was violating their minority language rights. The trial judge agreed. The judge also ordered the government to report back to the court on its progress in providing French-language facilities and programs at the secondary level. The provincial government appealed. However, the Supreme Court of Canada agreed that this was a suitable procedure.

In other cases, the courts have been criticized for their power when dealing with subjects like anti-terrorism legislation. Should the court be telling lawmakers what to do? Should they be giving governments time limits for rewriting a law? Or should the governments be given the exclusive authority to make the laws for the safety and security of Canada?

In Charkaoui v. Canada (Citizenship and Immigration), 2007, the Supreme Court struck down part of the Immigration and Refugee Protection Act dealing with security certificates and detentions. The accused were suspected of having terrorist ties. The court held that they were denied their right to a fair hearing. They were not informed of the case against them. They were not allowed to be represented by a lawyer in a secret hearing. The Supreme Court gave the government one year to create a new law that would not be in violation of the Charter.

Similarly, in M. v. H., 1999, the court ruled that equality rights were being denied to same-sex couples. The Ontario government was given six months to rewrite its family law legislation so as not to discriminate against same-sex partners. It did so.

As you can see, the court’s decision varies depending on the case. Sometimes the court protects individual rights guaranteed in the Charter. Sometimes laws are struck down. Sometimes governments are given the opportunity to create new laws.

On One Side

Some Canadians believe that the Supreme Court of Canada has become too powerful. It may be time to re-examine the role that the justices play. These people are opposed to the...
idea that nine appointed judges can overrule laws made by elected representatives. They say that if laws need to be updated and changed, elected lawmakers should do this. That is the very heart of democracy.

Other people believe that the Supreme Court is protecting individual rights at the expense of the needs of society. According to these critics, the Charter guarantees too many individual rights. They see it as threatening the welfare and safety of Canadians. They argue that it does too much to protect criminals. It does not do enough to guarantee the rights and freedoms of law-abiding Canadians.

On the Other Side

Many Canadians who support the Charter point out that it protects their rights and freedoms from government interference. They believe that the courts can respond to changing social attitudes and beliefs much more quickly than elected governments. Politicians want to be re-elected. That is why they often avoid passing controversial legislation. The appointed justices of the Supreme Court do not have this pressure. They do have professional legal backgrounds and they can be trusted to know the law and fairly interpret its provisions. Their ability to use the Charter to overrule certain laws ensures greater fairness and justice.

The Bottom Line

The Charter has changed life and law in Canada. It has often placed judges and their decisions in the media spotlight. Supreme Court decisions are especially important because they affect all Canadians. As the Charkaoui decision indicates, the courts are now being asked to consider security versus individual rights in light of anti-terrorism laws. When does security outweigh civil liberties, or should it ever? When the courts strike down a law, are they practising judicial activism? When the courts give the legislatures one year to create a new law, are they participating in a creative dialogue to allow laws to be upheld?

 Freedoms and rights may be expanded or limited. This will depend on new cases brought before the courts. The courts will continue to interpret rights and freedoms. They will also balance individual and societal interests when they make decisions about which rights to expand and which to limit. The bottom-line question is, although the legislatures have the prime lawmaking power, should the courts have the power to overrule them?

What Do You Think?

1. Examine the cases mentioned and identify whether the court decisions are in favour of individual rights or the needs of society.
2. In groups, discuss whether Supreme Court decisions are having a negative or positive effect on Canadian society. Share your conclusions.
3. What types of issues might require the court to limit individual rights in favour of the needs of society?
4. Should the needs of society be more important than individual rights, or should individual rights be protected at all costs? Explain.
Chapter Review

Chapter Highlights

- The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms of all Canadians.
- The Charter is a part of the Constitution Act, 1982.
- Since April 17, 1982, your rights and freedoms have been entrenched in the Canadian Constitution.
- The Constitution Act, 1982, is the most important law in Canada.
- The rights and freedoms guaranteed in the Charter are not absolute but are subject to reasonable limits that can be justified in our free and democratic society.
- The Supreme Court of Canada interprets the rights and freedoms listed in the Charter.
- Section 2 of the Charter lists the fundamental freedoms of all Canadians.
- Democratic rights include the right to vote.
- Mobility rights include the right to enter, remain in, and leave Canada.
- Legal rights provide protection if you are involved with the criminal justice system.
- A cornerstone of the Canadian justice system is the right to be presumed innocent until proven guilty.
- Equality rights provide you with freedom from discrimination.
- Language rights define French and English as the two official languages in Canada.
- Minority language education rights apply to the two official languages, French and English.
- The Charter provides for Aboriginal and multicultural rights.
- A constitutional remedy used by the courts includes striking down a law that violates the Charter.

- To save laws from being struck down as unconstitutional, courts can “read in” a term or “read down” the law.
- Federal, provincial, or territorial governments can use the notwithstanding clause to pass laws that override certain rights and freedoms in the Charter.

Check Your Knowledge

1. Prepare a chart outlining your rights and freedoms under the Charter.
2. Explain the purpose of the reasonable limits clause.
3. Explain how the notwithstanding clause makes it possible to override rights and freedoms under the Charter.
4. Explain the purpose of section 24 of the Charter.

Apply Your Learning

   a) Does the Charter apply?
   b) Has a Charter right or freedom been infringed?
   c) Does the reasonable limits clause justify the infringement?
   d) If not, is there a remedy provided under the Charter?

6. Use the Internet to research a Supreme Court of Canada Charter decision. Identify the name of the case and the Charter issue that the court was asked to consider.
Communicate Your Understanding

7. You have been asked to draft proposed changes to the Charter. Prepare an argument that poverty should be included as a ground for discrimination in equality rights.

8. Civil liberties are freedoms that protect individuals from unwanted government interference. Why are civil liberties, such as freedom of expression and freedom of religion, protected in our society? Should your civil liberties be reasonably limited in a democratic society?

9. Assume that your local town council is proposing to install video surveillance cameras on all major street corners in your community. Prepare a debate arguing that video camera surveillance technology is justifiable for security reasons. Be sure to consider a counterargument that the use of video camera surveillance technology violates your privacy rights.

10. In pairs, select one of the topics below. One student will prepare an argument in favour of the statement, and the other student will prepare a counterargument against the statement. Support your position with examples. Share your opinions with your partner.
   a) Canadian society is going to break down and the court system will become ineffective because Canadians have too many civil rights, and far too many minority groups are protected under the law.
   b) Because people who talk on cellphones while driving are dangerous to themselves and others, the use of cellphones while driving should be banned.
   c) Because they have so much power, the justices of the Supreme Court of Canada should be elected.
   d) Police officers should not be allowed to conduct random searches of schools, malls, and other public places using sniffer dogs.

Develop Your Thinking

11. On the twenty-fifth anniversary of the Charter, Chief Justice Beverley McLachlin of the Supreme Court of Canada commented: “The most important thing I think is to educate the children and young people. The basics of the Canadian Constitution—including the Charter—should be mandatory learning in our schools and high schools.” Why is it important to have an understanding of our rights and freedoms under the Charter?

12. In the case of Charkaoui v. Canada (Citizenship and Immigration), 2007, the court tried to balance liberty and security. The Supreme Court ruled that the indefinite jailing of a foreign national (non-citizen) suspected of being a terrorist is legitimate, as long as the detention is subject to a meaningful and regular review. What do you think would constitute a “meaningful and regular review”?

13. Mr. Justice Marc Rosenberg of the Ontario Court of Appeal has stated that “it is because of the Charter that the criminal justice system is out from under the shadow of capital punishment.” Which sections of the Charter do you think support his comments?

14. In the case of R. v. M. (M.R.), 1998, a vice-principal was justified in searching a junior high school student who was suspected of drug dealing. In its majority decision, the court stated: “Students know that their teachers and other school authorities are responsible for providing a safe environment and maintaining order and discipline in the school. They must know that this may sometimes require personal searches of students and their personal effects and the seizure of prohibited items.” Research more about your reasonable expectation of privacy. When should privacy rights be limited?