Part II: Magna Carta and Canada's Constitution

This article was written by a law student for the general public.

Introduction

Magna Carta is not formally part of Canada's Constitution, but it played an important role in its creation. Concepts such as the rule of law and many common law principles derive from it, and these do form part of our Constitution.

Not Formally Our Constitution, but Influences It

Constitutional expert Peter Hogg and court cases such as *R v Dobell* and *R v Jebbett* argue that Magna Carta is not a "constitutional document" in Canada.[1] That said, Canada's founding constitutional document at Confederation was the *British North America Act, 1867* (now known as the *Constitution Act, 1867*). The Preamble of the *Constitution Act, 1867* states that Canada adopts a constitution "similar in Principle to the United Kingdom," which does include principles from Magna Carta.[2] Much of the actual text of Magna Carta was formally removed from the statute books by the British Parliament a few years before Confederation, but Magna Carta principles such as the rule of law shaped our Constitution at Confederation.[3]

While Magna Carta principles may have been viewed as a cornerstone for our system of democracy and the rule of law at Confederation, the common law rights and protections that it influenced did actually become part of our Constitution, as they informed our *Canadian Charter of Rights and Freedoms*.[4]

3) The Rule of Law

The rule of law is the idea that no one is above the law, and that includes the government. It has its roots in Magna Carta.[5] Magna Carta limited the king's power and prevented him from acting arbitrarily. Further, any sort of legal punishment would have to be according to the due process of law.[6]

As noted in the previous section, the rule of law is embodied in the *Constitution Act,* 1867, since we inherited a constitution similar in principle to Britain. However, the rule of law is also explicitly stated in the *Charter*, whose preamble states that Canada is "founded on principles that recognize… the rule of law."[7] Further, section 52 of the *Charter* states that the Constitution is the supreme law of Canada, and any laws that are inconsistent with the Constitution are of no force or effect.[8]

4) Magna Carta, Common Law Protections and our *Charter*

Related to the rule of law, Magna Carta forbade illegal imprisonment, and required a fair

justice system that followed the due process of law.[9] These are important protections for people that have since developed through the common law, influenced by Magna Carta.

For example, habeas corpus, the ability to challenge an imprisonment as illegal, is thought to have come from Magna Carta, or at least to have been affirmed by it. However, this is inaccurate and likely skewed by influential English jurist Edward Coke's view of Magna Carta.[10] That said, common law protections such as the right to be tried by a jury of one's peers and the right to speedy and fair trials ("To no one will we sell, to no one deny or delay right or justice"), have roots in Magna Carta.[11]

Magna Carta's text may not be part of our Constitution, but crucial common law rights and principles that it influenced have been incorporated into our *Charter*. Magna Carta's requirement that legal action follow due process of law has also been described as "fundamental justice," which is included in section 7 of the *Charter*.[12] Clause 39 of Magna Carta protected "free men" from illegal and arbitrary detainment.[13] This is echoed in Section 9 of the *Charter,* which guarantees "the right not to be arbitrarily detained or imprisoned."[14] Magna Carta promised timely and fair justice, along with a person being judged by their peers.[15] Mirroring this, Section 11 of the *Charter* guarantees the right "to be informed without unreasonable delay of the specific offence," the right "to be tried within a reasonable time," the right to a fair hearing, and the right to a jury for serious offences.[16]

5) Magna Carta – A Symbol and More

Magna Carta has often been valued as a symbol of freedoms, liberties, and the rule of law. While it does have symbolic value in Canada, its value extends beyond that. Through its reflection in our Constitution, it has affected Canadian life in a practical way. It may not formally be part of Canada's Constitution, but important principles and rights descend from it that do form part of our Constitution, and thus its influence can be seen to this day.

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[1] *R v Dobell*, [1978] BCJ No 1041 (SC), *R v Jebbett* 2003 BCCA 69 at para 4

[2] *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5, Preamble

[3] Ralph V Turner, The Meaning of Magna Carta since 1215, History Today 53:9 (9 September 2003); Carolyn Harris, *Magna Carta and Its Gifts to Canada: Democracy, Law and Human Rights* (Dundurn, Toronto: 2015) at 91-95

[4] Harris, *supra* note 3at 91, 106-108

[5] *Ibid* at 39-40

[6] Magna Carta, 1215, clause 39

[7] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, Preamble

[8] *Ibid*, s 52

[9] *Supra* note 6, clauses 39, 40

[10] Turner*, supra* note 3

[11] *Supra* note 6, clauses 39, 40; Harris, *supra* note 3 at 43-44

[12] Harris, *supra* note 3 *Canada* at 41-43; *supra* note 7, s 7

[13] *Supra* note 6, clause 39

[14] *Supra* note 7, s 9

[15] *Supra* note 6, clauses 39, 40

[16] *Supra* note 7, s 11(a), (b), (d), (f)