Constitutional Rights

Constitutional rights are the most highly guaranteed freedoms within a legal system. In Canada, constitutional rights can be exercised by individuals or groups against the government, or by one level of government against another; either way, constitutional rights are always held against the government. If a claimant successfully argues in court that their constitutional rights have been violated, the court may decide to fix the rights violation by issuing a remedy.

The Canadian legal system sets out individuals' constitutional rights in the Canadian Charter of Rights and Freedoms;[1] these are often called *Charter* rights, which are held by individuals against the Federal and provincial governments. When an individual successfully proves in court that the government has violated their *Charter* rights, the government must then prove that the violation is justified in a free and democratic society.[2] If the government is unsuccessful in justifying the violation of rights, then a court remedy will be issued.[3] Sometimes, the government can then choose to use the "notwithstanding clause" outlined in section 33 in order to avoid the court remedy.[4]

Some constitutional rights are held against the government by groups rather than individuals. Aboriginal rights, for example, are recognised and affirmed in section 35(1) of the *Constitution Act, 1982*.[5] These include a variety of rights which can be claimed by an Aboriginal person on behalf of the recognised Aboriginal group to which he or she belongs.[6]

The *Constitution Act, 1867*[7] creates constitutional rights of a different type: in sections 91 and 92, it distributes particular powers to each level of government under our federal structure (the division of powers). Many early constitutional cases in Canada centred around the respective rights of each level of government to legislate over particular areas or subject matters.[8] Courts have developed various interpretive tools in order to analyse whether a level of government is legislating within its constitutional powers, or whether it is infringing on the powers of the other level of government.

In Canada, constitutional rights are held against the government, and these rights are entrenched in the Constitution. This means that the Constitution would need to be amended through a complex procedure in order for rights to be modified, created, or repealed. But there are also non-constitutional rights that encompass a broader range of entitlements and freedoms enjoyed at law. These are found at common law and in statutes. For example, an individual has the common law right to use and enjoy her property without interference from her neighbours, and a non-citizen has the statutory right to apply for citizenship when he meets the criteria set out by the *Citizenship Act*.[9] However, because these rights are not constitutional, they can be changed by government legislation.

[1] *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, s 7 (the "*Charter*").

[2] *Ibid*, s 1.

[3] See *Schachter v Canada*, [1992] 2 SCR 679, for example, where the remedies of striking down, suspended declarations of invalidity, "reading down" and "reading in" are discussed.

[4] See *Charter*, *supra* note 1, s 33(1): "Parliament or the legislature of a province may expressly declare in an Act of Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter."

[5] *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35.

[6] An Aboriginal right is only made out if the activity claimed to be at the core of the right is "integral to a distinctive culture," which requires a connection to be made between a right and a group; see *R v Van der Peet*, [1996] 2 SCR 507 at para 47.

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

[8] For example, the Federal Government has power over criminal law and banking, which might sometimes conflict with provincial powers over "property and civil rights" or "Matters of a merely local or private Nature".

[9] *Citizenship Act*, RSC 1985, c C-29, s 3.