Criminal Law Power

The criminal law power is a legislative power allocated to Canada's federal government via the *Constitution Act, 1867*. More specifically, section 91(27) of this *Act* gives Parliament exclusive jurisdiction over "The Criminal Law, except the Constitution of the Courts of Criminal Jurisdiction, but including Procedure in Criminal Matters."[2] This means that legislation that falls within the scope of section 91(27) must come from the federal Parliament (and *not* provincial legislatures) to avoid being struck down as *ultra vires* — i.e. beyond the responsibilities legally allocated to the government.[3]

The Scope of Section 91(27)

The criminal law power is notably broad.[4] According to the Supreme Court's landmark judgment in the *Margarine Reference*, section 91(27) extends to any legislation that contains a prohibition, a penalty, and a valid criminal law purpose. In that case, for example, the Court held that a federal ban on the manufacture and sale of margarine was *ultra vires*, because the true purpose of the ban — protection of the dairy industry — didn't constitute a valid criminal law purpose.[5]

In general, however, all elements of the criminal law power test (prohibition, penalty, and purpose) have been interpreted liberally by the courts. Prohibitions can include exemptions[6] and regulations,[7] and while the list of valid purposes was originally framed to include "public peace, order, security, health, [and] morality,"[8] this is a non-exhaustive list — neither "frozen in time [n]or confined to a fixed domain."[9] As a result, recent decades have seen the emergence of new valid purposes alongside novel issues, such as environmental protection or the reduction of tobacco use through restrictions on advertising.[10]

Provincial Governments and the Criminal Law

Jurisdictional disputes will sometimes come up between the federal and provincial governments around the criminal law power. This is because section 92 of the 1867 *Act* sets out areas of provincial jurisdiction which can sometimes conflict or overlap with the federal criminal law power. Examples include section 92(13), which addresses "Property and Civil Rights in the Province,"[11] and section 92(16), which addresses "Generally all Matters of a merely local or private Nature in the Province."[12] Where it is unclear if a law falls under one of these sections or section 91(27), courts will resolve the lack of clarity by assessing the pith and substance of the legislation to determine 1) what the dominant characteristic of the law is, and 2) which head of power that characteristic falls under.[13]

Although Parliament has a monopoly over the creation of criminal law and procedure per section 91(27) of the 1867 *Act*, it is important to point out that provincial governments continue to play an important role in the implementation of criminal law. The administration of justice, for example, is placed within the purview of the provinces via section 92(14),[14] and they accordingly exert significant influence over criminal law through their "decisions

to investigate, charge and prosecute offences."[15] Moreover, the provinces also maintain control over prisons per section 92(6) of the *Act*, and can legislate punishments (including imprisonment) for provincial laws per section 92(15) — as long as such laws simply enforce other legislation within provincial jurisdiction).[16]

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

[2] *Ibid* at s 91.

[3] *Cambridge Business English Dictionary,* (Cambridge University Press, 2011) *sub verbo* "ultra vires", (online): <dictionary.cambridge.org> [perma.cc/8T2K-BSXV].

[4] *RJR-MacDonald Inc v Canada (Attorney General)*, 1995 CanLII 64 (SCC) at 201.

[5] Peter Hogg, *Constitutional Law of Canada*, 5th ed, vol 1 (Toronto: Thomson Carswell) at 18-5.

[6] *Supra* note 4 at 202.

[7] *Supra* note 5 at 18-30.

[8] *Reference re Validity of Section 5 (a) of the Dairy Industry Act*, 1948 CanLII 2 at 50.

[9] *Supra* note 4.

[10] *R v Hydro-Québec*, 1997 CanLII 318 (SCC).

[11] *Supra* note 1 at s 92.

[12] *Ibid*.

[13] See, for example, *Westendorp v The Queen*, 1983 CanLII 1 (SCC).

[14] *Supra* note 5 at 19-2.

[15] *Ibid* at 18-2.

[16] *Ibid* at 18-3.

Section 25

What is Section 25?

Section 25 of the *Canadian Charter of Rights and Freedoms*[1] is a provision that sets out how the *Charter* affects the rights and freedoms of Indigenous peoples in Canada. It is potentially engaged where there is an apparent conflict between an Indigenous right and another, generally applicable right listed in the *Canadian Charter*.

The text of Section 25's text reads:

The guarantee in this *Charter* of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada including: a. any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and b. any rights or freedoms that now exist by way of land claim agreements or may be so acquired.[2]

Section 25 at the Supreme Court of Canada

In the first forty years of the *Charter*'s lifespan, section 25 was rarely considered by the Supreme Court of Canada (SCC).[3] One exception to this was in *Corbiere* (1999),[4] when the SCC stated that section 25 protects "broader" rights and freedoms than section 35 of the *Constitution Act, 1982*, and can extend to protect statutory rights in some cases.[5] *Corbiere* also marked the first reference to the "shielding" function of section 25,[6] which was then explored further in *Kapp*,[7] and ultimately became one of the two dominant interpretations of section 25. The gist of this interpretation is that it treats section 25 as a "shield" against *Charter* challenges. On this view, invoking section 25 will defeat a *Charter* challenge that would result in a violation of certain protected Indigenous rights (those that are within the "scope" of section 25).[8] This interpretation was favoured by Justice Bastarache of the SCC in *Kapp* and has been endorsed by lower courts, too.[9]

By contrast, the interpretive prism approach is the second of the two dominant interpretations of section 25. This interpretation depicts section 25 as an interpretive provision that requires courts to read *Charter* rights and Indigenous rights to give as much effect as possible to both but affording "no special priority" to the Indigenous right.[10] While this approach was rejected by Justice Bastarache in *Kapp*, it has subsequently been partially accepted, as explained below.

The Section 25 Framework Today: The *Dickson* Case

In *Dickson*, the SCC provided a long-awaited, comprehensive interpretation of section 25. They clarified the section's function and provided the test for its application, moving forward. Considering the two interpretations from *Kapp*, the Dickson Court held that *both* interpretations should be used to understand section 25.[11] Section 25 has a "shielding" effect as "it affords primacy to Aboriginal, treaty, or other rights."[12] However, it is not

enough to prove that an Aboriginal, treaty, or "other right or freedom" is engaged; rather, there must also be an *irreconcilable conflict* between the *Charter* right and the section 25 right, and this must be demonstrated by the party invoking section 25.[13]

To reach this conclusion on the meaning of section 25, the Court looked closely at the language of section 25's text, suggesting that the words "abrogate and derogate" indicate that the individual *Charter* right must not nullify, repeal, detract or depart from the collective Indigenous rights at stake (and hence, that the "shield" approach is at least partly correct).[14]

The *Dickson* Court also took the opportunity to clarify what section 25's category of "other" rights.[15] Here, the Court found that section 25 claimants must "establish both the existence of the right and the fact that the right protects or recognizes Indigenous difference," and that this difference would encompass interests connected to "cultural difference, prior occupancy, prior sovereignty, or participation in the treaty process."[16]

The Court proceeded to lay out the following step-by-step framework for section 25.

1. The *Charter* claimant shows that there has been a *prima facie* breach of their individual *Charter* right;
2. The party relying on section 25 to block the *Charter* challenge must show that the alleged right in question falls within the scope of section 25;
3. The party relying on section 25 must prove an *irreconcilable conflict* between the section 25 right and the individual *Charter* If there is a proven irreconcilable difference, section 25 will act as a shield protecting Indigenous difference;
4. The courts must then determine if other provisions of the *Charter* or the *Constitution Act, 1982* place limits on the protection of the section 25 right.[17]

Notably, the SCC added that this framework will apply regardless of a claimant's identity, meaning that the same process applies for *Charter* claims from Indigenous and non-Indigenous persons that risk limiting (collective) Indigenous rights.[18] And even if section 25 is not engaged, the collective right may still be prioritized via the section 1 justification stage of the *Charter* analysis, which will play out if the section 25 claim fails.

[1] *Canadian Charter of Rights and Freedoms*, s 15(1) Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

[2] *Ibid*, s 25.

[3] *Dickson v Vuntut Gwitchin First Nation*, 2024 SCC 10 [*Dickson*].

[4] *Corbiere v Canada (Minister of Indian and Northern Affairs)*, [1999] 2 SCR 203.

[5] *Ibid* at para 52.

[6] *Ibid* at paras 51-53

[7] *R v Kapp*, 2008 SCC 41 at para 79 [*Kapp*].

[8] *Dickson*, *supra* note 3 at para 153.

[9] *Ibid* at paras 155 and 157.

[10] *Ibid* at para 154.

[11] *Ibid* at para 158.

[12] *Ibid* at paras 150-152.

[13] *Ibid* at paras 150, 152, 167.

[14] *Ibid* at para 124.

[15] *Ibid* at para 150.

[16] *Ibid* at para 150.

[17] *Ibid* at paras 179-183.

[18] *Ibid* at para 166.

Principles of Fundamental Justice

Purpose

Principles of fundamental justice (PFJs) are used to determine whether section 7 of the *Charter of Rights and Freedoms* has been violated. Section 7 establishes that "[e]veryone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[1] This means that a party asserting a section 7 violation must demonstrate a breach of 1) life, liberty, or security of the person, and 2) at least one PFJ.[2] Claimants may base their arguments on already established PFJs or previously unrecognized principles that meet certain standards (see below).

Criteria

PFJs are not defined in the *Charter*, so the criteria for what constitutes a PFJ had to be developed gradually through case law. Although originally thought to address procedural matters only, the Supreme Court of Canada's *BC Motor Vehicle Act* judgment (1985) established that PFJs also include substantive ideals,[3] like the requirement of proving fault before imposing incarceration.[4]

In *R v Malmo Levine*, the Supreme Court provided additional clarification by establishing three requirements for legal recognition of a previously unrecognized PFJ:

1. They must be "legal principle[s]."[5]
2. There must be "significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate."[6]
3. They "must be identified with sufficient precision to yield a manageable standard."[7]

Examples

Courts have used the *R v Malmo Levine* criteria to recognize a wide range of PFJs (and recognized many PFJs before the establishment of these criteria). The most common PFJs used by the courts today are arbitrariness, overbreadth, and gross disproportionality,[8] which can be defined as follows:

- A law is arbitrary when its purpose fails to align with all of its effects.[9]
- A law is overbroad when its purpose is disconnected from some of its effects.[10]
- A law is grossly disproportionate where its effects are unjustifiably excessive.[11]

Some other principles of fundamental justice that have been recognized by the courts — but are less commonly referenced — include the principle that criminal defences must be practically attainable,[12] the principle that nobody should be imprisoned without fault,[13] and the principle that criminal defendants have a right to prosecutorial disclosure.[14] This list is non-exhaustive, which means that courts may recognize additional principles of fundamental justice in the future.

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

[2] Peter W Hogg, *Constitutional Law of Canada*, 5th edition, vol 2 (Toronto: Carswell, 2019) at 47.10(a).

[3] *Re BC Motor Vehicle Act*, 1985 CanLII 81 (SCC) at 513.

[4] Government of Canada, "Section 7 – Life, liberty and security of the person" (last modified 29 June 2023) at (i) "Substantive Fundamental Justice" (para 8), online: <justice.gc.ca> [perma.cc/52LS-9XG8].

[5] *R v Malmo-Levine*, 2003 SCC 74 at para 113.

[6] *Ibid*.

[7] *Ibid*.

[8] Peter W Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 SCLR 195 at 155.

[9] Government of Canada, *supra* note 4 at (i) "Substantive Fundamental Justice" (para 2).

[10] *Ibid*.

[11] *Ibid* at (i) "Substantive Fundamental Justice" (para 4).

[12] *R v Morgentaler*, 1988 CanLII 90 (SCC) at 33.

[13] *Re BC Motor Vehicle Act*, 1985 CanLII 81 (SCC) at 515.

[14] *R v Stinchcombe*, 1991 CanLII 45 (SCC) at 336.

Environmental Jurisdiction

Who Can Regulate the Environment in Canada?

The provincial and federal governments share jurisdiction over the environment.[1] The legislative powers of both levels of government are derived from sections 91 to 95 of the *Constitution Act 1867*, but these sections do not explicitly allocate power over "the environment" to one level or the other.[2] Consequently, environmental regulation has often been a complex area for governments to navigate.

Federal Environmental Jurisdiction

The federal government can use several of the legislative powers granted to it under section 91 of the *Constitution Act, 1867* to regulate different aspects of the environment. These include federal jurisdiction in relation to trade and commerce (91(2)), taxation (91(3)), fisheries (91(12)), Indigenous peoples (91(24)), navigation and shipping (91(10)), and criminal law (91(27)).[3]

For example, the Supreme Court of Canada (SCC) decision in *R v Hydro-Québec* demonstrates that the federal government can validly regulate the environment under its criminal law power.[4] For the federal government to use this power, its legislation must take the form of a prohibition, backed by a penalty, with a valid criminal law purpose.[5] In *Hydro-Quebec*, the SCC found that environmental protection was a valid criminal law purpose, and that a federal law that empowered government ministers to regulate the release of certain "toxic" substances into the environment was a valid exercise of the federal criminal law power.[6]

The Federal "POGG" Power

The opening paragraph in section 91 also allows the federal government to regulate matters affecting the "Peace, Order, and Good Government of Canada" (POGG for short). Today, courts recognize three branches of POGG: the national concern branch, the emergency branch, and the residual branch. A recent valid use of POGG in the context of the environment is seen in the *References re Greenhouse Gas Pollution Act* (*GGPPA*) from 2021.[7]

In this case, a majority of the SCC found that the *GGPPA*, a federal law aiming to regulate greenhouse gas (GHG) emissions by implementing minimum national standards of GHG pricing stringency, was constitutional.[8] This case came to the SCC on appeal after the Alberta, Ontario, and Saskatchewan governments asked their courts of appeal if the federal government had overstepped its jurisdiction by passing the *Act*.[9] In a landmark ruling, the SCC held that federal POGG powers enabled the government to pass the *Act*.[10] The Court framed the issue of establishing minimum national standards vis-à-vis carbon pricing as a matter of national concern that provincial governments were unable to address on their own (see here for a more comprehensive analysis of the *GGPPA* decision).[11]

Provincial Environmental Jurisdiction

Like section 91, there is no explicit reference to the environment in section 92, which enumerates most of the provincial government's legislative powers. However, provinces can regulate the environment through multiple heads of power, including their powers over natural resources (92A), local works and undertakings (92(10)), property and civil rights (92(13)), and matters of a local or private nature (92(16)).[12]

A recent case that highlights the potential for inter-governmental conflict over environmental issues is the *Reference re Impact Assessment Act* (2023).[13] The *Impact*

Assessment Act is a federal law that allows the government to assess the environmental impact of different types of "designated projects" and to place restrictions on projects with purportedly adverse effects.[14] Here, the SCC found that some sections of the *Act* were constitutional, but the "balance of the scheme" was ruled unconstitutional due to its overbreadth.[15]

This decision was celebrated by the Alberta government, which had initiated the action against the law. In response, Premier Danielle Smith suggested that the federal government should take the decision as a lesson to "abandon their ongoing unconstitutional efforts to seize regulatory control over the electricity and natural resource sectors of all provinces."[16]

Following the decision, the federal government proposed amendments to the law to fix its constitutional defects.[17] However, the Alberta government has already criticized the amendments, stating that they are unconstitutional, and that they will consider challenging them in court.[18]

Looking Forward

The recent Canadian case law reflects the extent of intergovernmental tensions over environmental regulation, with jurisdictional disputes continuing across the country. For example, the Government of Saskatchewan decided to stop remitting the federal carbon tax in response to the federal government's decision to exempt home heating oil but not natural gas from the carbon tax (the latter is widely used in Saskatchewan for home heating).[19] This shows that environmental jurisdiction remains exceptionally contentious in Canada, and will likely result in many future actions in the courts.

[1] Peter Oliver et al, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 494.

[2] *Ibid*.

[3] *Ibid* at 495-6.

[4] *Ibid* at 496.

[5] *Reference re Validity of Section 5(a) Dairy Industry Act*, [1949] SCR 1 at 50.

[6] *R v Hydro-Quebec*, [1997] 3 SCR 213 at para 146 [*Hyrdro-Quebec*].

[7] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11.

[8] *Ibid* at paras 57 & 221.

[9] *Ibid* at para 39-46.

[10] *Ibid* at para.

[11] *Ibid* at para 167.

[12] Oliver et al, *supra* note note 1 at 499.

[13] *Reference re Impact Assessment Act*, 2023 SCC 23.

[14] *Ibid* at para 5.

[15] *Ibid* at paras 215-216

[16] Premier Danielle Smith and Minister Mickey Amery, "Supreme Court of Canada ruling: Joint statement", *Government of Alberta* (October 13, 2023), online: <https://www.alberta.ca/release.cfm?xID=89093A2A5472B-F26C-C1A2-A129EE73F4A01853>.

[17] David Thurton, "Alberta calls Ottawa's impact assessment changes unconstitutional", *CBC News* (12 May 2023), online: <https://www.cbc.ca/news/politics/impact-assessment-alberta-1.7202785>.

[18] *Ibid*.

[19] Jeremy Simes "Sask. government introduces law to stop collecting carbon tax on natural gas", *CBC News* (16 November 2023), online: <https://www.cbc.ca/news/canada/saskatchewan/government-introduces-law-stop-collecting-carbon-tax-natural-gas-1.7030339>.

Section 11(a): The Right to Be Informed Without Unreasonable Delay of the Specific Offence Charged

Provision:

Any person charged with an offence has the right … to be informed without unreasonable delay of the specific offence.

This right consists of two elements. The first and primary element is the notification of the exact accusation. If the accused is not informed about the exact nature of the accusation, their ability to fully respond and defend themselves may be impeded. The accused has the right to understand the charges against them so that they can strategize their defense, gather evidence, and prepare to confront the prosecutor's case.[1] This right is a safeguard for the legal principle that "an accused can only be charged with an offence recognized by law."[2]

The second element is the right to be notified of the charges without undue delay. This provision serves to safeguard the right to a full response and defense.[3] The Supreme Court of Canada in *R v Delaronde* (1997) determined that section 11(a) also serves as an economic safeguard. The court ruled that individuals suffering economic hardships from delayed charge notifications may have legal redress.[4]

Trigger

The right to be informed under s.11(a) is only triggered once a person has been charged with an offence.[5]

Criminal Code

The section 11(a) requirement to provide sufficient notice of the charges against the accused has been partly codified by section 581 of the *Criminal Code*. Section 581 sets the requirements for the form of statement of offence, which includes that the statement uses plain language, uses the words of the enactment that describes the offence, or uses words that provide sufficient notice of the charges to the recipient. Additionally, it requires that each count in an indictment contains an independent statement.

Unreasonable Delay

Determination of "unreasonable delay" is approached using the same factors that are relevant under section 11(b) (this protects the right to be tried within a reasonable time). These factors include the length of any delay, reasons for the delay, waiver of time periods

(if the individual deliberately tries to avoid being informed of the charge), and prejudice to the accused.

Interplay with Section 1

Note that under section 1 of the *Charter*, *Charter* rights are guaranteed "subject only to such reasonable limits … as can be demonstrably justified in a free and democratic society." For more information on section 1 of the *Charter*, please refer to our webpage on the Supreme Court's *Oakes* Test.

[1] *R v Cisar*, [2014] ONCA 151 (CA).

[2] *Ibid* at para 11.

[3] *Ibid* at para 12.

[4] *R v Delaronde*, [1997] 1 SCR 213.

[5] *R v Heit*, [1984] 7 DLR (4th) 656.

Doré-Loyola Framework

"The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

Section 1 of the *Canadian Charter of Rights and Freedoms* explains that while the *Charter* guarantees specific rights and freedoms, these rights and freedoms may be lawfully limited if such limits are "demonstrably justified in a free and democratic society." In 1986, the Supreme Court of Canada created a general framework — known as the *Oakes* test — for deciding whether laws or policies that limit *Charter* rights are justified. Learn more about that here.

The government does not only act by enacting laws and policies though. Governmental entities also make thousands of discretionary administrative decisions every day — decisions on things as simple as issuing development permits[1] or reviewing visa admissions.[2] Where these kinds of discretionary decisions potentially engage an individual's *Charter* rights, the *Doré-Loyola* framework is used — not the otherwise applicable *Oakes* test. Under this framework, courts are required to proceed in two steps:

Step 1: Determine whether a *Charter* protection is engaged by the administrative decision;

Step 2: Consider whether the decision maker has proportionately balanced the *Charter* protections and the administrative body's objectives?[3] This includes identifying the statutory objectives of the administrative body and the *Charter* interest at stake, and considering the nature of the decision and its factual context.

Why do we need a separate framework for discretionary administrative decisions?

The Supreme Court of Canada provided a different approach for assessing the justifiability of discretionary administrative decisions under the *Charter* because the *Oakes* test is clearly geared towards reviewing legislation (and not discretionary decisions).[4] Attempting to apply parts of the test to administrative decisions emphasizes this point. Does it make any sense to talk about the "objectives" of administrative decisions? How could we determine whether a decision was rationally connected to its presumed objective? And is there really an array of decisions available for administrative decision-makers to choose from in order to select least drastic means of achieving the goal? As the Court noted in Doré, such questions illustrate that the *Oakes* test is arguably an "awkward fit" when it comes to justifying administrative decisions that engage the *Charter*.[5]

Charter rights and *Charter* values

Additionally, the framework refers to *Charter* protections as opposed to *Charter* rights. *Charter* protections include *Charter* rights, which are the guarantees specifically listed in the *Charter* like freedom of expression or the right to life, liberty, and security of the person. However, *Charter* protections also include *Charter* values, which are the foundational (but unwritten and implicit) values reflected by the *Charter*'s written guarantees.[6] These include equality, human rights, and democracy.[7]

The *Doré-Loyola* framework in action

Examples of the *Doré-Loyola* framework being used in case law include professional organizations issuing punishments against professional members[8] or provincial ministries requiring that education be taught using certain approaches.[9] In the coming years, the Supreme Court of Canada will release a decision reviewing a case regarding a minister's decision to deny a non-Francophone family's request for access to education in French in a territory with an Anglophone majority.[10] This may provide an opportunity for the Court to re-envision the *Doré-Loyola* framework.[11]

***

[1] *Minster Enterprises Ltd v City of Richmond*, 2020 BCSC 455.

[2] *Patel v Canada (Citizenship and Immigration)*, 2020 FC 77.

[3] *Doré v Barreau du Québec*, 2012 SCC 12, paras 7, 56-58; *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12; *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 para 31.

[4] *Doré v Barreau du Québec*, 2012 SCC 12, paras 4, 39.

[5] Ibid at para 4.

[6] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, para 4.

[7] *Ibid* at para 47.

[8] *Doré v Barreau du Québec*, 2012 SCC 12.

[9] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12.

[10] *Commission scolaire francophone des Territoires du Nord-Ouest, AB, et al v Minister of Education, Culture and Employment of the Northwest Territories, et al*, 2022 CanLII 28613 (SCC). Docket number 39915.

[11] Adam Schenk, "*AB v Northwest Territories*: A New Low for the *Doré/Loyola* Framework" (2023) 32:1 *Constitutional Forum* 39 at 40.

Alberta Sovereignty Act

What is it?

The *Alberta Sovereignty Within a United Canada Act* (also known as the *Sovereignty Act*)[1] is a piece of legislation passed by the Legislative Assembly of Alberta on December 8, 2022.[2] It is a novel piece of legislation that provides a process for the Government of Alberta to suspend provincial enforcement of federal legislation or initiatives that the legislature regards as unconstitutional or potentially harmful to Albertans.[3] For example, if the federal government imposed a ban on a certain type of firearm, the provincial government could pass a resolution through the process outlined in the *Sovereignty Act* and direct the executive branch to cease enforcement of the ban.

What are experts saying about it?

Since the first draft of the *Act* was unveiled in November 2022, it has faced criticism from constitutional scholars in and outside of Alberta. The main concern that many of the *Act*'s critics share is that it arguably allows the Legislative Assembly to usurp the role of the courts. For example:

- Professors Martin Olszynski and Nigel Bankes at the University of Calgary suggested that the *Act* attempts to give legislatures the power to declare whether a federal law is constitutional, even though this is the duty of the courts.[4]
- Professor Emmett MacFarlane commented that, through the *Act*, the Alberta government claims to have the power to order provincial entities to violate valid federal law.[5]
- Professor Eric Adams has claimed that abandoning the exclusive role for the courts to adjudicate matters regarding constitutionality embraces a dysfunctional version of federalism.[6]

By contrast, some commentators have defended the constitutionality of the *Act*. For example, Geoffrey Sigalet and Jesse Hartery have argued that, as drafted, the *Act* appears to constitute legislative recognition of the province's existing power to decline to enforce federal laws.[7] To quote Sigalet and Hartery: "the provincial executive branch is not required to co-operate in the *administration* of federal laws or programs."[8]

At the time of publishing, the *Act* has not yet been employed by the provincial government and the federal government has not raised constitutional challenge against it.

***

[1] *Alberta Sovereignty within a United Canada Act*, SA 2022, c A-33.8 [*Sovereignty Act*].

[2] Alberta, Legislative Assembly, *Hansard*, 30th Leg, 4th Sess, No 6 (December 7, 2022).

[3] *Sovereignty Act*, *supra* note 1, s 3(b).

[4] Martin Olszynski & Nigel Bankes, "Running Afoul the Separation, Division, and Delegation of Powers: The Alberta Sovereignty Within a United Canada Act" (December 6, 2022), online: *ABLawg* <https://ablawg.ca/2022/12/06/running-afoul-the-separation-division-and-delegation-of-powers-the-alberta-sovereignty-within-a-united-canada-act/>.

[5] Emmett Macfarlane, "Alberta's Sovereignty Act passes after amendments — yes, it's still garbage" (December 8, 2022), online: *Substack: Declarations of Invalidity* <https://emmettmacfarlane.substack.com/p/albertas-sovereignty-act-passes-after>.

[6] Eric Adams, "Danielle Smith didn't give us a watered-down version of Alberta's Sovereignty Act" (November 29, 2022), online: *CBC News* <https://www.cbc.ca/news/canada/calgary/opinion-danielle-smith-breaking-down-alberta-sovereignty-act-1.6668760>.

[7] Geoffrey Sigalet & Jesse Hartery, "Opinion: The Alberta Sovereignty Act appears to be constitutional" (December 1, 2022), online: *The Hub* <https://thehub.ca/2022-12-01/opinion-the-alberta-sovereignty-act-appears-to-be-constitutional/>.

[8] Geoffrey Sigalet & Jesse Hartery, "Opinion: Alberta's Sovereignty Act is constitutional but needs nuance" (December 7, 2022), online: *National Post* <https://nationalpost.com/opinion/alberta-sovereignty-act-constitutional-but-needs-nuance>.

[9] Macfarlane, *supra* note 5.

[10] *Ibid*.

Section 11(d) - The Presumption of Innocence

Section 11 of the *Charter of Rights and Freedoms* contains a list of rights provided to any person charged with a criminal offence. Subsection (d) protects the right "to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal."[1]

The rights contained under section 11 are engaged once a person has been charged criminally *or* when "conviction in respect of [an] offence may lead to a *true penal consequence*."[2] This means that section 11 may be engaged by some regulatory or disciplinary offences.

The Content of Section 11(d)

As the Supreme Court put it in *R v Oakes*: "The presumption of innocence is a hallowed principle lying at the very heart of criminal law … confirm[ing] our faith in humankind; it reflects our belief that individuals are decent and law-abiding members of the community until proven otherwise."[3] Section 11(d) enshrines this "sacrosanct" principle of criminal law in the *Charter*.[4]

Furthermore, as the Court stated elsewhere in *R v Oakes*, section 11(d) contains "at a minimum"[5] three criteria:

1) That the accused is proven guilty beyond a reasonable doubt. To satisfy this criterion, each essential element of the offence — including the actus reus and the mens rea — must be proved beyond a reasonable doubt.

2) That the state bears the burden of proving an individual's guilt.

3) That criminal prosecutions are conducted with due process.[7]

However, under section 11(d), an accused is not entitled to "the most favourable trial procedures imaginable."[8] As the Supreme Court put it in *R v JJ*, trial fairness must not only consider the accused but also the complainant and the wider community.[9]

Section 11(d) and Section 1

As with all rights contained in the *Charter*, section 11(d) can be limited under section 1.[10] For instance, section 1 has been used to uphold *some* criminal law provisions that impose a reverse onus on the accused. Such provisions, which require the accused to rebut a presumption that stems from a proven fact, are generally considered to be violations of section 11(d) (and must therefore be justified under section 1).[11] A key example of this is the law struck down in *R v Oakes*, which assumed that possession of narcotics was proof of an intent to traffic them unless an accused could prove otherwise.

Crucially, when conducting a section 1 analysis, the Supreme Court of Canada has recognized that section 11(d) carries significant weight. This means, in short, that a breach of the section 11(d) right will not be easily justified in terms of the collective interests that are normally considered as part of a section 1 analysis.[12]

[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 11 [*Charter*].

[2] *R v Wigglesworth*, [1987] SCJ No 71 at para 21, 2 SCR 541 [emphasis added].

[3] *R v Oakes*, [1986] SCJ No 7, 1 SCR 103 at para 29 [*Oakes*].

[4] *R v Brown*, 2022 SCC 18 at para 145 [*Brown*].

[5] *Oakes*, *supra* note 3 at para 32.

[6] *Brown*, *supra* note 4 at para 99.

[7] *R v JJ*, 2022 SCC 28 at para 124 [*JJ*].

[8] *Ibid* at para 125.

[9] *Ibid*.

[10] *Charter*, *supra* note 1, s 1.

[11] *Oakes*, *supra* note 3 at para 57.

[12] *Brown*, *supra* note 4 at para 166.

Human Dignity

Human dignity as a social value has a long and varied history drawing from various religious sources, political histories, and philosophical ideals.[1] As a constitutional value and right, however, human dignity is a relatively new concept, only coming to the fore in light of the atrocities that took place during World War II.[2] While its precise legal meaning is uncertain and elusive, it can generally be said to represent the idea that "every human being possesses an intrinsic worth" that precludes their subjection to certain forms of degrading treatment by the state.[3]

Human Dignity in Canadian Constitutional Law

Although human dignity is mentioned in the *Canadian Bill of Rights* (1960), it was only with the advent of the *Charter of Rights and Freedoms* (1982) that it came to play a meaningful role in judicial decision-making (despite not being explicitly mentioned in the *Charter*). In *R v Oakes*, for example, the Supreme Court stated that "respect for the inherent dignity of the human person" must be a guiding principle for Canadian courts when they interpret the *Charter*.[4] However, the Supreme Court has also explicitly stated (in *Blencoe v British Columbia*[5]) that human dignity is not a constitutional right in Canada.

What, though, is the difference between a constitutional right (which dignity is not) and a constitutional value (which it is)?

In short, a constitutional right is something that has direct legal consequences. If the state violates an individual's constitutional right, the individual can take legal action to compel the state to justify the violation (if a violation exists) and to remedy the violation if it can't be justified. A constitutional value, on the other hand, lacks such direct legal consequences, and can't ground a legal claim. Rather, a constitutional value is something that courts use to aid their interpretations of the Constitution. For example, a constitutional value can be used to help evaluate the scope of a constitutional right, and it can play an important role in determining the degree to which an infringement of a right can be justified.[6]

Specific Sections of the *Charter*

Since dignity is one of the *Charter*'s foundational and orienting values, it can potentially be invoked to aid the interpretation of any *Charter* right. However, dignity has played a *particularly* prominent role in judicial interpretations of three *Charter* sections: sections 7, 12, and 15.

Section 7

Human dignity has featured prominently in cases involving Section 7 of the *Charter*, which guarantees the individual's "right to life, liberty, and security of the person, and the right not to be deprived thereof except in accordance with the principles of fundamental justice."[7]

Most famously, Justice Wilson's concurring judgment in *R v Morgentaler* held that the state's criminal restrictions on abortion were unconstitutional because they restricted the liberty of women in a way that was, in essence, contrary to their human dignity.[8] Similarly, in *Carter v Canada*, the Supreme Court found that a criminal ban on assisted suicide was unconstitutional because it deprived individuals of control over "a matter critical to their dignity and autonomy."[9]

Section 12

Section 12 of the *Charter* prohibits cruel and unusual punishment or treatment, and the Supreme Court has stated that the purpose of this prohibition is to protect human dignity.[10] Building off of that, in *R v Bissonnette*, the Court found that consecutive sentences of life without parole were unconstitutional because leaving the door open for an offender's rehabilitation is necessary to ensure respect for human dignity.[11]

Section 15

Section 15 deals with equality rights and prohibits certain types of discrimination.[12] In *Law v Canada*, the Supreme Court held that the purpose of section 15 was to protect human dignity,[13] and incorporated human dignity into the legal test for a section 15 violation[14] (this test was later abandoned, however, in *R v Kapp*[15]). In the process, the Court also opined on the meaning of human dignity:

"Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment … [and] is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits."[16]

[1] See generally, Christopher McCrudden, ed, *Understanding Human Dignity* (Oxford: Oxford University press, 2013).

[2] Aharon Barak, *Human Dignity: The Constitutional Value and the Constitutional Right* (Cambridge: Cambridge University Press, 2015) at 3-4 [*Barak*].

[3] Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights" (2008) 19:4 The European Journal of International Law 655 at 679.

[4] *R v Oakes*, [1986] 1 SCR 103 at para 136.

[5] *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307 at para 77.

[6] *Barak*, *supra* note 2 at 103-104.

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

[8] *R v Morgentaler*, [1988] 1 SCR 30 at para 173.

[9] *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 65, 68, 81.

[10] *Charter*, *supra* note 7, s 12.

[11] *R v Bissonnette*, 2022 SCC 23 at para 85.

[12] *Charter*, *supra* note 7, s 15.

[13] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 6 [*Law*].

[14] *Ibid* at para 7-9.

[15] *R v Kapp*, 2008 SCC 41 at paras 19-21.

[16] *Law*, *supra* note 13 at para 53.

Section 10 — Rights Upon Arrest and Detention

Section 10 of the *Canadian Charter of Rights and Freedoms* states:

"Everyone has the right on arrest or detention: a) to be informed promptly of the reasons therefor; b) to retain and instruct counsel without delay and to be informed of that right; and c) to have the validity of the detention determined by way of *habeas corpus* and to be released if the detention is not lawful."[1]

These rights are only engaged once someone has been detained or arrested (see our key term on section 9). They are not engaged where someone has "voluntarily co-operated with the police, for example, by inviting the police into his or her home and answering questions."[2]

Section 10(a): The Right to Be Informed Promptly of the Reasons Therefor

Subsection (a) serves to ensure that the person who is under arrest can make an informed decision about whether to submit to arrest and exercise their right to counsel.[3]

In order for the decision to be an "informed" one, the individual must be given sufficient information about the reasons for the arrest. In particular, the level of legal jeopardy that

the individual faces must be clear; for instance, police cannot mislead the individual about the specific offence they are investigating.[4] Moreover, if there is a significant change in reasons (e.g. if a new charge is being added), the individual must be informed of this.[5]

Section 10(b): The Right to Retain and Instruct Counsel Without Delay and to be Informed of That Right

The purpose of subsection (b) is to inform a subject of their immediate right to access counsel. Without this right a person would be in a vulnerable position in the face of state power and at higher "risk of involuntary self-incrimination."[6]

The right to counsel is *immediate* and may only be delayed in exceptional circumstances, such as where there is a legitimate safety concern.[7] For example, the Supreme Court has accepted that a delay may be justified for individuals suspected of impaired driving, given the importance of administering roadside breath tests as quickly as possible.

Section 10(b) has two aspects: one ***i****nformational* and one *implementational*.

The informational aspect requires police to inform the individual of their right to counsel and to ensure that they understand that right.[9]

The implementational aspect requires that the individual has a reasonable opportunity to consult with counsel. To provide such an opportunity, the police must refrain from questioning that person until consultation with counsel has occurred.[10]

That said, the individual *can* choose to waive their right to counsel, which must be the result of a clear and informed decision.[11] The right to counsel may also be suspended by an individual's lack of due diligence; for example, if they make no reasonable effort to contact a lawyer.[12]

Section 10(c): The Right to Have the Validity of the Detention Determined by Way of *Habeas Corpus* and to Be Released if the Detention is Not Lawful

The last right contained in section 10 is subsection (c), which protects an individual's right to *habeas corpus*. This is the right to appear before a court and have a hearing on the validity of the detainment. If there is no basis for continued detention, the court will order the individual's release.[13]

Section 10 Rights Are Not Absolute

As with all rights under the *Charter*, a person's section 10 rights are subject to limitation under section 1. Section 1 of the *Charter* states that the government can legally impose "reasonable limits" on an individual's *Charter* rights, provided that those limits are "prescribed by law" and can be "demonstrably justified in a free and democratic society."[14]

[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 10 [*Charter*].

[2] Peter Hogg, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2019) at chapter 50-2.

[3] *R v Evans*, [1991] SCJ No 31, 1 SCR 869 at para 31 [*Evans*].

[4] *R v Greffe*, [1990] SCJ No 32, 1 SCR 755.

[5] *Evans*, *supra* note 3 at para 35.

[6] *R v Suberu*, 2009 SCC 33 at para 40.

[7] *R v Debot*, [1989] 2 SCR 1140, SCJ No 118 at para 42.

[8] *R v Thomsen*, [1988] SCJ No 31, 1 SCR 640.

[9] *Evans*, *supra* note 3 at para 44.

[10] *R v Manninen*, [1987] 1 SCR 1233, SCJ No 41 at paras 21-23.

[11] *R v Clarkson*, [1986] 1 SCR 383, SCJ No 20 at para 18.

[12] *R v Smith*, [1989] 2 SCR 368, SCJ No 89 at para 34.

[13] *R v Pomfret*, [1990] 2 WWR 568, MJ No 21.

[14] *Charter*, *supra* note 1, s 1.