



Lesson Plans - Law

Thinking About our Rights and Freedoms

Rights and Freedoms: Background Information

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I have my rights! Yes, you do. In *Rajiv's Story*, which you are about to read, mention is made of several rights - freedom of speech, freedom of religion, and the right to be secure against unreasonable search and seizure. But notice that questions are raised. Does *freedom of speech* mean you are free to say what you want? Does *freedom of religion* mean that a Sikh student is free to wear a kirpan to school? Does your *right to be secure against unreasonable search and seizure* mean that you can refuse the principal entry to your school locker?

Rights are not absolute. This means that although you have rights, there are often limits placed on these rights. Why is this so? As this story illustrates, rights can clash. When it is impossible to honor two important rights, limits are placed on one or both of the rights. The goal is to achieve a balance - to preserve important qualities of the rights while forging a practical solution that allows them to coexist. This principle that no rights are absolute applies to all legal rights, even the rights and freedoms protected by the *Canadian Charter of Rights and Freedoms*.

What is the difference between a right and a freedom? We often use the terms interchangeably but, *in law*, there is a difference. A *legal right* is something that cannot be given to you one time and then denied another time. If you have a *legal right*, then some other person has a legal duty to see that this right is honoured. If it isn't, you can rely on the law to see that something is done about the matter. A *freedom* implies that no one will interfere with what you want to do. Unlike a right, no one has a duty to oversee or enforce this *freedom*. The government, however, still has an obligation not to unduly limit individual freedoms.

What are some examples of limits being placed on our rights and freedoms?

- a. **freedom of speech.** You risk being sued for damages if you say (slander) or write (libel) untrue statements about a person and thereby ruin that person's reputation. This is called the *tort of defamation*. You can be charged with a criminal offence if you intentionally promote hatred against an identifiable group, such as saying or printing statements that fan hatred towards Jewish people, or black people. You are required to follow school rules and use appropriate language. Unwelcome sexual remarks or teasing in the workplace can be

interpreted as sexual harassment. You could be charged with public mischief if you yelled FIRE in a crowded theatre as a joke and jokes about bombs in suitcases are bound to land you in trouble with customs officials.

- b. **right not to be searched.** Police officers have the right to search vehicles if they have reasonable grounds to believe the law is being broken with respect to drugs or alcohol. It is also possible for police officers to obtain the necessary authorization to search a house. Customs officials have the right to search the luggage of passengers. A school principal has the right, in certain circumstances, to search lockers and students, especially if the safety of other students or teachers is threatened. For example, if someone telephoned the principal and said a bomb was planted in a student's locker, a locker search would be justifiable.

To summarize: important rights and freedoms are protected by the *Charter* but these rights are not absolute. There are limits. The *Charter* recognizes the need for limits: the first section states that no right is absolute BUT restrictions on *Charter* rights must be reasonable and justifiable in a free and democratic society.

Who decides what the limits will be? the legislators? the Prime Minister and premiers? lawyers? judges? human rights experts? law professors? citizens of Canada?

If this question was asked before April 17, 1982 the answer would be "the legislators". You may be familiar with the phrase *supremacy of Parliament*. It meant that the federal Parliament, or the provincial legislative assemblies, had the ultimate authority to decide what rights and freedoms would be protected by law and what limits, if necessary, would be placed on these rights and freedoms. If the majority of the citizens of Canada did not agree with certain laws, the remedy was clear: elect new representatives. A new government could change or abolish offensive laws.

The *Charter* has placed some limits on the power of the legislators and the government. No longer are legislators free to pass laws that "infringe" or erode the rights and freedoms protected by the *Charter*. If there are complaints about a law, or action by the government, it is "the judges" who are called upon to decide whether or not the government has respected the rights and freedoms enshrined in the *Charter*. Since the *Charter* is part of Canada's Constitution it is part of the highest law of the land. Constitutions are not easily changed and this means the rights and freedoms in the *Charter* are better protected than if they were put in ordinary laws which can be more easily changed. This is why we say the rights and freedoms are enshrined: they have constitutional protection. Ultimately it is the justices of the Supreme Court of Canada - the highest court in Canada- who have the final say on what these rights and freedoms mean to us and what government officials and lawmakers have to do to comply with the *Charter*.

Why did we need a *Charter*?

There are many people who will argue that we didn't need the *Charter* and that is dangerous to erode the principle that Parliament is supreme. They will argue that legislators, the elected representatives of the people, are in the best position to decide our rights and freedoms. They will say that judges are too far removed from ordinary life to be making political decisions.

There are others who will argue that we needed the *Charter* just like the United States needs the

Bill of Rights. They will point to incidents in the past where the governments of the provinces and Canada did NOT protect fundamental rights and freedoms. They will argue that the *Charter* is a good compromise: it protects our rights and yet recognizes that governments may need to limit these rights. If this is the case, though, the government must be able to demonstrate that the limits are reasonable and justifiable.

The assurance that rights are secure tends to diminish fear and jealousy of strong government; and by making us feel safe to live under it makes for its better support.

A quote by Mr. Justice Jackson in the 1943 American case entitled:

West Virginia State Board of Education v. Barnette (1943), 319 U.S. 624 (United States Supreme Court)

The *Charter* sets down rules for how governments have to act with respect to the citizens of Canada. People often get confused about this. What is government? This is something that the courts are having to interpret but it is clear that government is a broader concept than law-making. Yes, the laws passed by government must respect the *Charter* or they are in danger of being declared invalid. Government officials are also expected to abide by the *Charter* in applying the law and in formulating government policies. Police officers and social workers are examples of government "agents". Teachers and principals may or may not be "agents" - it will depend on the situation. However, whenever a dispute arises, one of the first questions to be asked is this: does the *Charter* apply?

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