The Influence of U.S. Jurisprudence on the Interpretation of the Canadian Charter of Rights and Freedoms: An Initial Survey

I. INTRODUCTION

In 1982 the Canadian government enacted several important amendments to its constitution.[1] These amendments include the Canadian Charter of Rights and Freedoms, which established constitutional protection for the civil rights of Canadian citizens.[2] In addition, the Charter established the concept of judicial review giving the Canadian courts the authority to strike down any legislation inconsistent with provisions in the Charter.[3]

Although the Charter states which rights and freedoms are to receive constitutional protection,[4] the courts will ultimately have to determine the degree of

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[1] The Constitution Act, 1982 is the document which contains most of these amendments. Constitution Act, 1982. The Act has sixty sections and is divided into seven parts. The parts are entitled: (1) Canadian Charter of Rights and Freedoms; (2) Rights of the Aboriginal Peoples of Canada; (3) Equalization and Regional Disparities; (4) Constitutional Conference; (5) Procedure for Amending Constitution of Canada; (6) Amendment to the Constitution Act, 1867; and (7) General. *Id.*

The Constitution Act, 1982, is Schedule B of the Canada Act 1982. The Canada Act 1982, containing only four sections, is the instrument which officially amended the Canadian Constitution. Canada Act 1982, 1982 c. 11(U.K.). Section one of the Canada Act established the Constitution Act, 1982 and enacted it into law. Section two terminated the British Parliament's power to enact laws for Canada. *See infra* notes 16–21, 83–96 and accompanying text for a discussion of Britain's relationship to Canada. Section three established the French version of the Act and made it clear that it had the same authority as the English version. Section four states that the Act may be cited as the Canada Act of 1982.

Both the Canada Act 1982 and the Constitution Act, 1982 became part of the Canadian Constitution on March 29, 1982. The Constitution Act, 1982, however, according to section 58, was not to come into force until "a day to be fixed by proclamation." Constitution Act, 1982 § 58. This proclamation occurred on April 17, 1982, at which time the Constitution Act, 1982 became effective.

[2] Canadian Charter of Rights and Freedoms [hereinafter cited as Charter]. The Charter is Part 1 of the Constitution Act, 1982.

[3] Days, *Civil Rights in Canada; An American Perspective*, 32 AM. J. COMP. L. 307, 328 (1984); THE CANADIAN CHARTER OF RIGHTS: LAW PRACTICE REVOLUTIONIZED 50 (W. MacKay ed. 1982) [hereinafter cited as LAW PRACTICE REVOLUTIONIZED].

[4] The rights protected by the Charter include: fundamental freedoms; democratic rights; mobility rights; legal rights; equality rights; and minority language educational rights. *See* Charter §§ 1–23. For a discussion of these newly enacted rights see P. HOGG, CANADA ACT 1982 ANNOTATED (1982) [hereinafter cited as P. HOGG ANNOTATED]; Hogg, *Canada's New Charter of Rights*, 32 AM. J. COMP. L. 283 (1984) [hereinafter cited as New Charter]; W. TARNOPOLSKY & G. BEAUDOIN, THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS (1982).

protection given to these rights.[5] This is especially true since section one of the Charter, entitled "Guarantee of Rights and Freedoms," states:

> 1. 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.[6]

Case law dealing with the Charter's rights and freedoms, however, has only started to flourish.[7] Canadian courts will undoubtedly continue to hand down important decisions interpreting the Charter. Therefore, it will take some time to determine the extent to which the Charter protects the individual.

Substantively, the Canadian Charter is similar to the U.S. Bill of Rights.[8] Although there is presently very little case law involving the Canadian Charter, U.S. courts have subjected the amendments in the U.S. Bill of Rights to a tremendous amount of judicial interpretation.[9] Because U.S. courts already have a great deal of experience interpreting constitutionally protected rights and freedoms, Canadian courts are likely to look to U.S. jurisprudence to help interpret the Canadian Charter.[10]

One commentator has proposed four additional reasons Canadian courts might rely on U.S. jurisprudence to help interpret various provisions of the Charter.[11] First, the adoption of language similar to that used in the U.S. Bill of Rights indicates that the Canadian Parliament intended courts to rely on U.S. decisions to help interpret the Charter.[12] Second, the reference in section one

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[5] At a conference addressing Canada's new constitution, one speaker stated: "Canada's judiciary, and in particular the Supreme Court of Canada, will either breathe life into the *Charter*, or reduce it to a hollow promise of things that might have been." LAW PRACTICE REVOLUTIONIZED, *supra* note 3, at 50.

[6] Charter § 1.

[7] An official reporter entitled Canadian Charter of Rights and Freedoms has been established to exclusively report Charter decisions. Other sources which deal exclusively with Charter decisions include: R. MCLEOD, J. TAKACH, H. MORTON, & M. SEGAL, THE CANADIAN CHARTER OF RIGHTS (1983) [hereinafter cited as R. MCLEOD]; THE CANADIAN CHARTER OF RIGHTS ANNOTATED (CLB) (1984).

[8] *See infra* notes 106–13 and accompanying text.

[9] The U. S. Constitution was enacted in 1789. The Bill of Rights, the first ten amendments adopted for the protection of individual rights, was enacted in 1791. The U.S. court system, therefore, has had close to two hundred years to interpret its constitution and Bill of Rights.

[10] Beckton, *Freedom of Expression—Access to the Courts*, 61 CAN. B. REV. 101 (1983). C. Beckton, Professor of Law at Dalhousie University stated:

> Our courts can benefit from the wisdom and mistakes of the American courts that has developed through periods of trial and error. This is not to say they should slavishly follow the tests created by the Supreme Court but merely that they examine some tests which offer, or fail to offer adequate protection to freedom of expression. By examining the successes and failures these undesirable tests can be avoided in Canada.

Id. at 108.

[11] R. MCLEOD, *supra* note 7, at 2–103.

[12] *Id.*

of the Charter to place "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" suggests that Canadian courts should look to those limits enforced in the United States.[13] Third, the fact that the rights expressed in the Charter have now become entrenched in the Canadian Constitution makes it easier than in the past for Canadian courts to rely on U.S. decisions.[14] Fourth, the similarities in societal aspirations and expectations of Canadian and U.S. citizens will naturally lead Canadian courts to rely on U.S. decisions to help interpret constitutional issues.[15]

This Comment examines the influence of U.S. judicial decisions on the interpretation of the newly enacted Canadian Charter. The author first focuses on the structure of Canada's Constitution prior to the enactment of the Charter. The author then discusses Canada's unsuccessful attempt to protect civil rights through the enactment of the Canadian Bill of Rights. The author also discusses the structure of the Charter and the reasons for its enactment. The author then compares the Charter with the U.S. Bill of Rights. Finally, the author analyzes Canadian court decisions under three sections of the Charter, which use language similar to provisions in the U.S. Bill of Rights. The author demonstrates that Canadian courts have adopted several U.S. tests and standards to help determine whether governmental action has unconstitutionally restricted rights protected by the Charter. The author concludes that, to determine how the Canadian courts will interpret other Charter issues, an analysis of the U.S. court system's approach to those same issues will be helpful.

II. HISTORICAL BACKGROUND

A. *The British North America Act of 1867*

Prior to 1982,[16] Canada's constitutional document was entitled The British North America Act of 1867.[17] The British Parliament enacted the BNA in order to establish a governmental structure for the colony of Canada.[18] The document

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[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] The Canada Act was enacted in 1982.

[17] The British North America Act, 1867, 30 & 31 Vic., ch. 3. [hereinafter cited as BNA]. The enactment of the 1982 amendment to the Canadian Constitution, however, did not invalidate the entire BNA. The amended Canadian Constitution has incorporated many sections of the BNA. *See* Constitution Act, 1982 § 53.

[18] *See* M. LALONDE & R. BASFORD, THE CANADIAN CONSTITUTION AND CONSTITUTIONAL AMENDMENT 9 (1979). The BNA, however, was not Great Britain's first attempt at developing a governmental structure for the colony of Canada. Britain enacted three other constitutions for Canada before the BNA. The other three constitutions were the Quebec Act of 1774, the Constitutional Act of 1791 and the Union Act of 1840. *Id.*

gave Canada the authority to make laws for, and control, its own government.[19] Although the Canadian government viewed the BNA as the constitution of Canada, it was actually a British statute.[20] Therefore, British Parliament had exclusive authority to alter or replace the document at any time.[21]

The BNA established the concept of federalism in Canada.[22] It set up a central federal government, the Canadian Parliament,[23] and a government for each province.[24] The BNA also distributed legislative powers between Parliament and the provincial legislatures. Sections 91 and 92 of the BNA listed the distribution of these powers.[25] Section 91 contained the powers delegated to Parliament while section 92 contained the powers delegated to the provinces.[26]

Section 91 listed twenty-nine specific subjects over which the Canadian Parliament had exclusive authority. For example, Parliament was empowered to regulate trade and commerce,[27] defense,[28] currency,[29] the postal service,[30] navigation and shipping,[31] weights and measures,[32] and taxation.[33] The power of the federal government, however, was not limited to these twenty-nine areas. Section 91 also gave Parliament the general power to:

> make laws for the Peace, Order and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces . . . .[34]

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[19] *See* G. FAVREAU, THE AMENDMENT OF THE CONSTITUTION OF CANADA 3–4 (1965). Even after enactment of the BNA, Britain retained power to enact laws for the colony of Canada. However, by 1931 Britain no longer retained this legislative authority. After 1931 the only circumstances under which Britain would enact legislation affecting Canada was when Canada specifically requested such action. This was in accordance with The Statute of Westminster, 1931, R.S.C. 1970, Appendix II, No. 26, which states in part that no act of British Parliament extends to a Dominion "as part of the law of that Dominion, unless it is expressly declared in the Act that the Dominion has requested, and consented to, the enactment thereof." *Id.*

[20] M. LALONDE & R. BASFORD, *supra* note 18, at 9.

[21] *Id.*

[22] *Id.* B. LAWSON, THE CANADIAN CONSTITUTION 11–16 (1960).

[23] BNA § 17.

[24] BNA §§ 58–88; G. FAVREAU, *supra* note 19, at 4.

[25] BNA §§ 91, 92; G. FAVREAU, *supra* note 19, at 4.

[26] For an analysis of the BNA, see B. LAWSON, *supra* note 22, at 11–28; W. LEDERMAN, THE COURTS AND THE CANADIAN CONSTITUTION (1964).

[27] BNA § 91(2).

[28] BNA § 91(7).

[29] BNA § 91(14).

[30] BNA § 91(5).

[31] BNA § 91(10).

[32] BNA § 91(17).

[33] BNA § 91(3).

[34] BNA § 91.

Parliament could, therefore, regulate any matter which fell within its more general power.[35]

The BNA did not give the provinces as broad power as the Canadian Parliament. Nevertheless, section 92 of the BNA assigned sixteen specific powers to the provincial legislatures.[36] The provinces had the power to organize their court systems,[37] tax citizens for provincial purposes,[38] and manage the sale of public lands and timber belonging to the province.[39] They also had control of municipal institutions,[40] property laws,[41] and civil rights in the province.[42] Additionally, section 93 of the BNA empowered the provinces to regulate educational matters.[43]

Although the powers distributed to the provincial legislatures were different from those granted to Parliament, both governments enjoyed equal status.[44] The provincial and parliamentary powers within their respective areas were complete, and each government functioned without serious interference from the other.[45]

The BNA also provided for the manner in which governmental power was to be exercised.[46] The BNA made it clear that the exercise of federal power was to be carried out by the Governor General, the representative of the Queen.[47] The Governor General, however, acted only on the advice of consti-

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[35] B. LAWSON, *supra* note 22, at 14–15.

[36] BNA § 92.

[37] BNA § 92(14).

[38] BNA § 92(2).

[39] BNA § 92(5).

[40] BNA § 92(8).

[41] BNA § 92(13).

[42] BNA § 92(13).

[43] Parliament, however, was given limited legislative authority to ensure the protection of minority rights for denominational, separate, or dissentient schools. The provinces were to legislate in all other educational areas. *See* BNA § 93.

[44] R. DAWSON, THE GOVERNMENT OF CANADA 78 (1970).

[45] *Id.* Some powers within the BNA, however, were concurrent. Parliament and the provinces both had the power to control agriculture and immigration. BNA § 95. In the case of a conflict, the federal legislation governed. B. LAWSON, *supra* note 22, at 15.

[46] BNA § 12.

[47] BNA § 12. Parliament was structured by the BNA to include the Queen, the Senate, and the House of Commons. BNA § 17.

The Senate and the House of Commons are the two legislative bodies of the Canadian Parliament. The Senate plays a minor part in the legislative process. Its main functions and duties are to act as a revising and restraining body, and to protect the interests of the provinces and minority, racial, religious, and language groups. Members of the Senate are appointed for life by the Governor General. The House of Commons has substantially more authority in the legislative process. The House has three major functions. First, it acts as the Committee of Supply, dealing with votes and grants for expenditure. Second, it acts as the Committee of Ways and Means, dealing with raising money. Third, it acts as the Committee of the Whole House, evaluating public and money bills. The House of Commons, whose members are elected, is the medium through which the public can express its

tutional advisors, namely the Prime Minister and the Cabinet.[48] Powers granted to the provinces were to be exercised by Lieutenant Governors acting on the advice of provincial ministers and cabinet members.[49]

The BNA, which was responsible for introducing the concept of federalism into Canada's governmental structure, also introduced the doctrine of parliamentary supremacy.[50] This concept of parliamentary supremacy was similar, but not identical, to that used in Great Britain's government. The major difference was that unlike the government in Great Britain, Canadian governments had limited powers.[51] Although the Canadian Parliament had absolute legislative authority, it existed only in those areas specified by section 91 of the BNA. Similarly, the doctrine of parliamentary supremacy, as it applied to the provincial governments, extended only to those powers listed in section 92 of the BNA.[52] Moreover, within this structure the Canadian courts assumed the power to review governmental legislation.[53] Courts could declare legislation invalid if they considered the enactment of such legislation to be outside the powers of the enacting body.[54] The Canadian system was, therefore, structured in a way

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opinions and exercise its political power. For a general discussion on the structure of the Canadian government, see B. LAWSON, *supra* note 22.

[48] The Prime Minister and the Cabinet are elected into office and control the administration of the government. B. LAWSON, *supra* note 22, at 20.

Although the BNA required the Queen to exercise the federal power, by the 1920s, Canada exercised its federal powers without involving either the Queen or the Governor General. *See* LAW PRACTICE REVOLUTIONIZED, *supra* note 3, at 10.

[49] Each provincial government, therefore, established a Lieutenant Governor as part of its structure in order to exercise its power. Apart from this common feature, however, provincial governments could be structured differently. For instance, Quebec has a Lieutenant Governor and two Houses, the Legislative Council and the Legislative Assembly. Ontario on the other hand, is structured to include a Lieutenant Governor and only one House, the Legislative Assembly. G. FAVREAU, *supra* note 19, at 4.

[50] A leading Canadian constitutional scholar explained parliamentary supremacy in the following manner:

> In the United Kingdom there are no limits to legislative power: there is no fundamental law which cannot be altered by ordinary parliamentary action; there is no instrument constituent which allocates some subject matters of legislation to the Parliament and denies others to it; and there is no bill of rights which denies to the Parliament the power to destroy or curtail civil liberties. Any law, upon any subject matter, no matter how outrageous is within the Parliament's competence. It follows, of course, that the courts have no power to deny the force of law to any statute enacted by the Parliament. Judicial review of legislation is unheard of in the United Kingdom.

P. HOGG, CONSTITUTIONAL LAW OF CANADA 421–422 (1977), *quoted in* Days, *supra* note 3, at 309 n.7. For a general analysis of the concept of parliamentary supremacy, see A. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 87–91 (1961).

[51] New Charter, *supra* note 4, at 284.

[52] *See id.*

[53] Sections 96–101 and 129 of the BNA concern the Canadian court system. For a discussion of the Canadian court system see *infra* note 91. *See also* W. LEDERMAN, *supra* note 26, at 177–219.

[54] In order to determine whether enacted legislation under the BNA was invalid, the courts used the concept of mutual exclusion. The premise was that there was no area in which Parliament and the provinces could both legislate. W. LEDERMAN, *supra* note 26, at 201.

which allowed the doctrines of parliamentary supremacy and federalism to coexist.[55] This type of constitutional structure developed as the result of the influence of both Great Britain and the United States on the BNA.[56]

Although the framers of the BNA adopted the U.S. concept of federalism, they failed to establish a counterpart to the U.S. Bill of Rights. As a result, the BNA did not protect civil liberties. Based on the doctrine of parliamentary supremacy, the Canadian Parliament could curtail any right or freedom.[57] Parliament could enact any statute regardless of how severely it injured individual civil rights.[58] Therefore, the BNA limited individual rights to those freedoms not restricted by law.[59] Furthermore, once Parliament restricted a right, no process existed through which the individual could challenge the parliamentary action.[60]

Since the Canadian Constitution was based partly on the doctrine of parliamentary supremacy and it did not contain provisions dealing with civil liberties, Canadian courts did not rely on U.S. cases to help protect individual rights.[61] Between the late 1930s and the late 1950s, however, Canadian courts applied a principle called the "implied bill of rights."[62] Under this principle, the courts considered certain areas, such as freedom of speech and religion, to be outside the authority of both Parliament and the provincial legislatures.[63] These deci-

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[55] The provincial organization of Canada, in particular French speaking Quebec, pressured the framers of BNA to develop the concept of federalism. Days, *supra* note 3, at 309.

[56] B. LAWSON, *supra* note 22, at 17.

[57] New Charter, *supra* note 4, at 284–85. The case of *Re Alberta Legislation*, [1938] 2 D.L.R. 81, the seminal case establishing freedom of expression in Canada, did not immunize freedom of expression from parliamentary control.

[58] New Charter, *supra* note 4, at 284–85.

[59] Not all rights and freedoms were in fact restricted in Canada. New Charter, *supra* note 4, at 285. Canadians had the right to a free election and there was the existence of a free press. *Id.*

[60] *Id.*

[61] Although there was no direct reliance on U.S. cases during the period in which the BNA was Canada's constitutional document, similarities, nevertheless, existed between court decisions in the two systems. Several Canadian court decisions in the late 1950s contain reasoning similar to certain U.S. decisions of the early 1940s. The Canadian cases involved the concept of validity, that every official act must be justified by law. Based on this principle Canadian courts held that, without an applicable federal statute, governmental actions taken to suppress religious activities could not be permitted. *See* Roncarelli v. Duplessis, 16 D.L.R.2d 689 (1959); Lamb v. Benoit, 17 D.L.R.2d 369 (1959); Chaput v. Romain, 1 D.L.R.2d 241 (1955). This approach is similar to the one taken in U.S. cases of the 1940s declaring restrictions on religious activity unconstitutional. *See* Cantwell v. Connecticut, 310 U.S. 296 (1940); Murdock v. Pennsylvania, 319 U.S. 195 (1943). The Supreme Court in *Cantwell*, for instance, held that the applicable statute permitting restrictions on religious activity was invalid because it was too general. Therefore, since there was no constitutionally valid statute allowing regulation of the religious activity, such activity could not be restricted. *See Cantwell*, 310 U.S. at 296–307.

[62] In the 1978 case of Attorney-General of Canada v. Dupond, 84 D.L.R.3d 420 (1978), the Supreme Court of Canada rejected the use of an implied bill of rights to protect individual rights of free speech and religion.

[63] *See* Switzman v. Elbing, 1957 S.C.R. 285 (the Act Respecting Communist Propaganda, R.S.Q. 1941, ch. 52 held invalid because it was *ultra vires* of the provincial legislature); Re Alberta Legislation,

sions were based on the fact that the drafters of the BNA attempted to establish a governmental structure in which parliamentary supremacy and freedom of expression could coexist.[64] For instance, the 1938 case of *Re Alberta Legislation*[65] addressing the issue of an individual's right to free speech observed:

> As stated in the preamble of the British North America Act, our constitution is . . . "similar in principle to that of the United Kingdom." At the time of Confederation, the United Kingdom was a democracy. Democracy cannot be maintained without its foundation: free public opinion and free discussion throughout the nation of all matters affecting the State . . . .[66]

Although the Canadian courts attempted to protect the right to free speech and religion, it was not until the 1960s that the Canadian Parliament enacted legislation to protect civil rights in Canada.

B. *The Canadian Bill of Rights*

In 1960 the federal government enacted the Canadian Bill of Rights.[67] Drafters of this legislation intended the instrument to provide protection for individual rights.[68] Due to the complicated and slow process of amending the BNA, however, the Canadian government decided to enact its Bill of Rights as a federal statute.[69] This lower status meant that the legislature could amend or strike down the Bill of Rights at any time.[70] Furthermore, because it was a federal statute, it applied only to the Canadian Parliament, not the provinces.[71]

The Bill of Rights contained two parts. Part one established all the rights to be protected by the statute. It gave individuals the right to enjoy freedom of speech, religion, press, assembly and association, equality before the law, and the right to life and liberty.[72] It prohibited cruel and unusual punishment,[73]

[1938] 2 D.L.R. 81 (the Act to Ensure the Publication of Accurate Laws and Information (Press Bill) held invalid because it was *ultra vires* of the provincial legislatures). *See also* Saumur v. City of Quebec & A.-G. Que., [1953] 4 D.L.R. 641 for a discussion of provincial legislative authority to restrict freedom of speech and religion.

[64] Days, *supra* note 3, at 313.

[65] [1938] 2 D.L.R. 81.

[66] *Id.* at 119.

[67] Canadian Bill of Rights S.C. 1960, c. 44; R.S.C. 1970, Appendix III [hereinafter cited as Bill of Rights].

[68] *See* Days, *supra* note 3, at 323.

[69] *See* notes 83–97 and accompanying text. For a discussion describing the difficulties associated with amending the BNA, see Scott, *Dominion Jurisdiction Over Human Rights and Fundamental Freedoms*, 27 CAN. BAR. REV. 497, 497–511 (1949).

[70] S. TARNOPOLSKY & G. BEAUDOIN, *supra* note 4, at 4.

[71] *Id.* at 22.

[72] Bill of Rights § 1(a)–(f).

[73] Bill of Rights § 2(b).

arbitrary detention, imprisonment or exile of any person,[74] and unfair hearings.[75] Furthermore, it entitled a person who had been arrested to the rights to be informed of the reason for the arrest, to retain counsel without delay, and to obtain a remedy by way of habeas corpus.[76]

Since Canada's governmental structure included the concept of parliamentary supremacy, the Canadian court system was uncertain of the approach to take with respect to legislation that violated the Bill of Rights.[77] Courts were unsure if they were supposed to take an active role and strike down statutes in conflict with this new Canadian document.[78] Furthermore, it was questionable what weight these rulings would actually have since Parliament was capable of enacting subsequent legislation which would override these court decisions.[79] With the exception of one case, the Supreme Court of Canada refused to use the Canadian Bill of Rights to protect individual freedom.[80] As a result, like the decisions prior to 1960, Canadian decisions after the enactment of the Bill of Rights did not refer to U.S. opinions, although both governments now had documents similarly designed to protect civil rights.

III. THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

The Canadian Parliament, as early as 1960, attempted to protect civil rights in Canada by enacting the Canadian Bill of Rights. Parliament, however, enacted the Bill of Rights as a federal statute, which in practice was ineffective.[81] As noted earlier, Parliament chose to enact the Bill of Rights as a federal statute because of the slow and complicated process associated with amending the BNA. In 1982, the Canadian Parliament finally changed the amendment process and was able to enact the Canadian Charter which established constitutional protection for the civil rights of Canadian citizens.[82]

A. *Enactment of the Charter*

Canada's independence from Great Britain came as the result of an evolutionary development which was complete by the early 1930s.[83] Even after Can-

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[74] Bill of Rights § 2(a).

[75] Bill of Rights § 2(e).

[76] Bill of Rights § 2(c)(i),(ii),(iii).

[77] Days, *supra* note 3, at 324.

[78] *Id.*

[79] *Id.*

[80] *See* Regina v. Drybones, 9 D.L.R.3d 473 (1970). The court in *Drybones* relied on the Canadian Bill of Rights to invalidate the Federal Indian Act.

[81] *See supra* notes 67–80 and accompanying text.

[82] *See* New Charter, *supra* note 4, at 286–88.

[83] There is no exact date when Canada became independent from Great Britain. However, by the time the Statute of Westminster was enacted in 1931, scholars considered Canada to be an independent sovereign. New Charter, *supra* note 4, at 283 n. 2; M. LALONDE & R. BASFORD, *supra* note 18, at 10.

ada's independence, the formal power to amend the BNA remained with the British Parliament.[84] In practice, however, Britain only amended the BNA when Canada specifically requested and consented to the proposed legislation.[85]

Between 1926 and 1975, Canada made nine attempts to restructure the BNA in order to give its government the authority to amend its own constitution.[86] Every attempt failed since the federal government and the ten provinces were unable to reach agreement on an amending formula.[87] Finally, the federal government,[88] in an attempt to change the procedure by which Canada's Constitution was amended, acted unilaterally and submitted a resolution to Parliament. The resolution, which consisted of several constitutional amendments, contained three parts, including: (1) a provision stripping Great Britain of its power to amend the BNA or enact any law for Canada; (2) a formula describing how future amendments to Canada's Constitution would be carried out; and (3) a Charter of Rights and Freedoms.[89]

Several provinces challenged the resolution, questioning the constitutionality of the federal government's unilateral action.[90] In 1981, the Supreme Court of Canada handed down an important decision which addressed this issue.[91] *Ref-*

The Statute of Westminster officially abolished the colonial relationship between Canada and Great Britain. LAW PRACTICE REVOLUTIONIZED, *supra* note 3, at 10.

[84] G. FAVREAU, *supra* note 19, at 10.

[85] *Id.*

[86] M. LALONDE & R. BASFORD, *supra* note 18, at 10–17.

[87] LAW PRACTICE REVOLUTIONIZED, *supra* note 3, at 11.

[88] Mr. Pierre Trudeau was Prime Minister at this time.

[89] LAW PRACTICE REVOLUTIONIZED, *supra* note 3, at 12.

[90] Manitoba, Newfoundland, and Quebec brought actions in their respective court of appeals challenging the federal government's unilateral action. *Id.*

[91] Reference re Amendment of the Constitution of Canada, 125 D.L.R.3d 1 (1981).

The Supreme Court of Canada, established under the authority of section 101 of the BNA, has been in existence since 1875. Until 1949, however, the Judicial Committee of the Privy Council, an Empire Court, was considered the highest court in Canada. In 1949 a Canadian statute cut off all appeals to the Judicial Committee. Since that time the Supreme Court of Canada has been acknowledged as the highest Canadian court.

The structure of the Canadian judicial system is different from that of the United States. In the United States the federal and state courts are separate, each having jurisdiction over different matters. The Canadian judicial system lacks this concept of federalism. Canadian federal and provincial courts act as a single unit, each having jurisdiction over both federal and provincial law. This type of structure provides for a much simpler system with relatively few jurisdictional conflicts. R. DAWSON, *supra* note 44, at 383–95.

The Saskatchewan court system, as outlined by Dawson, exemplifies the Canadian judicial system:

1. The Supreme Court of Canada (federal court)
2. The Court of Appeals for Saskatchewan (provincial court with federal appointment of judges)
3. The Court of Queen's Bench for Saskatchewan (a provincial court with federal appointment of judges)
4. The District Court for Saskatchewan (a provincial court with federal appointment of judges)
5. Minor provincial courts (provincial courts)
   (i) Surrogate courts
   (ii) Provincial magistrates' courts
   (iii) Justices of the peace
   (iv) Other courts

Id. at 389.

erence re Amendment of the Constitution of Canada[92] held that the resolution, as a matter of law, could be enacted by British Parliament without the consent of the provinces.[93] However, the court also decided that, as a matter of constitutional convention, the consent of the provinces was required.[94] Two months after the Supreme Court's decision, the federal government and the provinces reached a bilateral agreement on the proposed amendments.[95]

Finally, on March 29, 1982, the British Parliament enacted the Canada Act, 1982, which contained the amendments proposed by the resolution.[96] Schedule B of the Canada Act, 1982, the Charter of Rights and Freedoms, went into effect on April 17, 1982. The Charter, though it did not expressly repeal the Canadian Bill of Rights, became the primary instrument for the protection of civil rights in Canada.[97]

B. *Structural Analysis of the Charter*

The Charter, unlike the Canadian Bill of Rights, is part of the Canadian Constitution.[98] As part of the supreme law of Canada, it applies to acts of the Canadian Parliament as well as acts of the provincial legislatures.[99] Any statute inconsistent with provisions in the Charter will be held invalid.[100] Even though the Charter limits the powers of both Parliament and the provinces, it does not change the distribution of governmental power. Parliament and the provinces enjoy the same respective legislative powers that the BNA granted to them before enactment of the Charter.[101]

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[92] 125 D.L.R.3d 1 (1981).

[93] *Id.* at 12, 14, 49.

[94] *Id.* at 107. The federal government was therefore acting unconstitutionally, by disregarding the practice of the Convention, but not illegally. LAW PRACTICE REVOLUTIONIZED, *supra* note 3, at 13.

[95] Quebec did not participate in this agreement. *Id.* at 16.

[96] This was Great Britain's last official act with respect to amending Canada's Constitution. Canada's new Constitution can only be amended by the Canadian government in accordance with the newly adopted amending formula. *See* Constitution Act, 1982 §§ 38–49 for the procedure to amend the Constitution.

[97] W. TARNOPOLSKY & G. BEAUDOIN, *supra* note 4, at 4.

[98] *Id.*

[99] *Id.* at 25.

[100] *See* Constitution Act, 1982 § 52. Section 52 States:

> (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.
>
> (2) The Constitution of Canada includes
>
> (a) the *Canada Act 1982*, including this Act;
>
> (b) the Acts and orders referred to in the Schedule; and
>
> (c) any amendment to any Act or order referred to in paragraph (a) or (b).
>
> (3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.

[101] *See* LAW PRACTICE REVOLUTIONIZED, *supra* note 3, at 13. For a discussion of the powers distributed to Parliament and the provinces *see supra* notes 22–43 and accompanying text.

Although the Charter has constitutional status, its power is nevertheless limited by the "override" clause found in section 33.[102] Canadian governments, in accordance with section 33, have the power to enact legislation which restricts individual rights protected by the Charter.[103] A statute that does not comply with the provisions in the Charter, however, is required by section 33 to contain a specific declaration. This declaration must specify which sections of the Charter cannot apply to the statute.[104] Additionally, section 33(3) of the Charter limits this override power by making the declaration expire automatically after five years.[105] Essentially, the override clause enables the government to temporarily restrict or limit individual rights guaranteed under the Charter without amending the Canadian Constitution.

Substantively, the Canadian Charter is similar to the U.S. Constitution. Like the U.S. Constitution, the Charter has provisions to protect freedom of speech, press, and assembly,[106] and the right to vote.[107] Both texts specifically protect criminal defendants, granting them the right to counsel and a jury trial.[108] Furthermore, both instruments contain provisions dealing with unreasonable searches and arbitrary arrests,[109] double jeopardy,[110] ex post facto laws,[111] compulsory self-incrimination,[112] and cruel and unusual punishment.[113]

Although the Canadian Charter and the U.S. Constitution are substantively similar, there are also some important differences between the instruments. The Canadian Charter, unlike the U.S. Constitution, explicitly protects the right to leave and enter the country.[114] The Charter also emphasizes the multicultural heritage of Canada and requires that the Charter be interpreted with this in mind.[115] The U.S. Constitution does not contain a similar provision. On the

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[102] Section 33 of the Charter states in pertinent part:

(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.

[103] W. TARNOPOLSKY & G. BEAUDOIN, *supra* note 4, at 10–11. Tarnopolosky also obsevered, however, that exercise of the power under section 33 would attract such political opposition that it probably would not be used often. *Id.* at 11.

[104] *Id.* at 10–11.

[105] Charter § 33(3).

[106] Charter § 2(a)(b)(c). The right to free expression, in the United States, is protected by the first amendment of the U.S. Bill of Rights. U.S. CONST. amend. I.

[107] Charter § 3; U.S. CONST. amend. XV, XIX.

[108] Charter §§ 10(b), 11(f); U.S. CONST. amend. VI and art. III, § 2, cl.3.

[109] Charter §§ 8, 9; U.S. CONST. amend. IV.

[110] Charter § 11(h); U.S. CONST. amend. V.

[111] Charter § 11(g); U.S. CONST. art. I, § 9, cl. 3, art. I, § 10, cl. 1.

[112] Charter § 11(c); U.S. CONST. amend. V.

[113] Charter § 12; U.S. CONST. amend. VIII.

[114] Charter § 6(1). U.S. Supreme Court decisions have, nevertheless, held that these rights should receive constitutional protection. For U.S. decisions concerning mobility rights see United States v. Guest, 383 U.S. 745 (1966); Edwards v. California, 314 U.S. 160 (1941).

[115] Charter § 27.

other hand, the Charter does not contain language comparable to the first amendment establishment clause.[116] Finally, while the U.S. Constitution expressly protects property rights, the Charter makes no mention of such a constitutional right.[117]

The U.S. Supreme Court has interpreted the rights guaranteed under the U.S. Constitution as limited to protecting individuals from governmental action.[118] Therefore, in the United States, private discrimination or private interference with an individual's right to free speech or religion does not raise constitutional questions.[119] At least one commentator has also interpreted the Canadian Charter as protecting individuals from governmental action only.[120]

The Canadian Parliament enacted the Charter as a constitutional amendment. As a result civil rights in Canada are now guaranteed constitutional protection. Pursuant to section 24 of the Charter, "[a]nyone whose rights and freedoms as guaranteed by this Charter, have been infringed or denied may apply to a court . . . to obtain such remedy as the court considers appropriate and just in the circumstances."[121] Despite the language contained in section 24 of the Charter,

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[116] U.S. CONST. amend. I. The first amendment states in part: "Congress shall make no laws respecting an establishment of religion . . . ."

[117] The U.S. due process clause, for example, applies to deprivations of "life, liberty or property." U.S. CONST. amend. XIV. The corresponding language in the Charter covers deprivation of "life, liberty and security of person." Charter § 7. The U.S. fifth amendment provides that "private property" shall not be taken for public use without just compensation. The Charter has no counterpart.

[118] Civil Rights Cases, 109 U.S. 3 (1883). Furthermore, the fourteenth and fifteenth amendments, by their own terms, make it clear that the U.S. Constitution protects individuals only from governmental action. The fourteenth amendment states in part:

> No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law . . . .
> U.S. CONST. amend. XIV (emphasis added).

The fifteenth amendment states in part:

> The right of citizens of the United States to vote shall not be denied or abridged by the *United States* or by any *State* on account of race, color, or previous condition of servitude.
> U.S. CONST. amend. XV (emphasis added).

The question of what constitutes state action has generated considerable litigation. It is clear that governmental action includes federal, state, and local legislation. It also includes the regulations, internal policies, and official activities of governmental agencies. *See generally* J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 497–525 (1983) [hereinafter cited as NOWAK].

Slavery or involuntary servitude are exceptions to the rule that the U.S. Constitution protects individuals from governmental action only. The thirteenth amendment restricts private as well as governmental action in this area. U.S. CONST. amend. XIII.

[119] Although private invasion of rights does not generally violate the U.S. Constitution, Congress may nevertheless enact federal statutes to prohibit it. For example, the Civil Rights Act of 1964, Pub. L. 88–352 prohibits racial and gender discrimination in private employment, hotels, restaurants, and theaters. In addition, the Federal Housing and Urban Development Act of 1968, Pub. L. 90–448, prohibits race and gender discrimination in the sale or rental of private housing.

[120] Bender, *The Canadian Charter of Rights and Freedoms and the United States Bill of Rights: A Comparison*, 28 MCGILL L.J. 811, 829–32 (1983).

[121] Constitution Act, 1982 § 24.

courts will not invalidate all legislation which restrict individual rights. Section one of the Charter makes it clear that reasonable restrictions on the rights and freedoms guaranteed by the Charter will be permitted.[122] Thus, the Charter has given Canadian courts a new role. They are now responsible for determining the nature and limit of Canadian civil rights. Since the Charter and the U.S. Bill of Rights contain similar provisions, commentators have suggested that Canadian courts might rely on U.S. jurisprudence to help determine whether a protected right has been unconstitutionally restricted.[123] The following section will examine the extent to which Canadian courts have relied on U.S. court decisions to interpret the Charter.

IV. U.S. INFLUENCE ON CANADIAN DECISIONS

A. *Freedom of Expression*

There has been an enormous amount of litigation involving freedom of expression in the United States. Freedom of expression is protected by the first amendment of the U.S. Constitution which states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . . .[124]

The right to free speech is an important issue since it is one of the "preeminent rights of Western democratic theory, a touchstone of individual liberty."[125] U.S. courts have developed several tests to determine whether an individual's right to free expression has been unconstitutionally restricted. These tests include: (1) the least restrictive means test;[126] (2) the clear and present danger test;[127] (3) the overbreadth doctrine;[128] and (4) the concept of prior restraint versus prohibition.[129]

Courts have adopted the least restrictive means test to help protect first amendment rights. Under this approach, the court first concedes that a statutory restriction, placed on an individual's constitutionally protected right of free

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[122] See *supra* text accompanying note 6.

[123] Beckton, *supra* note 10, at 112; R. MCLEOD, *supra* note 7, at 2–103.

[124] U.S. CONST. amend. I.

[125] *Dunagin v. City of Oxford Miss.*, 489 F. Supp. 763, 769 (N.D. Miss 1980)(quoting J. NOWAK, R. ROTUNDA, & J. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 712 (1978)).

[126] *See, e.g.*, Shelton v. Tucker, 364 U.S. 479 (1960).

[127] *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969)(per curiam); Bridges v. California, 314 U.S. 252 (1941); Herndon v. Lowry, 301 U.S. 242 (1937).

[128] *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Thornhill v. Alabama, 310 U.S. 88 (1940).

[129] *See, e.g.*, Nebraska Press Association v. Stuart, 427 U.S. 539 (1976); New York Times Co. v. U.S., 403 U.S. 713 (1971); Near v. Minnesota, 283 U.S. 697 (1931).

speech, is necessary since there is a compelling state interest which is legitimately being pursued.[130] However, the court also determines that the compelling state interest can be accomplished in a less restrictive way.[131] The court, therefore, will strike down the statute as unconstitutional.

The Supreme Court in *Shelton v. Tucker,*[132] applying the least restrictive means test, struck down an Arkansas statute which required teachers to list annually every organization to which they belonged or contributed in the past five years.[133] The Court agreed that the state had an interest in investigating the competence and fitness of its teachers, but concluded that the statute went beyond legitimate purposes.[134] The information filed pursuant to the statute was not kept confidential, allowing public exposure and the risk of offending superiors by belonging to an unpopular group. In addition, the requirement that teachers list every organization to which they belonged often had no relevance to the teachers' fitness for the job.[135] The Court, therefore, held the Arkansas statute to be unconstitutional.[136]

To determine the constitutionality of governmental restrictions on public speeches, the U.S. Supreme Court has developed the clear and present danger test. The Court in *Bridges v. California* [137] articulated the standard to be used in this test:

> What finally emerges from the "clear and present danger" cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished.[138]

Thus, based on the *Bridges* decision, speech could be constitutionally restricted if the court decided that harm might result from that speech.

Subsequent Supreme Court cases, however, have moved away from the clear and present danger test. The Court in *Brandenberg v. Ohio*[139] used a different test to determine whether inciteful speech could be constitutionally restricted. Striking down an Ohio statute which forbade the advocacy of violence as a

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[130] *See Shelton*, 364 U.S. at 485.

[131] The court striking down a statute, based on the least restrictive means test, is not required to specify what less restrictive approach would be acceptable. *See* Shelton v. Tucker, 364 U.S. 479 (1960).

[132] 364 U.S. 479 (1960).

[133] *Id.* at 490.

[134] *Id.* at 485.

[135] *Id.* at 488.

[136] The *Shelton* Court stated that the statute was "unlimited and indiscriminate" in its sweep, and went beyond "what might be justified in the exercise of the State's legitimate inquiry into the fitness and competence of its teachers." *Id.* at 490.

[137] 314 U.S. 252 (1941).

[138] *Id.* at 263.

[139] 395 U.S. 444 (1969).

means of accomplishing industrial or political reform, the Court held that speech advocating the use of force or crime can only be prohibited if two conditions are satisfied. First, the speech must be directed at "inciting or producing imminent lawless action."[140] Second, the speech must be "likely to incite or produce such action."[141] The Court held that the Ohio statute was unconstitutional since it punished individuals who advocated violent political change in an abstract manner so as not to incite imminent unlawful action.[142]

Courts have also used the overbreadth doctrine to strike down legislation restricting individuals' first amendment rights.[143] Under this approach, the courts will invalidate a statute if it limits, in addition to constitutionally unprotected activities, rights protected by the first amendment.[144] The Supreme Court in *U.S. v. Robel*[145] applying the overbreadth doctrine, found section 5(a)(1)(D) of the Subversive Activities Control Act[146] unconstitutional. Section 5(a)(1)(D) of the Act made it a crime for any member of a communist-action group to engage in any employment in any defense facility, with the knowledge that a final registration order was in force for that particular group. The Court acknowledged that the purpose of section 5(a)(1)(D), to reduce the threat of sabotage and espionage in defense plants, was appropriate.[147] The Court, however, concluded that the section was invalid since it also had the effect of restricting an individual's first amendment right to free association.[148] Section 5(a)(1)(D) reached persons occupying non-sensitive positions in a defense facility and passive as well as active members of a designated communist group.[149] Since the statute prohibited protected as well as unprotected associational rights, the *Robel* Court declared section 5(a)(1)(D) of the Subversive Activities Control Act unconstitutional.[150]

The overbreadth doctrine has been adopted by U.S. courts to prevent the erosion of protected speech.[151] It encourages Congress to enact narrowly de-

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[140] *Id.* at 447.

[141] *Id.* The continuing influence of the clear and present danger test is demonstrated by the requirement that the speech be "likely to incite or produce" imminent unlawful action.

[142] *Id.* at 449. In spite of this new approach, no statute restricting political speech has been found unconstitutional since 1965.

[143] *See, e.g.*, Lewis v. City of New Orleans, 415 U.S. 130 (1974); Broadrick v. Oklahoma, 413 U.S. 601 (1973); Thornhill v. Alabama, 310 U.S. 88 (1940).

[144] NOWAK, *supra* note 118, at 867–71.

[145] 389 U.S. 258 (1967).

[146] Subversive Activities Control Act, 50 U.S.C. § 784(a)(1)(D) (1982).

[147] *Robel*, 389 U.S. at 264.

[148] *Id.* at 264, 268.

[149] *Id.* at 266.

[150] *Id.* at 268. The Supreme Court in *Broadrick*, however, has limited the use of the overbreadth doctrine in first amendment cases, requiring the overbreadth of the statute "not only to be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

[151] W. TARNOPOLSKY & G. BEAUDOIN, *supra* note 4, at 84.

fined legislation which restricts only constitutionally unprotected activities.[152] Courts will strike down a statute under this approach even if it is being challenged by a party whose restricted conduct is not constitutionally protected.[153]

Finally, courts have held that prior restraints on First Amendment rights are more objectionable than punishment after the fact.[154] Courts are reluctant to allow prior restrictions since they constitute "immediate and irreversible sanction[s]."[155] The Supreme Court has established a strong presumption against the constitutional validity of a prior restraint statute.[156] In *Near v. Minnesota*,[157] the Court indicated that prior restraints could only be permitted in exceptional circumstances such as with speeches inciting violence, speeches using obscenity, and in times of war.[158]

The Supreme Court has also determined that certain types of speech are not protected by the first amendment. Justice Murphy in *Chaplinsky v. New Hampshire*[159] observed that there are several kinds of speech which when restricted do not raise constitutional questions.[160] Categories of speech that are not constitutionally protected include: (1) the lewd and obscene; (2) the profane; (3) the libelous; and (4) the insulting or fighting words.[161] The Court noted that these areas of speech contain very little social value. Restrictions on these types of speech are therefore appropriate since "any benefit [that] may be derived from them is clearly outweighed by the social interest in order and morality."[162]

The first amendment also guarantees freedom of the press. Although freedom of the press is protected under the concept of free expression, the Supreme Court has, nevertheless, granted greater protections for the press than for individuals.[163] These additional protections have focused primarily on the right of the press to acquire and disseminate information.[164] For example, the Court in *Nebraska Press Ass'n v. Stuart*[165] held that pretrial orders, prohibiting the press from publishing certain types of information about the case, were unconstitutional.[166] Similarly, the Supreme Court in *Richmond Newspapers, Inc. v. Virginia*,[167]

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[152] *Id.*

[153] *See* Gooding v. Wilson, 405 U.S. 518, 520 (1972). For general discussion on the overbreadth doctrine see Note, *The First Amendment Overbreadth Doctrine*, 83 HARV. L. REV. 844 (1970).

[154] *Nebraska Press Association*, 427 U.S. at 559.

[155] *Id.*

[156] Bantam Books Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

[157] 283 U.S. 697 (1931).

[158] *Id.* at 716.

[159] 315 U.S. 568 (1942).

[160] *Id.* at 571.

[161] *Id.*

[162] *Id.* at 572.

[163] W. TARNOPOLSKY & G. BEAUDOIN, *supra* note 4, at 95.

[164] *Id.*

[165] 427 U.S. 539 (1976).

[166] *Id.* at 570.

[167] 448 U.S. 555 (1980).

upheld the press's right of access to criminal trials.[168] The Court's reason for granting additional protection to the press is that it has the ultimate effect of preserving and fostering individual rights of free expression.[169]

The Canadian Charter also protects the right to free expression. Section 2(b) of the Charter states:

> 2. Everyone has the following fundamental freedoms:
> (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication[.][170]

Section 2(b) of the Charter did not create a new right for its citizens. Canadian law has always recognized the existence of the fundamental right to free speech.[171] During the period between the late 1930s and the late 1950s, the Canadian courts used the implied bill of rights doctrine to protect an individual's right to free expression.[172] Furthermore, the Canadian Bill of Rights, enacted in 1960, explicitly recognized the right to free expression.[173] Section 2(b) of the Charter raised this right to the status of a constitutionally protected right.

Since the enactment of the Charter in 1982, there has been a substantial amount of litigation involving freedom of expression in Canada.[174] Canadian courts have already addressed many issues regarding section 2(b) of the Charter. Some of these decisions have dealt with: (1) restrictions on obscenity;[175] (2) the right of litigants to be represented by a lawyer of their choice;[176] (3) trademark

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[167] 448 U.S. 555 (1980).

[168] *Id.* at 581. The right of access to criminal trials is not absolute. In Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982), the Supreme Court held that denial of access to a criminal trial is permissible if it is "necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest." 457 U.S. at 607.

[169] W. TARNOPOLSKY & G. BEAUDOIN, *supra* note 4, at 95.

[170] Charter § 2(b).

[171] The court in Regina v. Reed, 8 C.C.C. 3d 153 (1983), stated that while Canadian law has always recognized the existence of fundamental freedoms, it has also upheld the need for justifiable restrictions. *Id.* at 161.

[172] *See supra* text accompanying notes 62–66 for a discussion of the Canadian implied bill of rights.

[173] Section 1(d) and 1(f) of the Canadian Bill of Rights states:

> 1. It is hereby recognized and declared that in Canada there have existed and shall continue to exist without discrimination by reason of race, national origin, color, religion or sex, the following human rights and fundamental freedoms, namely,
> (d) freedom of speech;
> (f) freedom of the press.

[174] *See generally* R. MCLEOD, *supra* note 7; THE CANADIAN CHARTER OF RIGHTS ANNOTATED, *supra* note 7.

[175] *See, e.g.*, Re Luscher and Deputy Minister, Revenue Canada Customs and Excise, 149 D.L.R.3d 243 (1983); Re Cote and Deputy Minister of National Revenue for Customs and Excise (May 18, 1984), *reported in* THE CANADIAN CHARTER OF RIGHTS ANNOTATED, *supra* note 7, at 9.2–11.

[176] *See* Malartic Hygrade Gold Mines Ltd. v. The Queen In Right Of Quebec, 142 D.L.R.3d 512 (1982).

infringement;[177] (4) limitations on commercial expression;[178] and (5) advertising regulations affecting a professional group.[179]

To help determine whether an individual's right to free speech has been unconstitutionally restricted, the Canadian courts have adopted the U.S. overbreadth doctrine.[180] The court in *Re Red Hot Video Ltd. and City of Vancouver*,[181] applied this U.S. overbreadth test to a Vancouver statute, which defined the types of "sex-orientated products" that could not be sold or rented by merchants.[182] The statute restricted products depicting a person or persons engaging in real or simulated sex acts, and items which simulated or were a reproduction of any human sex organ in any type of sexual activity.[183]

The court noted that "sex-orientated products," by itself, was an indiscriminately broad expression.[184] The court concluded, however, that the statute sufficiently limited the term's application to two specific types of products.[185] In addition, the court determined that the statute exempted from regulation any sex-oriented product found to be educational or pharmaceutical.[186] Since the challenged law restricted only those activities that it intended to regulate, the court held that the statute was not overbroad and was, therefore, constitutional.[187]

The court in *Re Ontario Film & Video Appreciation Society and Ontario Board of Censors*[188] held sections of the Theatres Act of 1980[189] "to be of no force or effect" based on the U.S. overbreadth doctrine.[190] Section 3(2)(a) and (b) of the Theatres Act of 1980 gave the Ontario Board of Censors the power "to censor any film" and "to approve, prohibit or regulate the exhibition of any film in

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[177] *See* Source Perrier (Societe Anonyme) v. Fira-Less Marketing Co. (1983), 70 C.P.R. (2d) (F.C.T.D.) *reported in* THE CANADIAN CHARTER OF RIGHTS ANNOTATED, *supra* note 7, at 9.2–2.

[178] *See* Regina v. Halpert, 9 C.C.C.3d 411 (1983).

[179] *See* Re Law Society of Manitoba and Savino, 1 D.L.R.4th 285 (1983).

[180] The court in Re Red Hot Video Ltd. and City of Vancouver, 5 D.L.R.4th 61 (1983), explicitly recognized that the U.S. overbreadth test has gained acceptance in Canada. *Id.* at 65. For a discussion of the U.S. overbreadth doctrine see *supra* text accompanying notes 143–53.

[181] 5 D.L.R.4th 61 (1983).

[182] The challenged Vancouver statute stated:

> Wherever the words "retail store", "retail or business establishment", "retailing", "convenience commercial", or similar use descriptions which imply the sale of merchandise as a permitted use, appear in this By-law or in any By-law passed pursuant to this By-law, such permitted use shall not include the sale or rent of sex-oriented products.

By-law 3575 § 10.22.1, *cited in Re Red Hot Video*, 5 D.L.R.4th at 63.

[183] *Re Red Hot Video*, 5 D.L.R.4th at 65.

[184] *Id.* at 63.

[185] *Id.* at 65.

[186] *Id.* at 66.

[187] *See id.* at 66.

[188] 147 D.L.R.3d 58 (1983).

[189] Theatres Act, R.S.O. 1980 c. 498 §§ 3(2)(a), (b), 35, 38.

[190] *Re Ontario Film*, 147 D.L.R.3d at 68. *See Re Red Hot Video*, 5 D.L.R.4th at 65 (noting that *Re Ontario Film* determined the validity of the Theatres Act by applying the U.S. overbreadth doctrine).

Ontario."[191] The court noted that the Theatres Act intended to prevent public screening of socially offensive films.[192] The Act, however, did not require the board of censors to use any specific standards or regulations to determine whether a film should be censored.[193] The court determined that the Theatres Act of 1980 was too broad, thereby violating section one of the Charter.[194] The court reasoned that in order for a statute to be constitutional its limitations must be articulated clearly and precisely.[195]

The judiciary in Canada has also been influenced by U.S. jurisprudence when deciding constitutional issues of freedom of the press.[196] To determine the extent of constitutional protection afforded the Canadian press, the court in *Re Edmonton Journal and Attorney-General for Alberta*[197] compared the language in the U.S. Constitution, protecting freedom of the press, with similar language in the Charter. The first amendment of the U.S. Constitution protecting the freedom of the press states: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[198] The Canadian Charter addresses the same issue by stating:

> 2. Everyone has the following fundamental freedoms:
> (b) freedom of thought, belief, opinion and expression, *including* freedom of the press and other media of communication[.][199]

The U.S. Constitution clearly separates the right to free speech from the right of freedom of the press. The drafters of the Charter, however, did not differentiate between freedom of the press and the other rights protected under the same section. Noting this distinction, the court in *Re Edmonton Journal* determined that freedom of the press is not a separate right within the Canadian system.[200] Instead, freedom of the press is protected only by the right to free expression.[201] Section 2(b), therefore, guarantees individuals the right to express themselves orally, in writing, or in any other way including the use of the media.

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[191] Theatres Act, R.S.O. 1980, c. 498 §§ 3(2)(a), (b). Section 35 of the Act requires that, before being exhibited in Ontario, all films must be submitted to the Board for approval. Section 38 of the Act requires that no person shall exhibit a film in Ontario that has not been approved by the board.

[192] *Re Ontario Film*, 147 D.L.R.3d at 65.

[193] *Id.* at 67.

[194] *Id. See also supra* text accompanying note 6.

[195] *Re Ontario Film*, 147 D.L.R.3d at 67.

[196] *See* Re Edmonton Journal and Attorney-General for Alberta, 4 C.C.C.3d 59 (1983); Re Southam Inc. and The Queen (No. 1), 3 C.C.C.3d 515 (1983); Re Canadian Newspapers Co. and The Queen, 6 C.C.C.3d 488 (1983).

[197] 4 C.C.C.3d 59 (1983).

[198] U.S. CONST. amend. I.

[199] Charter § 2(b) (emphasis added).

[200] 4 C.C.C.3d at 63.

[201] *Id.* at 62.

The court concluded that section 2(b) does not, however, include a separate freedom specifically designed to protect the press.[202]

Several Canadian cases, influenced by U.S. decisions, have addressed the issue of freedom of expression and the right of the press to observe public trials.[203] The decisions in *Re Southam Inc. and The Queen* and *Re Canadian Newspapers Co. and The Queen*, held section 12(l) of the Juvenile Delinquents Act,[204] which restricts access of the press from juvenile trials, to be unconstitutional.[205] This right of access to public trials was decided by the *Re Canadian Newspapers* court based on several factors.[206] First, a rule favoring an open court system would help foster public confidence in the integrity of the legal system.[207] Second, Canadian society even as early as 1909 recognized the importance of making court proceedings universally known.[208] Third, many considered an open court system to be the hallmark of a democratic society.[209] Fourth, pre-Charter court decisions considered open trials of the utmost importance, even though such an approach caused inconvenience to the individual on trial.[210] Finally, the court relied on the U.S. decision of *Richmond Newspapers, Inc. v. Virginia*[211] in holding that juvenile proceedings in Canada should be open to the public.[212]

The U.S. *Richmond Newspapers* case was, in fact, cited by both the *Re Southam* and *Re Canadian Newspapers* courts in their analyses of the constitutionality of section 12(1) of the Juvenile Delinquents Act.[213] *Richmond Newspapers* was the first case in which the U.S. Supreme Court considered whether the right of the public and press to attend criminal trials was constitutionally protected.[214] The Court concluded that, absent any overriding governmental interest, the first amendment requires that criminal trials be open to the public.[215] Writing for the majority in *Richmond Newspapers*, Chief Justice Burger stressed that criminal proceedings have traditionally been open to the public and that this tradition

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[202] The court in *Re Edmonton Journal* applied this analysis upholding the constitutionality of section 12(1) of the Juvenile Delinquents Act, which restricts access of the press from juvenile trials. *Id.* at 65–66.

[203] *See* Re Southam Inc. and The Queen (No. 1), 3 C.C.C.3d 515 (1983); Re Canadian Newspapers Co. and The Queen, 6 C.C.C.3d 488 (1983).

[204] Juvenile Delinquents Act R.S. c. 160, § 1.

[205] *Re Southam*, 3 C.C.C.3d at 536; *Re Canadian Newspapers*, 6 C.C.C.3d at 498. *But see Re Edmonton Journal*, 4 C.C.C.3d at 66 (discussed *supra* at notes 197–202 and accompanying text).

[206] *Re Canadian Newspapers*, 6 C.C.C.3d at 494–96 (relying on factors set forth in *Re Southam*, 3 C.C.C.3d at 521–25).

[207] *Id.* at 496.

[208] *Id.* at 494.

[209] *Id.*

[210] *Id.*

[211] 448 U.S. 555 (1980).

[212] *Re Canadian Newspapers*, 6 C.C.C.3d at 495–96.

[213] *Re Southam*, 3 C.C.C.3d at 524; *Re Canadian Newspapers*, 6 C.C.C.3d at 495.

[214] *Re Southam*, 3 C.C.C.3d at 524.

[215] *Richmond Newspapers*, 448 U.S. at 581.

was well in place even at the time the first amendment was adopted.[216] Relying on this decision, the courts in *Re Southam* and *Re Canadian Newspapers* held that section 12(1) of the Juvenile Delinquents Act was an unreasonable restriction on the rights guaranteed by section 2(b) of the Charter.[217]

U.S. decisions have also influenced Canadian cases on the issue of how broadly section two of the Charter should be interpreted.[218] The Canadian court in *Baxter v. Baxter*[219] determined that the rights and freedoms under the Charter should be interpreted in terms of what restrictions the government was prohibited from imposing on the individual. The court concluded that it would not be appropriate to use section two of the Charter to require the government to provide certain affirmative actions for the individual.[220] The *Baxter* court thus held that a husband could not require the state to exempt his marriage from the Divorce Act of 1970,[221] even though the husband felt that the Act violated his religious rights protected by section 2(a) of the Charter.[222] In its holding, the court specifically relied on the U.S. Supreme Court case of *Sherbert v. Verner*.[223] The *Baxter* decision, paraphrasing Justice Douglas's opinion in *Sherbert*, stated that the "Charter is written in terms of what the State cannot do to the individual, not in terms of what the individual can exact from the State."[224]

Canadian courts have relied on U.S. jurisprudence to interpret section two of the Charter. They have made use of the U.S. overbreadth doctrine to help determine whether legislation restricting an individual's right to free expression is constitutional. In addition, several Canadian cases have relied on U.S. decisions in reaching their own decisions to require juvenile proceedings in Canada to be open to the public. Furthermore, a Canadian court engaged in an extensive analysis between the language in section two of the Charter and similar language contained in the first amendment of the U.S. Constitution, to determine the extent of constitutional protection afforded to the Canadian press. Finally, at least one Canadian court, basing its decision on a U.S. Supreme Court case, has held that section two of the Charter should be interpreted only with respect to the constitutionality of governmental restrictions. The court concluded that, like the U.S. Constitution, the Charter was not to be interpreted in terms of what affirmative actions an individual could expect from its government.

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[216] *Id.* at 564.

[217] *Re Southam*, 3 C.C.C.3d at 524–25; *Re Canadian Newspapers*, 6 C.C.C.3d at 496.

[218] Section two of the Charter protects freedom of expression. *See supra* text accompanying note 170.

[219] 6 C.C.C.3d 165 (1983).

[220] *Id.* at 168.

[221] Divorce Act. 1967–68, c. 24, § 1.

[222] *Baxter*, 6 C.R.R. at 166.

[223] 374 U.S. 398 (1963).

[224] *Baxter*, 6 C.R.R. at 168.

B. *Unreasonable Searches and Seizures*

The fourth amendment to the United States Constitution guarantees individuals freedom from unreasonable searches and seizures. The fourth amendment states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[225]

In recent years, the U.S. Supreme Court has held that the fourth amendment's prohibition against unreasonable searches and seizures is based on the concept of privacy.[226] Therefore, there has been a search within the meaning of the fourth amendment if an individual can prove that a reasonable expectation of privacy has been invaded by the state.[227]

U.S. courts have adopted the general rule that searches are reasonable, and constitutional, if carried out pursuant to a warrant.[228] Warrantless searches, on the other hand, are *per se* unreasonable and unconstitutional. The courts, however, have carved out several exceptions to this general rule.[229] Warrantless searches which are nevertheless considered reasonable include: (1) a search incident to an arrest;[230] (2) a search accompanying a "hot pursuit;"[231] (3) a "stop and frisk" search;[232] (4) a search of a vehicle held in police custody;[233] (5) a search to prevent loss of evidence;[234] (6) a search where the party consents;[235] and (7) a search where the object is in "plain view."[236]

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[225] U.S. CONST. amend. IV.

[226] *See* Katz v. U.S., 389 U.S. 347 (1967). The court in *Katz* stated:

> [T]he fourth amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of fourth amendment protection . . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.
>
> *Id.* at 351(citations omitted).

[227] *Id.* at 361 (Harlan, J., concurring).

[228] *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971). A warrant can only be issued after "probable cause" has been established. For there to be probable cause to search a particular area it must be proven that the items sought are connected with criminal activity and the items will be found in the place to be searched. A warrant is valid only when issued by a neutral and detached magistrate. *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[229] *See* Perry & Neisser, *Criminal Procedure*, 1980 ANN. SURV. AM. L. 265, 278–82 (1980).

[230] *See, e.g.*, U.S. v. Rabinowitz, 339 U.S. 56 (1950).

[231] *See, e.g.*, U.S. v. Sanata, 427 U.S. 38 (1976).

[232] *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968).

[233] *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970).

[234] *See, e.g.*, Carrol v. U.S., 267 U.S. 132 (1925).

[235] *See, e.g.*, Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[236] *See, e.g.*, Coolidge v. New Hampshire, 403 U.S. 443 (1971). For a complete discussion regarding search and seizure see W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT

The Supreme Court in *Weeks v. United States*[237] developed the exclusionary rule, holding that evidence obtained in violation of a defendant's fourth amendment rights is inadmissible in court against the defendant.[238] In *Terry v. Ohio*,[239] the Court cited two major reasons for the exclusion of evidence obtained in violation of a defendant's constitutional rights. First, exclusion acts to deter future violations of the Constitution.[240] Second, the integrity of the judicial system would diminish if the courts allowed the government to violate constitutional rights.[241] In recent years, however, commentators have criticized the use of the exclusionary rule[242] and the Supreme Court has handed down several decisions limiting its scope.[243]

In Canada, the right to be secure against unreasonable search and seizure is constitutionally protected by section 8 of the Charter. Section 8 states that "[e]veryone has the right to be secure against unreasonable search or seizure."[244] The Charter, however, is not responsible for introducing this concept into Canadian society. The right to be secure against unreasonable searches and seizures was established by Canadian common law before the enactment of the Charter.[245] The common law decisions gave police officers and government officials the authority to enter private property, to search for and seize evidence, only if such action was authorized by a statute.[246] The common law rule, therefore, considered a search or seizure reasonable and permissible as long as it was authorized by law.[247]

(1978); C. WHITEBREAD, CRIMINAL PROCEDURE: AN ANALYSIS OF CONSTITUTIONAL CASES AND CONCEPTS 13–254 (1980); Note, *An Emerging New Standard for Warrantless Searches and Seizures Based on Terry v. Ohio*, 35 MERCER L. REV. 647–80 (1984); Wilson, *Enforcing the Fourth Amendment: The Original Understanding*, 28 CATH. LAW. 173–98 (1983).

[237] 232 U.S. 383 (1914).

[238] *See id.* at 398.

[239] 392 U.S. 1 (1968).

[240] *Id.* at 12.

[241] *Id.*

[242] *See* Kaplan, *The Limits of the Exclusionary Rule*, 26 STAN. L. REV. 1027 (1974); Wilkey, *The Exclusionary Rule: Why Suppress Valid Evidence?*, 62 JUDICATURE 215 (1978); S. SCHLESINGER, EXCLUSIONARY INJUSTICE (1977).

[243] *See* Massachusetts v. Sheppard, 52 U.S.L.W. 5177 (U.S. Jan. 17, 1984); U.S. v. Leon, 52 U.S.L.W. 5155 (U.S. Jan. 17, 1984); Stone v. Powell, 428 U.S. 465 (1976). For a general discussion on the U.S. exclusionary rule see Note, *The Exclusionary Rule and a Good-Faith Exception: Is it Time for a Change?*, 35 MERCER L. REV. 699 (1984); Fitzhugh, *The New Exclusionary Rule Cases*, 70 A.B.A.J. 58 (1984); Note, *The Erosion of the Exclusionary Rule Under the Burger Court*, 33 BAYLOR L. REV. 363 (1981); Oaks, *Studying the Exclusionary Rule in Search and Seizures*, 37 U. CHI. L. REV. 665 (1970).

[244] Charter § 8.

[245] McGinn, *The Canadian Charter of Rights and Freedoms: Its Impact on Law Enforcement*, 31 U.N.B.L.J. 177, 185 (1982). The Canadian Bill of Rights, however, does not contain a provision protecting individuals from unreasonable searches and seizures.

[246] P. HOGG ANNOTATED, *supra* note 4, at 29.

[247] *See* Levitz v. Ryan, 9 C.C.C.2d 182 (1972); McGinn, *supra* note 245, at 185.

Initially, section 8 of the Charter contained language which indicated that the "reasonable if legal" approach would continue to apply to searches and seizures. An early version of section 8 stated that "[e]veryone has the right not to be subjected to search or seizure except on grounds and in accordance with procedures established by law."[248] The framers of the Charter decided that this approach did not provide enough protection for the individual.[249] Section 8 was redrafted to broaden the meaning of unreasonableness with respect to searches and seizures. The final version of section 8 gives the Canadian courts the authority to also determine whether the legislation permitting a search or seizure is itself unreasonable.[250] The Minutes of Proceedings before the Joint Committee, furthermore, makes it clear that Parliament intended section 8 to have as broad a scope as the fourth amendment's search and seizure provision.[251]

The Canadian case of *Re Becker and The Queen in Right of Alberta*[252] determined that the word "seizure" in the Charter does not encompass real property rights.[253] The court based its decision on an extensive analysis between the language in the fourth and fifth amendments of the U.S. Constitution and sections 7 and 8 of the Charter.[254] Both section 8 and the fourth amendment state that individuals have the right to be free from unreasonable searches and seizures.[255] A comparison of section 7 and the fifth amendment, however, shows important differences. The legal rights protected by the Charter, set out in section 7, include: "the right to life, liberty, and security of the person and the right not to be deprived thereof."[256] In comparison the fifth amendment states that a person shall not "be deprived of life, liberty, or property, without due process of law."[257] Unlike the fifth amendment, section 7 of the Charter does not include a property right among the constitutionally protected rights.

Based on the comparison between the two instruments, the court in *Re Becker and The Queen* held that the word "seizure" in section 8 of the Charter does not encompass real property rights.[258] The court reasoned that sections 8 through 14 of the Charter refer to the general rights created by section 7.[259] If the framers of the Charter intended section 8 to protect property rights they would

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[248] Minutes of Proceedings November 18, 1980. Vol. 7 at 11, *reported in* McGinn, *supra* note 245, at 185.

[249] *Id.* at 186.

[250] *Id.* For the language of the final version of section 8, see *supra* text accompanying note 244.

[251] McGinn, *supra* note 245, at 186–87.

[252] 148 D.L.R.3d 539 (1983).

[253] *Id.* at 545.

[254] *See id.* at 543–44.

[255] *See* text accompanying notes 225 and 244.

[256] Charter § 7.

[257] U.S. CONST. amend. V.

[258] 148 D.L.R.3d at 545.

[259] *Id.* at 544.

have included this right in section 7, as the framers of the U.S. Constitution did in their fifth amendment.[260]

Unlike the U.S. courts, Canadian courts have not accepted the notion that the prohibition against unreasonable search and seizure is based on the concept of privacy. In *R. v. Taylor*,[261] the court specifically rejected the U.S. approach and stated that the Charter was not written with the intent to protect a right of privacy.[262] The court reasoned that the framers would have used broader language if they had intended section 8 to extend beyond the ordinary meaning of search and seizure.[263]

Since section 8 of the Charter does not contain a warrant clause, Canadian courts have focused on the more general issue of reasonableness to determine whether a search or seizure is constitutional.[264] The courts have adopted a balancing approach, used by the United States court system, to determine whether a search or seizure is reasonable.[265] Under this U.S. balancing approach, the court will determine whether a seizure is reasonable by weighing the degree of governmental intrusion against the government's legitimate interest in conducting the search.[266] The court, in effect, balances the "public interest in effective law enforcement against the individual's right to be secure against unreasonable search and seizure."[267]

The Canadian courts applying this balancing approach have reached the same results as U.S. courts on identical issues. For instance, both Canadian and U.S. courts have determined that taking fingerprints after a lawful arrest is not an

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[260] *Id.* at 544–45.

[261] B.C.S.C., December 30, 1983, *reported in* R. MCLEOD, *supra* note 7, at 6–17.

[262] *Id.*

[263] *Id.* The court in Ziegler v. Hunter, Fed. T.D., August 9, 1983, *reported in* R. MCLEOD, *supra* note 7, at 6–3 also refused to find an implied right of privacy for section 8 of the Charter. Furthermore, the court in Regina v. Porter (January 17, 1983), 9 W.C.B. 311 (B.C. Co. Ct.), *reported in* THE CANADIAN CHARTER OF RIGHTS ANNOTATED, *supra* note 7, at 13–20, made it clear that for a search and seizure to be unreasonable within the context of section 8 of the Charter, there must be a physical taking of property. The court, therefore, held that entry into an individual's home, without consent or a warrant, and the implantation of surveillance equipment, was not a violation of section 8. *Id.* The Charter's legislative history supports the approach taken by these Canadian courts. The original draft of the Charter contained a provision, equivalent to section 8, which would have specifically protected arbitrary and unlawful interference with privacy. R. MCLEOD, *supra* note 7, at 6–2. The final version of the Charter does not contain this provision. *Id.*

[264] Issuance of a search warrant, nevertheless, can be an important factor when determining the reasonableness of a search and seizure. Regina v. Rao (May 16, 1984), 12 W.C.B. 118 (Ont. C.A.), *reported in* THE CANADIAN CHARTER OF RIGHTS ANNOTATED, *supra* note 7, at 13–49.

[265] *See* Re New Garden Restaurant & Tavern Ltd. and Minister of National Revenue, 1 D.L.R.4th 256 (1983); Re Maltby and Attorney-General of Saskatchewan, 143 D.L.R.3d 649 (1982); Regina v. McGregor, 3 C.C.C.3d 200 (1983).

[266] *McGregor*, 3 C.C.C.3d at 209.

[267] *Re New Garden Restaurant*, 1 D.L.R.4th at 261. The court adopted the balancing test used in the U.S. Supreme Court case of United States v. Biswell, 406 U.S. 311 (1972).

unreasonable search.[268] U.S. courts have held that fingerprinting lawfully detained individuals does not sufficiently infringe upon fourth amendment rights to constitute an unreasonable search.[269] The Canadian case of *Regina v. McGregor*[270] has similarly reasoned that mandatory fingerprinting is not unconstitutional since the public interest involved outweighs section 8 rights of a detained individual.[271] Both judicial systems have also concluded that strip searches imposed upon prison inmates after visits are not unreasonable.[272]

The Canadian courts have also made use of the United States plain view doctrine to help determine whether a search or seizure is reasonable.[273] The court in *Re Regina and Shea*[274] held that the seizure of any item in plain view, made while in the process of conducting a constitutional search, is reasonable.[275] As a result, a policeman who lawfully entered an apartment to help aid a landlord in an emergency conducted a reasonable seizure when he unexpectedly discovered and confiscated narcotics.[276] The court, justifying the use of the plain

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[268] U.S. cases deciding the issue of search and seizure and fingerprinting include: Paulson v. State of Florida, 360 F. Supp. 156 (S.D. Fla. 1973); Davis v. Mississippi, 394 U.S. 721 (1969). The Canadian case deciding the same issue is Regina v. McGregor, 3 C.C.C.3d 200 (1983).

[269] *See* Paulson v. State of Florida, 360 F. Supp. 156 (S.D. Fla. 1973). Cf. Davis v. Mississippi, 394 U.S. 721 (1969).

[270] 3 C.C.C.3d 200 (1983).

[271] *Id.* at 209–10.

[272] *See* Bell v. Wolfish, 441 U.S. 520 (1979); Re Maltby and Attorney-General of Saskatchewan, 143 D.L.R. 3d 649 (1982).

The *Bell* court reasoned:

> The test of reasonableness under the fourth amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted . . . . A detention facility is a unique place fraught with serious security dangers. Smuggling of money, drugs, weapons, and other contraband is all too common an occurrence . . . . [W]e deal here with the question whether visual body cavity inspections as contemplated by the MCC rules can ever be conducted on less than probable cause. Balancing the significant and legitimate security interests of the institution against the privacy interests of the immates we conclude that they can.

Bell, 441 U.S. at 559–61.

The Canadian court in *Re Maltby* agreed with the reasoning in *Bell* and also observed:

> In this day and age, knowing full well the extent of the drug scene, controls must be in effect to ensure the security of the institution and the strip searches requested of remand inmates before they are returned to the remand unit following a visit are no more than a minimum reasonable requirement. Certainly no violation of the provisions of the Charter of Rights is involved.

Re Maltby, 143 D.L.R.3d at 661.

[273] *See, e.g.*, Re Regina and Shea, 1 C.C.C.3d 316 (1982). The court in *Shea* also noted that Canadian courts have used the plain view doctrine before and after the enactment of the Charter. *Shea*, 1 C.C.C.3d at 322.

[274] 1 C.C.C.3d 316 (1982).

[275] *Id.* at 321–22.

[276] *Id.*

view doctrine, cited the U.S. Supreme Court case of *Coolidge v. New Hampshire*[277] which stated:

> What the "plain view" cases have in common is that the police officer in each of them had prior justification for an intrusion in the course of which he came inadvertently across a piece of evidence incriminating the accused. The doctrine serves to supplement the prior justification . . . and permits the warrantless seizure.[278]

Section 24 of the Charter provides for the exclusion of illegally obtained evidence in cases where admission of such evidence would bring the administration of justice into disrepute.[279] The courts in *R. v. Collins*[280] and *R. v. Cohen*[281] have developed a test which narrowly defines the type of evidence, which, if admitted, would discredit the administration of justice. Under this test only evidence obtained by police conduct in a manner which is shocking to the community is inadmissible.[282] Thus, evidence obtained in violation of section 8 of the Charter is, nevertheless, admissible as long as the police did not obtain it in a shocking manner.

Dissatisfaction with the U.S. exclusionary rule was one of the major reasons why the *Collins* court limited the scope of the exclusion clause in section 24 of the Charter.[283] The court noted that the U.S. experience with the exclusionary rule demonstrated its detrimental effect on the judicial system.[284] It caused society to become enraged with the legal process since many times it allowed the criminal to go free as the result of a relatively small error by the police officer.[285] Based on these observations, the court concluded that section 24 of the Charter should be interpreted as only a modified exclusionary rule.[286]

Canadian courts have, to some extent, relied on U.S. jurisprudence in interpreting section 11(b) of the Charter. They have adopted both the U.S. balancing test and the U.S. plain view doctrine to help determine whether a search and

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[277] 403 U.S. 443 (1971).

[278] *Id.* at 466, *cited in Shea*, 1 C.C.C.3d at 322.

[279] Charter § 24. Section 24 states:

(1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

[280] 33 C.R.3d 130 (1983).

[281] 33 C.R.3d 151 (1983).

[282] *Collins*, 33 C.R.3d at 142–43.

[283] *Id.* at 145–49.

[284] *Id.* at 148.

[285] *Id.* at 148–49 (*quoting* Kaplan, *supra* note 242, at 1036).

[286] *Id.* at 138.

seizure is reasonable. In addition, one Canadian court made an extensive comparative analysis between the fourth and fifth amendments of the U.S. Constitution and sections 7 and 8 of the Charter, in determining whether the word seizure in section 8 encompassed real property rights. The Canadian courts, however, have specifically rejected the U.S. approach which bases searches and seizures on the concept of privacy. Furthermore, Canadian courts have concluded that the exclusion clause in section 24 of the Charter should be interpreted as only a modified U.S. exclusionary rule.

C. *Trial Within A Reasonable Time*

The sixth amendment of the U.S. Constitution guarantees an individual the right to a trial within a reasonable time. The sixth amendment states that "[i]n criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . ."[287] Although the right to a speedy trial is an important constitutional right, it has been hard to define. Conceptually, it is more vague than other constitutional rights and cannot be characterized or quantified in exact terms.[288] For this reason, courts have not been able to determine an exact time limit past which this right has been violated.

The current approach taken by U.S. courts, with respect to sixth amendment rights, was established by the Supreme Court in the case of *Barker v. Wingo*.[289] In a unanimous opinion the Court held that the primary burden remains on both the courts and prosecutors to assure that cases are brought to trial in a speedy manner.[290] The Court developed a balancing test to help determine whether an accused's right to a speedy trial has been unconstitutionally violated. The test consists of four factors, which assess the conduct of both the prosecution and the defendant.[291] These factors include: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his right; and (4) the prejudice to the defendant.[292] The existence of any one of the above factors is not specifically required to prove a sixth amendment violation. The Court emphasized, however, that an individual who fails to assert the right to a speedy trial will have difficulty proving that this right was violated.[293]

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[287] U.S. CONST. amend. VI.

[288] Barker v. Wingo, 407 U.S. 514, 521 (1972).

[289] 407 U.S. 514 (1972).

[290] *Id.* at 529.

[291] *Id.*

[292] *Id.* at 530–32. A defendant is considered to have been prejudiced by the delay if it: (1) resulted in an unnecessarily oppressive pretrial detention; (2) caused the defendant concern and anxiety; and (3) impaired the defendant's defense. Furthermore, the Court observed that the third factor was the most important to consider when determining if there has been prejudice to the defendant. *Id.* at 532.

[293] *Id.* at 532. The Court expressly rejected the demand-waiver rule which makes a defendant automatically lose his right to a speedy trial if he neglects to assert this right. *Id.* at 528.

The Canadian Constitution also has a provision to protect an individual's right to a speedy trial. Section 11(b) of the Charter states:

> 11. Any person charged with an offence has the right
> (b) to be tried within a reasonable time.[294]

To determine what is an unreasonable time within the context of section 11(b), Canadian courts have adopted the U.S. balancing approach and the four *Barker* factors.[295] Justification for adopting this U.S. standard has been articulated by Justice Allen in *Regina v. Biggar*.[296] He observed that reliance on U.S. court cases to interpret the Canadian Constitution can prove to be very helpful.[297] He further pointed out that, until the Canadian Supreme Court addresses a particular issue, lower courts in attempting to decide a case correctly should feel free to refer to U.S. jurisprudence.[298] Finally, Justice Allen concurred with the reasoning used in the *Barker* case and concluded that it should also be applied to section 11(b) of the Charter.[299]

Although Canadian courts have adopted the U.S. balancing test to determine whether an individual's right to a speedy trial has been violated, at least one Canadian court has slightly altered the approach.[300] The third factor in the *Barker* test requires the court to determine whether the defendant attempted to assert his constitutional right to a speedy trial.[301] In accordance with the *Barker* decision, this factor is to be balanced with the other three factors to determine

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In *Barker* the court applied the balancing test and held that the defendant had not been denied his right to a speedy trial. *Id.* at 536. Although the delay was too long, minimal prejudice was done to the defendant, and the defendant himself did not assert his right to a speedy trial.

The remedy for violation of this constitutional right is the dismissal of the indictment or vacation of the sentence. Strunk v. U.S., 412 U.S. 434 (1973).

[294] Charter § 11(b). The Canadian Bill of Rights does not contain a similar provision.

[295] *See* Regina v. Antoine, 148 D.L.R.3d 149 (1983); Re Coghlin and The Queen, 141 D.L.R.3d 451 (1982); Re Regina and Thompson, 3 D.L.R.4th 642 (1983); Regina v. Donald, 5 D.L.R.4th 382 (1983); Regina v. Cameron, 70 C.C.C.2d 532 (1982).

Not all Canadian courts, however, have adopted the *Barker* test to interpret Section ll(b) of the Charter. The court in Re Balderstone and The Queen, 2 C.C.C.3d 37 (1982), applied a different test and identified seven factors that should be considered by a court deciding whether a trial delay was reasonable. They include: (1) the nature, number and complexity of the charges; (2) the number of accused; (3) the volume and complexity of the evidence; (4) the availability of witnesses; (5) the mode of trial; (6) the diligence of the Crown and the efforts of the accused; and (7) whether the accused is in custody of the charges. *Id.* at 55.

[296] 1 C.C.C.3d 23 (1982).

[297] *Id.* at 26.

[298] *Id.*

[299] Justice Allen stated:

> Indeed I will go so far as to say that much of what was said in the opinion of the United States Supreme Court as delivered by Powell J., in the *Barker* case appeals to my reasoning in considering the application of s. 11(b) of the Canadian Charter. *Id.*

[300] Regina v. Antoine, 148 D.L.R.3d 149 (1983).

[301] *Barker*, 407 U.S. at 531.

whether the length of time between arrest and trial has been reasonable.[302] Furthermore, the U.S. Supreme Court emphasized that an individual who failed to assert his right to a speedy trial would find it difficult to prove that his sixth amendment right was violated.[303] The Canadian court in *Regina v. Antoine*,[304] however, determined that in some instances this third *Barker* factor should not be included in the balancing test.[305] The court noted that, although the failure to object to trial delays was an important factor, a delay might be so shocking that it violates section 11(b), in spite of the defendant's apparent consent to the delay.[306]

Section 11(b) has raised important policy considerations.[307] In *Regina v. Cameron*,[308] the Canadian court, relying on the *Barker* decision, listed several reasons why society should make sure that an individual receives a trial within a reasonable time.[309] First, an individual who is released on bail awaiting trial for an unreasonably long period of time has the opportunity to commit other crimes.[310] Second, the longer an accused is out on bail awaiting trial, the more likely it becomes that he will jump bail.[311] Third, it may be harder to rehabilitate a criminal offender if an unreasonable delay occurs between the time of arrest and conviction.[312] Fourth, an accused is subject to a tremendous amount of stress while waiting for the trial to commence.[313] Finally, unreasonable trial delays, resulting in a backlog of untried cases, make it more likely that a defendant's sentence will be reduced through plea bargaining.[314] The court in *Regina v. Cameron* stated that these policy considerations would also be used in determining whether an individual's right to a speedy trial has been unconstitutionally violated.[315]

U.S. jurisprudence has influenced the interpretation of section 11(b) of the Charter. Canadian courts have adopted the U.S. balancing approach to help determine whether trial delays, within the context of 11(b), are reasonable. Furthermore, Canadian courts have adopted the policy considerations articu-

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[302] *Id.* at 533.

[303] *Id.* at 532.

[304] 148 D.L.R.3d 149 (1983).

[305] *Id.* at 163.

[306] *Id.* The court never defines what length of time is long enough to warrant the label "shocking". In the *Antoine* case the court, however, determined that 26 months was not a long enough time to be considered shocking.

[307] Regina v. Cameron, 70 C.C.C.2d 532, 536–37 (1982) (*Citing Barker* 407 U.S. at 519–20).

[308] 70 C.C.C.2d 532 (1982).

[309] *Id.* at 536.

[310] *Id.*

[311] *Id.*

[312] *Id.*

[313] *Id.*

[314] *Id.*

[315] *Id.* at 537.

lated by the U.S. Supreme Court, which discuss the reasons why an individual should receive a trial within a reasonable time.

V. CONCLUSION

The British North America Act of 1867, Canada's constitutional document, was not designed to protect civil liberties. Although the framers of the BNA adopted the U.S. concept of federalism, they did not include any provisions similar to the U.S. Bill of Rights. As a result, Canadian courts did not rely on U.S. decisions to help protect civil liberties in Canada.

In 1960, the Canadian government enacted a federal statute entitled the Canadian Bill of Rights. Drafters intended this instrument to help protect individual rights in Canada. Many sections of the Canadian Bill of Rights were similar to provisions contained in the U.S. Bill of Rights. Although the two documents were structured similarly, the Canadian courts did not rely on U.S. opinions to help protect civil rights in Canada. The rights protected by the Canadian Bill of Rights, unlike the rights in the U.S. Bill of Rights, were not part of the constitution. The Canadian courts, therefore, were cautious about using this federal statute to protect individual rights. In fact, the Canadian court system used its Bill of Rights only once to strike down a statute for being unconstitutional.

In 1982, the Canadian Parliament amended its Constitution to include the Charter of Rights and Freedoms. This document provides constitutional protection for the civil rights of Canadian citizens. The language in the document, however, is quite general, and the Canadian courts have been left with the task of ascertaining the actual status of individual rights under the Charter. Many Canadian courts have already written decisions addressing the issue of how the Charter should be interpreted.

Substantively, the U.S. Constitution and the Charter are similar, both protecting many of the same rights. This Comment examined three sections of the Charter which contain language similar to provisions in the U.S. Bill of Rights. An examination of court decisions involving sections 2 and 11(b) of the Charter indicates that the Canadian courts are willing to rely on U.S. jurisprudence to help interpret its new constitution. Canadian courts have adopted several U.S. tests and standards to determine whether individuals' rights to free expression and a speedy trial have been unconstitutionally restricted. Furthermore, the Canadian courts have made comparisons between the language protecting freedom of expression in both constitutions to help determine exactly what rights are protected by section 2 of the Charter.

Canadian courts, however, have been more reluctant to rely on U.S. jurisprudence in the area of search and seizure. Although courts have adopted the U.S. balancing test and plain view doctrine to help interpret section 8 of the Charter,

they have determined that, unlike the U.S. approach, search and seizure does not protect a right of privacy. Furthermore, Canadian courts, citing the dissatisfaction in the United States with the exclusionary rule, have narrowly defined the scope of the exclusion clause contained in section 24 of the Charter.

It appears that although Canadian courts are willing to rely on U.S. jurisprudence to help interpret its Charter, they will be more reluctant to do so in areas where the U.S. Bill of Rights, as interpreted by U.S. courts, has undergone criticism. Therefore, if there has been adverse reaction to the U.S. judicial approach regarding a civil rights issue, it is likely that the Canadian courts will develop a different approach to resolve that same issue within the context of the Canadian Charter. As a result, the U.S. influence on the interpretation of rights protected by the Charter will be a function of the reaction to the approach taken by U.S. courts with respect to those same rights.

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