

INFANCY AND MATURITY: A COMPARISON OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND THE UNITED STATES CONSTITUTION

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The Canadian Charter of Rights and Freedoms¹ (Charter) was Canada's first foray into constitutional governance. It represents Canada's first specific guarantees of individual liberty on a constitutional level. It also expanded the role of the Canadian judiciary by explicitly charging courts with interpreting the Charter's provisions and with developing analytical applications when evaluating constitutional issues.²

This paper discusses some interesting facets of Canada's new constitution, judicial holdings since the constitution's inception, and compares it to the more-developed constitutional jurisprudence in the United States. The Introduction section briefly discusses Canada's constitutional history, and then outlines some considerations necessary for the subsequent discussion. The Introduction also gives an overview of the

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1. CANADIAN CHARTER OF RIGHTS AND FREEDOMS, Canada Act, 1982, ch. 11, sched. B (Eng.); Constitution Act, 1982, part I (Can.) [hereinafter CANADIAN CHARTER].

2. CANADIAN CHARTER § 24.

structure of the Canadian Charter of Rights and Freedoms. The Comparison section offers a discussion of the differences between Canadian and American judicial review theories and tests, and then contrasts individual rights litigation jurisprudence under the two constitutions. The Comparison section then discusses the issues of: 1) standing, 2) search and seizure, and 3) the exclusionary sanction, by contrasting the two constitutional models. The paper then concludes that considerable differences exist between the two constitutions, notwithstanding the similarities in both cultures. It also concludes that the Canadian Charter has many advantages over the United States Constitution, but that Canadian courts are handicapped by the temptation to blindly follow United States constitutional jurisprudence.

I. INTRODUCTION

A. History

Canada was formed through the British North America Act (hereinafter B.N.A.) executed in 1867 by the British Parliament.³ The B.N.A., also known as the Constitution Act of 1867, defined the basic element of Canada's judicial system.⁴ It did not, however, define the powers of the federal or provincial governments, and provided no way to transcend government actions which infringed on individual rights.⁵ Contrary to the United States system, which relies heavily on the Federal Constitution as the primary source of legal protection against governmental interference upon individual rights, the Canadian system followed the British convention of parliamentary supremacy whereby the Supreme Court served in a purely advisory capacity.⁶

While individual liberties were not addressed in the B.N.A., they were guaranteed by the Canadian Bill of Rights.⁷ The Bill did, however, not have constitutional status, and the Canadian Supreme Court historically

3. British North America Act, 1867, 30 & 31 Vict. C. 3 (Eng.) [hereinafter B.N.A.].

4. B.N.A., *supra* note 3, §§ 96-101.

5. Robert A. Sedler, *Constitutional Protection of Individual Rights in Canada: The Impact of the New Canadian Charter of Rights and Freedoms*, 59 NOTRE DAME L. REV. 1191, 1192 (1984).

6. *Id.*

7. Canadian Bill of Rights, 1960, 8 & 9 Eliz. 2, ch. 44 (Can.). While labeled *Bill of Rights*, the legislation was merely a statute, able to be repealed at any time. Further, the Bill probably was not binding on the provinces. William C. Hodge, *Patriation of the Canadian Constitution: Comparative Federalism in a New Context*, 60 WASH. L. REV. 585 n. 110 (June 1985).

hesitated to employ the Bill to invalidate government actions.⁸ This changed in 1982 when the British Parliament enacted the Canada Act of 1982.⁹

B. The Charter

The Charter essentially changed the structure of Canada's government.¹⁰ The Canada Act removed all of the United Kingdom's authority in governance over Canada¹¹ and, along with the Constitution Act, formulated the central law of Canada.¹² Already, a primary contrast between the Charter and the United States Constitution is evident: the Canadian Charter was enacted by the British Parliament, while the United States Constitution came from the people which it was meant to protect and emancipate from the British. However, the Canadian people were involved to some extent in creating the Charter. The Canadian Charter required ratification via the Canadian Parliament in essentially the same way as the United States Constitution was ratified by the states.¹³

Before entering into an analysis of the constitutions of the two nations, it is necessary to understand some fundamental differences between the Canadian and American systems of government. First, in the judicial scope, Canada basically has a unitary judicial system with no separate division of federal and provincial courts.¹⁴ The United States, in contrast, has a dual system which provides for the power of both state and federal courts. Contrary to the American judicial system, the Canadian Supreme Court, the nation's highest court of appeal, has authority to decide any federal or local question raised in a case.¹⁵ However, while jurisdiction may remain in theory, appeals to the Canadian Supreme Court as of right were abolished in 1975, and the Court now rarely grants leave

8. Franklin R. Liss, *A Mandate to Balance: Judicial Protection of Individual Rights Under the Canadian Charter of Rights and Freedoms*, 41 EMORY L. J. 1281, n.5 (Fall 1992).

9. Canada Act, 1982, ch. 11, sched B (Eng.).

10. Prior to 1982, Canada was controlled by a parliamentary system of government, with a Prime Minister as leader and the Monarch of England as the supreme head of state. Under this model, there is not a separation of power but a fusion of power between the legislative and executive branches of government. Parliament both creates the executive branch and regulates the judicial branch. Arthur M. Schlesinger, Jr., *The Constitutional and Presidential Leadership*, 47 MD. L. REV. 54, 55 (Fall 1987).

11. Canada Act, *supra* note 9.

12. CANADIAN CHARTER §§ 52, 60.

13. Sedler, *supra* note 5, at 1194 n.10.

14. *Id.*

15. *Id.*

to hear questions of provincial law.¹⁶ The constitutional process in Canada concerns the association between the courts and the government, while in the United States it concerns the federal courts and the branches of both the federal and state governments.¹⁷ Additionally, the Canadian Charter expressly provides that the courts are responsible for defining the Charter's provisions and for making decisions regarding governmental actions in light of the Charter.¹⁸ Such responsibility is not so explicitly mandated in the United States Constitution.

There is another difference in the relationship between the judiciary and the government in each country. In the United States, judicial review is perceived as being confrontational. The United States Supreme Court strikes down laws or actions, appearing to be directly in conflict with the legislative branch of the system.¹⁹ In Canada, the Supreme Court judicial review process most often takes the form of a procedure called *references* where the interested party, usually the government, voluntarily requests the Court to determine the constitutionality of a government action or legislation.²⁰ The interested parties do not ask the Court to strike down a law, and the Court in Canada takes on a more advisory role. Such a role is impossible under the United States constitutional jurisprudence.²¹ In Canada, the *reference* procedure and review by the Court is a matter of right,²² and the courts' role in defining the Charter was explicitly provided for in the body of the Charter.²³ Rather than a confrontational process as in the United States, Canadian Supreme Court judicial review of government action appears to be a more cooperative effort between the judiciary and legislative bodies.²⁴

Secondly, the way powers are allocated to the provinces and to the federal government differs from the governmental hierarchy system in the United States. The Constitution Act of 1867 explicitly defines the Canadian federal government's exclusive powers²⁵ and the powers of the

16. *Id.*

17. *Id.* at 1231.

18. CANADIAN CHARTER § 52.

19. Sedler, *supra* note 5, at 1232.

20. *Id.*

21. *Herb v. Pitcairn*, 324 U.S. 117, 125-26, (1945) (holding that the United States Supreme Court was not permitted to render advisory opinions).

22. Sedler, *supra* note 5, at 1233 (citing *Attorney-General of Ont. v. Attorney-General of Can.*, [1912] A.C. 571 (Can.)).

23. CANADIAN CHARTER § 52.

24. Sedler, *supra* note 5, at 1233.

25. B.N.A., *supra* note 3, § 91

provincial legislatures.²⁶ These powers do not overlap, but in case of direct conflict over an activity, the federal power prevails.²⁷ The only amendment in the 1982 Act which affected allocation of power was the expansion of provincial powers over non-renewable natural resources.²⁸ Conversely, a prominent feature of American allocation of power is concurrency: states have power to govern in the interests of the health and welfare of their citizens except when the Constitution explicitly prohibits the states from exercising such powers.²⁹ Furthermore, any power not guaranteed to the federal government is left to the states.³⁰ States do not derive their sovereignty from the Constitution, as the Canadian provinces do, rather the United States Constitution limits the extent of state powers.

Before a proper analysis of the Canadian Charter and comparison with the American Constitution can be performed, it is necessary to first gain an albeit cursory familiarity with the provisions of the Canadian Charter of Rights and Freedoms.

C. Structural Overview

The structures of the provisions of the Canadian Charter differ significantly from those of the United States Constitution. One reason for this is that the Charter was written at a time when Canada had over a century to develop its jurisprudence,³¹ while the American Constitution was developed at the inception of the country. In fact, many provisions of the United States Constitution were designed to prohibit colonial practices which the framers found particularly repugnant.³² Another contrast between the two constitutional systems is thus evident: since the Canadian Charter is a contemporary document, it was drafted with experience relevant to modern contemporary life, allowing for provisions relevant to twentieth-century rights protection. The United States Constitution rarely directly addresses modern rights issues, and the Supreme Court has had to develop rights protections relevant to contemporary American society by creating penumbra rights.³³

26. B.N.A., *supra* note 3, § 92.

27. Sedler, *supra* note 5, at 1196.

28. CANADIAN CHARTER § 50.

29. U.S. CONST. amend. X.

30. *Id.*

31. Sedler, *supra* note 5, at 1212.

32. *Id.*

33. *Id.* at 1212-13.

The *limiting provision* of section 1 of the Charter outlines the consideration required when analyzing alleged infringements on individual rights.³⁴ According to this section, the rights and freedoms guaranteed by the body of the Charter are subject only to reasonable limits prescribed by law as can be justified in a democratic society. As discussed above, this section, taken along with section 24, has been regarded as the Canadian courts' mandate to interpret the Charter's provisions.

Section 2 proclaims the explicit guarantees of freedom of religion, opinion, expression, peaceful assemble, and association.³⁵ They are enumerated as explicit declarations of rights, as opposed to the provisions of the American Bill of Rights and the Fourteenth Amendment. Sections 3, 4, and 5 outline the federal parliamentary election system and the system for the legislative assembly.³⁶ Section 6 discusses mobility rights, while sections 7 through 14 cover the legal rights of life and liberty, freedom from arbitrary detention, unreasonable search and seizure, and prohibition of cruel punishment.³⁷ This area, subtitled *Legal Rights*, also addresses criminal procedure provisions such as: double jeopardy, rights to speedy trial, and the presumption of innocence until proven guilty.³⁸

Particularly unique to the Charter is the guarantee of language rights.³⁹ The section first grants unequivocal equal status to both French and English as official languages of the country. This section guarantees citizens the right to engage in debate in parliament, to receive public services, and to be tried in court in either language. This section also guarantees the right to be educated in either language through the secondary school level.⁴⁰

As mentioned above, section 24 is particularly important from the judicial perspective, as it mandates the courts' role in interpreting the Charter's provisions.⁴¹ This section commands the courts to hear complaints of those whose rights have been allegedly infringed or denied, and orders the courts to consider the complaints and apply appropriate remedial measures.

Another unique provision which warrants special consideration is section 33. Called the *section 33 override*, its provisions are all but

34. CANADIAN CHARTER § 1.

35. *Id.* § 2.

36. *Id.* §§ 3, 4, 5.

37. *Id.* §§ 6-14.

38. *Id.* §§ 7-14.

39. *Id.* §§ 16-23.

40. *Id.* § 23.

41. *Id.* § 24.

prohibited in the American constitutional system. The section permits, with qualification, a province to decide that certain provisions of the Charter will not apply to them and enables the provincial legislatures to enact provisions which completely contradict their Charter counterparts.⁴²

II. COMPARISON WITH THE UNITED STATES CONSTITUTION

A. Judicial Review

The United States has had well over 200 years to develop its constitutional jurisprudence. In contrast, Canada has had only fourteen. The Canadian judiciary must constantly battle with the temptation to follow United States constitutional case law. Such *borrowing* could lead to illogical analysis and the creation of a legal framework and structure that is inconsistent with the differing Charter. Consequently, Canadian courts risk developing tests which apply incorrect logic to issues and exceptions inherent in a Charter with differing provisions.

Contrary to the American view of courts, judicial review in Canada is seen as supportive of the legislature rather than being in conflict with it.⁴³ The Charter expressly legitimizes judicial review of government actions, and the right to review such actions did not need to evolve as it did in the United States, through *Marbury v. Madison*.⁴⁴ Since the Charter expressly mandated the right to review its provisions to the courts, no such evolution was required in Canada.⁴⁵

42. (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.

(2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.

(3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier date as may be specified in the declaration.

CANADIAN CHARTER § 33.

43. Sedler, *supra* note 5, at 1198-99.

44. *Marbury v. Madison*, 5 U.S. 137 (1803). The United States Supreme Court in this landmark case observed that it is implicit in a written constitution that it cannot be changed at will. Further, the Court mandated the task of interpreting the laws of the land; "[i]t is the province and duty [of the court] to say what the law is." *Id.*

45. CANADIAN CHARTER § 24.

B. Infringement of Protected Rights

In individual liberty litigation, section 1 of the Charter has been a central feature. The section acknowledges that the government may limit freedoms guaranteed elsewhere in the Charter.⁴⁶ It also creates a framework for analysis when an alleged infringement occurs: the claimant must first establish that the government's action has infringed some right protected by the Charter. Such infringement can then still be declared constitutional if it falls within the reasonableness of parameters of governmental action as defined in section 1. Contrasted with American constitutional analysis, government interests do not enter into the formula as they do in the United States system. The Canadian test does not limit the extent of individual rights with an evaluation of government interests.⁴⁷

The first prong of the test, government action, was defined in *Retail, Wholesale & Department Store Union, Local 580 v. Dolphin Delivery, Ltd.*⁴⁸ The Canadian Supreme Court's threshold definition of government action, developed in this case, has since come to be known as the *Dolphin Delivery Government Action Requirement*. In the case, the plaintiff-union contended that a court-imposed injunction against picketing constituted an infringement of the Charter's section 2(b) freedom of expression. The Court held that the injunction constituted judicial enforcement of common law and did not rise to the level of government action for individual liberty litigation purposes.⁴⁹ The Court then went on to limit government action to legislative, executive, or administrative action by a government body which is alleged to have infringed on a right enumerated in the Charter.⁵⁰ Charter right infringement litigation was held to be inappropriate in cases such as *Dolphin Delivery*, where the cause of action is between two private parties and no government action is relied upon as the basis for the litigation.⁵¹ Contrast this with American cases such as *Shelley v. Kraemer*⁵² in which the United States Supreme Court held that judicial enforcement of covenants in a private agreement constituted government action for Fourteenth Amendment purposes.

46. CANADIAN CHARTER § 1.

47. Liss, *supra* note 8, at 1284.

48. *Retail, Wholesale & Dep't Store Union, Loc. 580 v. Dolphin Delivery, Ltd.*, [1986] S.C.R. 573 (Can.).

49. *Id.* at 600.

50. *Id.* at 598-99.

51. *Id.* at 603.

52. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

Once government action has been established, a plaintiff must demonstrate an infringement of individual rights as defined in the Charter.⁵³ The degree of infringement was defined in *Operation Dismantle Inc. v. The Queen*.⁵⁴ The plaintiffs alleged that the Canadian Cabinet's permission, allowing the United States to test missiles in Canadian territory, violated their guarantee of life and security of person because it increased the probability of nuclear war.⁵⁵ The Canadian Supreme Court denied the claim as speculative and hypothetical, and in its holding defined *infringement* as an actual or probable deprivation of a guaranteed right which can *surely* result directly from the government action.⁵⁶ The Court further held that, while allegations should be taken as true for litigation purposes, such allegations must be capable of proof.⁵⁷

Once the plaintiff has established the *prima facie* infringement case, the government has the burden of showing that its action was reasonable as outlined in section 1 in order to prevail.⁵⁸ As discussed above, unlike American constitutional analysis, the government interest is of no importance and takes no part of the analytical framework. Thus, in Canada an infringement of the rights outlined in the Charter may be saved by a showing of reasonableness as provided by section 1.

When government action takes the form of legislation, the Canadian Supreme Court now employs the *Oakes* three-prong test developed in *Regina v. Oakes*.⁵⁹ In *Oakes*, a federal narcotic statute required that defendants proven to be in possession of narcotics were required to prove that they were not in possession for purpose of trafficking. The Court in *Oakes* determined that this statute infringed upon Charter section 11(d) which provides that those accused of offenses are presumed innocent until proven guilty. Having determined the infringement, the Court then decided whether the government action could be saved under section 1.⁶⁰ After analyzing the legislative objective,⁶¹ the

53. CANADIAN CHARTER § 1.

54. *Operation Dismantle, Inc. v. The Queen*, [1985] S.C.R. 441 (Can.).

55. *Id.*

56. *Id.* at 456.

57. *Id.*

58. *Retail, Wholesale & Dep't Store Union, Loc. 580 v. Dolphin Delivery, Ltd.*, [1986] S.C.R. 573 (Can.).

59. *Regina v. Oakes*, [1986] S.C.R. 103 (Can.).

60. *Id.* at 114.

61. The Court held that, to maintain the reasonableness of the government infringement, the government's legislative objective must be "of sufficient importance to warrant a

Court used a three-prong analysis to test the means used by the legislature to achieve its objective: 1) the means must be rationally connected to the objective; 2) there must be minimal impairment of the right in question; and 3) the effects of the measures impairing the right must be in proportion to the legislative objective.⁶² The Court held that the legislative objective of protecting society from drug traffickers as sufficiently warranted, but it held that the statute failed the first prong of the three-prong test because the statute was applied to those arrested with minimal amounts of narcotics who could not possibly be found to be traffickers.⁶³ While the third prong of the *Oakes* test may seem to implicate a government interest analysis, the Canadian Court has yet to employ this prong to a large extent.⁶⁴ Justices have stuck to the first two prongs of the test to invalidate government actions, and in doing so have appeared more deferential to the legislature.⁶⁵ Further, the Court has yet to define the requirements and applications of prong three.⁶⁶

There are several advantages to the Canadian constitutional analysis framework over its American counterpart. Because of the contemporary nature of the Charter, the drafters were able to resolve many constitutional questions that United States courts have had to resolve through extensive litigation and interpretation of the Constitution. Many constitutional issues which had been previously litigated in the United States are addressed and remedied by the text of the Charter.⁶⁷

One advantage of the Charter, removing analysis of the government's interest, may be appealing.⁶⁸ In his article *A Mandate to Balance*, Franklin Liss illustrates⁶⁹ through the following example, the contrast between the two analytical systems. *A* and *B* wish to engage in the same act under differing factual circumstances which appears to fall under the protection of the Canadian Charter. The government desires to regulate the conduct in the same way with respect to both *A* and *B*. Because of differences in facts, the government action takes the form of

constitutionally protected right or freedom" and such objective must "relate to concerns which are pressing and substantial in a free and democratic society." *Id.* at 138-39.

62. *Id.* at 139.

63. *Id.* at 142.

64. Liss, *supra* note 8, at 1312.

65. *Id.* at 1311.

66. *Id.* at 1312.

67. Sedler, *supra* note 5, at 1223.

68. Liss, *supra* note 8, at 1312.

69. *Id.* at 1312-13.

two different statutes. The government's legislative objective in regulating within *A*'s case is far superior to its objective in *B*'s.

Assume the government's regulation in *A*'s case is upheld under a section 1 reasonableness analysis. This result would not prejudice, and may assist *B*'s constitutional challenge. *B* could use *A*'s unsuccessful challenge to show the infringement and establish his *prima facie* case. *B* could then use *A*'s case to show that the legislation in *B*'s case must fail under a section 1 analysis because the legislation in *A* was held to be reasonable.

In the United States, a court upholding the legislation in *A*'s case, after balancing the competing interests of *A* and the government, could structure its analysis so that the conduct in both *A* and *B*'s cases would not be constitutionally protected. In the United States the conduct could be broadly regulated if *A* loses his case, while in Canada, each case is differently, and the legislation in *B*'s case may be found unreasonable, partly due to the government prevailing in *A*'s case.⁷⁰ Therefore, when government interests are analyzed, as in the United States, litigants are precluded from bringing cases subsequent to a holding detrimental to their argument. When no government interest is analyzed, as in Canada more litigants may have their day in court.

Another advantage is the probable consistency in Canadian Charter analysis.⁷¹ The section 1 reasonableness of government infringement on guarantees of freedoms framework is independent of the Charter guarantee infringed.⁷² Holdings subsequent to *Dolphin Delivery* and *Oakes* appear to use the same analysis despite the nature of the transgressed right.⁷³ In American constitutional jurisprudence, the tests and analyses employed depend on the right infringed. There are no textual provisions in the United States Constitution to guide the courts, and the Supreme Court has been left to develop its own mode of analysis. The consistency enjoyed in Canada is impossible under the United States model.

70. *Id.*

71. *Id.* at 1313.

72. *Id.*

73. *Id.*, citing *Devine v. Quebec*, [1985] S.C.R. 790 (Can.) (holding language provisions infringed on Charter section 2(b) but were justified under section 1 analysis); and *Regina v. Paul Magder Furs*, 60 O.R.2d 172 (Ont. Ct. App. 1989) (holding that analysis by the Supreme Court in another case was equally applicable to a challenge to the same legislation alleging infringement of a different Charter provision).

C. Standing

The United States and Canadian courts have addressed the issue of standing in different manners. The Supreme Court of Canada has taken the opposite approach of its American counterpart regarding standing issues. The Canadian Court permits third parties to apply for constitutional remedies. This has led to a substantial difference between American and Canadian standing holdings in constitutional-challenge cases.

Section 24 of the Canadian Charter grants remedy only to persons "whose rights or freedoms . . . have been infringed."⁷⁴ Standing often depends on the scope of the right or freedom as defined by the provision guaranteeing it. The Canadian Supreme Court has also permitted third parties to assert the constitutional rights of others.⁷⁵ Further, anyone charged with a criminal offense has standing to challenge the constitutionality of the law under which they were charged even if their own rights had not been violated.⁷⁶ This was the holding in *Big M Drug Mart*,⁷⁷ a landmark case regarding standing in Canadian constitutional jurisprudence. This holding has been cited favorably in subsequent cases, and third-party standing status still prevails in Canada.⁷⁸ By contrast, the United States Supreme Court has held that complainants must demonstrate a violation of their own constitutional rights before they can claim standing to challenge the constitutionality of legislation.⁷⁹

The issue of personal standing in search and seizure cases has not been conclusively defined by the Canadian Supreme Court. Section 8 of the Charter proclaims the right to be secure against unreasonable search and seizure, and the Court had the opportunity to address the section in *Hunter v. Southam*.⁸⁰ In *Hunter*, the Court referred to an American case, *Katz v. United States*,⁸¹ to interpret the provision of section 8 as based on privacy interests and not property interest.⁸² The Court cited the much-

74. CANADIAN CHARTER § 24.

75. Paul Denis Godin, *A Comparative Study of the Exclusionary Rule and Its Standing Threshold in Canada, the United States, and New York State: The Relation of Purpose to Practice*, 52 U. TORONTO FAC. L. REV. 52 (Winter 1994).

76. *Regina v. Big M Drug Mart*, [1985] S.C.R. 295 (Can.).

77. *Id.*

78. See e.g., *Regina v. McDonough*, 44 C.C.C.3d 370 (Ont. D.C. 1988)(holding the defendant had standing to constitutionally challenge search of third person's car).

79. *Broderick v. Oklahoma*, 413 U.S. 601 (1973).

80. *Hunter v. Southam Inc.*, [1984] S.C.R. 145 (Can.).

81. *Katz v. United States*, 389 U.S. 347 (1967).

82. *Hunter*, [1984] S.C.R. 145, at 159.

used *Katz* standard approvingly, and has imposed the standard of this case as useful when construing section 8 protection.⁸³

In most instances, standing issues represent another contrast between the provisions of the American constitution and Canadian Charter. They also present another example of why Canadian courts should resist the temptation to blindly apply American rules to Canadian constitutional challenges.

D. Search and Seizure and the Exclusionary Sanction

When issues involve search and seizure, and admissibility of evidence obtained in an illegal search and seizure, the two countries' systems also differ. As mentioned above, the Canadian Court, in its limited experience construing section 8, seems to believe that the section is similar to the rights protected by the Fourth Amendment of the United States Constitution. However, the two provisions are not identical. The crux of the contrast between the two lies in the remedial provisions of the two constitutions.

The remedy in illegal search and seizure situations in Canada is expressly contained in section 52 of the Canadian Charter.⁸⁴ This theory was confirmed in *Regina v. Collins*⁸⁵ in which the Court held that evidence illegally obtained should be excluded, and that such exclusion is expressly provided for by section 24 of the Charter.⁸⁶ Exclusion of such evidence in the United States stems from judge-made law, and no express remedial provision is present in the United States Constitution. Further, in Canada, exclusionary sanctions are seen as protection of the integrity of the justice system, while in the United States the theory is that exclusion is used as a deterrence to police misconduct.⁸⁷

Section 24 prescribes a discretionary exclusionary rule under which a court may exclude evidence if its admission "would bring the administration of justice into disrepute."⁸⁸ *Collins*, the definitive case in this area, breathed life into the remedial provision of section 24.⁸⁹ It set up a three part balancing test of factors to which American courts give little

83. *Id.*

84. CANADIAN CHARTER § 52.

85. *Regina v. Collins*, [1987] S.C.R. 265 (Can.).

86. *Id.* at 266.

87. Jonathan Dawe, *Standing to Challenge Searches and Seizures Under the Charter: The Lessons of the American Experience to Canadian Law*, 53 U. TORONTO FAC. L. REV. 52 (Winter 1994).

88. CANADIAN CHARTER § 24(2).

89. *Collins*, [1987] S.C.R. 265 (Can.).

or no weight.⁹⁰ Under the *Collins* test, the Canadian courts weigh the nature of the evidence, the prejudice of the forced contribution of the evidence against the accused, and the seriousness of the rights violation.⁹¹ This test also requires that after evidence is shown to be illegally obtained, the defendant must show that admitting the evidence will bring the administration of justice into disrepute. Judges in Canada can also use this balancing test to factor in such elements as probative value and need for evidence.⁹² This is contrary to the American position on excluding evidence obtained in violation of the Fourth Amendment.

The Canadian approach has advantages over the American approach. While the Fourth Amendment addresses individual rights, remedies are societal. The Supreme Court must therefore apply inconsistent Fourth Amendment theories to rights and remedies.⁹³ Such inconsistency theoretically will not exist in Canadian exclusionary cases. This position is furthered because of the express provision and the Court's subsequent interpretation in *Collins*. Further, because of the express nature of the remedy, there seems to be no danger that the exclusionary sanction will disappear in Canada. However, in the United States, because the sanction is judicially fabricated, it is possible that the remedy can be eroded by an anti-crime Supreme Court which may not be as willing to liberally read the exclusionary sanction into the United States Constitution.⁹⁴ A second advantage is the flexibility of the balancing test enunciated in *Collins*, but this advantage may be overshadowed by the American system which assigns definitive weight to factors like inevitable discovery.⁹⁵ Courts in Canada, while enjoying their flexibility, may be sacrificing the consistency of the American model.⁹⁶

III. CONCLUSION

The Canadian Charter of Rights and Freedoms is an infant compared to the two-hundred-year-old United States Constitution. While many of the provisions appear to be based on its American counterpart, there exist many differences. Because of the difference in the nature of the

90. *Id.*

91. *Id.*

92. Godin, *supra* note 73.

93. Donald L. Doernberg, "The Right of the People": Reconciling Collective and Individual Interests Under the Fourth Amendment, 58 N.Y.U. L. REV. 259, 283 (May 1983).

94. Godin, *supra* note 73.

95. *Id.*

96. *Id.*

Canadian Charter and the United States Constitution and because of differences in the two countries' theories regarding the relationship between the judiciary and government, constitutional jurisprudence must naturally develop differently in Canada than in the United States, notwithstanding the similarities in the two countries' culture and democratic governance.

In the domain of individual rights protection, the provisions in the Charter are more explicit than in the Constitution, and the infringement test is more concrete and more consistently applicable. Standing to challenge government action is awarded more liberally in Canada. Additionally, the exclusionary rule has different theories and systems in the two countries.

Canadian courts have the burden of developing constitutional guidelines to analyze their Charter's provisions while evading the added temptation of importing American theories into their decisions. However, Canadian courts have the advantage of interpreting a constitution which was drafted in modern contemporary times with contemporary considerations. In addition, important provisions are explicitly provided for in the Charter. These same provisions required two centuries of judicial development in the United States Supreme Court.