

Speech:[†] Unconscious Parallelism: Constitutional Law in Canada and the United States

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While I was honoured to be invited to speak to you today, this feeling was tempered by a concern about what to speak about. The content problem comes from my own experience. Early in my litigation practice, I progressively reached the conclusion that judges were not the best source on the law. Another group that shares that view are the court's law clerks.

So when choosing a topic to speak about I took into account the fact that this audience would be law students and academics—a group that, while tolerant, would not be too forgiving of carelessness, which presents a challenge. With that in mind, I thought a safe route would be a comparison of the Supreme Court of Canada with the Supreme Court of the United States. On that basis, I may be seen as being right at least half of the time. In highlighting some of the differences between the two courts and countries, there is no suggestion that either system is superior but that, by different routes, both have nurtured democracies that are examples to the world.

As neighbours, we share not only the border but essentially common values and beliefs. As well, the Supreme Court in each country is viewed as the ultimate protector of rights. Today I will outline some of our constitutional differences and use freedom of expression as an example of how we seem to arrive at an arguably satisfactory result by different means. There is a difference of opinion on the application of freedom of expression, yet each country considers it a basic and fundamental right. In part, the variance in

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approach is directly related to our citizen's perception of governments. To what extent is the government friend or foe?

The United States and its Constitution was created with the ringing affirmation of Jefferson's Declaration of Independence¹ after an armed revolution against the oppressive British government. By contrast, Canadian independence evolved through a series of legislative actions. In fact, the British North America Act of 1867² was only an act passed by the British parliament, but this served to grant Canada independence. No doubt the British government's willingness to grant increasing amounts of sovereignty to its remaining colonies was influenced by their earlier defeats in the United States.

This difference in our respective creations explains in part the view of government that our citizens have. The American view, formed by revolution, an armed fight for freedom from an oppressive government, is that governments are subservient to the citizens and they retain a suspicion of what and why government acts as it does. By contrast, Canada's relatively painless evolutionary constitutional development has resulted in a more trusting view of government. This may account for the general preference of Americans at large to want to be left alone to solve their problems, while the Canadian usual reaction to problems is to turn to the government for solutions.

Article III of your Constitution calls for the creation of a Supreme Court, and defines the matters over which that court has jurisdiction.³ In Canada, the British North America Act (our Constitution) simply gives the power to the federal government to create a "General Court of Appeal for Canada."⁴ One difference in the court's role is that yours was born of the Constitution while ours was legislated.

The Supreme Court of the United States began sitting in 1790 shortly after the country came into being. In Canada the government waited eight years until 1875 before passing the legislation required to create the Supreme Court of Canada, and waited another seventy-four years (1949) before eliminating appeals to the privy council in

1. THE DECLARATION OF INDEPENDENCE (U.S. 1776).
2. Constitution Act, 1867, 30 & 31 Vict. Ch. 3 (U.K.).
3. U.S. CONST. art. III.
4. Constitution Act § 101.

England and making our Supreme Court the final Canadian court of appeal. Obviously, Canada felt no urgency, instilled in part by our painless gaining of independence.

The foundation and form of the Canadian Constitution will illustrate some differences from America's. Canada became independent by the British North America Act of 1867, which, as stated, is only an act of the English parliament but has been thought of as our Constitution. The important sections are sections 91 and 92,⁵ which contain the division of powers between the legislatures of the provinces (states) and the federal government. Unlike the U.S., the residual power in Canada belongs to the federal government. You have achieved the same result by leaving the residual powers with the states, but by judicially interpreting the Commerce Clause⁶ to in fact create a more powerful federal government here than in Canada.

In 1982, we adopted a Charter of Rights,⁷ which parallels your Bill of Rights. However, there are three significant differences. The first difference is section 1, which provides that “[t]he 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.”⁸ Thus, the government can act in a manner inconsistent with a right or freedom guaranteed by the Charter so long as that governmental action can be demonstrably justified in a free and democratic society.

The second difference is section 24(2), which provides that:

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.⁹

5. Constitution Act §§ 91, 92.

6. U.S. CONST. art. I, § 8, cl. 3.

7. Canadian Charter of Rights and Freedoms, Constitution Act, 1982, pt. I, Canada Act, 1982, ch. 11, sched. B (U.K.).

8. *Id.* § 1.

9. *Id.* § 24(2).

This is an interesting provision because evidence obtained in a manner, which violates a Charter right is not automatically excluded. Rather, it is only excluded under section 24(2) if it can be shown by the prosecution that, having regard to all of the circumstances, the admission of that evidence would (or could) bring the administration of justice into disrepute.

Finally, section 33 provides a legislative override whereby the federal or provincial government can declare that an act shall operate notwithstanding certain Charter rights.¹⁰ Therefore, in addition to the limitation found in section 1, certain Charter rights and freedoms are subject to the legislative override in section 33, or, as it is sometimes called, “the notwithstanding clause.” This override provision is limited to only certain rights and freedoms. It can be used to override the Charter’s equality rights, legal rights, and the fundamental freedoms of expression, religion, association, and assembly. It does not extend to mobility rights nor democratic rights. As well, a section 33 override will only remain in effect for a period of five years, unless renewed.

Some commentators have seen this provision as a reconciliation between entrenched rights and the tradition of parliamentary supremacy. Others have said that section 33 can lead to a tyranny of the majority, and with that there is no Constitution. Experience has shown that the feared tyranny has not occurred. To date, no federal government has relied on section 33 and it is considered a death knell if it did.

The mere mention of section 33 can arouse a public outcry. For example, in 1998, the government of Alberta suggested that it would use section 33 to protect legislation, which would limit compensation available to victims of a forced sterilization scheme. However, this suggestion drew widespread criticism and the government subsequently withdrew its proposal. Therefore, for the time being at least, we can say that section 33 lays dormant.

It has also been suggested that the present U.S. Constitution has provisions that may have operated similarly to Canada's section 33. This suggestion was raised in an article in the Michigan Law Review,

10. *Id.* § 33.

which compared section 33 of the Canadian Charter with the provisions of the U.S. Constitution authorizing Congress to control the jurisdiction of the federal courts, including the Supreme Court.¹¹ Although these provisions are structurally different, the author argued that the U.S. provisions “[b]roadly interpreted . . . might foreclose judicial consideration of constitutional challenges to legislation, just as section 33 does.”¹² However, as I understand it, the American power to regulate jurisdiction has never really served as a significant limit on the power of judicial review.

I should also note in passing that section 35 of the Charter constitutionally recognizes and affirms existing aboriginal and treaty rights of the aboriginal peoples of Canada.¹³ Unfortunately, after more than twenty years the reconciliation of difficulties has not been resolved by section 35, in spite of hopes to the contrary.

The fact that the founders of Canada were willing to leave it to the federal government to pass a law to create a Supreme Court while the founders of this country felt it was necessary to entrench the existence of such an institution in the Constitution itself is further demonstration of the different levels of trust in government. Regardless of the form of our relative births there is no doubt that both courts are, are seen to be, and act as a third level of government, a task performed independently and not always to the satisfaction of the government.

Both courts have nine judges appointed by the federal government. Unlike your court, we have mandatory retirement at age seventy-five. I must say that the arguments usually used to support mandatory retirement, particularly those about diminishing mental capacity, become less persuasive to me as seventy-five approaches.

The appointment process is different. In Canada, the Prime Minister’s appointments of judges are not subject to the consent of Parliament. The media would prefer your public hearings. Our new Prime Minister has expressed interest in the media’s insistence on a

11. Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245, 274–97 (1995).

12. *Id.* at 285.

13. Canadian Charter of Rights and Freedoms § 35.

public hearing. The critics of reform say why fix a non-existent problem.

The present system, while not public, involves wide consultation by the Justice Department prior to the Prime Minister's selection. A serious problem with public hearing is to avoid the extremes of personality and yet acquaint the public with the proposed nominee.

An attempt to do this was recently made with the last two appointments. In spite of various parliamentary commissions, the upshot was that the appointment was made as usual by the Prime Minister, and the Minister of Justice then went before a parliamentary committee to explain the choice. This hybrid process did not satisfy anyone. However, the Prime Minister has said this is just the beginning. As I am likely the next to retire from the Court, my replacement may be the product of the new method of selection. Even allowing for improvement in process, it is hard for me to imagine an improvement in quality.

Despite the differences in the creation and appointment process of judges, both courts are watch-dogs required to determine when the executive or the legislative branch of the government has erred or exceeded their jurisdiction. The actual work of both courts is very similar. Here, a litigant files a "petition for certiorari," and the Court has control over which cases are heard. In Canada, the Supreme Court is a court of general jurisdiction and the parties file an "application for leave." In each court, leave to appeal must be obtained. As it is thought that work expands to fill the time available, consider that the United States Supreme Court receives approximately 7000 applications and we get close to 700, yet both hear about seventy to one hundred cases a year.

While differences exist between us, we share common values but come to conclusions in different ways. An example of that is freedom of expression. Both of us value freedom of expression. It is properly viewed as a cornerstone of a free society. Both countries are in favor of unrestricted use of that freedom, particularly for those ideas with which they agree. For those views with which they disagree, restrictions might be more palatable.

The power of words, ideas, and images has been repeatedly demonstrated throughout history, as has the violent opposition that has greeted those ideas that challenge the status quo. Numerous

examples exist, from the treatment of Socrates' criticism of the gods, to the assassination of Martin Luther King for his views on civil liberties. While the first person to challenge existing views has often suffered and perished for their efforts, the power of their ideas lives on. Galileo was forced to recant his theories of astronomy during his lifetime, but astronomers have since relied on his correct ideas. There is no doubt that freedom of expression fosters ideas and changes. Debate ensues, new ideas emerge, and our democracies improve. The challenging question is whether any limits on freedom of expression should be allowed? And if so, what limits?

The courts of both countries have said yes—some limits are acceptable. But the location and extent of those limits varies, not only between countries, but over time within each country. The framework within which each court addresses these questions may, in part at least, be traced back to the different views of government that I spoke of earlier.

In the United States, freedom of expression is protected by the first amendment. Passed in 1791, it provides:

*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; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.*¹⁴

In Canada, freedom of expression was historically protected only by the common law. In 1982, the Charter of Rights and Freedoms became part of our Constitution and section 2 reads in part: "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion; (b) freedom of thought, belief, opinion and expression, including freedom of the press and other means of communications."¹⁵ As can be seen from those two sections, the approach to protecting that right in the two countries is different. In Canada, the right is given to the citizens, while in the United States, you limit the power of Congress to take away that right.

14. U.S. CONST. amend. I (emphasis added).

15. Canadian Charter of Rights and Freedoms § 2.

In assessing the legislative differences, section 1 of the Canadian Charter, which I mentioned earlier, enables the government to take an action that infringes a right or freedom so long as the impugned act can be demonstrably justified in a free and democratic society. Section 1 has played a role in Canadian jurisprudence on freedom of expression.

Hate speech is a particular aspect of freedom of expression that is dealt with differently by our respective courts. In the United States, the present approach of the Court is to say that government cannot ban certain types of speech based on their content. But this is a relatively recent development. As recently as 1952, the United States Supreme Court upheld¹⁶ an Illinois criminal group libel law which prohibited the exhibition in any public place of any publication portraying “criminality, unchastity, or lack of virtue of a class of citizens, of any race . . . which . . . exposes [them] . . . to contempt [and] derision . . . or which is productive of breach of the peace or riots.” The categories of unprotected speech included the lewd and obscene, the profane, the libelous, and the insulting or “fighting words,” words which cause harm or are likely to provoke a violent confrontation.

But over time the U.S. Supreme Court has shifted its position on the limits that can be placed on hate speech. In 1978, the Seventh Circuit Court of Appeals in *Collin v. Smith*¹⁷ struck down an ordinance forbidding the dissemination of any material promoting and inciting racial hatred. The Supreme Court refused to hear the appeal, and the result was that neo-Nazis were allowed to march through the predominantly Jewish village of Skokie.

In 1992, your Supreme Court struck down the City of St. Paul’s “bias motivated crime ordinance” in *R.A.V. v. City of St. Paul, Minnesota*.¹⁸ The ordinance prohibited the display of a symbol that one knows “arouses anger, alarm or resentment in others on the basis of race, color, creed, religion, or gender.” The person charged in that case had, with a group of friends, taped chair legs together into the form of a cross and then burned it in the back yard of a black family.

16. *Beauharnais v. Illinois*, 343 U.S. 250 (1952).

17. 578 F.2d 1197 (7th Cir. 1978).

18. 505 U.S. 377 (1992).

In the decision for the court written by Justice Scalia, the fact that fighting words were not protected by the first amendment was recognized. However, Justice Scalia went on to hold that while a government could limit all fighting words, it could not selectively limit fighting words based on their content. He found that because the state had not limited all fighting words, but only those that offended particular groups, the ordinance was contrary to the first amendment. While innovative, I have trouble with this logic—that is my problem not Justice Scalia’s. The minority opinion would also have found the law contrary to the first amendment, but would have done so on the basis that it caught speech that only hurt feelings and therefore did not amount to fighting words. So, the majority thought the restriction was too narrow while the dissent found it too broad.

It is significant that some forms of speech are not protected by the first amendment. It is clear that even as the court in *R.A.V.* was narrowing the limits that could be placed on expression, they were still not willing to concede that limits could never be placed on expression.

In Canada, the jurisprudence on hate speech demonstrates how section 1 of the Canadian Charter, which allows a government to justify an infringement of a constitutionally protected right, has allowed the Canadian courts to develop a different approach to freedom of expression. The leading Canadian case regarding restrictions on hate speech is *The Queen v. Keegstra*,¹⁹ where the court was asked to review section 319 of our criminal code. That section made it an offense to “unlawfully” promote hatred.

Keegstra was a rural high school teacher who described Jewish people as “revolutionist, treacherous imposters, sneaky, manipulative, money-loving and power hungry” in the high school history class he taught. He also denied the holocaust, saying it was a fraud. He gave good marks only to those students who repeated these views.

Keegstra was charged under section 319 and convicted by a jury. However, the conviction was overturned by the Alberta Court of Appeals, which held that section 319 violated the guarantee of freedom of expression in the Charter.²⁰ The Supreme Court of

19. [1990] S.C.R. 697.

20. [1988] 43 C.C.C.3d 150

Canada allowed the appeal and restored the conviction.²¹ The court held that section 319 did limit Keegstra's right to free speech, but that the limit was justifiable under section 1.

You will note that, unlike in the United States, the court did not need to linger on whether this type of speech was protected in the first place. In Canada, all expression that attempts to convey a meaning is protected by section 2(b).²² The Supreme Court of Canada is able to maintain this broad protection because section 1 provides an express method for the court to consider whether an infringement of rights is justified.²³ In *Keegstra*, the majority of the court decided that the government had provided sufficient evidence to prove that the limit in question was justifiable in a free and democratic society.

As these two cases demonstrate, the actual protection given to similar speech can vary between the two countries. Nevertheless, it is clear that both countries value freedom of expression as an important right. It is also clear that in both countries, the Supreme Court has accepted that some limits on this right will be allowed.

The courts acknowledge these limits in different ways. In the United States, it is done by deciding that some expression was never intended to be protected by the first amendment, and limits are placed on the time, place, and manner of expression, but not on the content. In Canada, all expression that attempts to convey a meaning is protected, but the government can restrict a citizen's right to that expression if can justify the limit.

These differences have not gone unnoticed by the lawmakers in each country. One does not need to search long to find examples where a law before the court was clearly passed with previous freedom of expression jurisprudence in mind.

Jurisprudence has followed that qualification. In *Hill v. Colorado*,²⁴ the United States Supreme Court found a restriction of expression valid with respect to a law that restricted expression, but did not curtail it. The Canadian Supreme Court, by virtue of section 1

21. *Keegstra*, [1990] S.C.R. at 795-96.

22. Canadian Charter of Rights and Freedoms § 2(b).

23. *Id.* § 1.

24. 530 U.S. 703 (2000).

of the Charter, found little difficulty in recently restricting individual political spending during an election campaign.²⁵

CONCLUSION

Canada and the United States took different paths on the road to sovereignty. This is reflected in the institutions we created to govern our countries and the protections from government action included in our Constitutions. But over time, our geographical proximity has overcome many of these differences and we have come to share many of the same values and beliefs. One of these embraced beliefs is in the rule of law.

My goal today was to simply describe how two Supreme Courts, using different approaches, struggle with one of the many issues they face each year. I hope that it has been demonstrated that while the result in certain isolated cases may be different, the goal of each Supreme Court is the same. That goal is to allow the government the opportunity to govern, while protecting the citizens from laws that go beyond the jurisdiction of government. In striving towards this goal, courts are forced to balance competing interests in close cases where many find it difficult to say what is the right decision.

But too much of this talk has been devoted to the courts. And while they are, in a manner of speaking, the last stop, the rule of law depends more directly on lawyers. That is the future of many of you, and I urge you to follow the many examples of the American bar and vigorously inform and courageously continue the struggle to ensure the quality of the law and that no one is above it.

25. Harper v. Canada, [2004] S.C.R. 827.