

# **From Natural Rights to Actual Rights with an Examination of the Canadian Charter of Rights and Freedoms.**

**Yes, you can get from here to there**

By

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How do we move from the Natural Rights argument to a system of rights that is clear and unambiguous.

The "Natural Rights" argument begins with the assertion that whatever right is being discussed spontaneously occurs in a natural state or in the case of the religious that some deity bestowed this right as part of the creation process. In the first assertion, it is given to be axiomatic that in the absence of society that these rights exist. For such a statement to be true, these rights should be able to be demonstrated to exist at all times. A "right" is a duty or obligation to either refrain from or act to. In the absence of society or human presence, can such a duty or obligation be demonstrated or proved? Let us look at a single person who builds a house. No other human is in the world. According to the "natural rights" theorists, he has a right to any property that he accumulates through his own efforts. Since he is alone, we can dispense with the "unless such efforts violate the rights of others." exception.

Our solitary man builds a house, encompasses the immediate land surrounding the house within a fence and calls this land and house...property.

According to the "Natural Rights" theorists, he has established a claim to property and this property is protected by the natural right of property. If a storm or flood or any other natural occurring event destroys his property he should, if the natural rights argument is to hold together, have a claim against the force wielder that destroyed his property. If we ignore deistic mythology for the moment, who has wielded force against him? Nature...the apparent granter of the very rights that he supposedly has.

Since he has a claim against Nature, he now can enforce this claim and gain restitution or compensation from Nature. Or can he? Who or what does he lodge this complaint against? The storm? No. The storm was only the agent of force and obviously has disappeared(ended). The initiator of the storm? If we take the scientific cause of storms, he has a atmospheric pressure differential that he can blame. Wonderful... we have a

culprit. Wait...we have a problem. That differential likely has equalized, since the storm has ended. So our search continues.

On the other hand, if we invoke deities or even a single deity, we still have a problem. How does one sue a deity? Can one expect due compensation from a deity? Can one prove that said deity exists? And who do you approach to gain a judgement against this deity?

This is where the "Natural Rights" theory falls on its face. It is not constant and only works with the introduction of people interacting. This alone is enough to demonstrate that rights are not natural in origin. If they were, they would pre-exist man and would function without human interaction.

Even in the presence of human interaction, such rights can be non-existent. If our solitary man suddenly meets a second man, who claims the property and forces the first man from the enclosed land, who will enact judgement against the so-called "rights violator?" A part of the problem is still missing. The "objective" third party who weighs the evidence and passes judgement. Even if such a third party exists, does this create a natural right? The answer must still be no. For if it was natural, it ought to follow that once judgement has been passed, that restitution must follow. Again, this is not true. For if the second man refuses to heed the judgement and destroys both the first man and the third party, no restitution will be forthcoming.

So.... How are rights created? Through consent. The only rights that can be truly considered as valid are those arrived at through consent between voluntarily agreeing individuals. Since it is the action between two rational and consenting people that create rights, we can state unequivocally that rights are man-made and are a form of contract between people. Without this agreement or contract, there is no rights but what the philosopher Hobbes called, a state of nature. In order for each person to escape the state of nature and to maximize their liberty, it is in their best interests to reach agreement with others to refrain from using force against each other.

## **Out of Hobbes' State of Nature**

How does agreeing to refrain from initiating force maximize their potential liberty? With such an agreement, each person has less need to devote resources to defending themselves or their possessions. Once the agreement has been made to refrain from initiating force against each other's person, the next logical step is to agree to refrain from initiating force against each other's possessions. Or in other words, since possessions can not reach agreement with humans, to refrain from initiating force against others by refraining from taking their possessions.

These two agreements establish the right of liberty and the right of property. One follows from the other. From there, any other rights can be drawn, both positive and negative rights. Neither positive or negative rights can be an infringement on liberty since those rights are only valid between those who have consented to the establishment of those rights.

## **What is moral behaviour?**

Objectivists and their "Natural Rights" libertarian cousins often refer to certain actions as being moral or just. What is moral behaviour and how is it determined to be moral? Morals are by agreement. One may believe that a certain action is moral (meaning that one believes that said action is the right thing to do) yet without agreement from others, such a belief has little impact beyond oneself. Once agreement between two people has been reached on what is right, then between those two people and anyone else they can convince to agree with them those specified actions become moral actions. Without agreement, any interaction or action is amoral.

By entering into agreement with other consenting persons, one agrees that actions defined in the agreement become moral or immoral.

## **Can one enforce morality on non-consenting people?**

One can either ignore or use force on non-consenting people. If they do not consent, enforcing "morality" is initiating force against them. Note: "Initiating force", not "initiating aggression". Since aggression is a moral determination, in an amoral state there can be no aggression. If one holds that initiating force against others is wrong, then one logically can not enforce morality against those who have not agreed with you. From a libertarian perspective, this means that a libertarian who agrees that it is wrong to initiate force, agrees that those who choose voluntarily to live in a society that acts as a collective may do so and should not be interfered with. OTOH, those who disagree and wish to leave the collective may be assisted in their efforts.

## **The Canadian Charter of Rights and Freedoms, and how it fits into this discussion**

I shall now examine Canada's Charter of Rights and Freedoms to see how it fits in with the discussion above, and later show how properly written and with an eye to consent be made into a document that is, from a moral philosophical view, rigorous to withstand any erosion over time.

In the case of Canada's Charter of Rights and Freedoms, it is hard to say that they were an agreement voluntarily entered into by Canadians. They were discussed between a group of politicians and proclaimed by the government without the option for the citizen to enter into the agreement or reject the agreement. Thus there was no real consent and since, as will be shown, the government can at its pleasure remove or restrict those "rights" unilaterally, it is not a contract with both parties being equal in the agreement. An examination of the "Charter" formally known as the Constitution Act of 1982 Part 1 begins with the following statement:

*Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:*

A simple enough statement, that give prima facie recognition to a deity and to the rule of law. The flaw will be shown later, in the small print, as the insurance business says.

Next we have a Guarantee offered.

## ***Guarantee of Rights and Freedoms***

- 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.*

Keep your eye on that underlined section, it is a gotcha clause.

Next are enumerated the Fundamental freedoms that we are supposedly guaranteed:

- 2. 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 media of communication;*
- (c) freedom of peaceful assembly; and*
- (d) freedom of association.*

All very reasonable sounding and no one would dispute that these are desired and admirable freedoms. Who would want to infringe on the rights to think or believe or to hold with a religion or conscience? The right to assemble peacefully is very useful and paramount to freedom, as is the right to choose whom you wish to associate with. After

all, would you want to the government to tell you with whom you can be friends with, or work with?

The catch of course is that problematic clause “*reasonable limits prescribed by law*”. The Courts and the government have both inserted themselves into those “fundamental freedoms” through legal and legislative decisions. Fundamental means basic or essential in my dictionary. One would think that those essential freedoms would not be easily tampered with, yet those rights are the ones which the courts have intruded heavily into with all manner of caveats, and the government has created, through legislation, quasi-legal tribunals and commissions that make their own determination as to what limits and exceptions they will limit the citizenry to in an attempt to bring “equality” or “fairness” to society. And the word “reasonable” has become very elastic in meaning along the way.

The Human Rights Commissions have long held that offending someone could be called hate speech, an execrable phrase that has little meaning other than to say that words that describe an emotion can be banned from the public square.

The other freedoms have been under attack by Human Rights Commissions as well. Remember how the Charter document describes how Canada is founded on principles that recognize God? Apparently that has been now dropped, as any town councillor or school trustee can find themselves under attack for uttering anything with a religious connotation while at a public meeting, unless, of course that utterance is in reference to his stumbling or slamming his fingers in a door. Which is curious, since if the principles of the country are founded on a deistic belief, how can the deity be banned from the public square? It has, and not for “hate speech” reasons, but for a reason even more pathetic. The reason given by tribunals? That others, that either do not hold with religion, or belong to another religion, may be uncomfortable. So much for religious freedom. Freedom of expression has long been targeted by the tribunals and it has only been in the last year, that the government has acted to pass legislation that would permit free expression on blogs and websites in Canada. This legislation has been held up in the Senate for weeks now, awaiting final passage. Freedom of conscience has also been attacked and outlawed in some provinces, particularly if it relates to contraception or abortion. As for Freedom of Assembly, that has been proscribed for those who oppose abortion. They may gather, but not within certain distances of abortion clinics, and many of our universities ban student groups with those beliefs from being on campus.

So, looking back at those four fundamental freedoms, each one has been limited or banned in some form or another, which does not speak well of the regard for liberty by the courts, legislatures or their appointed tribunals.

One fundamental right that we have had, under common law, was the right of property. The observant will note that this right is not listed anywhere in the document. This was an act of deliberate omission, as it was there in the draft, but to appease the socialists at the table, the intellectually and morally dishonest Prime Minister, Pierre Elliot Trudeau

agreed to delete that right.

The section entitled democratic rights has had little interference by the intrusive trio and so I will skip discussion of them. Ah, mobility rights, how could anyone intervene with them? You can, as a Canadian citizen, leave remain or enter back into Canada. You also may move from province to province. Fair enough. No argument there, and no real challenges by the intrusive trio as I noted save for a few issues that I note below.

## **Mobility Rights**

- 6. (1) Every citizen of Canada has the right to enter, remain in and leave Canada.
  
- (2) Every citizen of Canada and every person who has the status of a permanent resident of Canada has the right
  - (a) to move to and take up residence in any province; and
  - (b) to pursue the gaining of a livelihood in any province.
  
- (3) The rights specified in subsection (2) are subject to
  - (a) any laws or practices of general application in force in a province other than those that discriminate among persons primarily on the basis of province of present or previous residence; and
  - (b) any laws providing for reasonable residency requirements as a qualification for the receipt of publicly provided social services.
  
- (4) Subsections (2) and (3) do not preclude any law, program or activity that has as its object the amelioration in a province of conditions of individuals in that province who are socially or economically disadvantaged if the rate of employment in that province is below the rate of employment in Canada.

Ah, another gotcha. The charter states that if a province wishes to, it can discriminate on who can move if the object is to ameliorate the conditions of individuals who find themselves socially or economically disadvantaged if the rate of employment is below the rate of employment of Canada. However, this one is not that drastic and really is not an issue, since it boils down to a province being permitted to not allow workers into the province if there is not enough work for those already resident in the province. Most people are not going to look for employment in a province that is already bereft of jobs. People tend to move to places of opportunity, not to spend their resources looking for work where there is none.

There is one place, not noted in the charter as being permissible, where the courts and legislature have intruded into Mobility rights. That is in the revocation of passports and/or driver licenses of those individuals, mainly men, who have had the misfortune of falling into the hands of various government operated family support payment programs. Often through no fault of their own, they can be ruled delinquent in payment and have these documents ordered revoked by these programs. In fact, there have been cases where the office ordering the revocation has been at fault, through their mismanagement of paperwork, or failure to note that payments have been made. In other cases, sudden unemployment may have made people unable to make payments, and before the arrears can be made up, a revocation order has been made.

The section Legal Rights has been honoured and needs no comment, so again, I will skip it and move on to Equality Rights. This is a section, that like the Fundamental Freedoms, has been constantly tinkered with and turned upside down, as permitted by the gotcha clause. Section 15.1 sounds laudatory and is quite clear. Section 15.2 then permits section 15.1 to be ignored if the legislature desires to effect certain social goals, which every government or tribunal has seen fit to do. Therefore making a complete mockery of the right.

## **Equality Rights**

- 15.(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.
- (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (84)

I'll just skip the section on language rights as that can of worms has been distorted, misused to the point where the original "rights" can no longer be said to exist.

Skipping down to Section 26. In other words, the guarantee is about as good as useless if the courts say so.

26. The guarantee in this Charter of certain rights and freedoms shall not be construed as denying the existence of any other rights or freedoms that exist in Canada.

Section 27 Another Gotcha Clause. The charter is subordinate to the enhancement of

multiculturalism.

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Section 28 Sounds fair. Fooled you. Everything is guaranteed equally to males and females. Don't bet on it. Courts have routinely made a mockery of this in Custody and Domestic Violence cases.

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

Section 29 Is routinely violated by the provinces which push curriculum changes on private or separate schools and even tell Catholic schools that they must support gay clubs within their schools, even though homosexuality is a sin within the Catholic church. All in the name of equality, of course.

29. Nothing in this Charter abrogates or derogates from any rights or privileges guaranteed by or under the Constitution of Canada in respect of denominational, separate or dissentient schools. (95)

In the next section I examine how this twisted piece of baffle gab can be rebuilt into a meaningful enumeration and protection of rights through moral philosophy and intellectual rigour.

## **How do we get out of this mess?**

First, understand that the Charter of Rights and Freedoms, which I affectionately refer to as The Charter of Privileges and Permissions was a creation by politicians who sought to create a rights document that would be still easily altered for political purposes. In this, they succeeded. What they did was foist upon Canada a document that is essentially worthless at protecting the rights that Canadians have always had under our legal system based on English Common law with its' unenumerated rights that go back to the Magna Carta.

To get out of this mess, it would seem best to present to the citizens of Canada a document that would be publicly examined by all interested members of the voting public. At that time, a period of consultation would take place where all would be able to submit what they would desire to see protected as rights and the government of the day would counter with what they would like to see protected along with whether these rights should be negative or positive rights. This would go on, until there was agreement in principle as to what should be protected rights. At which point, a referendum would be called and a subsequent vote would allow for the citizens of the country to affirm their agreement and support for these rights. This would then become a covenant or contract between the citizen and the state. Afterwards, those who voted not to accept the agreed upon rights would have the opportunity to ratify the agreement and join the covenant or to opt out and remain outside the covenant. How they would be dealt with would be, by necessity, worded in the covenant.

## **Negative and Positive Rights, why one or the other?**

This is what gives the rigour that we should seek in such an important contract between state and citizenry.

First off, we have to establish what exactly is a right. A right is always “against” some person or persons. Specific rights are against specific persons, such as when you purchase a vehicle. The seller is obligated to deliver the vehicle upon receipt of payment from you. In this case, we are interested in general rights, that is rights that apply to all people. An example of this would be a right to life, that at a minimum prohibits people from killing you, and you from killing them. Rights in the general sense are conditions that everyone's interests benefit by protecting them.

A right, is then essentially a ground of duties or obligations on the part of others in relation to the right-holder. Those that entail only duties to refrain are known as negative rights. Rights that not only call upon others to refrain from preventing or interfering but call on others to assist or help are known as positive rights. The practical difference between the two is that a negative right imposes no costs upon others, while a positive right that calls upon others to assist, impose costs of time, resources or money upon those others. Positive rights, because of their implied duty on others to provide assistance are problematic when dealing with a state, since the state has the power, the ability to use force to impose costs on others to assist those who claim the right for something or other. These are also the rights that activists, whether in a legislature or sitting on a judicial bench can use to manipulate society into changes that they (the legislature or judiciary) seek. In fact, I would argue that they simply beg for people to use them for manipulative purposes. Whereas a negative right simply states that people refrain from doing something. This makes it difficult to manipulate or to be used to coerce people. Since the proclaiming of the Charter, our charter rights have been viewed as either positive or negative rights by various courts, an inconsistency that has led to

further cases being heard, and a lack of clarity for future decisions. This lack of clarity and consistency has made it easy for activist type members of the judiciary to shift laws to favour particular political views.

## **Examining the Canadian Charter and how it would work if based on negative rights.**

Let's look at the fundamental freedoms as expressed in the Charter.

2. *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 media of communication;*
- *(c) freedom of peaceful assembly; and*
- *(d) freedom of association.*

Expressed in the form of negative rights, they would read as follows.

Everyone has the following fundamental rights:

- *(a) the right of freedom of conscience and religion;* no one could tell you what to think or believe or force you to act against your conscience. At the same time, you would be expressly forbidden from imposing your religious views on others without their consent. EG one could believe that gays should not be permitted to marry, one would be forbidden from preventing their marriage. One could believe that abortion is wrong, one would also be forbidden from blowing up abortion clinics or physically obstructing people trying to enter such a clinic. One could still protest outside the clinic's property but not obstruct.
- *(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;* One could say gays will go to hell, in the public square without being hauled off to a tribunal, but not to say that all gays should be killed or harmed. At the same time, others could stand in the same square, and call you a loon.
- *(c) freedom of peaceful assembly; and* This would permit any group of people to assemble to protest or to support a particular view, whether a local sports club, a political decision or what have you. The duty would also prohibit said group from interfering with a group that holds the contrary view from assembling in the

public square.

- *(d) freedom of association.* This would allow anyone to voluntarily join a club, union, political party etc, but the same freedom would also enjoin groups from forcing people to join their club, union or political party.

The reader will note that I did not include the part 1 of the Charter, the Guarantee which I have shown to contain the gotcha clause of reasonable limits prescribed by law

*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.*

This, in a negative rights based charter could be rephrased as *The Canadian Charter of Rights and Freedoms recognizes the duty of all, government and citizen to refrain from the initiation of force.* No more gotcha clause, the only time government or citizen is justified using force is to prevent the violation of a right. For example, the government could and should use force, in the form of police, to prevent a robbery or physical assault. The citizen would be able to use force to defend his rights as well, but not initiate force in order to violate some others rights. All this gets us to the point earlier in this essay where I discussed leaving Hobbes' State of Nature and entering into a civil society based on mutual respect for each other's rights.

The problem with our current Charter is that even if expressed using negative rights as a basis, it lacks something, and that is property rights. Property rights protection is necessary in a free society, as without it, a person has no claim against a state entity choosing to dispossess a person's property. Even for the public good and with a payment in exchange, as in the exercise of eminent domain, is not satisfactory, as such an action is unilateral, something that is not part of a free society. One would not be happy if someone entered your home, walked off with, say your computer and on the way out, handed you \$10.00 for your inconvenience. I will next, show how a negative rights based Charter of Rights could be written, one that protects the individual from the state, yet allows the state to govern and protect the citizens of the state. And show that in a state of negative rights, that there need be no differentiation of civil and criminal law, as any act of aggression would be seen, not as a violation of law, but a violation of rights.

## **An Example of a Charter of Rights based on negative rights**

1. *A citizen has the right to his autonomy, self-expression, conscience and religion.*
2. *The right of property is recognized and protected.*

3. *A citizen has the right to be safe from the actions of others.*
4. *The right to autonomy shall not be abridged save where it would conflict with the right of a person to be safe from the actions of another.*
5. *The right to be safe from the initiation of force by others including the state gives the citizen the right to self defence, including the right to keep and bear arms.*
6. *The State shall endeavour to protect the citizen from attack from others by maintaining such defensive forces as necessary and that the citizenry is willing to pay for.*
7. *The State shall not, by way of force or coercion, demand tribute or fees beyond what is required to protect the rights of the citizenry and whatever services that the citizenry wishes the state to provide.*
8. *The citizen has the right to a legal system and laws for redress of any rights violation.*
9. *The State shall protect the rights of the citizen from within as well as from without the state. This form of protection means the State shall ensure that such laws that are enacted shall not infringe upon the rights of citizen.*
10. *The State shall only have such authority as granted to it by the voluntary wishes of free men. This authority may be revoked by the community or individual at any time.*

That a negative rights oriented Charter would be better and more stable can be shown by comparing the US Bill of Rights and Constitution to our Charter of Rights and Freedoms. The US Constitution has withstood meddling virtually untouched for over two hundred years, whereas, our Charter has resulted in the imposition of star chamber style tribunals and commissions in the short time and the growth of government intrusion into people's lives in the short span of 30 years.

## **Sources**

I drew upon several books for the background theory and for some examples for this essay. They are as follows:

*Jan Narveson Moral Matters, Broadview Press 1993*

*Jan Narveson The Libertarian Idea Temple University Press 1988*

*Tibor Machan Two Defences of Liberty*