

The Right that Dares not Speak its Name

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"Protecting the Constitutional Freedoms of Canadians"

The Right that Dares not Speak its Name

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About the Canadian Constitution Foundation

The Canadian Constitution Foundation is a registered charity, independent and non-partisan, with a unique charter which allows it to engage in litigation. The CCF receives no funding from governments. We rely on the voluntary contributions of Canadians to carry out our legal and education work. Our registered charitable number with the Canada Revenue Agency is **86617 6654 RR0001**.

Our Mission

We protect the constitutional freedoms of Canadians through education, communication and litigation.

Our Vision

We envision a Canada where:

- Every Canadian is equal before the law, and is treated equally by governments;
- There is freedom from fear and oppression;
- Canadians have the knowledge and motivation to recognize, protect and preserve their constitutional rights and freedoms;
- Individuals control their own destiny as free and responsible members of society;
- Governments are held accountable to our Constitution in making and applying laws, regulations and policies.

Our litigation priorities

Through education and public interest litigation, the Foundation supports:

- **Individual freedom** – the “fundamental freedoms” in section 2 of the *Charter*:
 - *freedom of association*;
 - *freedom of peaceful assembly*;
 - *freedoms of conscience and religion*;
 - *freedoms of thought, belief, opinion and expression*.
- **Economic liberty** – the right to earn a living, and to own and enjoy property, as part of the *Charter* section 7 right to “life, liberty and security of the person.”
- **Equality before the law** – the *Charter* section 15 should mean equal freedom and equal opportunities for all Canadians, special privileges for none.

The Right that Dares not Speak its Name

Introduction

Canadians seem to attach different connotations to the phrase “human rights” depending upon the geographical location of the events being discussed.

When we talk about human rights in Third World countries, we often mean something quite dramatic: the rights not to be silenced, arbitrarily imprisoned, tortured or even murdered by one’s own government. For instance, many Canadians urged our government throughout the decade 2000-2009 to raise with Chinese leaders the forced harvesting of donor organs from imprisoned members of the Falun Gong sect, currently a prominent blotch on China’s human rights record.

However, when most Canadians talk about human rights in western democratic countries such as Canada, the United States or Europe, they are generally referring to a government-granted entitlement to be free from discrimination by businesses on the basis of characteristics such as race or sex. In fact, every Canadian province has legislation forbidding employers, landlords and shopkeepers from discriminating against minority group members in the provision of jobs, rental housing, goods and services. These provincial laws all have the phrase “human rights” in their names.

But one subject rarely figures into Canadians’ discussions about human rights. These are economic rights—including the right to freedom of contract and the right to earn, keep and use private property. In fact, Canadian courts have repeatedly dismissed the notion that Canadians have economic rights—or at least any that are entitled to constitutional protection. Our courts have shown a willingness to literally define such rights out of existence. And since the decisions of our courts have such a powerful influence on public discourse, many Canadians have likewise come to believe that economic rights are either non-existent or unimportant.

The thesis of this essay is that economic rights, properly defined, are actually a crucially important subset of human rights. When economic rights are ignored by the state—or worse yet violated by it—no other human rights are secure.

To make this argument, we will first have to describe the characteristics of genuine rights.

Characteristics of Rights

Over the past several centuries, Western liberal democracies have ordinarily viewed the concept of a “right” as primarily a protective mechanism. A right is like an incorporeal wall keeping individuals safe from the interference of others. Our most

revered rights—to life, liberty, freedom of speech, and so on—have traditionally been interpreted as an entitlement not to be interfered with by others (including others acting in concert under the collective name of “government”). The right to life, for example, simply meant the right not to have one's life taken away—the right not to be killed by others. It did not traditionally include the right to require others to give one the means of sustenance.

In recent decades, however, there has been a trend towards re-defining rights to include much more than non-interference. People have started to speak of rights to specific forms of resources, such as health care, housing, education, food and so on. We can speculate on why these claims have been couched in the language of rights: perhaps in order to impart a sense of the importance that the speaker attaches to the claim, or perhaps to borrow the respect and dignity which has come to be attached to the concept of rights. However, claims of this kind are very different in nature from our traditional understanding of rights and can be distinguished in many ways. For our immediate purposes, claims of this kind will be referred to as “positive rights”, while traditional claims to non-interference will be called “negative rights.”¹

Positive and negative rights share one characteristic: it is impossible to claim either kind of right without simultaneously making an implicit statement about some other person's obligation. In the case of a positive right, the implicit obligation of others is to provide some advantage or some material object that is the subject of the rights claim. In the case of a negative right, the implicit obligation of others is to refrain from taking away or interfering with the subject matter of the rights claim. In either case, however, an obligation is implied.

One important difference between negative and positive rights is that the former can be fulfilled regardless of time, place and technology, while the latter depend heavily upon the economic, environmental and technological conditions in which the rights claimant finds himself. A right not to be interfered with was as capable of fulfilment in prehistoric times, and in any corner of the globe, as it is in Canada in the year 2010. A right to food, however, could not be fulfilled in Ireland during the potato blight. It could not be fulfilled in many places and times, during droughts or floods or famines. It is only in the past half-century that improvements in agricultural and transportation technologies, plus widespread increases in prosperity, have made it possible even to contemplate a guarantee of universal food.

A second distinction between the two types of rights is that the fulfilment of a negative right requires nothing more than an act of will on the part of other human beings. If each of us simply agrees that he or she will not kill other people, then everyone's right to life is assured. This is not the case with a positive right. No amount of mental discipline, good intentions or willpower will fulfill a right to food.

¹ Some of the discussion that follows concerning the characteristics of rights is based on ideas found in Walter E. Block, *The U.S. Bishops and Their Critics*, (Vancouver: Fraser Institute, 1986).

The most important distinction, however, between positive and negative rights is that the negative rights of all individuals can co-exist without conflict, but the positive rights of any single individual will necessarily bring him into conflict with at least one other human being. For example, your right not to be killed does not conflict with my right not to be killed. Both rights can be fulfilled; there is no necessity for either of us to be killed. However, your alleged positive right to food, if you have not produced the food yourself or traded something for it, necessarily implies that food must be taken away from somebody else who produced it or traded something for it, which leads to the question: what about that person's right to food?

This feature of positive rights is disturbing because it implies that people are not all equal in possessing identical rights. If certain people have a right to food, certain others must of necessity lack that type of right, because their food must necessarily be taken away from them. In fact, positive rights effectively give some people the right to violate the rights of others. This negates our most basic conceptions about rights; it contradicts the very meaning of the term. One of the two conflicting "rights" cannot be a genuine right if we sanction—or worse yet, legally compel—its abrogation.

Therefore, the kind of claim which we have hitherto been calling a positive right is really not deserving of the name "right" at all. Only negative rights can be enforced and fulfilled in favour of all individuals equally without creating a logical contradiction.

The Negative Rights

What are the negative rights? The first one mentioned whenever anyone lists them is the right to life. This is not mere accident. Rights are indeed hierarchical; each one derives logically from the one before, and all of them ultimately derive from the first: the right to life.

The right to life is axiomatic. Anyone who is unwilling to grant the existence and primacy of this right cannot logically grant any other rights either. The exercise of any other right presupposes that the individual exercising it will remain alive long enough to complete his intended actions. What good would it do to uphold the right to freedom of speech, for example, if one were not willing to uphold the speaker's right not to be shot halfway through his speech?

However, as already discussed, the right to life cannot logically mean the right to be provided with the means of sustaining one's life (e.g. food or shelter). It is just the right not to have one's life taken away—the right not to be killed. This should not be taken too literally, however; it is really a shorthand term encompassing a right to non-interference with one's body. It would be silly to propose, for example, that one could be tortured or maimed with impunity provided one were not actually tortured all the way to death. Thus the right to life includes the right not to be physically

assaulted or damaged, a right sometimes embodied in legislation as the right to “security of the person”.

Although no one is entitled to demand that they be given the means of sustaining their lives, everyone must be entitled to seek out those means, or else the right to life would be meaningless. Each individual is in the best position to determine how best to secure, prolong and enhance his or her own life. This leads to the proposition that individuals must be left free to conduct their lives in the manner they themselves select. They must be free of coercion by others, so long as they themselves do not exercise coercion against others. This is the right to liberty. Without it, the right to life is eviscerated.

Many of the traditional rights that have been claimed in democratic societies have been really nothing more than subsets or particular instances of the right to liberty. The four “fundamental freedoms” guaranteed by the *Canadian Charter of Rights and Freedoms* are a good example. These are:

- (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.²

The first pair of these are essentially the liberty to exercise one's mental faculties and to translate the resulting thoughts into words and action. Since human beings sustain their lives through purposeful, deliberate, rational action (as contrasted with animals, who act largely on instinct), this right must necessarily be included in the right to liberty.

The second pair are essentially the rights of individuals to exercise their liberty in concert with others. It would be very strange if a person were permitted to do or say whatever he pleased, but only so long as he did it by himself. If two or more people wish to assemble or associate with others, they are each exercising their separate rights of liberty, not some new right that applies only to groups.

Similarly, the right to liberty also necessarily includes the right to contract with others: the right to enter into voluntary agreements for the exchange of services or goods, or for mutual efforts to be applied toward a common goal. It is easy to think of ways in which the securing of one's life may be facilitated by, or even depend upon, interacting with others. Economists have recognized for centuries that occupational specialization, the division of labour, and the free trade of labour and goods have

² Section 2, *Canadian Charter of Rights and Freedoms*

made it possible for human beings to move beyond a life of chronically impending death and disaster to one that provides a cornucopia of comfort and resources. None of this would be possible without a legal system that permitted individuals to reliably expect the fulfillment of the contractual exchanges they negotiate with others. It would be self-contradictory to concede rights to life and liberty which did not encompass this right.

In the natural course of exercising their rights to life and liberty, people accumulate property, even if in some cases it is nothing more than food and clothing. To deprive them of their property later is equivalent to retroactively depriving them of that portion of their lives that they spent in acquiring the property. The right not to be deprived of property is therefore a necessary corollary of the rights to life and liberty.

It is the latter two rights—the right to freely contract with others and the right to retain property acquired through one’s past efforts—that together form the much-maligned category of economic rights.

The Treatment of Economic Rights by the Courts

Section 7 of the *Canadian Charter of Rights and Freedoms* guarantees to Canadians, “the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”

However, the Supreme Court of Canada has held repeatedly that the *Charter* does not include among the rights guaranteed by section 7 any economic rights. Here is a typical statement made by members of the court in 2005 in a decision called *Chaoulli*:

“The argument that “liberty” includes freedom of contract...is novel in Canada, where economic rights are not included in the *Canadian Charter*...”³

But the court’s pronouncements have not always been quite so extreme. In the early days following enactment of the *Charter*, the Supreme Court was less willing to rule economic rights entirely out of existence. Here is what the court said in the 1989 *Irwin Toy* case:

The intentional exclusion of property from s. 7, and the substitution therefor of “security of the person” has, in our estimation, a dual effect. First, it leads to a general inference that economic rights as generally encompassed by the term “property” are not within the perimeters of the s. 7 guarantee. This is not to declare, however, that no right with an economic component can fall within “security

³ *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, dissenting judgment of Justices Binnie and LeBel

of the person". [emphasis added] Lower courts have found that the rubric of "economic rights" embraces a broad spectrum of interests, ranging from such rights, included in various international covenants, as rights to social security, equal pay for equal work, adequate food, clothing and shelter, to traditional property -- contract rights. To exclude all of these at this early moment in the history of *Charter* interpretation seems to us to be precipitous. We do not, at this moment, choose to pronounce upon whether those economic rights fundamental to human life or survival are to be treated as though they are of the same ilk as corporate-commercial economic rights. [emphasis added] In so stating, we find the second effect of the inclusion of "security of the person" to be that a corporation's economic rights find no constitutional protection in that section. ⁴ [emphasis in original]

Reading through the jurisprudence and legal literature that appeared between the dates of the two cases quoted above, one almost gets the sense that later judges and commentators simply made a mental note of the *Irwin Toy* case as being an example of a case in which no economic rights were recognized. They then appear to have generalized that mental note into the inaccurate proposition that there are no economic rights under the *Charter*. The phrase "no economic rights" became almost a shorthand device or mnemonic by which to remember what was decided in the *Irwin Toy* decision. It then metamorphosed into a general proposition of law. Rarely, it seems, did anyone go back and re-read the paragraph set out above, which made it clear that the finding of no economic rights for a corporation did not rule out the possibility that there might be such rights for human beings.

Even the *Irwin Toy* decision demonstrates a decidedly negative attitude towards economic rights. This is apparent from the court's use of the word "ilk" to describe corporate-commercial economic rights. The court could instead have chosen to wonder whether economic rights fundamental to human life were of the same *type*, *kind* or *nature* as corporate-commercial economic rights. "Ilk" has undeniable pejorative connotations.

No satisfactory explanation has ever been provided by the Canadian courts for their apparent disdain towards economic rights. The *Charter* was enacted in 1982 and came into effect fully in 1985. It gave the courts a blank slate to write upon. The word "liberty" in section 7 stood naked and unadorned. There was nothing in the text or scheme of the *Charter* to indicate that "liberty" should be narrowed in any respect from its broadest possible meaning, or even from its ordinary meaning. In particular, there was nothing in the text of the *Charter* to indicate that freedom of contract and property rights should not form part of liberty. Why, then did the courts impose such straitjackets upon themselves?

⁴ *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 S.C.R. 927

The scheme of the *Charter* was supposed to be straightforward. It is readily apparent on a simple reading of its sections. Various rights were guaranteed to all citizens. Lawmakers were obliged to respect those rights and to refrain from passing laws that violated them. However, in the event that lawmakers *did* enact laws that infringed on guaranteed rights, there was still the possibility that these laws could be found constitutional if they met another requirement of the *Charter*: namely, the provisions of section 1. Section 1 reads as follows:

“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.”⁵

In other words, any law that violated the section 7 guarantees of life, liberty or security of the person (or any of the other rights guaranteed in other sections of the *Charter*) would have to pass a test adjudicated by the courts: the test of whether it was a “reasonable limit” that could be “demonstrably justified in a free and democratic society.”

But early on in the life of *Charter* jurisprudence (1985), Madam Justice Bertha Wilson of the Supreme Court of Canada penned a fateful statement that knocked the entire scheme off-kilter. She wrote:

“Indeed, all regulatory offences impose some restriction on liberty broadly construed. But I think it would trivialize the *Charter* to sweep all those offences into s. 7 as violations of the right to life, liberty and security of the person even if they can be sustained under s. 1.”⁶

In other words, Justice Wilson decided to ignore the plain meaning of the word “liberty” in section 7 of the *Charter* even though she herself admitted that all regulatory offences would constitute violations of liberty. She decided that she would not apply the test set out in section 1 of the *Charter* to see whether such violations of liberty could be sustained as demonstrably justified in a free and democratic society. She instead chose to ignore the clear scheme of the *Charter* and simply define out of existence a vast portion of the meaning of the word “liberty”.

What was her excuse for re-writing the *Charter* in this manner? She claimed it would “trivialize” the *Charter* to have to deal with “all those offences”. But consider: the *Charter* was designed to guarantee us our liberty. If there really are “all those offences” out there that were too burdensome for Madam Justice Wilson to bother with, isn’t this in itself a devastating commentary on just how little genuine liberty Canadians have really been left with over years of being regulated by the state?

⁵ The Canadian Charter of Rights and Freedoms, section 1

⁶ Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486

Later Supreme Court decisions picked up the ball from Justice Wilson and ran with it. In 1993, the Justice Beverley McLachlin wrote on behalf of a unanimous court, “The *Charter* does not protect against insignificant or “trivial” limitations of rights.”⁷

So what *does* the *Charter* deal with?

Let us return to Madam Justice Wilson, writing in 1988:

“Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.”⁸ (emphasis added)

The Supreme Court thus seems to have adopted the belief that the *Charter* protects us from violations of our liberty regarding the big, important decisions in our lives—something that may come along once in a lifetime, perhaps—yet does not protect us from the petty, day-to-day violations of our liberty that occur on a routine basis, over and over.

This view is problematic in several respects:

1. The dividing line between a “decision of fundamental importance” and one that is “insignificant or trivial” is a very subjective one. Many people might reasonably think that a decision as to what occupation one engages in is of at least as great importance as the decision about to whether or not to abort a fetus, yet according to the opinions expressed by various Supreme Court judges, being able to engage in one’s choice of occupation does not fall within “liberty”⁹ while one’s choice to have an abortion does.¹⁰
2. It is absurd to think that minor violations of liberty, if heaped up high enough, do not eventually add up to a full-blown case of abject subjugation. Suppose, for instance, the state decided to prescribe what time we must rise in the morning, what colour clothing we must wear, how often we can visit the toilet, how many hours of television we can watch and how many times we must chew our food before we swallow. Each of these rules in itself might be described as a “trivial” regulation not worthy of constitutional protection. But could anyone honestly believe we would still be living in a free country? How

⁷ *Cunningham v. Canada*, [1993] 2 S.C.R. 143

⁸ *R. v. Morgentaler*, [1988] 1 S.C.R. 30

⁹ See, for example, *Mussani v. College of Physicians and Surgeons of Ontario*, 2004 CanLII 48653 (ON C.A.)

¹⁰ *R. v. Morgentaler*, [1988] 1 S.C.R. 30

many trivial violations of liberty can the state heap on us before we're forced to admit that this is stifling authoritarianism, and not freedom at all?

3. Where is the logic in having different rules for decisions of fundamental importance and decisions of trivial importance? If citizens are so stupid or irresponsible that they cannot handle minor decisions without direction from the state, where will they suddenly acquire the wisdom and character to handle the big stuff?
4. Who are the people with the wisdom and intelligence to decide all those little matters for us, if they themselves are citizens who likewise cannot be trusted with the freedom to make those little decisions for themselves? If ordinary citizens have the intelligence and wisdom to choose our elected representatives from among ourselves, and if any one of us can run for office, how can being elected suddenly elevate candidates from the status of ignorant dolts un-trustworthy to make every-day decisions about their own lives, into sage lawmakers who can make such decisions not only for themselves but for everyone in the country?

By defining away a huge swath of the scope of “liberty” the court reduced the number of times it has to consider, using section 1 of the *Charter*, whether or not state violations of individual freedoms are demonstrably justified in a free and democratic society.” It is not clear why the judges were so anxious to escape that duty.

One clue, however, can perhaps be found in a biography of Justice Wilson—who was a primary architect of the structure that replaced the one Parliament had enacted. In the book *Judging Bertha Wilson: Law as Large as Life* (which was apparently an approved biography since Justice Wilson herself wrote the foreword), we learn that Justice Wilson “considers herself to be a socialist.”¹¹

This may explain her disdain for economic liberty.

However, the world has changed profoundly since Justice Wilson was on the bench. She wrote her decisions opposing economic liberty before the Berlin wall fell. She herself retired from the bench in 1991, the same year that the Soviet Union disintegrated.

In the almost two decades since Wilson retired, socialism—and its extreme form, communism—have been in retreat, and for very good reason. Public choice theory, for which economist James Buchanan won a Nobel prize in 1986, has now had time to thoroughly expose the problems of “government failure” as being far worse than any perceived problem of “market failure”.

¹¹ *Judging Bertha Wilson: Law As Large as Life*, by Ellen Anderson, University of Toronto Press, 2002 at page 237

The world now has a much better appreciation of the fact that economic liberty is the source of prosperity, and that the denial of economic liberty is what condemned billions of people for most of human history to misery and poverty.

But another fact has also become obvious: that the denial of economic liberty cannot be accomplished without the simultaneous denial of the other cherished freedoms comprised in the phrase “life, liberty and security of the person.”

The communist system adopted in countries like the former Soviet Union and North Korea had as their very cornerstone the denial of private property. The state also regulated (or in the case of North Korea, continues to regulate) virtually all economic transactions, prescribing the prices at which goods and services would be exchanged, determining what will be produced regardless of supply and demand, and conscripting individuals to perform forced labour regardless of their own wishes. The two major economic rights—freedom of contract and property ownership—were both crushed in countries that followed the ideology of socialism.

The result was that the individuals whose economic rights were denied wanted to leave—in droves. To prevent them from doing so, ever more brutal methods were required. All of the other human rights (the non-economic ones) ranging from life, to liberty, to security of the person, to freedom of speech, to freedom of conscience, and on, and on—all were sacrificed to enforce the denials of economic liberty. The result was brutal dictatorship.

Canada has obviously not yet reached this extreme. Most of us still take private property and freedom of contract for granted. We own our houses, we can start our own businesses, and generally speaking we are permitted to conduct our lives *as if* we had economic rights that were constitutionally protected. But the state is encroaching on those economic freedoms ever more steadily in myriad ways: through zoning, environmental laws, taxes and voluminous and onerous regulations. As it does so, it is revealing a concomitant propensity to nibble away at the edges of what would otherwise be constitutionally protected non-economic freedoms.

In one recent case that has come to the attention of the Canadian Constitution Foundation, for instance, a Calgary naturopathic doctor was selling nutritional supplements which allegedly did not meet Canadian regulatory standards. There was no secret about the contents of his products. They were not even alleged to be harmful—merely non-compliant with government regulations. His customers wanted to buy them and he wanted to sell them. One would have thought that freedom of contract should prevail. However, Health Canada (acting under the authority of laws adopted by a government that has been discouraged by the courts from respecting economic liberty) thought otherwise. It conducted a raid of the doctor’s home at gunpoint and held him and his family captive for 11 hours while it confiscated his inventory and his records. His business has been destroyed and his ability to earn an income severely impaired. But no regulatory offence charges were laid against him until he began publicizing his ordeal on YouTube almost a year after the raid. Perhaps

this is mere coincidence, but one cannot help wondering whether his decision to exercise his freedom of expression was what triggered this apparent reprisal by the authorities. Certainly, the CCF has received reports that other natural health product suppliers who have been raided in similar fashion by Health Canada are afraid to speak up.

It is self-delusional to believe that a country can maintain its traditional human rights and freedoms at the same time as it systematically violates economic rights. If we value the former, it is time for us to start insisting that the latter be permitted to speak its name.

For these reasons, freedom of contract and the right to earn, keep and use private property should be included and addressed by the Canadian Museum for Human Rights.

These economic rights are as important as – and essential to the exercise of – other fundamental human rights such as freedom of speech; freedom of association; freedom of conscience and religion, and other fundamental human rights.