R. v. *Heywood*	7 11(d)* 12* 9* 11(h)*	Yes No* No* No* No*	Not saved * These sections were only dealt with by minority as the first determination made the others unnecessary	Legislation (F)
Dagenais v. *C.B.C.*	2(b) 11(d)	Yes Yes	Not saved Not saved	Common Law Rule
R. v. *Laba*	11(d)	Yes	Not saved	Legislation (F)
R. v. *Pizzardi;* *R.* v. *Lewis*	7	No	—	Action
Tolofson v. *Jenson*[2]	92(13)	*intra vires* the province's competence to have provisions of a provincial act apply to all who have car accidents in Quebec	—	Legislation (P)

[1] The *143471 Canada Inc.* case was not a constitutional challenge *per se*, but a motion for interlocutory relief based on a likely infringement of two sections of the *Charter*.

[2] The inclusion of the *Tolofson* case was marginal: while it made a pronouncement on the jurisdiction of the province to make the law in question, the focus of the decision was that of a conflict of laws rather than any constitutional challenge on federalism grounds.

LAMENT FOR A CHARTER

BY DAVID BEATTY

April 17 is something of a landmark in Canadian political history. It was exactly 15 years ago that we added a Charter of Rights and Freedoms to our constitution.

Signing on to a written bill of rights radically changed the way we Canadians govern ourselves. We moved from a system in which Parliament was sovereign and could do no wrong, to a model in which some very real restrictions were put on what governments could and could not do.

Adopting a written bill of rights meant that Canada joined an elite group of nations in which the rule of law replaced majority rule as the supreme value in the political life of the country. In theory, from that day on, Canadians (like Americans, Germans, Italians, Indians, Japanese, and others before us) had a legal guarantee that our fundamental freedoms (of religion, expression, association, etc.) and our basic human rights (to equality, life, liberty and security of person, etc.) would not be violated by our governments unless it was practically impossible to avoid.

To be sure, anniversaries, like birthdays, are quite artificial benchmarks, but they are useful occasions for reflection nonetheless. Moreover, in law, as in life, certain periods—like adolescence—have more meaning than others and warrant special attention.

The story of the *Charter*'s infancy and adolescence is easy to tell. In the beginning, its development looked very promising. In the first few years following its entrenchment, the Supreme Court of Canada was very insistent that politicians and public servants respect the new rights and freedoms that the *Charter* guaranteed.

Using the *Charter*, the Court struck down a variety of laws, including: (1) parts of Quebec's language code that restricted the education rights of its English-speaking minority; (2) a section in B.C.'s motor vehicle law that threatened people who drove without a valid license with a week in jail even if they did so inadvertently; and (3) various provisions in the federal government's immigration rules that had the effect of denying some people who wanted to make a refugee claim the right to a public hearing of their case.

Led by Bertha Wilson and Brian Dickson, the Supreme Court established two basic tests or principles of constitutional validity in these early cases. In order to justify rules and regulations that interfered with people's constitutional rights, governments had to meet both.

The first is a test of avoidability. It requires governments to prove that no other policy was available that would have interfered with the people's rights to a lesser extent. In striking down the offending provisions of the B.C. *Motor Vehicle Act*, for example, the Court ruled that imprisonment was much more punitive than was necessary, given the seriousness of the "crime."

The second test is one of consistency. It insists that if a government cannot avoid restricting people's rights, it should only do so in ways that are broadly consistent with the way the rights of others have been treated elsewhere and in the past. For example, the Supreme Court said Canada's refugee determination law could not pass this test because other free and democratic societies were able to provide hearings for all refugee claimants, and because even in Canada people who receive parking tickets are entitled to a hearing to settle the merits of their case.

Notwithstanding this very auspicious beginning, the Court soon began to restrict and relax the use of these standards. Increasingly, it released the politicians and government officials from their constitutional duties to craft their laws as carefully and sensitively as they can.

Especially over the last decade, as more and more of

Brian Mulroney's appointees took their seats on the Bench, the Court has systematically cut back on the *Charter*'s reach. Except for people caught up in the criminal justice system, the *Charter* has not been very much help to people who say they have been treated arbitrarily by government.

For example, in defining what protection freedom of association provides, the Court has said that it does not include either the right to strike or the right of workers to choose their own union to represent them in negotiations with employers. Indeed, a majority of the Court has said they do not even believe that freedom of association protects people against laws—like compulsory union dues—that force them to contribute to causes they oppose.

Section 7's guarantee of "life, liberty and security of the person" has been shrunk in a similar way. Lots of people have been told their interests and activities are not the kind that section 7 guarantees. For example, according to the Court, this universal human right provides no protection to Canadians who are engaged in purely commercial activities. Those who face extradition to countries that will execute people for the commission of certain crimes have also been put beyond the pale. And, few Canadians will need reminding of the Court's declaration that section 7 provides no relief to people, like Sue Rodriguez, who claim the right to decide how their lives will end.

The equality rights in section 15 have suffered a similar fate. Some groups—like workers—have been told that they cannot claim *any* protection for section 15. Young boys were informed they did not have the same rights as their sisters to be protected against sexual abuse. Religious minorities came away empty-handed when they said section 15 guaranteed them the same level of public support for their schools as for those of other religious and secular groups. Women lost two challenges to provisions of the *Income Tax Act* that disadvantaged mothers who work and/or have sole responsibility for the care of a child. And, in dismissing the claims of gays and lesbians for spousal allowances under the *Old Age Security Act*, four members of the Court announced that they intended to use a test in equality cases that would effectively require claimants to prove that a government acted with a malicious intent in order to succeed.

Public control of the appointment process, together with limits on the number of years anyone can sit on the Bench, are the two primary tools that other free and democratic societies use to better ensure their bills of rights provide as much protection as they can. It is time for Canada to follow suit.

Other examples of the Court gutting the *Charter* abound. In a long series of precedents, the Court has developed a practice of deferring to governments whenever any social or economic policy is at stake. On everything from labour laws, to education acts, to obscenity laws, to judge-made rules of property and contract, the Court has taken the position that the tests of avoidability and consistency should only be applied in a very relaxed, deferential way. Perhaps the most extreme example of the Court denying people the protection of the *Charter* occurred when a group of Acadians were told that their right to use French in the courts of New Brunswick did not include the right to be understood.

For the record, it is important to acknowledge that there have been rulings outside the area of criminal law in which the Court has vindicated the rights of some minorities, Aboriginals, women, and the elderly, as well as public servants, professionals, and private corporations. However, even these groups have lost as many (or more) cases as they have won.

Such victories as have been won are very much the exception which prove the rule. There is widespread agreement among those who study their judgments that, on most days, the current members of the Supreme Court of Canada are a cautious and conservative lot who are not comfortable calling politicians and government officials to account.

For Canadians who care about the protection of basic human rights, the lessons of our infancy and adolescence as a constitutional democracy are clear. The way the Supreme Court of Canada has interpreted and applied the *Charter* provides yet more proof of the truth that a constitution is only as strong as the judges want it to be. It is the allegiance of those who actually sit on the Bench to the basic rules of the constitution, much more than the words in the text, that determines how "free and democratic" a society really is.

If it was not obvious that bills of rights are not self-enforcing at the time the *Charter* was entrenched, it should be now. After watching the Supreme Court of Canada struggle in its role of "guardian of the constitution" for 15 years, it should be apparent that the only way to guarantee that our rights are respected is by appointing people who are wholly committed to the rule of law.

Public control of the appointment process, together with limits on the number of years anyone can sit on the Bench, are the two primary tools that other free and democratic societies use to better ensure their bills of rights provide as much protection as they can. It is time for Canada to follow suit.

Since the entrenchment of the *Charter*, we have witnessed the fall of the Berlin Wall and the proliferation of bills of rights all over the world. If Canadians want to maintain their position as leaders in the protection of human rights, we must recognize that we are still very much in our adolescence as a constitutional democracy and still have a lot to learn. Countries with much longer histories than our own have had to overcome similar growing pains and there is no reason we cannot to do the same.

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