

The Canadian Charter of Rights and Freedoms - The First 25 Years from an Applicant's Perspective¹

Introduction

A generation of young Canadians have come of age not knowing a world without the protection of their fundamental rights guaranteed under the *Canadian Charter of Rights and Freedoms* ("the *Charter*"). Even though the *Charter* did not create an entirely new set of rights, as some were already recognized and accepted as part of Canadian common law, it entrenched those rights in our Constitution. Section 52 states that the Constitution is the supreme law of Canada, a provision of monumental importance in that it expressly and unequivocally tells us that governments are not above the law and their decisions and actions must conform with the *Charter*.

Not without some controversy, the *Charter* has been described as a "shield, not a sword". It is the protective cloak that envelopes each and every Canadian and guarantees essential human rights that are fundamental to our freedom and democracy. The *Charter* recognizes and affirms basic rights such as the right to equal treatment under the law, the right to free association and expression, the right to religious freedom, the right to vote and the right to be free from unjustified and arbitrary state intervention in our lives.

As it has only been 25 years since the advent of the *Charter*, its jurisprudence is still in relative infancy. We cannot predict with any degree of certainty what the future holds or what direction the Courts may take over time, but as the law continues to evolve and develop, there are lessons to be learned from the past and new issues that will continue to arise.

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Since the enactment of the *Charter* in 1982, the Courts have struggled at times to apply its provisions and have grappled to strike an appropriate balance between deference to Parliament and the Courts' legitimate role as interpreters of the law. These are not easy tasks and Courts should be applauded for not shying away from what are often difficult and controversial issues. When it comes to the constitutionality of legislation, the Supreme Court of Canada has recognized that this has always been a justiciable question that properly falls within its sphere of expertise.²

Charter Litigation in General

Lawyers who practice in the area of *Charter* litigation know these cases can be extremely complex, expensive and time-consuming. They often involve social science and expert evidence in order to lay the proper evidentiary foundation the Court requires to ensure a *Charter* issue is not decided in factual vacuum. Despite the challenges that come with the territory, the importance of *Charter* litigation cannot be overstated as many times these cases not only affect the individual applicant, but have a profound impact on society as a whole. In the criminal law context, for instance, cases such as *Stinchcombe* and *Askov*³ have changed the way our criminal justice system operates, and controversial decisions such as *Morgentaler*, *Rodriguez* and, most recently, *Chaoulli*, have brought to the forefront issues ripe for public debate.⁴

Over the past 25 years the Courts have reached a stage where they have found a measure of comfort in interpreting *Charter* rights by looking to a wide range of extrinsic evidence for guidance, for example legislative histories, Hansard

² *Thorson v. Canada (Attorney General)*, [1975] 1 S.C.R. 138

³ *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, which held that the Crown has a legal obligation to make full disclosure to the defence; *R. v. Askov*, [1990] 2 S.C.R. 1199, which related to the right to be tried within a reasonable time.

⁴ *R. v. Morgentaler*, [1988] 1 S.C.R. 30, which dealt with the constitutionality of the abortion provisions of the *Criminal Code*; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, relating to assisted suicide; and *Chaoulli v. Quebec (Attorney General)*, [2005] 1 S.C.R. 791, which dealt with Quebec's prohibition against private health care insurance.

debates, social science evidence and international treaties and conventions. The use of this type of evidence allows the Courts to consider the issues in the proper context and are of invaluable assistance to applicants when challenging the actual intent or effect of a particular law.

Like all things in life, when it comes to *Charter* litigation, one must take the good with the bad, and this paper considers the good and the bad from an applicant's perspective. To fully canvass all of the *Charter* jurisprudence over the past 25 years could easily be a lifelong endeavour, so for the purposes of this paper we have focused only on a few of the Supreme Court of Canada cases that have affected, either positively or negatively, the way in which its provisions have been interpreted or the manner in which litigants should bring their claims before the Courts. Some of the cases identified relate to substantive developments in the law, while others pertain to more practical matters, for instance the way legal arguments should be framed. Given that the focus at the Public Interest Law Centre is on civil litigation, we have limited our selection almost exclusively to those provisions of the *Charter* in which we have the most expertise, namely ss. 7 and 15.

SIGNIFICANT CASES OVER THE PAST 25 YEARS

(a) Preliminary issues

1. The "Standing Trilogy" - *Thorson, McNeil and Borowski*⁵

Unlike many *Charter* cases in the criminal law context where an accused is directly affected by the law or state action and is seeking a remedy such as a

⁵ *Thorson*, supra note 2, wherein the appellant taxpayer sought a declaration as to the validity of certain provisions of the *Official Languages Act*; *Nova Scotia (Board of Censors) v. McNeil*, [1976] 2 S.C.R. 265 wherein the powers of the Nova Scotia Board of Censors were challenged after it banned showing of the film "Last Tango in Paris"; and *Borowski v. Canada (A.G.)*, [1981] 2 S.C.R. 575, where sections of the *Criminal Code* pertaining to abortion were challenged under the *Canadian Bill of Rights*.

stay of proceeding or exclusion of unlawfully obtained evidence, in the civil context, the remedy sought is often declaratory as opposed to compensatory, and at times an action is commenced **before** a violation of a particular right actually occurs. As a result, standing to bring the action may arise as a preliminary issue with the question being whether the applicant has a sufficiently genuine interest in the issue that it warrants the use of scarce judicial resources.

Prior to the Standing Trilogy of *Thorson*, *McNeil* and *Borowski*, Courts were generally reluctant to grant standing to challenge legislation for fear that the floodgates would swing wide open to "mere busybodies" bringing forward trivial actions. Back in 1924, the Supreme Court in *Smith v. Ontario (Attorney General)*⁶ denied standing on the basis that the plaintiff had not established that he was "exceptionally prejudiced" by the legislation in question because he had not in fact actually violated its provisions and was therefore not subject to prosecution.

Fortunately from an applicant's point of view, this narrow doctrine of standing was firmly rejected by the Supreme Court, first in *Thorson* and later in *McNeil* and *Borowski*. In *Thorson*, Laskin J. did not accept the "mere busybody" argument and with confidence noted that Courts are "quite able to control declaratory actions, both through discretion, by directing a stay, and by imposing costs".⁷ In powerful language, Laskin J. dismissed the floodgate fears in favour of government accountability when he stated:

... it would be strange and, indeed, alarming, if there was no way in which a question of alleged excess of legislative power, a matter traditionally within the scope of the judicial process, could be made the subject of adjudication.

Although the Standing Trilogy pre-dates the *Charter*, these cases paved the way for improved access to justice for *Charter* litigants. Since the Standing Trilogy,

6 [1924] S.C.J. No. 15

7 *Thorson*, supra note 2, at para 12.

not only individual applicants, but organizations such as the Women's Legal Education and Action Fund ("LEAF"), the National Anti-Poverty Organization ("NAPO") and Equality for Gays and Lesbians Everywhere ("EGALE") have been granted standing and brought forward *Charter* claims on issues of national importance.⁸

The question of standing, once a critical threshold issue for public interest litigants, has to a large degree been reduced, and at least from an applicant's point of view, is now often considered to be merely a vexatious tactic on the part of the government to delay or impede the bringing forward of a *Charter* challenge.

(b) Section 7 - Life, Liberty and Security of the Person

Section 7 of the *Charter* guarantees the rights 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. Section 7 protects individuals from unjustified state infringement that affect their very lives and freedom from physical restraint. It also protects individual autonomy, integrity and the ability to make personal decisions that are of fundamental importance.

The principles of fundamental justice, the "basic tenets of our system", are both procedural and substantive. Although a precise definition has proved somewhat difficult to pin down, the Courts have recognized principles such as the right to a fair hearing, the right to make a full answer and defence, and the right to be free from arbitrary state action as principles that form the foundation of a free and democratic society. What follows are two examples of cases that have profoundly impacted the meaning of s. 7 in a manner beneficial to applicants in that they have expanded its scope and therefore broadened the types of claims that will attract judicial scrutiny.

⁸ See for example *Federated Anti-Poverty Groups of B.C. v. Vancouver (City)*, [2002] B.C.J. No. 493 (Quicklaw) and *Barbeau v. British Columbia (Attorney General)* (2003), 225 D.L.R. (4th) 472.

2. *New Brunswick (Minister of Health and Community Services) v. G. (J.)*⁹ - Expanding s. 7 and improving access to justice

G.(J.) was the first time the Supreme Court considered the issue of state-funded counsel outside the criminal law sphere and in the context of a child custody proceeding initiated by New Brunswick's Ministry of Health and Community Services. The appellant's three children had been apprehended and she was not represented by counsel at the hearing. She was unable to afford a private lawyer and New Brunswick's Legal Aid plan at the time did not appoint counsel for these matters.

The Supreme Court found that apprehension of one's children by the state triggers protection of the right to security of the person given the obvious and serious distress arising from interference with the parent/child relationship and the stigmatization that comes with being labelled an unfit parent. The inability of the applicant to effectively represent herself at the hearing rendered it unfair and contrary to the principles of fundamental justice. The Supreme Court further found that the denial of state-funded counsel could not be justified by the government on the basis of budgetary constraints. To remedy the *Charter* breach, the provincial government was ordered to provide state-funded counsel, for instance through its Legal Aid plan or otherwise.

G.(J.) made it clear that s. 7 is not limited to purely criminal or penal matters and extends to other ways the state may deprive individuals of their rights to life, liberty and security of the person in the administration of justice. Further, precise guidelines were laid down in this case as to how judges are to deal with unrepresented individuals and when it is appropriate to order state-funded counsel to ensure a fair hearing. In particular, judges are to consider whether the parent has made all efforts to retain counsel, the seriousness of the interests

9 [1999] 3 S.C.R. 46.

at stake, the complexity of the hearing and the capacity of the parent to represent him/herself.

From an applicant's perspective, this case is significant for two reasons, first that it expanded the scope of s. 7 beyond the criminal law sphere, and second because of its advancement of access to justice by unrepresented litigants. Although the Supreme Court was quick to point out that its decision was limited solely to child custody proceedings brought by the state, the principles from this case are applicable to other state-initiated action or proceedings and may be relied upon in future cases by indigent persons whose s. 7 rights are in peril.

3. *Chaoulli v. Quebec (Attorney General)*¹⁰ - Expanding the scope of s. 7 beyond the administration of justice

The recent *Chaoulli* decision caused considerable controversy given the high emotions that tend to arise around the subject of the public health care system in Canada. The question in this case was not, however, whether there is a constitutional right to health care of a reasonable standard or whether our public system should be replaced, but rather whether it is a violation of s. 7 for the state to prohibit Canadians from obtaining private health care insurance if the result is to subject them to long delays that cause physical and psychological harm.

Chaoulli is a prime example of a case where the Supreme Court grappled with the issue of justiciability and it was far from united on this point. Three judges, namely McLachlin C.J. and Major and Bastarache J.J., found the prohibition against private insurance in circumstances where timely health care was not available to be a matter properly within the judicial sphere, while three other judges, Binnie, Lebel and Fish J.J., characterized the issue as being political in nature (although they did acknowledge the specific issue raised in the appeal was a legal one).

¹⁰ Supra note 4.

Despite the difference of opinion, the six judges who decided the issue on *Charter* grounds did agree that s. 7 interests were engaged.¹¹ Where they diverged was on the question of whether or not the violation was in accordance with the principles of fundamental justice. McLachlin C.J. found s. 7 was infringed in an arbitrary manner based on evidence that there is no connection between banning private insurance and preserving the overall public health care system. Binnie J., on the other hand, found the prohibition was not arbitrary because even though some may disagree with the wisdom or efficacy of the government's decision, the prohibition against private health insurance was clearly intended to preserve the public health care system.

As opposed to cases such as *Morgentaler* and *Rodriguez*, where a s. 7 claim was established because criminal sanctions were attached to the legislative scheme and therefore could be linked to the administration of justice, the legislative scheme at issue in *Chaoulli* was purely administrative, as there was no prohibition linked to criminal sanctions. McLachlin C.J. found this distinction to be irrelevant, which suggests the door may have been opened sufficiently wide enough for future cases that challenge **any** legislative scheme that infringes upon one's rights to life, liberty and/or security or the person in an arbitrary manner.

Regardless of one's views on the public health care system in Canada and whether the Supreme Court was right or wrong in its deliberations, *Chaoulli* is extremely important from an applicant's perspective. This case broadened the scope of s. 7 considerably by entering into the health care realm, a matter not, some would argue, typically considered to fall within "the administration of justice".

¹¹ Deschamps J. decided the case solely on the basis of whether the prohibition violated the Quebec Charter and not the Canadian Charter of Rights and Freedoms.

(c) **Section 15(1) - Equality**

Section 15(1) of the *Charter* guarantees equality before and under the law and states:

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.

The Courts have freely admitted that s. 15 is one of the most difficult provisions of the *Charter* it to define with precision. What has emerged from the jurisprudence is that the underlying purpose of equality rights is to respect the dignity, worth and value of all Canadians and to ensure legislation and government action is based on actual circumstances and needs rather than on stereotypes and negative presumptions. The meaning of discrimination was succinctly described in *Andrews* as being:

... a distinction, whether intentional or not but based on grounds relating to a personal characteristic of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits and advantages available to other members of society. Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.¹²

The first series of cases that wound their way to the Supreme Court after s. 15 came into effect reflect the difficulty in interpreting what are rather vague concepts and it was not until the *Law* case came along that a structured framework for a s. 15 analysis was established.

¹² *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143, at para 37.

4. *Law v. Canada (Minister of Employment and Immigration)*¹³ - A (Flawed?) Analytical Framework

Although the applicant in this case was not successful in proving discrimination on the basis of age, the *Law* case is extremely significant because it laid down guidelines as to how a s. 15 claim should be framed. The Supreme Court has consistently stated that the *Law* test is not to be applied in a rigid and inflexible manner, but it nonetheless gives applicants a road map to follow when bringing a *Charter* challenge. Based on the test in *Law*, an applicant must show:

- that the law (a) either draws a formal distinction between the claimant and others on the basis of one or more personal characteristic; or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively different treatment between the claimant and others on the basis of one or more personal characteristic;
- that the differential treatment is based on one or more enumerated or analogous grounds; and
- that the differential treatment discriminates by imposing a burden upon, or withholding a benefit from, the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristics, or that otherwise has the effect of perpetuating or promoting the view that the individual is less capable or less worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect and consideration.

¹³ [1999] 1 S.C.R. 497.

In addition to establishing the framework for a s. 15 analysis, *Law* is also important for applicants because it recognized both direct discrimination and “adverse effects” discrimination, where the law may be neutral on its face but in reality negatively impacts a particular group. This is significant because not only does it broaden the protection afforded by s. 15(1), but it means that Courts must look beyond the mere wording of legislation to consider the actual impact of the law on a particular group. Further, *Law* made it clear that an applicant need not prove a discriminatory intent on the part of the state, which would likely be an almost impossible task, but is only required to show a discriminatory effect.

Despite its seminal role in formalizing the Courts' approach to a s. 15 analysis and the importance of this case, it should be noted that the third part of the *Law* test has been criticized by some for imposing burdens of proof on the equality-seeking applicant that are more properly borne by the state under s. 1.

**5. *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*¹⁴
- Beware the pitfalls**

Auton is an example of how critical the framing of legal arguments can be and of the risk that if they are not framed appropriately, it could very well be fatal to the claim.

The respondents in *Auton* were a group of parents suing on behalf of their autistic children. The narrow issue before the Supreme Court was the British Columbia government's decision not to fund a particular treatment for pre-school autistic children, but the broader issue was whether or not governments are under a legal obligation to fund **all** medically necessary treatment.

¹⁴ [2004] 3 S.C.R. 657

To find the answer to that question, the Supreme Court in its analysis reviewed the *Canada Health Act* and provincial legislation and ultimately concluded that the only medical care governments are obligated to fund are those “core” services provided by medical practitioners. “Non-core” services, being those provided by “health care practitioners” such as those delivered by chiropractors, dentists and physical therapists were found to be discretionary services that governments are not legally obligated to fund. As the treatment sought by the parents fell under the category of “non-core” services, their discrimination claim failed, in essence before it ever got started, because the benefit they sought was not one their children were entitled to under the law.

Although the Supreme Court could have stopped at that point, it went on to consider whether the parents could have proved discrimination had they established the treatment sought was in fact a benefit of the law. Once again, the Supreme Court found the parents would not have been able to prove discrimination, this time because they identified the wrong comparator group, which was the foundation of their argument. The parents had argued that their children should be compared to non-disabled children and adult persons with mental disabilities. The Supreme Court disagreed with the parents' argument and substituted its own view of the correct comparator group in what some may say was an overly narrow manner, as follows:

I conclude that the appropriate comparator group for the petitioners is a non-disabled person or a person suffering from a disability other than a mental disability (here autism) seeking or receiving funding for a non-core therapy important for his or her present and future health, which is emergent and only recently becoming recognized as medically required.¹⁵

Based on its analysis under the *Law* test using what it considered to be the appropriate comparator group, the Supreme Court found it could not be said the

¹⁵ at para 55.

Province funded other new therapies or treatments for non-disabled or otherwise disabled persons. Further, the Supreme Court determined that even if the particular therapy at issue had been designated to be a non-core service, the decision not to fund it was not discriminatory.

The *Auton* decision received considerable media attention and in an interview after its release one of the parents questioned whether the *Charter* has any meaning at all if it cannot protect and defend the rights of autistic children. Public perception of this case may have reflected this sentiment given the vulnerability of the children and for this reason *Auton* may have tarnished the image of s. 15.

From an applicant's perspective, *Auton* highlights the pitfalls they must be aware of and is a lesson in the importance of giving careful consideration to how a *Charter* claim is framed and legal arguments advanced.

6. *Corbiere v. Canada*¹⁶ - Refining the concept of "analogous grounds"

To successfully prove discrimination on a ground other than one or more of those enumerated in s. 15(1), an applicant must prove differential treatment on the basis of one that is analogous. To date, the Courts have recognized sexual orientation, marital status and citizenship as analogous grounds. *Corbiere* expanded the test for establishing an "analogous ground" and provides an example of how it was used to recognize for the first time a basis of discrimination that to some may not have easily come to mind.

Corbiere dealt with a challenge to legislation that excluded off-reserve members of a First Nation from the right to vote in Band elections. The Supreme Court found the law to be a violation of s. 15 that could not be justified under s. 1. It found that prohibiting off-reserve members from exercising their political rights

¹⁶ [1999] 2 S.C.R. 203.

was based on false and negative presumptions that they are not interested in Band matters or preserving their cultural identity. The Supreme Court held that in essence the effect of the legislation was to force Band members to choose between living on reserve and being allowed to vote or living off-reserve and renouncing their rights.

Corbiere recognized Aboriginal residence as an analogous ground for the first time. When making that determination, the Supreme Court made two very important statements relevant for future cases that may add to the list of analogous grounds already recognized.

First, the Supreme Court noted that once a ground is held to be analogous, it will always be considered as such. In other words, now that Aboriginal residence is recognized as an analogous ground, applicants in future cases will not have to overcome this hurdle when meeting the requirements of the *Law* test. Whether or not an applicant can meet the final stage of the *Law* test and prove discrimination is another matter, however it relieves the applicant from at least having to satisfy this stage.

The second significant finding in *Corbiere* was the Supreme Court's recognition that establishing a ground of discrimination as being analogous does not mean one must prove the characteristic is immutable in the sense that it cannot be changed at all, for example age or race. Rather, the Supreme Court accepted that so long as an applicant can show a particular characteristic is "constructively immutable", meaning the government has no legitimate interest in expecting one to change that characteristic or it can only be changed only at an unacceptable personal cost, that will suffice.

(d) **Section 1 - Justification of a *Charter* infringement**

Should an applicant successfully prove a *Charter* violation, the onus then shifts to the state to justify the infringement according to the test set out in *Oakes*.¹⁷ The government must show the legislation is intended to further an objective that is pressing and substantial, that there is a rational connection between the limit on the *Charter* right and the legislative objective, and that the effect of the violation does not outweigh the legislative purpose.

7. *Newfoundland (Treasury Board) v. Newfoundland and Labrador Association of Public and Private Employees (N.A.P.E.)*¹⁸ - Anomaly or the first step down the dreaded slippery slope?

The Supreme Court has held on numerous occasions that the burden of proof rests on the government to show on a balance of probabilities that the infringement meets the *Oakes* test and has on more than one occasion expressly stated that budgetary considerations alone are not sufficient to override a *Charter* right. The *NAPE* case, as it is commonly referred, sent chills down the spines of equality-seekers as it seemed to fly in the face of these well-recognized legal principles.

NAPE dealt with pay equity and there was no real dispute between the parties that the provincial government's actions were discriminatory. In 1988, after acknowledging years of systemic discrimination against female employees as a result of being paid less for work of equal value, the Newfoundland provincial government entered into a Pay Equity Agreement. In 1991, in response to a significant decrease in federal transfer payments, the government passed legislation to defer the first payment under the agreement, in essence erasing a \$24 million payment due to former employees. Those employees who retired before 1991 would never benefit from the Pay Equity Agreement at all.

¹⁷ *R. v. Oakes*, [1986] 1 S.C.R. 103.

¹⁸ [2004] S.C.J. No. 61, October 28, 2004

The focus in *NAPE* was not whether a *Charter* violation had occurred, but whether the government had met its burden of proof under the *Oakes* test. Despite what one might reasonably argue was scant evidence submitted on the part of the government, the Supreme Court accepted as fact that it was facing a serious financial crisis sufficient to justify the infringement.

According to the Supreme Court's written judgment, the only evidence presented by the government appeared to be an excerpt from Hansard and some budget documents. Considering the Courts' general position that what is said during Legislative and Parliamentary debates is not determinative when establishing intent and is not to be taken as fact, the Supreme Court's conclusion in *NAPE* is very concerning for applicants. Despite its assurances that its finding in this case is the exception to the accepted rule that budgetary constraints in and of itself are not sufficient to justify a *Charter* violation, the fear is certainly very real that future cases may continue down this slippery slope, gradually chipping away at the government's burden of proof. If this fear in fact becomes a reality, we run the risk of seriously weakening the protection the *Charter* provides.

CONCLUSION

The above cases represent only a small sample of the many *Charter* cases that have gone before the Courts, however they highlight several key aspects from an applicant's perspective. They illustrate some of the positive and the negative aspects of *Charter* jurisprudence over the past 25 years and identify the pitfalls that may befall an applicant.

Charter litigation, like all areas of the law, continues to evolve and there are many issues left to be considered and no shortage of future scenarios where government action or legislation will be called into question. Despite some setbacks and controversial decisions, there have been many victories over the

years and we must remain hopeful that Courts will follow a path that strengthens the protections afforded by the *Charter* so that it continues to be a meaningful and powerful document.