THE LAW OF THE CHARTER: GENERAL PRINCIPLES
By Dale Gibson
Toronto: The Carswell Company Ltd., 1986
291 pp.
David Rose*

Professor Gibson has distinguished himself as one of the most prolific authors on the Canadian Charter of Rights and Freedoms,¹ since its advent in 1982. To an already extensive collection of literature, he has added a useful guide to the use and application of the Charter, which should prove to be a helpful tool for a legal community still fairly inexperienced in arguing and applying the Charter.

As is stated in the book’s preface, The Law of the Charter is limited to considerations of historical background; principles of interpretation; scope; limits; general defences; remedies; and procedures. Consideration of these topics is not calculated to provide compelling reading. In fact, I found it difficult to read through the book from cover to cover. Rather than attempting to entertain, however, Gibson has provided practical guidance to lawyers who have suddenly been confronted with a document which possesses a constitutional character they are ill-prepared to deal with. The Constitution Act, 1867² has hardly been a commonplace feature of everyday litigation. Conversely, the Charter is the subject of daily argument and application, particularly in the criminal law courts. The book provides a point of departure from which those relatively unfamiliar with the Charter can begin to frame a constitutional argument.

In this regard, two chapters should prove quite helpful. Chapter IV deals with limits, particularly with section 1 of the Charter. Most, if not all, claims that a law is inconsistent with the Charter will be met with the contention that the law is a “reasonable limit . . . demonstrably justified in a free and democratic society.” Unless this contention is met, a finding that a statutory provision prima facie violates the Charter will be a hollow victory.

Chapter VII, on the other hand, deals with the exclusion of evidence from judicial proceedings. In the criminal law context little is gained if police actions are found to violate a Charter provision, for evidence thereby obtained is, in any case, admitted. Both chapters noted deal quite extensively with the pertinent elements of their respective topics, and should prove to be quite helpful.

On the whole, the book is well organized, providing numerous helpful headings for convenient reference. It is clearly written and free of cumbersome language, so prevalent in the work of many academics. Notes are

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located at the foot of the page so that sources are easily ascertainable. Overall, the book should appeal to a wide audience within the legal profession. For this, Professor Gibson should be commended.

However, *The Law of the Charter* is not without its shortcomings. Chapter 1, in particular, is an enigma. Gibson uses it to provide some historical context for the reader. In doing so, he becomes the *Charter* apologist, trotting out examples of the Canadian judiciary ignoring basic civil liberties. The particularly reactionary words of Mr. Justice O'Halloran are cited as one of the more egregious examples:

The Holmesian idealistic concept of freedom...leads in our day not to the strengthening of the foundations of freedom, but tends on the contrary to encourage the suppressors of freedom...[T]here is ultimate danger in the Holmesian thinking as there is present danger in the Communist thinking...Freedom like fire is a real thing with positive consequences and it is dangerous to leave its definition and appraisal to the negative fictions and formulae of idealistic libertarians.4

Certainly, these words would make any “civil libertarian” shudder. However, the obvious corollary is not, as Professor Gibson implies, that an entrenched bill or charter of rights is required to safeguard a person’s freedom. Another conclusion, at least as obvious, is that individual liberties are as frail as the sensibilities of those commissioned to protect and uphold those same liberties.

Regardless of one’s conclusion on this point, it would seem that a proper justification of the *Charter* requires more than a thumbnail historical sketch of civil liberties in Canada. In brief, Chapter I neither provides a meaningful historical context for the *Charter*, nor does it convert “unbelievers” into *Charter* enthusiasts. It seems quite out of character with the rest of the book, and as such, its useful content could well have been contained within a brief introductory section.

A particularly glaring oversight in the publication of the book is that nowhere, neither within the body nor in an appendix, does it contain a copy of the *Charter*. I found it somewhat frustrating when, wishing to refer to a particular provision, it was necessary to seek my information elsewhere.

Unfortunately, as is foreseen in the book’s preface,5 attempting such a comprehensive work at such an early stage of *Charter* jurisprudential development will inevitably lead to a good deal of the book becoming obsolete fairly quickly. In particular, some of the more unorthodox and innovative views held by Professor Gibson have already been rejected by Canadian courts. For example, his view that the *Charter* is applicable as between private citizens has been ostensibly rejected by the Supreme Court of Canada in *R.W.D.S.U. v. Dolphin Delivery*.6 Another position which seems to have met the same fate is Gibson’s view that public opinion polls should be used in determining whether the admission of illegally obtained evidence would “bring the administration of justice into disrepute”, within the meaning of

section 24(2). It has been explicitly disavowed by Mr. Justice Le Dain in
R. v. Therens7 and has been impliedly rejected by the majority of the
Supreme Court in the same case.

The Law of the Charter, in the final analysis, is a welcome addition to
the collection of literature dealing with the Charter. While much of this
literature has dealt with the substantive provisions of the Charter, Professor
Gibson has tackled some of the less glamorous topics, but topics which
nonetheless need to be addressed. While the book is, unfortunately, to a
significant degree bound for obsolescence, during its life span it should
provide useful service to many students and practitioners.

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