

The Contribution of Chief Justice Dickson to an Interpretive Framework and Value System for Section 1 Of The *Charter of Rights*

Peter W. Hogg* and Roland Penner**

Editor's Note: The major address to the Dickson Legacy Symposium on Section 1 of the *Charter of Rights and Freedoms* was delivered by Professor Peter Hogg of Osgoode Hall Law School. However, the paper which he read was already committed to another publication, *The Dickson Years, 1973-1990*, to be published by the Supreme Court of Canada Historical Society and edited by Professor DeLloyd Guth of the Faculty of Law, University of British Columbia. Accordingly, Professor Hogg's paper as delivered cannot be published here in its complete form. What follows, by agreement with Professors Hogg and Guth, is a synopsis of Hogg's paper and an expanded commentary by Roland Penner, Dean of Law, University of Manitoba (part of which was delivered at the symposium).

A. SYNOPSIS OF ADDRESS BY PETER W. HOGG

SECTION 1 OF THE *CHARTER*¹ provides 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.

Section 1 not only makes it clear that rights and freedoms guaranteed by the *Charter* are not absolute, but sets the stage for a definition of the limits which may be put on rights and freedoms by requiring that those limits must be "prescribed by law," must be "demonstrably justified," and perhaps most importantly for the judicial evolution of a contemporary value system, must base that justification on the current beliefs of a "free and democratic society."

The existence of Section 1, Professor Hogg believes, reflects the influence of international human rights instruments; he compares these instruments to the American Bill of Rights, which contains no

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¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

such clause and which, in the main, defines guaranteed rights in seemingly unqualified terms.

Though the existence of Section 1 in the Canadian *Charter* may be justified as a vehicle for balancing individual and collective rights, there is a clear and always present danger, Hogg suggests, that the non-elected judiciary will assume the task of "re-doing the political calculus of costs and benefits that has already been performed by an elected legislative body." He sees this as a danger because of the non-accountability of the judiciary and because the courts will often lack the "expertise and resources to review the legislature's judgment that a particular law will increase the general welfare."

It is Professor Hogg's thesis that the Supreme Court of Canada under the leadership of Brian Dickson, beginning with his celebrated and "brilliant opinion" in *Oakes*,² has not only grappled boldly with the seemingly intractable problem of "taking rights seriously" in such circumstances, but, on the whole, has done so rather well.

Professor Hogg draws our attention to the development from *Oakes*³ to *Edwards Books*⁴ and *Irwin Toy*⁵ of a Section 1 test that is rigorous in defence of guaranteed rights but yet, within the ambit of a discretionary "margin of appreciation," is appropriately deferential with respect to the mandate of Parliament and the legislatures.

Professor Hogg, in discussing the vital issues of the burden of proof and the nature of the evidence to be adduced, asserts that the Supreme Court (wisely, he thinks) is of the view that in the absence of positive admissible evidence on the issue of justification it can resort to common sense for proof. Nevertheless, Hogg points out, it is risky for a government to appear at a hearing where, as will increasingly be the case, the issue is Section 1, without having built an evidentiary basis for the government's justificatory argument.

Professor Hogg summarizes the four criteria developed in *Oakes*⁶ which must be satisfied for the law limiting a right to be qualified as reasonable. These are: (1) sufficiently important objective; (2) rational connection; (3) least drastic means; and (4) proportionate effect.

He points out that, in effect, it will most usually be the issue of least drastic means which troubles the court. He cites a number of

² *R. v. Oakes*, [1986] 1 S.C.R. 1781.

³ *Ibid.*

⁴ *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713.

⁵ *Irwin Toy Ltd. v. Quebec*, [1989] 1 S.C.R. 927.

⁶ *Supra*, note 2.

cases in which the law in question has failed the requirement of least drastic means: the *Criminal Code's* felony-murder rule held to be too drastic a means of discouraging the use of weapons by criminals in *R. v. Vaillancourt*;⁷ Quebec's prohibition of the use of English in commercial signs held to be too drastic a means of protecting the French language (although requiring the use of French is acceptable) in *Ford v. Quebec*;⁸ Alberta's rule prohibiting Alberta lawyers from entering into partnership with lawyers not resident in Alberta held to be too drastic a means of regulating the standards of the legal profession in *Black v. Law Society of Alberta*;⁹ Alberta's statutory prohibition of the publication of accounts of matrimonial litigation held to be too drastic a means of safeguarding the privacy of individuals in *Edmonton Journal v. Alberta*.¹⁰

However, as he points out, it "is rarely self-evident that a law limiting a *Charter* right does so by the least drastic means." It would not be difficult for a judge so inclined to find less drastic means than those actually employed, but such a stretching of the point will involve an abandonment of "some degree of deference to legislative choices." It is particularly in a federal state where there are likely to be some appreciable differences in the choice of the means to accomplish the same goal by various legislatures that there should be, Hogg argues, what European judges have termed a "margin of appreciation" — *i.e.* a "zone of discretion within which different legislative choices in derogation of a *Charter* right could be tolerated."

It is in light of this need that, Hogg suggests, the Supreme Court of Canada has moved away from the apparently categorical language of *Oakes*¹¹ to something closer to a "margin of appreciation" test with, *e.g.*, the concept of reasonableness being added in *Edwards Books*.¹² In that case La Forest J. put it: "A legislature must be given reasonable room to manoeuvre." Subsequently, in *Irwin Toy*,¹³ the court actually used the phrase "margin of appreciation."

⁷ [1987] 2 S.C.R. 636.

⁸ [1988] 2 S.C.R. 790.

⁹ [1989] 1 S.C.R. 591.

¹⁰ [1989] 2 S.C.R. 1326.

¹¹ *Supra*, note 2.

¹² *Supra*, note 4.

¹³ *Supra*, note 5.

The results of the cases where the court has moved away from the strictness of the *Oakes*¹⁴ test “makes for an unpredictable jurisprudence” Hogg argues, but, he suggests “there is no practical way to avoid uncertainty” in this area.

“During the public debate that preceded the adoption of the Charter of Rights, there was controversy about the desirability of a limitation clause, the conventional view being that the clause weakened the *Charter*. But Dickson C.J.’s powerful judgment in *Oakes*¹⁵ has given to Section 1 the role of actually strengthening the *Charter*. The stringent requirements of justification imposed in that judgment are undoubtedly more difficult to discharge than the requirements that would have been imposed by the courts in the absence of a limitation clause. Although *Oakes*¹⁶ has been softened by the idea of a ‘margin of appreciation,’ it remains the keystone of judicial review under the *Charter*, and the most important of Dickson C.J.’s many contributions to the development of a systematic, principled, *Charter* jurisprudence,” Hogg concludes.

B. COMMENTARY BY ROLAND PENNER

PETER HOGG’S CLEAR OVERVIEW of Section 1 and the developing jurisprudence thereunder invites a comment in particular on the critically important issue of “least drastic means” — *i.e.* the employment in the challenged statute by the legislature or Parliament, as the case may be, of the least drastic means for restricting the guaranteed right in order to achieve the desired objective. As he points out, like so many major touchstones in law (notoriously “reasonableness”), “least drastic means” can become treacherously subjective and leave the test of the least drastic means as open-ended, or at least as multifarious, as are the views of individual judges.

It is useful, indeed necessary, to pay attention here to the mounting criticism of judicial review in the era of the *Charter* by a substantial number of respected critics, *e.g.* Petter,¹⁷ Glasbeek and Mandel,¹⁸

¹⁴ *Supra*, note 2.

¹⁵ *Supra*, note 2.

¹⁶ *Ibid.*

¹⁷ A. Petter, “Immaculate Deception: The *Charter*’s Hidden Agenda” (1987) 45 *Advocate* 857.

Bakan,¹⁹ much earlier Ison²⁰ and many others, all of whom are concerned, *inter alia*, about the displacement of political discourse by legal discourse; that is to say the relatively undemocratic substitution of the views and will of a non-elected and tenured judiciary for the views and will of elected and untenured politicians. I suppose that even the strongest critic of judicial review would admit that political discourse at the parliamentary level is only formally democratic and can by no means be said to respond to the popular will on any given issue at any particular time.²¹ A further question, addressed later in these comments, is whether in “trumping” the challenged legislation by “legal discourse” the judiciary can be said to be responding — if not *all* of the time then *most* of the time — to what might be defined, on the issue before them, as the popular will.

In coming to what might seem like, and I suppose at least in part is, a defence of the *Charter* and of the judicial review it necessarily invites, I hope that I will not *per se* be categorized out of hand as a collaborator in the “legalization of politics” (Glasbeek and Mandel) or a fellow traveller on the train of “judicial imperium” (to use a phrase originally coined by Peter Russell). My point in this commentary is that if, as appears to be the case, the ambit of judicial review in *Charter* cases has been narrowed by the conscious use of a deferential test like the “margin of appreciation,” we may well have the beginnings of an acceptable use of judicial powers — although the matter does not end there by any means.

Glasbeek and Mandell, in referring to the *Charter*, state at the outset of their important article on the *Legalization of Politics*:

Thus, the judiciary has been given a central role to play in Canadian socio-political affairs, beyond the role of umpire between the two levels of government. It has become a recognized participant.²²

¹⁸ H.J. Glasbeek and M. Mandel, “The Legalization of Politics in Advanced Capitalism: The Canadian *Charter of Rights and Freedoms*” (1984) 2 *Socialist Studies/Etudes Socialistes: A Canadian Annual* 84.

¹⁹ J. Bakan, “Strange Expectations: a review of the two themes of judicial review” (1990) 35 *McGill L.J.* 439.

²⁰ T.G. Ison, “The Sovereignty of the Judiciary” (1985) 10 *Adelaide L.R.* 1, reprinted in (1986) 27 *Les Cahiers de Droit* 503.

²¹ *viz* the debate about the legitimacy of the federal government using a parliamentary majority and a made-for-the-occasion Senate majority to pass the controversial and vigorously opposed statute authorizing the Goods and Services Tax.

²² *Supra*, note 18 at 84.

In my view, there has been no time in the history of constitutional adjudication in Canada that the courts at any level merely played the role of "umpire" and did not, for the most part, play a value laden "political role." (One can only hope that the burgeoning discipline of Canadian legal history will soon tackle in some depth the "myth of the umpire.") In any event, although enhanced by it, judicial review is not a child of the *Charter* and certainly not, I would argue, its "*enfant terrible*." We lost our innocence with respect to judicial review not in 1982, but circa 1876/78, the years immediately following the passage of the *Supreme Court Act*,²³ when the Court delivered its first division of powers judgments, thereby making a political decision — i.e. a decision with clear political consequences. Surely there is not much that can be more political than, in effect, re-distributing legislative power in a federal state.

No doubt the *Charter* has greatly enhanced — or more appropriately widened — the scope of judicial review, but it certainly did not invent it! When a court strikes down a statute because it is held to be *ultra vires*, it is in effect legislating and, either implicitly or sometimes very explicitly, putting aside the veil of doctrine and revealing a policy and a value bias. In the game of constitutional jurisprudence the umpire is never blind. The courts have not just *become* participants: they always *were*!

Secondly, this implied notion of the arrogation of power by the judiciary (often described in those terms in popular legal journalism) fails to take sufficient account of the undeniable fact that it was "we the people" who, through a very democratic constitutional process, conferred upon the judiciary that duty and that power; and it is "we the people" who, albeit not without some considerable difficulty, can take that power away by amendment to the *Constitution Act, 1982* or through the use of the "override," the notwithstanding clause.²⁴

That said, the issue remains: how wisely has the power of judicial review been used and to what effect? A related issue is defined by the argument, frequently enough heard, that even if the *Charter* is used wisely now, there is nothing to guarantee that it will be used wisely in the future. Here, essentially, we must look to Section 1 jurisprudence both in terms of the analytical model developed to date and,

²³ R.S.C. 1985, c. S-26.

²⁴ *Constitution Act, 1982*, being Schedule B of the *Canada Act, 1982* (U.K.), 1982, c. 11, s. 33. With respect to the democratic process leading up to the passage of the Act and, in particular, the final formulation of the *Charter*, see, e.g., S. Robinson, "The NDP, the *Charter* and the Constitution" (1981) 61 *Canadian Forum* 14.

more fundamentally, to the policy parameters expressed or implied in the cases; and, even more fundamentally I would suggest, to those things which appear to shape judicial opinion at least as much as and, in the case of Dickson or the Dickson Court, more than the individual value systems of the judges.

As Hogg points out in his paper, the analytical model which the Court has developed is now a great deal more than the structure and formulae originally developed, primarily by Dickson, in *Oakes*.²⁵

As it stands today that model is also infused with a set of values which is perhaps Dickson's greatest contribution. Peter Hogg outlined them in his paper as including "respect for the dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs and respect for cultural and group identity."

I cite one case for specifics: *Slaight Communications v. Davidson*,²⁶ but I could as well have chosen *Irwin Toy*²⁷ or *Edwards Books*.²⁸

At issue in *Slaight* was a labour mediator's remedial order in an unjust dismissal case, which remedial order palpably limited the employer's freedom of expression by ordering it to give a well defined though factual letter of reference to the unjustly dismissed employee and further ordering it not to reply to inquiries in anything but the same terms. Since it was undeniable that this amounted to a first stage denial of *Charter* guaranteed freedom of expression, a second stage recourse to Section 1 became necessary.

In discussing the application in *Slaight* of Section 1, Dickson referred to his statement in *Oakes*²⁹ about underlying values essential to a free and democratic society including the inherent dignity of the human person and commitment to social justice and equality and, specifically, in the labour law context said:

It cannot be over-emphasized that the adjudicator's remedy in this case was a legislatively-sanctioned attempt to remedy the unequal balance of power that normally exists between an employer and employee.³⁰

²⁵ *Supra*, note 2.

²⁶ *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038.

²⁷ *Supra*, note 5.

²⁸ *Supra*, note 4.

²⁹ *Supra*, note 2.

³⁰ *Supra*, note 25.

One thinks as well of the moving references in *Edwards Books* to the social significance of a common pause day and to the disadvantaged position of marginalized retail clerks,³¹ and of the reference in *Irwin Toy*³² to the court's concern with the vulnerable in our population, in that case children.

As pointed out by Lynn Smith,³³ in *Brooks*³⁴ and *Janzen*³⁵ — not *Charter* cases it is true — Dickson for a unanimous court in each instance wrote about the vulnerability and changing role of women in the workplace.

It is not only right but in my view essential to point to these statements as significant value parameters within which the Dickson court has developed at least the beginnings of or basis for a *humanistic* Section 1 jurisprudence.³⁶

It is right to attribute much of this to the very special genius of the person we honour today. However, it would be wrong in my view to say, as some critics of judicial review under the *Charter* do, that this is ephemeral, the influence of one unique individual, and that over the long haul the underlying bias will be the essential conservatism of the judiciary.

This is an understandable concern, but what it misses, I think, is what I have sometimes referred to as the symbiotic relationship between the judiciary and the particular society in which it operates.

In his well-known essay "The Death of Law?,"³⁷ Owen Fiss writes, in part, about law appearing both as "generative of public values" and "dependent upon them."

The Warren Court and the transformative process that it precipitated in American society not only presupposed a belief in the existence of public values but was also responsible for it.³⁸

³¹ *Supra*, note 4.

³² *Supra*, note 5.

³³ L. Smith, "The Equality Rights," *supra* at 376.

³⁴ *Brooks v. Canada Safeway Ltd.* (1989), 59 D.L.R. (4th) 321 (S.C.C.).

³⁵ *Janzen v. Platy Enterprises Ltd.* (1989), 59 D.L.R. (4th) 382 (S.C.C.).

³⁶ And see in this respect E.P. Mendes, "In Search of a Theory of Social Justice: The Supreme Court Reconceives the Oakes Test" (1990) 24:1 R.J.T. 1.

³⁷ O. Fiss, "The Death of Law?" (1986) 72 Cornell L. Rev. 1. (In his article in this collection Peter Russell raises but does not deal with the critical issue of what he calls "the transmission belts" which connect judicial opinions to popular political culture.)

³⁸ *Ibid.* at 15.

Which comes first, the Warren Court or the civil rights movement? Which came first in Canada, the women's movement or such judgments as (in the example of the women's movement) *Brooks*³⁹ and *Janzen*,⁴⁰ the aboriginal rights movement or judgments like *Guerin*⁴¹ and *Sparrow*,⁴² the general commitment in contemporary Canadian society to social justice or the Dickson Court as in, e.g., *Edwards Books*?⁴³

This is not at all to denigrate from the contribution of Brian Dickson but to recognize his and the Supreme Court's highly important contribution in rooting Section 1 in the kind of contemporary values which are said to make Canada a distinct society and are far more populist than elitist. This is a legacy which, in my view, will not soon or easily or perhaps, one hopes, ever disappear from Canada's legal and political landscape.

Harry Arthurs recently proposed that when the short term effects of *Charter* jurisprudence subside, "when the adaptive mechanisms run their course the direct effect of *Charter* decisions will appear as but a grace-note in the historic symphony of economics, cultural and social change."⁴⁴

Perhaps! And perhaps, as Arthurs concludes in his "Right to Golf" speech, "life will likely go on, as it does now and as it has always done, relatively unaffected by law."⁴⁵

This is quite another and, no doubt, a fundamental discussion.

My point is that, to the extent life *is* affected by law and our polity by the *Charter*, the Dickson Legacy has been, substantially, to democratize *and humanize* the application of Section 1 *and*, in so doing, to return, *as far as the courts can*, the fundamental law of the land not so much to Parliament and the legislatures as to "we the people," where, in the final analysis, it really belongs.

³⁹ *Supra*, note 34.

⁴⁰ *Supra*, note 35.

⁴¹ *Guerin v. R.*, [1984] 2 S.C.R. 335.

⁴² (1990), 70 D.L.R. (4th) 385 (S.C.C.).

⁴³ *Supra*, note 4.

⁴⁴ H.W. Arthurs, "The Right to Golf: Reflections on the Future of Workers, Unions and the Rest of Us Under the *Charter*" (1988) 13 *Queen's L.J.* 17.

⁴⁵ *Ibid.* at 31.