

THE LAW OF THE CHARTER: GENERAL PRINCIPLES

By Dale Gibson

Toronto: The Carswell Company Ltd., 1986

291 pp.

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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, 1867*² 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."³ 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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1. Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

2. *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3 (Formerly *British North America Act, 1867*).

3. *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, s. 1.

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 I, 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 ostensively 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

4. *Martin v. Law Society of B.C.* (1950), [1950] 3 D.L.R. 173 at 185 f. (B.C.C.A.).

5. D. Gibson, *The Law of the Charter: First Principles* (Toronto: Carswell, 1986) at iii.

6. (1986), [1986] 2 S.C.R. 573, [1987] W.W.R. 577, 38 C.C.L.T. 184.

section 24(2). It has been explicitly disavowed by Mr. Justice Le Dain in *R. v. Therens*⁷ 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.

7. (1985), [1985] 1 S.C.R. 613, 18 D.L.R.(4th) 655.

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