CHARTER ISSUES IN CIVIL CASES edited by Neil R. Finkelstein and Brian MacLeod Rogers (Toronto: Carswell, 1988) pp. 320.

"Charter Issues in Civil Cases" is a collection of thirteen essays reviewing the civil side of the Canadian Charter of Rights and Freedoms, on the basis of the first five years of experience under the Charter. The essays are by twelve different authors and were originally presented at programs sponsored by the Law Society of Upper Canada in Toronto and Ottawa in November and December, 1987.

The essays are organized in chapters under four headings: General Principles, Employment and Labour Law, Freedom of Expression, and the Regulatory Environment. The styles of the chapters vary, as do their approaches to Charter issues. At a minimum, each of the chapters contains an interesting analysis of relatively recent Charter litigation dealing with topical concerns. Many of them contain extremely thorough reviews of the case law and developed doctrines in particular areas. A number go well beyond this, synthesizing principles, and providing insightful evaluations of those principles. Some of the essays, particularly in the first part of the book dealing with general principles, take the additional step of identifying and discussing themes that recur in a number of contexts in Charter litigation. It is interesting to see those themes picked up and discussed in particular applications in subsequent parts of the book.

Part One, General Principles, commences with a paper by Robert J. Sharpe entitled "Judicial Development of Principles in Applying the Charter". Professor Sharpe discusses the interpretation and limitation of Charter rights and freedoms and demonstrates that both are influenced by the courts' own views of their institutional competence in particular areas. With regard to procedural guarantees or the protection of minorities, the courts consider that they have a special expertise and tend to expansively define rights and freedoms, and to stringently review any limits placed on them. On the other hand, in areas of economic policy, or areas involving perceived political compromises, the courts are clearly much more hesitant to second guess the legislatures, and tend to limit by definition Charter rights and freedoms, and further to allow "a certain leeway" to legislatures in their assessment of reasonable limits. A number of examples are discussed, including the labour trilogy of cases in which the various Justices, in split decisions, were clearly influenced by their concerns to give some deference to the legislative balancing of rights. This influence affected McIntrye J.'s purposive analysis of the scope of freedom of association, and Dickson C.J.C.'s discussion of reasonable limits under s. 1. Professor Sharpe concludes that "there will be no single standard of judicial review routinely applied to all cases" and that the courts will "proceed by assessing their own institutional strengths and weaknesses in relation to each given issue". Cautious and conservative approaches can be expected in areas of economic policy and business regulation, but the courts will act "with confidence" to protect minority rights, procedural rights, or substantive rights in the area of criminal law. This theme of institutional competence and resulting variation in the standards of judicial review recurs throughout the later chapters of the book.

The next three chapters of Part One deal with the scope of application of the Charter, the remedies available for Charter violations, and procedural issues in civil Charter litigation. Edward P. Belobaba addresses the question of governmental action in a chapter entitled "The Charter of Rights and Private Litigation: The Dilemma of *Dolphin Delivery*". He begins with an analytical framework for the elements of government action, focusing on both statutory and structural connections to government. Sufficiently strong statutory or structural connections, or a combination of the two, should call for an application of the Charter. The dilemma of *Dolphin Delivery* was a desire, on the one hand, to confine the application of the Charter to governmental action only, and on the other hand, to have the Charter apply to all forms of law, including the common law, and to all branches of government, including the judicial branch. Clearly there are strong statutory and structural connections between the courts and government. But it was feared that fulfilling the second objective would indirectly result in the application of the Charter to private activity. For this reason, the Supreme Court drew back from a full application of the Charter to common law or the courts. Mr. Belobaba suggests that the apparent dilemma was just that, and could have been avoided by providing that the Charter applies to common law rules in a general sense, when the rules either facially or in their generalized operation negatively impact on the Charter. This would exclude from Charter application situations where neutral common law rules are applied in a specific case to enforce private activity, such as a discriminatory restrictive covenant. Such a resolution of the dilemma would have avoided the confusion and contradictions engendered by the *Dolphin Delivery* decision. These confusions and contradictions reflect another theme, the unknown scope of governmental action and the anomalous results that follow from an application of the *Dolphin Delivery* rules, that recurs throughout the following chapters.

Brian Morgan in his chapter entitled "Charter Remedies: The Civil Side After the First Five Years" provides a comprehensive review of case law and academic commentary on remedies issues. He briefly reviews the standard defensive remedies and declarations of invalidity and, in considerably more depth, he reviews the more innovative remedies of damages, various forms of injunction, and partial invalidation or judicial amendment of statutes. In this chapter the theme of institutional competence finds expression in judicial concern to avoid remedies that intrude on the legislative function. While the author recognizes these concerns and analyses the various remedies in view of their degree of intrusiveness, he also demonstrates that a lack of judicial flexibility in the remedies area will mean that Charter rights and freedoms will not be properly given effect. In this context, once a court has determined that an unreasonable infringement of a Charter right or freedom exists, and presumably has taken into account its own institutional competence in coming to that conclusion, judicial activism, not deference to the legislature, is necessary.

The final chapter in Part One is entitled "Civil Litigation Under the Charter" and was written by Graham R. Garton. This paper deals with questions of standing, the definition of courts of competent jurisdiction to grant Charter remedies, and procedure and evidence in Charter cases. A

number of complex issues are dealt with, such as the jurisdiction of administrative tribunals to grant Charter relief. Mr. Garton notes that in general the Charter has not created significant differences in these areas, although previously developed principles or rules of practice have had to accommodate Charter concerns, particularly in the area of evidence for the development of a s. 1 record.

Part Two of the book, Employment and Labour Law, contains three papers dealing with different Charter guarantees in the context of issues of interest to the labour lawyer. In this Part the theme of institutional competence recurs, and there are a number of examples of difficulties experienced in distinguishing between governmental and private action, and in applying the rules of *Dolphin Delivery*. The first essay, written by Neil Finkelstein, is entitled "The Supreme Court, the Charter and Labour Relations". It examines the labour relations trilogy of cases, and attempts to draw from them some general principles relating to the scope of freedom of association under the Charter. One of the major principles that is apparent from an examination of the decisions of LeDain J. and McIntyre J. is that a high degree of judicial restraint should be exercised in the labour relations field. There is a perceived need for delicate legislative balancing. Clearly labour law is not to be generally constitutionalized, and Mr. Finkelstein speculates that the decisions may signal a retreat generally from judicial intervention in economic areas. The author goes on to examine a number of labour issues including the right not to associate, in the context of either compelled dues or union security provisions, and picketing and certification issues. They are all complicated by threshold issues of Charter applicability, and by issues of characterization as private or governmental action. This is an area in which there is a particularly complex intermingling of public and private activity, with private actors operating within elaborate statutory schemes, and public actors operating through private law vehicles such as collective agreements.

Also included in Part Two are essays entitled "Equality Rights, Affirmative Action" by Russell R. Juriansz and "Charter Mobility Rights: Five Years Down the Road" by Roger A.G. Beaudry. The equality rights paper includes a review of the various judicial tests of the scope of s. 15, now rendered somewhat moot by the delivery of the *Andrews* v. *The Law Society of B.C.*[1] decision. However, other aspects of the equality rights paper are not dated. There is a very interesting analysis of the relationship of s. 15 to provincial and federal human rights statutes, examining the areas of overlap and of complementary jurisdiction. There is also a detailed and thoughtful discussion of the provisions for affirmative action in both the Charter and human rights legislation, discussing the various subjective and objective tests of acceptability of such programs.

The analysis of mobility rights is interesting in that Mr. Beaudry is the only author in this book who laments what appears to be simply another example of judicial shaping of the Charter to exclude or minimize interference in economic areas, in this case the exclusion of a free-standing

1. *Andrews* v. *Law Society of British Columbia*, S.C.C., February 2, 1989 (unreported).

right to work from s. 6 of the Charter. Mr. Beaudry finds such an approach disappointing, suggesting that most Canadians would perceive the right to earn a living to be as fundamental and necessary as legal rights in the criminal process. But on other issues, this author echoes concerns referred to elsewhere, particularly in the context of defining government action and the consequent results. A narrow view of government action will mean that a combination of union security clauses, and union membership rules excluding extra-provincial workers, may be shielded from constitutional review, even though such provisions would appear to give rise to concerns central to the concept of mobility rights.

Part Three, Freedom of Expression, contains one article dealing with "Freedom of Press Under the Charter" by Brian McLeod Rogers, and two articles by Marie Finkelstein: "Commercial Expression", and "The Charter and the Control of Content in Broadcast Programming". These areas seem to be implicitly accepted by the authors and the courts as within the institutional competence of the courts, as there is extensive reference to pre-Charter common law protection of speech. However, with regard to commercial expression, this is subject to a *caveat* for, while Ms. Finkelstein correctly anticipates that commercial expression will be subject to at least *prima facie* protection under the Charter,[2] she also suggests that a different standard of s. 1 review will apply in this context, as the courts have demonstrated a clear concern to allow limitations on commercial speech to address consumer protection concerns.

The articles dealing with freedom of the press and with broadcast regulations provide a number of interesting parallels and contrasts. These two aspects of the media have similar, although not identical, roles in society, and, as is pointed out by Ms. Finkelstein, give rise to similar policy concerns. Both exercise significant impact on society. Further, both are experiencing decreasing competition and access due to economic barriers to entry into the industries. Nonetheless, these media have historically been treated differently with the print media being afforded greater protection than the broadcast media. Ms. Finkelstein reviews in depth the asserted distinctions between the print and broadcast media, questioning in a number of cases whether there is any current factual basis for such distinctions, and calls accordingly for a more significant protection of free expression in the broadcast media then has traditionally been provided in either Canada or the United States.

On the other hand, since freedom of the press is already afforded a significant degree of protection in terms of direct content-based infringements of free expression, Mr. Rogers is able to explore the potential application of s. 2(b) in other areas, such as indirect infringements on the newsgathering or distribution functions of the press, and publication restrictions in situations where there are significant competing interests. He explores in detail questions and cases relating to rights of access to court proceedings, to the proceedings of administrative or legislative bodies, and to other forms of newsworthy government information. He considers

2. *Ford* v. *Quebec (Attorney General)*, S.C.C., December 15, 1988 (unreported).

indirect interferences with newsgathering through the subpoena of reporters, and indirect interferences with distribution through restrictions on the placement of newspaper vending boxes. He also discusses, with extensive reference to authority, questions of publication bans relating to certain aspects of court proceedings such as the publication of information that would identify complainants in sexual offence cases. In all of these cases he is bold in his assertions of the proper scope of the Charter and the strictness with which a s. 1 test should be applied. While some of his predictions, for instance that mandatory publication bans in the above context are unconstitutional, have subsequently proved to be incorrect,[3] this may mean only that a different balancing than he anticipated is being applied by the courts where there is a direct conflict between free expression and interests related to the administration of justice. Apart from this specific context it continues to seem reasonable to expect a strict protection of freedom of expression as it relates to the functioning of the press.

Part Four, Regulatory Environment, is particularly useful as it introduces the civil litigation lawyer to legal rights that have developed in the criminal context but have at least a limited application with regard to regulatory or quasi-criminal proceedings. There are three chapters in this part: "Investigative and Search Powers in the Regulatory Environment: The Impact of the Charter" by John B. Laskin, "Administrative Tribunals and Section 7 of the Charter" by I.G. Whitehall, and "Rights in the Criminal Process as they Affect Regulatory or Quasi-Criminal Proceedings" by Michael Code.

It is interesting to see even in this procedural context a different and more deferential approach being developed with regard to economic regulation. Mr. Laskin notes that appellate courts have held that s. 8 does not require as high as standard as that established in *Hunter* v. *Southam* for a search to be found reasonable in the regulatory context. Three justifications for the distinction have been put forward. First, the courts have referred to the strong public interest in ensuring compliance with regulatory statutes, and have suggested that this interest cannot practicably be accommodated under a prior authorization system. Further, the Courts have suggested that no significant expectation of privacy is involved in regulatory searches. Finally, a notion of implied consent to searches by licensees has been advanced.

Mr. Laskin suggests that while the first two considerations are proper factors to take into account in a balancing of individual privacy interests against social interests advanced by legislation, there is still a need to critically analyze the justification in the context of a particular statute and particular form of search. With regard to the implied consent notion, he argues that this fiction simply detracts from the proper balancing test. In addition to searches in the usual sense, the question of whether or not a demand for production should be characterized as a search or seizure is addressed and the case law on the point reviewed. Further, the issue of a general right against self-incrimination applicable in the inquiry context is discussed.

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3. *Canadian Newspapers Co.* v. *Canada (Attorney General)*, [1988] 2 S.C.R. 122.

Mr. Whitehall's article reviews s. 7 decisions that will probably be more generally familiar to the civil litigation lawyer than the other legal rights discussed in this part. Again, the issue of judicial restraint as applied to economic regulation is raised as he reviews the cases interpreting "life, liberty or security of the person" and concludes that s. 7 rights are unlikely to apply in an economic context. The article did, however, predate the British Columbia Court of Appeal decision in *Wilson* v. *Medical Services Commission of British Columbia*,[4] which may call for a reconsideration of this view, with at least limited economic rights arguably entitled to s. 7 protection.

In the final chapter of the book Mr. Code considers the implications of the *Reference Re Section 94(2) of the B.C. Motor Vehicle Act* decision with regard to a mental or fault element in regulatory offences, and then explores two Charter provisions whose implications in the civil context may not be generally appreciated. Section 9, the right not to be arbitrarily detained, in view of the broad definition of detention in *R.* v. *Therens*, could apply to a number of powers of government inspectors and officials under regulatory statutes, and could complement s. 8 in protecting the privacy of the person in this context. Section 10(b), the right to retain and instruct counsel and be informed of that right following detention, could similarly apply where individuals are subject to compulsory questioning by inspectors under regulatory statutes. Mr. Code reviews a large number of criminal authorities developing the content of these rights.

In sum, "Charter Issues in Civil Cases" is a volume filled with practical information about Charter rights for the civil litigator. Further, for the student or academic it contains a number of interesting ideas and themes that are developed and explored in various contexts.

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4. *Wilson* v. *Medical Services Commission of British Columbia*, B.C.C.A., August 5, 1988 (unreported); leave denied November 3, 1988.