

### BOOK REVIEWS

*THE LAW OF THE CHARTER: GENERAL PRINCIPLES* by Dale Gibson. Carswell, Toronto (1986) pp. xxxiii and 302.

Dale Gibson is one of Canada's foremost legal scholars. He has been a professor of law at the University of Manitoba since 1968 and served on the Manitoba Law Reform Commission from 1971-79. He is the author of numerous books and articles on Constitutional Law.<sup>1</sup> His accomplishments earned him the Law Reform Commission of Canada/Canadian Association of Law Teachers Research Award in 1986. News of Professor Gibson's impending book on the Charter was greeted with interest by this writer and other academics working in the Constitutional law area.

With the publication of *THE LAW OF THE CHARTER: GENERAL PRINCIPLES*, Professor Gibson makes a significant contribution to the growth of Charter scholarship. As the title indicates, this book provides a general survey of issues which affect all Charter litigation. It does not directly address those issues which surround the substantive rights sections. In spite of its general nature, or perhaps because of it, this book is important for everyone who is confronted by the challenges that the Charter presents. Judges, lawyers, politicians, academics, and students alike will find useful material in *THE LAW OF THE CHARTER*. Professor Gibson, playing upon Lord Sankey's "living tree" analogy,<sup>2</sup> describes *THE LAW OF THE CHARTER* as follows:<sup>3</sup>

This book is intended to provide a general map of the Charter forest before it becomes too high and too dense to survey. It attempts to describe the major features of the landscape, and to draw attention to areas where aberrant early growth patterns indicate a need for forest management by judges or legislators.

On the premise that before you know "where you are going it is helpful to know where you have been",<sup>4</sup> Professor Gibson begins with a discussion of the historical context in which the Charter arose.<sup>5</sup> In the course of this chapter, the author discusses our experiences with British constitutional tradition, the British North America Act,<sup>6</sup> the judicial activism during the 1950's, and human rights regimes. Particularly searching is Professor Gibson's examination<sup>7</sup> of The Canadian Bill of Rights, 1960.<sup>8</sup> Professor Gibson concludes that "the experiment with statutory bills of rights has

1. See, for example, D. Gibson, "Public Opinion and Law: Dicey to Today" in *Law in a Cynical Society? Opinion and Law in the 1980's* (D. Gibson and J. Baldwin eds. 1985); D. Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Consideration" in *Canadian Charter of Rights and Freedoms: Commentary*, (W.S. Tarnopolsky and G.-A. Beaudoin eds. 1982); D. Gibson, "Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms", (1983) 61 *Can. Bar Rev.* 377; D. Gibson and L. Gibson, *Substantial Justice — Law and Lawyers in Manitoba 1670 - 1970* (1972). The reader should note that this list merely scratches the surface of Professor Gibson's literary endeavors.

2. *Edwards v. A.-G. Canada* [1930] A.C. 124 (P.C.) at 136.

3. D. Gibson, *The Law of the Charter: General Principles* (1986) at iii.

4. *Id.* at 1.

5. *Id.* at 1 - 41.

6. Now referred to as The Constitution Act, 1867.

7. *Supra* n. 3 at 12 - 27.

8. S.C. 1960, c. 44.

largely failed in Canada.” According to Professor Gibson, this was a result of the “peculiar manner” in which the Bill was worded, leading to a restrictive interpretation. Further, he places blame on the “attitudes of the judiciary” which he describes as being deferential to elected officials.<sup>10</sup> The first chapter concludes with a brief description of the history of the Charter itself.

The second chapter discusses the principles of interpretation that are applicable in Charter litigation.<sup>11</sup> This chapter discusses issues of interpretation affecting the Charter, as well issues of interpretation affecting legislation challenged on the basis of the Charter. The discussions of why constitutions are different and the implications of those differences fall into the former category. So, also, does the discussion of aids to Charter interpretation.<sup>12</sup> On the other hand, the question of whether the courts should focus on the purpose or effect of impugned legislation — an important question in light of the recent decision in *Regina v. Edwards Books and Art Ltd.*<sup>13</sup> — falls into the latter category.

In Chapter III, the author examines the scope of the Charter.<sup>14</sup> Sections 32 and 33 of the Charter form the focal point of this part of the book. First, the question of who is protected by the Charter is examined. In discussing who is bound by the Charter, the author tackles the issues of whether the Charter applies to the private sector and what is meant by the term “government” in section 32. The chapter concludes with a discussion of the legislative override contained in section 33 of the Charter.

In Chapter IV,<sup>15</sup> Professor Gibson tackles problems associated with the scope of section 1 of the Charter. Section 1 provides a general limitation on Charter rights as long as the limitations are reasonable and demonstrably justified in a free and democratic society. Of particular interest in this part of his treatise is Professor Gibson’s treatment of the relationship between section 1 and those substantive rights that are already self-limited.<sup>16</sup> This is one of the more difficult unresolved issues inherent in section 1 and, although one might not agree with Professor Gibson’s solution, at least he tackles the problem head-on.<sup>17</sup>

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9. *Supra* n. 3 at 27.

10. *Id.*

11. *Id.* at 43 - 83.

12. *Id.* at 62 - 82. Professor Gibson includes in this topic internal aids — headings, marginal notes, and certain Charter sections (e.g. sections 27, 28); external aids — legislative history, Proceedings of the Special Joint Committee of the Senate and House of Commons, and so forth; comparative aids — the Canadian Bill of Rights decisions, American decisions, and International decisions.

13. Unreported. Judgment delivered December 18, 1986, reversing *sub nom. R. v. Videoflicks* (1985) 14 D.L.R. (4th) 10 (Ont. C.A.).

14. *Id.* at 85 - 131.

15. *Id.* at 133 - 161.

16. See, for example, section 8 of the Charter which provides: “Everyone has the right to be secure against *unreasonable* search or seizure.”

17. This problem arises most dramatically in regard to section 15 of the Charter. If the terms “equality” and “discrimination” are interpreted as being qualified, some rationalization of the relationship between ss. 1 and 15 will be essential.

An equally thorny problem is dealt with in Chapter V entitled "General Defences".<sup>18</sup> At the outset of this chapter, the author examines whether one can contract out of one's Charter rights. This question has serious implications regarding the effect of the Charter on labour relations. Other defences which may be advanced, such as special immunity, state necessity, and good faith reliance, are discussed as well.

*THE LAW OF THE CHARTER* concludes with three chapters examining the issues surrounding the remedial powers contained in the Canadian Charter of Rights and Freedoms. The remedial powers are contained in section 24(1), 24(2), and 52(1).<sup>19</sup> Chapter VI<sup>20</sup> deals with remedies inherent in sections 52(1) as well as the general remedies provision, section 24(1). The exclusion of evidence is discussed in Chapter VII.<sup>21</sup> Of particular interest in this chapter is the discussion of whether it is necessary for an applicant to show a causal connection between the infringement of the right and the obtaining of the evidence. Professor Gibson spends a significant amount of time discussing how an applicant might show that the administration of justice would be brought into disrepute by the admission of evidence. Central to this portion of the treatise is a discussion of the use of public opinion polls.<sup>22</sup>

The book concludes with a chapter concerning "Procedural Matters".<sup>23</sup> Included are subjects such as standing to sue, interventions, notice, and the like.

After reading *THE LAW OF THE CHARTER*, the major question confronting this reviewer is why has the author written this book at this time? According to the preface, the author thinks that now is an appropriate time to examine these basic Charter issues. The suggestion is made that if we wait much longer 'we will not be able to see the forest for the trees' — that the basic issues will become obscured and confused by the sheer number of judicial decisions.<sup>24</sup> Although there is merit in this view, it does create a situation where the propositions advanced, and the explanations and justifications offered, are, due to the 'march of time', either speculative, incomplete, or no longer accurate. Professor Gibson has recognized this problem. He states:<sup>25</sup> "It would be futile to hope that the 'forest map' provided herein will remain valid for long; the trees are growing too rapidly for that."

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18. *Supra* n. 3 at 163 - 181.

19. Section 52(1) provides that "the Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force and effect." This section is not actually part of the Charter. However, the Charter's status as part of the Constitution means that remedies based upon section 52(1) are available when laws are inconsistent with Charter rights.

20. *Supra* n. 3 at 183 - 217.

21. *Id.* at 219 - 261.

22. *Id.* at 236 - 250. This is based on Gibson, "Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms", *supra* n. 1.

23. *Id.* at 263 - 291.

24. *Id.* at iii. Professor Gibson states: "This book is intended to provide a general map of the Charter forest before it becomes too high and too dense to survey."

25. *Id.*

This problem is exhibited in a number of places in the treatise. For example, in discussing the way in which the Charter should be interpreted, the author states that the Supreme Court should feel free to depart from previous decisions.<sup>26</sup> This reviewer would not disagree with this proposition. However, an illustration of this doctrine might have been useful for the reader. The *Mannion* case might have provided such an illustration.<sup>27</sup> In this case the Supreme Court held that an accused's previous testimony could not be introduced against him on a second trial on the same indictment. In so holding, the Supreme Court explicitly departed from pre-Charter precedent on the scope of the right against self-incrimination.

A second example of the arguably premature nature of *THE LAW OF THE CHARTER* is found in the discussion of the meaning of the phrase "court of competent jurisdiction" found in section 24(1) of the Charter.<sup>28</sup> Because of the timing of the book's publication (the preface is dated July 2, 1986), the discussion of this topic proceeds in the absence of any mention of *Mills v. The Queen*,<sup>29</sup> handed down by the Supreme Court of Canada on June 26, 1986. This case represents an important statement by the Court on the meaning of "court of competent jurisdiction".

A third example of the 'ravages of time' concerns Professor Gibson's discussion of the application of the Charter to the private sector. Professor Gibson makes a strong argument that the Charter should apply to the private sector. After a detailed analysis of the issue, he concludes:<sup>30</sup>

If the Charter is to serve the purpose of striking a satisfactory compromise between the claims of the individual and the claims of the community, its norms must be applied to everyone — public or private — whose actions affect the rights and freedoms of others.

This issue was recently dealt with in the case of *R. W.D.S.U. v. Dolphin Delivery*.<sup>31</sup> On this point, Justice McIntyre concluded that he was "in agreement with the view that the Charter does not apply to private litigation." Although the judgment may be open to some criticisms, it appears that the focus of the debate must now shift to an examination of which seemingly 'private' actors can be included under the 'rubric' of "government" in section 32 of the Charter.

The argument that this book is premature, may, in some ways be applied to every article published on the Charter to date, and, for a while to come. Articles, however, have a shorter time lag between authorship and publication. Further, in the reviewer's opinion, the reader views them as having a more limited lifespan than books. This, however, brings me to my second major comment on *THE LAW OF THE CHARTER*.

The themes in the treatise are taken largely from previously published articles by Professor Gibson. Of the eight chapters in the book, one is entirely new (Chapter I), a second (Chapter V) is based in part on an article that was forthcoming at the time the book was written and has since been

26. *Id.* at 52.

27. *R. v. Mannion* (1986) 47 Alta. L. R. 177 (S.C.C.) Indeed *Mannion* applied the decision of the Supreme Court in *Dubois v. The Queen* [1985] 2 S.C.R. 350.

28. *Supra* n. 3 at 283.

29. (1986) 26 C.C.C. (3d) 481.

30. *Supra* n. 3 at 118.

31. Unreported. Judgment delivered December 18, 1986.

published.<sup>32</sup> At least five other chapters (Chapter II — IV, VI and VII) are based largely or in part on previous writings of Professor Gibson.<sup>33</sup> It should be clearly noted that Professor Gibson's previous articles on the Charter are an important part of the scholarship on the Charter and, consequently, so is the book. Professor Gibson states that the "earlier material has been revised and updated, however, to take account of both judicial developments and new academic writings."<sup>34</sup> This must be read, of course, in light of the reviewer's earlier comments regarding the difficulty in writing a Charter book at this stage in the development of Charter jurisprudence.

Even taking into consideration the above comments, *THE LAW OF THE CHARTER* is a useful book for students of the Charter, whether they be judges, lawyers, politicians, academics, or actual students. In fact, this reviewer had the benefit of using this book in the preparation of a civil liberties course and a first year course in constitutional law and history. It provides a guide to the basic issues raised by the Charter and, bearing in mind the above comments, is an excellent starting point for one's research into the questions attendant to those issues. Furthermore, and more importantly, it is an excellent tool for structuring one's study of the Charter. *THE LAW OF THE CHARTER* will undoubtedly become a standard reference work on the Canadian Charter of Rights and Freedoms.

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32. D. Gibson, "The 'Special Nature' of Human Rights Legislation: Re Winnipeg School Division No. 1 and Craton" (1985-86) 50 *Sask. Law Rev.* 175.
  33. Chapter II is based upon D. Gibson, "Interpretation of the Canadian Charter of Rights and Freedoms: Some General Considerations" in Tarnopolsky and Beaudoin, *supra* n. 1. Chapter III, in large part, is taken from D. Gibson, "Distinguishing the Governors from the Governed: The Meaning of 'Government' in Section 32(1) of the Charter" (1983) 13 *Man. L.J.* 505 and D. Gibson, "The Charter of Rights and the Private Sector" (1982) 12 *Man. L.J.* 213. Chapter IV is based largely upon D. Gibson, "Reasonable Limits Under the Canadian Charter of Rights and Freedoms" (1985) 15 *Man. L.J.* 27. Chapters VI and VII were drawn from D. Gibson, "Enforcement of the Canadian Charter of Rights and Freedoms" in Tarnopolsky and Beaudoin, *supra* n. 1, "Remedies for Inequality under the Canadian Charter of Rights and Freedoms: Accentuating the Positive and Eliminating the Negative" in *Righting the Balance: Canada's New Equality Rights* (L. Smith et al. eds. forthcoming), D. Gibson, "Shocking the Public: Early Indications of the Meaning of 'Disrepute' in Section 24(2) of the Charter" (1983) 13 *Man. L.J.* 495, and D. Gibson, "Determining Disrepute: Opinion Polls and the Canadian Charter of Rights and Freedoms" *supra* n. 22.
  34. *Supra* n. 3 at iii.