CASE COMMENT
SINGH V. *MINISTER OF EMPLOYMENT AND IMMIGRATION*

DONALD G. CASSWELL*

The main issue in *Singh* v. *Minister of Employment and Immigration*,[1] decided by the Supreme Court of Canada on April 4, 1985, was whether the appellants, each of whom had applied for and been denied refugee status as defined under the Immigration Act,[2] had been treated unfairly under the procedures established by that *Act*. The Supreme Court unanimously[3] held that they had been treated unfairly and remanded their applications for refugee status to the Immigration Appeal Board for hearings. The purpose of this short comment is not to consider the particular facts and holdings in *Singh*, but rather to note two points of general importance which were raised in the judgment of Wilson, J., namely, the onus on a government body to make adequate discovery of its case — in "Charter cases" and "non-Charter cases" — and the manner in which counsel should prepare for submissions relating to section 1 of the Charter.

First, the onus on a government body to make discovery of its case was referred to in the course of Wilson, J.'s consideration of s. 7 of the Charter.[4] S. 7 provides:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Wilson J. agreed with counsel, who had submitted that:[5]

> . . . at a minimum the concept of "fundamental justice" as it appears in s. 7 of the *Charter* includes the notion of procedural fairness articulated by Fauteux, C.J., in *Duke* v. *R.*, [1972] S.C.R. 917. At p. 923 he said:
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> > "Under s. 2(e) of the *Bill of Rights* no law of Canada shall be construed or applied so as to deprive him of a 'fair hearing in accordance with the principles of fundamental justice'. Without attempting to formulate any final definition of those words, I would take them to mean, generally, that the tribunal which adjudicates upon his rights must act fairly, in good faith, without bias and in a judicial temper, and must give to him the opportunity adequately to state his case."

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* Faculty of Law, University of Victoria.

1. (1985) 58 N.R. 1 (S.C.C.). This case was heard in a consolidated hearing together with six similar cases, and one judgment was rendered.
2. Immigration Act, 1976, S.C. 1976-77, c. 52.
3. Wilson J., concurred in by Dickson C.J. and Lamer J., specifically chose to decide the case under the Canadian Charter of Rights and Freedoms, Part I, Constitution Act 1982, being Schedule B to the Canada Act 1982, (U.K.) c. 11, not the Canadian Bill of Rights, R.S.C. 1970, App. III. See 58 N.R. 29. On the other hand, Beetz J., concurred in by Estey and McIntyre JJ., specifically chose to decide the case under the Canadian Bill of Rights, not the Charter. See 58 N.R. 6-7. Ritchie J. sat on the case but took no part in the judgment. The case had been argued on a *Charter* basis, but the Court later invited written submissions from counsel concerning the Canadian Bill of Rights. See 58 N.R. 6 *per* Beetz J. and 58 N.R. 28 *per* Wilson J.
4. See 58 N.R. 62-66.
5. 58 N.R. 62.

That right to be given an opportunity to present one's case, to have a hearing, whether oral or by written submission,[6] is only possible if the government body makes adequate discovery of its case before the hearing. As Wilson J. stated:[7]

> It is perhaps worth noting that if the Immigration Appeal Board allows a redetermination hearing to proceed pursuant to s. 71(1), the Minister is entitled pursuant to s. 71(2) to notice of the time and place of the hearing and a reasonable opportunity to be heard. It seems to me that, as a matter of fundamental justice, a refugee claimant would be *entitled to discovery* of the Minister's case prior to such a hearing. [Emphasis added.]

In short, if the government body does not make adequate disclosure of its case prior to the hearing, the individual's right to "life, liberty and security of the person", as guaranteed by s. 7, has been violated and the individual is therefore entitled to an appropriate remedy under section 24.[8] Of course, the most obvious example to which this analysis would apply is a criminal proceeding in which the Crown does not make adequate discovery to the accused. It is submitted that Wilson J.'s comments provide powerful ammunition to an accused who has not received adequate disclosure of the Crown's case to enable him to properly prepare his defence to meet that case.[9]

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6. The Court indicated that the "hearing" might be either oral or by written submissions, depending on the circumstances. In particular, if the case involved issues of credibility, the hearing should be oral. See 58 N.R. 14 *per* Beetz J. and 58 N.R. 62-63 *per* Wilson J. On the facts in these appeals, oral hearings were explicitly ordered by Beetz J. See 58 N.R. 21. Wilson J. ordered hearings, but did not explicitly indicate whether the hearings had to be oral. See 58 N.R. 73.

7. 58 N.R. 65. Wilson J. was considering the provisions of the Immigration Act, 1976, S.C. 1976-77, c. 52, ss. 45-48, 70-71, and, in particular, ss. 45(4), 71(2), which clearly contemplated non-disclosure of the Minister's case to the appellant. See 58 N.R. 39-48.

8. Section 24(1) of the Charter provides that "Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances."

   Section 24(2) reads "Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a matter that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

9. I emphasize that this analysis is not limited to cases in which the accused was initially relying upon some other alleged violation of a Charter guaranteed right or freedom. Rather, this analysis applies to any criminal proceeding. Further, the analysis would apply whether the failure to disclose was pursuant to some statutory scheme such as, in this case, the Immigration Act, 1976, S.C. 1976-77, c. 52, or due to the procedures followed by government officers in particular cases. See footnote 10. The relevance of the *Charter* in cases of non-disclosure has been considered in the context of parole hearings (see *Re Martens and Attorney-General of British Columbia et al.* (1983) 7 C.R.R. 354 (B.C.S.C.), *Re Latham and Solicitor General of Canada et al.* (1984) 10 C.R.R. 120 (F.C.T.D.), *Cadieux* v. *The Director of Mountain Institution et al.* (1984) 10 C.R.R. 248 (F.C.T.D.) and *Wilson* v. *National Parole Board* (1985) 18 C.C.C. (3d) 541 (F.C.T.D.)) and in criminal proceedings (see *R.* v. *Glesby, Deloli, et al.* (1982) 2 C.R.R. 203 (Man. Co. Ct.) *R.* v. *Potma* (1983) 3 C.R.R. 252 (Ont. C.A.), *R.* v. *Fiumara, et al.* (1983) 12 C.R.R. 271 (Ont. Co. Ct.) and *R.* v. *Taylor et al.* (1983) 8 C.R.R. 29 (B.C.S.C.)). In *Taylor*, Toy J. stated at C.R.R. 38: "Included in the 'principles of fundamental justice' accorded to citizens who are subject to being deprived of their life, liberty or security of person, should be added at least timely and adequate notice of that which is being alleged against an accused person and adequate notice of what the evidence to be adduced against him is."

Second, Wilson J. commented on preparation by counsel for submissions under section 1 of the Charter. Section 1 of the *Charter* provides:

> 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.

If a party establishes that a statutory provision is inconsistent with the Charter in that it limits a right or freedom guaranteed by the Charter,[10] the appropriate order under s. 52(1)[11] is a declaration that the statutory provision is of no force and effect,[12] unless the party supporting the statutory provision establishes that the limitation is "justifiable in a free and democratic society". How does the supporting party establish this? What evidence must it lead, since clearly evidence is required on a question of fact as opposed to law?[13] Wilson J. referred to Estey J.'s com-

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10. Two important points should be noted. First, it is necessary to distinguish this type of case from one in which the party alleging a violation of a Charter guaranteed right or freedom is not attacking the constitutionality of a statutory provision but rather is complaining about the conduct of a particular government body or officer. This distinction is made clear by Dickson J. (as he then was) in *Hunter et al.* v. *Southam Inc.*, [1984] 2 S.C.R. 145 at 154 where he stated: "At the outset it is important to note that the issue in this appeal concerns the constitutional validity of a statute authorizing a search and seizure. It does not concern the reasonableness or otherwise of the manner in which the appellants carried out their statutory authority. It is not the conduct of the appellants, but rather the legislation under which they acted, to which attention must be directed." *Singh* involved an attack on the legislation under which the appellants' claims to refugee status had been determined: see *per* Wilson J. at 58 N.R. 32. Second, a limitation which amounts to a complete denial of a Charter guaranteed right or freedom or to an amendment of the Charter cannot be justifiable nor, therefore, saved under s. 1. As the Supreme Court of Canada stated, in its by the Court judgment in *The Attorney General of Quebec* v. *Quebec Association of Protestant School Boards et al.*, [1984] 2 S.C.R. 66 at 88: "The provisions of s. 73 of Bill 101 collide directly with those of s. 23 of the Charter, and are not limits which can be legitimized by s. 1 of the Charter. Such limits cannot be exceptions to the rights and freedoms guaranteed by the Charter nor amount to amendments of the Charter. An Act of Parliament or of a legislature which, for example, purported to impose the beliefs of a State religion would be in direct conflict with s. 2(*a*) of the Charter, which guarantees freedom of conscience and religion, and would have to be ruled of no force or effect without the necessity of even considering whether such legislation could be legitimized by s. 1. The same applies to Chapter VIII of Bill 101 in respect of s. 23 of the Charter."

11. Section 52(1) of the Charter provides: "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 or effect."

12. See 58 N.R. 72, *per* Wilson J. The most notable case to date in which such an order has been made is *Hunter et al.* v. *Southam Inc.*, [1984] 2 S.C.R. 145, in which the Supreme Court of Canada unanimously declared sections 10(1) and 10(3) of the Combines Investigation Act, R.S.C. 1970, c. C-23, to be of no force or effect. In addition to obtaining a declaration that an unconstitutional statutory provision is of no force or effect, the individual "who [has] suffered as a result of the application of an unconstitutional law to [him is] entitled under s. 24(1) to apply to a court of competent jurisdiction for 'such remedy as the court considers appropriate and just in the circumstances'", quoting from Wilson J. at 58 N.R. 72. Referring back to the distinction made in note 10, if the applicant establishes improper conduct on the part of a government body or official, which has infringed or denied a Charter guaranteed right or freedom, but does not attack the constitutionality of legislation under which a government body or official acted, the appropriate remedy is under either s. 24(1) or s. 24(2), rather than an order under section 52(1). For example, see *R.* v. *Therens* (1985) 59 N.R. 122 (S.C.C.).

13. See Finkelstein: *Section 1: The Standard for Assessing Restrictive Government Actions and the Charter's Code of Procedure and Evidence* (1983) 9 Queen's L.J. 143, and Richards: "Proof of Foreign Law Under s. 1 of the Charter" (1984), 3 *Advocates Society Journal*, no. 2, at 21.

ments on this point in *The Law Society of Upper Canada* v. *Skapinker*,[14] where he said:[15]

> As experience accumulates, *the law profession and the courts* will develop standards and practices which will enable the parties to demonstrate their position under s. 1 and the courts to decide issues arising under that provision. May it only be said here, in the cause of being helpful to those who come forward in similar proceedings, that the record on the s. 1 issue was indeed minimal, and without more, would have made it difficult for a court to determine the issue as to whether a reasonable limit on a prescribed right had been demonstrably justified. [Emphasis added.]

Wilson J. echoed[16] these comments. While specifically indicating that she was not critical of counsel in *Singh* for not leading much evidence on this point, she nevertheless was of the view that it would have been preferable if the Court had had more evidence before it on the s. 1 stage of the case. She stated:[17]

> Unfortunately, counsel devoted relatively little time in the course of argument to the principles the court should espouse in applying s. 1. This is certainly understandable given the complexity of the other issues which are in one sense preliminary to the application of s. 1. It is nevertheless to be regretted. A particular disappointment is the limited scope of the factual material brought forward by the respondent [Minister] in support of the proposition that the *Immigration Act*'s provisions constitute a "reasonable limit" on the appellants' rights. It must be acknowledged that counsel operated under considerable time pressure in the preparation of these appeals and I do not intend these remarks as a criticism of the presentation made to the court by counsel which was, indeed, extremely valuable.

But, what issues does the Court feel are relevant on the consideration under section 1 of whether a limitation on a Charter guaranteed right or freedom is justifiable in a free and democratic society? Estey J., in *Skapinker*, indicated, in the passage from his judgment already reproduced,[18] that "the law profession *and the courts* [would] develop standards and practices" [Emphasis added] in this regard. However, Wilson J. in her judgment in *Singh*, merely said:[19]

> Though it is tempting to make observations about what factors might give rise to justification under s. 1, and on the standards of review which should be applied with respect to s. 1, I think it would be unwise to do so. I therefore confine my observations on the application of s. 1 to those necessary for the disposition of the appeals.

With respect, it is submitted that this is disappointingly inadequate. Wilson J. leaves the burden on counsel to determine what factors, what issues, the Court may consider to be relevant under s. 1. While the Court cannot, and probably should not, attempt to exhaustively and definitively set out the relevant considerations when confronting s. 1, it is submitted that it could and should provide considerable guidance to counsel and to lower courts.

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14. [1984] 1 S.C.R. 357.
15. [1984] 1 S.C.R. 357 at 384.
16. At 58 N.R. 67, Wilson J. said that she felt "constrained to echo the observations made by Estey J., in . . . *Skapinker*. . .".
17. 58 N.R. 67. Counsel for the Minister had indicated to the Court that the procedures under the *Immigration Act* for determining refugee status had been approved by the United Nations High Commissioner for Refugees and were similar to procedures in Commonwealth and Western European countries. See 58 N.R. 68.
18. See text accompanying note 15.
19. 58 N.R. 71. Wilson J. did indicate, however, that she had "considerable doubt" (58 N.R. 69) whether administrative convenience would weigh heavily, if at all, as a factor to be considered under s. 1. See 58 N.R. 68-71.

In conclusion, by way of *caveat* when referring to Wilson J.'s judgment, it must be remembered that she wrote for herself and two other Judges in *Singh*. Three other Judges specifically chose not to consider Charter issues and one Judge sat on the case but did not take part in the judgment.[20]

20. Recall n. 3.