CONSTITUTIONAL ADVOCACY

*Hon. Bertha Wilson**

The subject assigned to me on the program today is "Constitutional Advocacy" and it may be that whoever had the bright idea of asking me to speak on this subject thought that you would all leave The Briars with a set of sure-fire guidelines to success in constitutional cases before the Supreme Court of Canada. Well, of course, this is pipe dreaming. All I ever knew for sure when I was sitting on these cases was that I would be on the losing side! But I did learn a few things about the presentation of the facts in constitutional cases and the presentation of submissions on the law — so let me start with the facts.

FACTS

In the balmy days before the advent of the *Canadian Charter of Rights and Freedoms*[1] when all we had to worry about was who could pass what legislation, the facts we were primarily concerned with were what we called legislative facts, the facts that would portray the contextual framework in which the litigation was taking place and assist the Court in deciding questions of law which had a substantial discretionary or policy element to them. Such questions might require a much more broadly based investigation into the socio-political and economic environment that would normally be required in private litigation. And indeed we can see in some of the pre-*Charter* constitutional cases a move toward the broadening of the evidentiary base. This occurred typically in cases where the legislative power that had been exercised by the federal or provincial legislature was properly exercisable only if some factual pre-condition was met. We see it in cases dealing with the federal legislature's "peace, order and good government" power, the exercise of which had to be premised on the existence of some kind of national emergency. For example, in *Reference Re Board of Commerce Act, 1919, and The Combines and Fair Prices Act, 1919*,[2] the Privy Council had to consider whether the economic turmoil that followed in the wake of the First World War amounted to the type of "exceptional" circumstances required for federal intervention in an otherwise provincial regulatory sphere. Similarly, *A.G. (Canada)* v. *A.G. (Ontario)*,[3] in the mid-thirties,

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[1] Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

[2] (1921), [1922] 1 A.C. 191, (*sub nom. A.G. Canada* v. *A.G. Alberta*) 60 D.L.R. 513 (P.C.).

[3] [1937] A.C. 355, (*sub nom. Reference Re Employment and Social Insurance Act, 1935*) [1937] 1 D.L.R. 684 (P.C.).

raised a question as to whether the unemployment experienced during the Great Depression was of sufficient dimension that it could be said to touch on the life of the nation as a whole. And more recently in *Reference Re Anti-Inflation Act*,[4] the Court had to decide whether double digit inflation could constitute a national emergency justifying the use of the "peace, order and good government" power. These questions are essentially questions of fact but their very magnitude seemed to demand a significantly different approach to the rules of evidence from that utilized in the fact-finding process at an ordinary trial.

The federal "peace, order and good government" power, of course, is not the only head of legislative authority under the *Constitution Act, 1867*[5] which depends to a certain extent upon factual underpinnings. The cases evaluating the scope of the federal "trade and commerce" power under subsection 91(2) provide perhaps the most obvious illustrations since the constitutional legitimacy of any particular product's marketing scheme depends to a great extent on the Court's examination of the market to be regulated and the extent to which there is an interprovincial flow of goods. Another example of the need for an extremely broad evidentiary base was provided by *Re Eskimo*[6] in which the Supreme Court considered the scope of the federal power to legislate with regard to Indians under subsection 91(24). The record presented to the Court on the question whether the Inuit people fall within the term "Indians" as used in that provision included a wide range of historical, anthropological and socio-cultural data. Without access to such data it is difficult to see the basis on which such a factual determination could be made.

You will recall that the traditional pre-*Charter* view as expressed by Chief Justice Laskin in the *Anti-Inflation Reference* was that the *wisdom* as opposed to the *vires* of an impugned statute was strictly a policy matter for the elected representatives of the people and not for the courts.[7] Accordingly, in very few cases dealing with the separation of powers were the courts tempted to investigate the potential impact of an impugned statute. Its consequential effects were not seen as having any direct bearing on its constitutional validity.

There is, however, one large and important exception to this. Despite the lack of constitutional concern for the impact of legislation *per se*, the proper classification of legislation under sections 91 and 92 sometimes required a determination of its "pith and substance" and a good guide to the "pith and substance" of legislation is, of course, its potential impact. We see this kind of analysis taking place in the decision of the Supreme Court of Canada in *Texada Mines Ltd* v. *A.G. (British Columbia)*.[8] Under examination in that case was a British Columbia statute imposing a tax on iron ore. The statute, of course, was sought to

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[4] [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452 [hereinafter *Anti-Inflation Reference* cited to D.L.R.].

[5] (U.K.), 30 & 31 Vict., c. 3.

[6] [1939] S.C.R. 104, [1939] 2 D.L.R. 417.

[7] *Supra*, note 4 at 497.

[8] [1960] S.C.R. 713, 24 D.L.R. (2d) 81.

be upheld on the basis of the provincial power to levy taxes within the province and, indeed, on its face this is precisely what the statute seemed to do. However, the Court took the view, after examining the consequential effects of the statute, that the legislation was not in regard to taxation at all. Rather, the purpose underlying the enactment was perceived to be to make the export of iron ore from the province so financially burdensome as to discourage it entirely. Accordingly, the legislation was in pith and substance a matter of interprovincial trade rather than taxation within the province and therefore *ultra vires*. The Court examined a significant amount of financial and market-related data in order to analyze the economic milieu in which the statute was passed.

Now, not surprisingly, this trend towards an expanded evidentiary base has continued to develop under the *Charter*. The rights provisions in the *Charter* are, as you know, replete with words such as "reasonable", "unreasonable", "promptly", "arbitrarily", "fair" — all of which call for some comparison with an accepted standard which presumably is subject to proof. Likewise, phrases like "cruel and unusual punishment", "where numbers warrant", "bring the administration of justice into disrepute" all seem to require solid factual underpinnings. Otherwise the judges will be unable, as Judge Cardozo put it, "to transcend the limitations of their egos" and will rely upon their own personal value systems in interpreting and applying the *Charter*.

Quite apart from the requirement of proof of the legislative facts relevant to the determination of the meaning and scope of each particular right contained in the *Charter* is the need for an evidentiary base for the application of section 1. Once the citizen has made out a *prima facie* case that a right has been infringed the Court has held, as you know, that the onus moves to the government to establish that the legislation constitutes a reasonable limit on the right which is justified in a free and democratic society. This is clearly where the Court has to choose between competing social policies presented to it by counsel and hopefully backed up by relevant evidence. The Court has on numerous occasions stressed the fact that a fairly detailed evidentiary base is necessary under section 1 of the *Charter*. Indeed, the absence of such an evidentiary base at trial results in many leave applications in *Charter* cases being turned down. The Court has to envisage the possibility that it may find that the right has been violated and it is then faced with the task of balancing. If the required material is not in the record, this will be a very important factor in the decision whether or not to grant leave. The necessary evidentiary base is often absent when the *Charter* issue has not been raised at trial but is raised only at the Court of Appeal stage or in some cases only when the matter comes for a grant of leave to the Supreme Court of Canada. Leave in these cases is frequently denied on the ground that the issue is bound to arise again when the Court will have a better record on which to proceed.

Coming back then to section 1 the Court is required under *R.* v. *Oakes*[9] to consider whether the legislation was designed to deal with a

[9] [1986] 1 S.C.R. 103, 26 D.L.R. (4th) 200 [hereinafter *Oakes*].

pressing and substantial societal concern that might warrant some infringement of the citizen's guaranteed rights. This is obviously not a question one can answer without extensive evidence of the legislative context. One thinks immediately of the tremendous volume of evidence which was filed by psychologists and sociologists in *Brown* v. *Board of Education*,[10] concerning the effect of segregation on school children in the United States. It was this knowledge placed at the Court's disposal which laid the ground work for the overturning of the nearly century old "separate but equal" doctrine which had upheld racial segregation. The factual inquiry established, to the Supreme Court's satisfaction, that separate facilities simply could not provide the equality which the U.S. *Bill of Rights*[11] required.

The Supreme Court of Canada followed the United States' lead in its extremely important decision on minority language rights in *Ford* v. *Quebec (Attorney General)*.[12] We had to decide in that case whether legislation passed in Quebec restricting the use of languages other than French in public signs was constitutional. We drew on sociological evidence that the parties submitted concerning the nature of language and its role in society in order to understand the interests that were at stake in the case. We also allowed the Attorney General of Quebec to submit a number of studies on socio-linguistic and language planning as well as articles, reports and statistics indicating the position of the French language in Quebec and Canada. These were relevant to an assessment of whether the impugned legislation constituted a justifiable restriction on freedom of expression. We concluded that the evidence established that the language policy of the legislation was a legitimate one but that it had not been demonstrated that the French only requirement on public signs was necessary to give effect to that policy.

It seems to me that there are two kinds of evidence the government must adduce on a section 1 enquiry. There is first the evidence on the basis of which the government decided to enact the impugned legislation in the first place. To what societal concern was it addressed? How serious was that concern? What were the government's options in dealing with it and why did it choose the option it did? This is the evidence which mirrors the test laid down in *Oakes*, i.e., the pressing and substantial concern, the rational response, and the proportionality of the response.

This evidence is all directed at the purpose of the legislation. However, the government can't stop there because the legislation can be struck down on the basis of its effects no matter how commendable its purpose. Indeed, I stated at a very early stage in the Court's *Charter* experience (and I remain of the view) that the effect of the legislation is really the crucial thing in *Charter* litigation. It can almost be assumed in this day and age that governments act in a responsible way to resolve

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[10] 347 U.S. 483 (1954).
[11] U.S. CONST. amends. I to X.
[12] [1988] 2 S.C.R. 712, 54 D.L.R. (4th) 577.

the complex issues of the day. The key question is: what is the effect of the solution they have adopted on the guaranteed rights of the citizens? If there is found to be an infringement, then the government must adduce evidence to persuade the Court that there was no better way, that other alternatives were considered and found wanting, that, in effect, some impact on guaranteed rights was inevitable if the pressing concern was to be effectively dealt with.

Now, I would like to digress at this point to say something about the division on the Court as to how section 1 should be applied. Ever since the Court handed down its decision in *Oakes* there has been a concern on the part of some members of the Court that the *Oakes* standard of justification is too high. They would like to replace it with a standard of reasonableness and the reason for this is, without a doubt, their concern about the legitimacy of judicial review itself. Although Lamer J. stated in the *Reference Re Section 94(2) of the Motor Vehicle Act*,[13] that "adjudication under the *Charter* must be approached free of any lingering doubts as to its legitimacy",[14] in fact the lingering doubts remain. I think it is now fair to say that, although the Court continues to pay lip service to the strict *Oakes* test, in many of its judgments it has in fact applied it in a less rigorous fashion.

In *Singh* v. *Minister of Employment and Immigration*,[15] which was the first *Charter* case on which I wrote, I expressed a concern about the tremendous importance of the way in which section 1 would be applied. I realized that if too low a threshold was set, the courts could run the risk of emasculating the *Charter*. On the other hand, if too high a threshold was set, the courts could run the risk of dramatically restricting governments' ability to do what they are supposed to do, namely to govern. I think this must have been prophetic for there is no doubt that those who continued to cling to the strict *Oakes* test (like myself) did so out of a concern that the *Charter* not be emasculated, that the shift towards the much more flexible standard of reasonableness makes it increasingly likely that governments' immediate objectives will take precedence over the rights and freedoms of the individual.

I think if you study the decisions of the Court on this subject in the order in which they were handed down you will see the ambivalence on the part of the Court. The Court seems to have concluded that the strict application of *Oakes* may be appropriate in some cases and the more flexible approach of reasonableness in others. What has happened, in effect, is that the members of the Court have come to some kind of compromise on the application of the *Oakes* test. In *Irwin Toy* v. *Quebec (A.G.)*,[16] it drew a distinction between cases in which the government was attempting to mediate the conflicting interests of competing groups,

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[13] [1985] 2 S.C.R. 486, 24 D.L.R. (4th) 536 [hereinafter *Motor Vehicle Reference* cited to S.C.R.].

[14] *Ibid.* at 497.

[15] [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422.

[16] [1989] 1 S.C.R. 927, 58 D.L.R. (4th) 577.

where a less demanding justification standard was appropriate, and cases in which the government was best described as the "singular antagonist" of the individual whose right had been infringed, where a more demanding justification standard was appropriate. However, the Court has obviously not stuck to its compromise solution as is clear from *R.* v. *Chaulk*,[17] and the most that can be said at present is that the state of the law is quite uncertain. If I may be permitted a quick look into the future it would be my guess that the flexible approach will win out. The doubt about the legitimacy of judicial review persists and finds expression by different members of the Court in different ways — in terms of a distinction made between law and policy, law being for the courts and policy for governments, or in terms of courts not getting into the wisdom as opposed to the *vires* of the legislation (the pre-*Charter* Laskin concern), or perhaps the most straightforward rationale, namely the concept of the courts owing deference to the legislature as the elected representatives of the people. I must confess that to me judicial review and deference to the legislature are an incompatible pair and I fear that our attempt to combine them has simply resulted in a muddying of the jurisprudential waters!

LAW

I think it axiomatic that questions of fact and questions of law are intimately related and nowhere is this more true than in *Charter* adjudication. It is through the detailed presentation of historical, economic and social data by counsel that the court has available to it the necessary background against which to develop the meaning and content of *Charter* rights and guarantees. This is not to say, of course, that the social scientists should be or are doing our job for us. It would be strange if not wholly misplaced to allow statistics to dictate the scope and meaning of the Constitution. While the social sciences can be of enormous assistance in helping us to understand cause and effect relationships of various kinds and the social implications of government initiatives, the task of a constitutional court is somewhat different. Ultimately, judges must make fundamental choices about what the Constitution is or is not to protect. In other words, judges must decide which *values* in our society are so important that we must both protect and promote them under our Constitution.

What are the implications of this for your presentation of the law in *Charter* cases? It would seem to follow that the presentation of background facts is but one part of the task of making out a constitutional case. As we all know, the courts have many times expressed the view that the Constitution is not cast in stone, that it is by its nature a "living tree". In the words of Professor Paul Freund, we should be wary "not to read the provisions of the Constitution like a last will and testament

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[17] [1990] 3 S.C.R. 1303, [1991] 2 W.W.R. 385.

lest it become like one." In *Hunter* v. *Southam Inc.*,[18] the Supreme Court of Canada took this admonition to heart and established a unique method of constitutional interpretation called the "purposive approach". The holding in *Southam Inc.* represented a paradigmatic shift in Canadian constitutional thinking. The frozen rights approach, for which the Court was hotly criticized under the Canadian *Bill of Rights*,[19] was thankfully laid to rest. Later, in *R.* v. *Big M Drug Mart*,[20] Dickson J., as he then was, elaborated on this method of *Charter* interpretation. He stated that the purpose of the right or freedom in question in any given case:

> [i]s to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and....to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the *Charter*.[21]

He emphasized that the interpretation of rights and freedoms was to be a generous rather than a legalistic one.

The words of Dickson J. give a strong hint as to how legal argument in relation to constitutional interpretation is to be presented. He provides helpful guidelines as to what is involved in elucidating the purpose of *Charter* rights and freedoms. But unless the point is kept in mind that the inquiry is always directed at ascertaining the *purpose* of the particular right or freedom, the danger exists that the factors listed in *Big M* will be applied mechanistically.

Take, for example, the idea that the historical underpinnings of a given guarantee are relevant to how we are to give it meaning in the twenty-first century. Clearly, precedent is relevant. But blind adherence to the doctrine of precedent misses the point. As Professor Pentney says, and I agree:

> The purpose of the inquiry is to glean from the historical context the values underlying a right or freedom, and from that to "pour content" into it, in order to determine its meaning or scope. This does not require an analysis merely of specific enactments or judgments which are pertinent to a right or freedom; instead a purposive approach requires that the origins of a right or freedom in Canadian, British or (more broadly) western legal traditions be examined in order to provide an understanding of the *concept* embodied in the right or freedom. This is history writ large, and it may require an analysis of legal history and doctrinal antecedents, as well as an examination of broader social or political history.[22]

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[18] [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641 [hereinafter *Southam Inc.*].

[19] R.S.C. 1985, App. III.

[20] [1985] 1 S.C.R. 295, 18 D.L.R. (4th) 321 [hereinafter *Big M* cited to S.C.R.].

[21] *Ibid.* at 344.

[22] W.F. Pentney, *Interpreting the Charter: General Principles* in G.A. Beaudoin & E. Ratushny, eds., THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS, 2nd ed. (Toronto: Carswell, 1989) 21 at 25.

In other words, what you have to do is probe into the question why the particular right or freedom has traditionally been and currently is considered so basic in a democracy that it has been entrenched in the Constitution.

In almost every *Charter* case the Court is breaking new ground and it is accordingly more important for the Court to look ahead to the implications of any judgment it may come up with than to look back. Accordingly, a tactfully advanced *in terrorem* argument can be quite effective. Courts are always worried in case they say something that is going to come back to haunt them and the Supreme Court is no exception. Indeed, the major value of intervenors from the point of view of the Court is that they broaden the scope of the dispute and show the Court how any decision it makes might impact in undesirable ways on other groups or on other areas of the law.

Just as the guidelines laid down in *Big M* should always be linked to the larger interpretive exercise of getting at the purpose behind *Charter* provisions, so too they should be seen as what they are, *guidelines* only, and not intended to circumscribe the factors which may be relevant in construing *Charter* guarantees. Other factors may be germane depending upon the type of provision being dealt with. This was the case, for example, in *Société des Acadiens du Nouveau Brunswick Inc.* v. *Association of Parents for Fairness in Education*,[23] where the language rights guarantees in the *Charter* were at issue. Justice Beetz expressed the view that language rights were different from legal rights, the former being based on political compromise and the latter being rooted in principle. However, it is important to note that simply because some *Charter* guarantees are different from others does not mean that they should not also be interpreted in a purposive way. As I said in *Reference Re Bill 30, An Act to Amend the Education Act (Ontario)*:

> While due regard must be paid not to give a provision which reflects a political compromise too wide an interpretation, it must still be open to the Court to breathe life into a compromise that is clearly expressed.[24]

Another factor that may be germane under section 1 is whether other jurisdictions have legislation similar to the legislation under attack. As I am sure you know, the Court stated quite early on that evidence of measures adopted in other jurisdictions may be relevant on the question whether a law being challenged is justifiable in a free and democratic society. Again, however, a submission based on foreign law must be presented in support of a purposive interpretation of the *Charter* guarantee. As noted by Professor McWhinney, verbal similarity or even textual identity of provisions in other jurisdictions advances the inquiry only so far. It still must be determined whether societal conditions in these other jurisdictions parallel those in Canada.

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[23] [1986] 1 S.C.R. 549, 27 D.L.R. (4th) 406.
[24] [1987] 1 S.C.R. 1148 at 1176, 40 D.L.R. (4th) 18 at 44.

Of course, these and other similar issues will continue to arise as the Constitution evolves. There are many more *Charter* guarantees yet to come before the courts and many dimensions of those provisions already litigated still to be fully explored. The purposive approach will undoubtedly develop in this process.

I should also mention that the purposive approach is but one interpretive tool to be used in the task of expounding the Constitution. The question whether other principles of interpretation such as the techniques of "reading in" or "reading down" have any role under the *Charter*; whether the presumption of constitutionality applies in *Charter* adjudication; how subsections 52(1) and 24(1) relate to each other. Like the purposive approach these are broad questions of constitutional law which the Court will eventually have to address.

A general word in conclusion. It may well be, as Professor Noel Lyon at Queen's has suggested, that counsel as well as judges suffer in dealing with *Charter* cases from the highly legalistic nature of their training. We have not been trained in our law schools to put law into a larger social perspective. We have been preoccupied with the nuts and bolts. Professor Lyon told us judges, in no uncertain terms, that we had to broaden our horizons and expand our reading — if need be, acquire a whole new library — if we were to make a decent fist of discharging our responsibilities under the *Charter*. He exhorted us to liberate ourselves from what he called "the dominant mold of the common law" and give a rightful place in our decision-making to the insights of sociology, philosophy and history. Professor Lyon's advice, it seems to me, is equally applicable to counsel.

I don't believe that counsel have yet realized the importance of taking a broader approach to *Charter* litigation although I think that the Court's recent emphasis on the contextual approach must have brought home to them the need to inform themselves thoroughly on the social context in which the issue arises and that they must appreciate it not only intellectually but emotionally as well. We are in the business now of weighing competing values and values have an emotional and spiritual as well as an intellectual content. So counsel must educate themselves on what it is about a free and democratic society that is so precious. What are its essential elements? When should the rights of the individual or the minority be sacrificed for what the government, i.e. the majority, perceives to be the common good? Or when is this a dangerous path to go down? These are not easy questions to answer and the Court needs all the help it can get. So please don't treat *Charter* cases as if you were dealing with mechanics' liens. Approach them with a bit of imagination. Make clear to the Court the larger social implications of the issue before it, but make sure first that you completely understand those implications yourself.

CONSTITUTIONAL RIGHTS IN THE INVESTIGATIVE PROCESS. Par Neil Finkelstein et Marie Finkelstein. Butterworths, 1991. Pp. 197. (70,00$).

L'adoption de la *Charte canadienne des droit et libertés*[1] « a opéré une véritable révolution constitutionnelle », pour reprendre la phrase du professeur Patrice Garant.[2] Nombreux sont ceux qui prétendent que la crainte exprimée par monsieur le juge Zuber,[3] à l'effet qu'il fallait redouter que la *Charte* ne soit interprétée de façon à paralyser et à miner l'administration de la justice, se soit matérialisée. Ce qui n'est pas contesté cependant, c'est que le droit canadien a bien évolué depuis le samedi 17 avril 1982. En fait, il y a fort à parier que si les ouvrages de doctrine, les articles spécialisés, et les notes de conférences portant sur la *Charte* étaient réunis, ces textes formeraient un agrégat qui pourrait presque égaler le produit doctrinal portant sur tous les autres domaines du droit criminel depuis cent ans.

Cependant, un texte se démarque de toute cette documentation : CONSTITUTIONAL RIGHTS IN THE INVESTIGATIVE PROCESS n'a pas pour objet de discuter (encore une fois, diront certains) du retentissement de la *Charte* au stade du procès ; au contraire, il a le mérite de discuter de façon fouillée et avec une rigueur que l'on souhaiterait plus répandue la panoplie des droits constitutionnels qui sont disponibles aux justiciables pour contrôler les actes des organismes étatiques lors de l'étape de l'enquête. Comme l'expriment les auteurs :

> The purpose of this book is to examine the protection guaranteed by the *Charter* to an individual or corporation in the course of an investigation of a suspected offence, whether that person is an accused, a suspect or even, in the case of an individual, a witness.
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> Today, in addition to offences under the *Criminal Code*, vast legislative schemes regulating competition, securities, taxation, the environment, occupational health and safety and many other aspects of our society are in place. These schemes include enforcement provisions embracing powers of entry and search, compulsory production of documents and testimonial compulsion. More than ever, both natural and artificial persons must avail themselves of *Charter* rights such as the guarantee against unreasonable search or seizure and the right to counsel in order to redress the inevitable imbalance between the person and the state. These rights protect the person from sweeping investigative powers which could be prejudicial later on in the legal process. In other words,

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[1] Partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c. 11, reproduite dans L.R.C. 1985, app. II, no 44 [ci-après *Charte*].

[2] J. Gosselin, LA LÉGITIMITÉ DU CONTRÔLE JUDICIAIRE SOUS LE RÉGIME DE LA CHARTE, Cowansville, Yvon Blais, 1991 à la p. xiii.

[3] *Voir R.* c. *Altseimer* (1982), 38 O.R. (2d) 783 à la p. 788, 29 C.R. (3d) 276 à la p. 282 (C.A.) : « in view of some of the bizarre and colourful arguments being advanced, it may be appropriate to observe that the Charter does not intend a transformation of our legal system or the paralysis of law enforcement. Extravagant interpretations can only trivialize and diminish respect for the Charter, which is a part of the supreme law of this country ».

> fairness, or the lack thereof, in the investigative process will ultimately affect the fairness of the trial, which is the lynchpin of our judicial system and, in turn, of the modern democratic state.[4]

Que ce texte se révèle d'une très grande utilité pour les criminalistes, les constitutionnalistes, les juristes oeuvrant au sein des grandes sociétés et dans le cadre de la petite et moyenne entreprises et pour les agents de police et autres enquêteurs qui comptent parmi les « représentants de l'État »[5] n'est pas chose surprenante pour celui ou celle qui a pris connaissance de certains des autres écrits de cette équipe d'époux. Qu'il suffise de relever la cinquième édition de LASKIN'S CANADIAN CONSTITUTIONAL LAW[6] qu'a signée Neil Finkelstein, et le livre peu remarqué de la critique mais par ailleurs fort instructif, THE RIGHT TO COUNSEL[7] de Marie Finkelstein.

L'objet de cette recension compte quatre chapitres. Le très bref chapitre introductif souligne l'importance d'assurer un équilibre entre l'individu et l'appareil étatique, de crainte que l'ultime procès, le cas échéant, ne soit entaché d'un vice qui mine de façon irrémédiable le droit au procès équitable. D'autre part, les auteurs nous livrent un survol de l'historique constitutionnel et du partage des pouvoirs, pour enchaîner avec une discussion sommaire de la nature de la *Charte*.

Le second chapitre est consacré à une étude générale de l'article 7 de la *Charte* qui se lit ainsi :

> Chacun a droit à la vie, à la liberté et à la sécurité de sa personne ; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.[8]

Cet excellent chapitre débute avec une revue sommaire de la question à savoir qui peut jouir de la protection que consacre l'article 7.[9] Par après, à la sous-section B,[10] les questions des barèmes législatifs et des sources du droit sont étudiées. La sous-section C discute de la notion de la vie, la liberté et de la sécurité de la personne.[11] Enfin, la dernière partie souligne de façon générale les principes de justice fondamentale.[12]

Ayant discuté ainsi de façon générale de l'article 7 au second chapitre, son étude se poursuit au chapitre 3, mais de façon approfondie. Ce chapitre porte le titre : « Life, Liberty and Security of the Person: Specific Applications ». Le seul sujet que l'on peut dire être d'intérêt

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[4] P. v.

[5] Pour reprendre l'expression consacrée dans l'affaire *R.* c. *Broyles*, [1991] 3 R.C.S. 595 à la p. 606, 131 N.R. 118 à la p. 130.

[6] N. Finkelstein, LASKIN'S CANADIAN CONSTITUTIONAL LAW, 5e éd., Toronto, Carswell, 1986.

[7] M. Finkelstein, THE RIGHT TO COUNSEL, Toronto, Butterworths, 1988.

[8] *Supra*, note 1.

[9] Pp. 5-7.

[10] Pp. 7-13.

[11] Pp. 13-22.

[12] Pp. 22-26.

moindre implique la prise d'empreintes digitales, aux pages 27 à 30. Cependant, l'étude de la question de l'écoute électronique[13] est remarquable et il importe de noter que les prévisions quant à l'évolution du principe de l'accès au contenu du paquet scellé par la personne accusée se sont avérées justes.[14]

L'étude suivante, intitulée « Compulsory Production of Documents »,[15] est la plus étoffée de ce chapitre et compte parmi les meilleures analyses de ce sujet qu'il nous a été donné de consulter.[16] Le chassé-croisé de jugements parfois contradictoires et très souvent peu conséquents que nous a livré la Cour suprême du Canada (et partant, les paliers d'appels des provinces) en cette matière est mis à nu, dans un premier temps, afin de permettre au lecteur et à la lectrice d'identifier tous les éléments essentiels de cette question. Dans un second temps, ces éléments sont regroupés dans la mesure du possible afin d'en dégager les points de convergence sans toutefois négliger de mettre de l'avant des projets de réponses pour plusieurs des questions qui restent sans réponses. Les balises jurisprudentielles américaines sont aussi énumérées, mettant ainsi en relief l'expérience (et les erreurs) de nos voisins du sud.[17] La dernière partie du chapitre 3 est consacrée à l'étude de la contraignabilité d'une personne à témoigner. Ce sujet est discuté de façon exhaustive par plusieurs auteurs mais il nous est difficile de citer un texte qui soit aussi détaillé et qui fasse état de façon plus systématique d'une jurisprudence tellement abondante mais si peu constante. Fait à souligner, les analyses que nous livrent les auteurs deviennent de plus en plus fouillées, au fur et à mesure que les questions qui sont discutées présentent des volets marquées par la complexité.

Le dernier chapitre, « Search and Seizure », discute de façon remarquable cette question qui est d'actualité et qui ne peut qu'être de plus en plus d'intérêt pour les sociétés à but lucratif en raison de la

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[13] Pp. 30-41.

[14] *Voir* note 48 à la p. 39, en particulier la p. 41. Pour une revue utile des jugements récents de la Cour suprême du Canada dans les affaires *Dersch* c. *P.G. Canada*, [1990] 2 R.C.S. 1505, 77 D.L.R. (4th) 473 ; *R.* c. *Zito*, [1990] 2 R.C.S. 1520, 60 C.C.C. 216 ; *R.* c. *Lachance*, [1990] 2 R.C.S. 1490, 60 C.C.C. (3d) 449 ; *R.* c. *Garofoli*, [1990] 2 R.C.S. 1421, 60 C.C.C. (3d) 161 portant sur l'écoute électronique, on peut consulter les notes de conférence de R. Marchi, *Développements en matière d'écoute électronique de 1989 à 1991* dans DÉVELOPPEMENTS RÉCENTS EN DROIT CRIMINEL (1991), Cowansville, Yvon Blais, 1991 à la p. 1.

[15] Pp. 41-58.

[16] À cet égard, il sera utile de souligner la parution récente du texte du professeur D. Stuart, CHARTER JUSTICE IN CANADIAN CRIMINAL LAW, Toronto, Carswell, 1991. Le chap. 5, « Administrative and Regulatory Searches » aux pp. 5-1 à 5-43, nous livre une synthèse remarquable du sujet.

[17] Pp. 57-58.

décision récente dans l'affaire *R.* c. *Wholesale Travel Group Inc.*[18] Ce chapitre comporte neuf sous-sections et il sera utile de signaler qu'il débute en discutant de la question des principes d'application générale aux pages 85 à 88 pour ensuite analyser la portée de l'article 8 de la *Charte*. Le sens des mots « fouilles » et « perquisitions » fait l'objet d'une analyse approfondie aux pages 89 à 94. Par après, la question épineuse du déplacement du fardeau (ou de la charge de la preuve) à la suite de l'affaire *Hunter* c. *Southam Inc.*[19] est discutée.[20] Cette analyse est particulièrement réussie et l'explication que le livre met de l'avant pour plusieurs thèses énoncées par les tribunaux ne peut être critiquée comme étant un peu courte. Les sous-sections D, E, F et G complètent le premier volet de ce quatrième chapitre et on y discute, avec force détails, les questions portant sur les mandats de perquisitions et les fouilles qui ont lieu sans mandats, surtout en ce qui a trait aux particuliers. Le second volet de ce chapitre nous livre une analyse prenante de l'article 24. Toutes les questions de l'heure y sont discutées à l'aide de multiples renvois à la jurisprudence. De fait, les pages 182, 183 et 184 ressemblent étrangement aux articles qui sont publiés dans les revues juridiques américaines, en raison des nombreux commentaires au bas de la page. Que certains s'offusquent de cette technique ne nous surprendrait pas, mais nous n'y voyons aucun désavantage, bien au contraire.

Aussi, si nous devions résumer la force de ce livre, notre réponse serait que les auteurs ont réussi à tailler une piste parmi la jurisprudence (comme le ferait une station de ski de fond) qui soit à la fois marquée par ses angles obtus ou doux, et par des accidents de terrain qui, à première vue, sont impossibles à franchir mais qui s'avèrent être aisément parcourus une fois le terrain examiné. Ainsi, il est question du droit au silence. L'analyse débute de façon générale[21] et on y ajoute des pentes douces à plusieurs endroits, c'est-à-dire les nuances et les éléments plus complexes. Le lecteur, la lectrice, que l'on peut assimiler à des adeptes du ski de fond, ne quittent jamais le sentier régulier mais gagnent l'impression de s'être mesurés à un parcours très difficile. Ce trompe-l'oeil doctrinal, si l'on nous permet cette expression, c'est bien la force de ce texte. En nous présentant les questions qui sont à la fois difficiles

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[18] (1991), 8 C.R. (4th) 145, 67 C.C.C. (3d) 193 (C.S.C.). Comme l'exprime le professeur Stuart, rédacteur en chef des CRIMINAL REPORTS, dans *Wholesale Travel: Presuming Guilt for Regulatory Offences is Constitutional but Wrong* à la p. 225 : « the strict liability compromise for regulatory offences is held to survive *Charter* challenge ». Il en résulte que les possibilités d'enquêtes impliquant des sociétés ne vont pas diminuer ; à tout le moins peut-on croire que le nombre de ces enquêtes va aller en augmentant, surtout en ce qui a trait aux sociétés que l'on croît avoir porté atteinte à l'environnement. À cet égard, *voir* P.-M. Johnson, *Réflexion éthique sur la responsabilité pénale des dirigeants d'entreprises en matière de dommages écologiques* dans CONFÉRENCES COMMÉMORATIVES MEREDITH 1990, Cowansville, Yvon Blais, 1991.

[19] [1984] 2 R.C.S. 145, 11 D.L.R. (4th) 641.

[20] Pp. 94-104.

[21] *Ibid.*

à exprimer et donc à comprendre d'une façon précise et détaillée, les Finkelstein permettent à qui veut bien se donner la peine de faire l'effort d'appréhender ces questions avec une aise déconcertante. Il faut les féliciter d'avoir eu recours à la technique pédagogique qui est celle de répéter subtilement et avec toujours plus de détails et de nuances une et puis plusieurs propositions fondamentales qui sont juxtaposées et puis jumelées avec, comme résultat, une analyse quasi-exhaustive de la question à l'étude.

Au demeurant, CONSTITUTIONAL RIGHTS IN THE INVESTIGATIVE PROCESS est un texte dont la parution marque de façon insigne le dixième anniversaire de la proclamation de la *Charte*.

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