Les Cahiers de droit

The Possible Impact of the Canadian Charter of Rights and Freedoms on Administrative Law

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Volume 26, numéro 2, 1985

URI : https://id.erudit.org/iderudit/042668ar
DOI : https://doi.org/10.7202/042668ar

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Éditeur(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (imprimé)
1918-8218 (numérique)

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Citer cet article

Roman, A. J. (1985). The Possible Impact of the Canadian Charter of Rights and Freedoms on Administrative Law. *Les Cahiers de droit*, *26*(2), 339–359. https://doi.org/10.7202/042668ar

Résumé de l'article

Bien que la *Charte canadienne des droits et libertés* ait généré dans un premier temps surtout de la jurisprudence criminelle, il est à prévoir qu'elle exercera aussi une influence considérable sur le droit administratif. Elle ne changera pas beaucoup le droit relatif au contrôle judiciaire de l'Administration, mais par rapport à un droit administratif conçu plus largement il ne fait pas de doute qu'elle va produire des effets substantiels.

Le présent article a pour objet principal l'article 8 de la Charte, qui protège contre les fouilles, perquisitions et saisies abusives. Il analyse cette disposition en référant à des situations spécifiques en matière d'impôt, de monopoles, d'immigration, de douanes et d'étiquetage.

L'auteur en arrive à la conclusion que la Charte a d'une certaine façon constitutionnalisé la pratique et les procédures administratives. L'administration ne doit désormais exercer que les pouvoirs qui sont absolument nécessaires pour s'acquitter des tâches que lui confie le parlement. Les mécanismes de mise en oeuvre des lois doivent d'autre part être conçus en fonction de situations normales et non pas en fonction des pires hypothèses.

The Possible Impact of the Canadian Charter of Rights and Freedoms on Administrative Law

Andrew J. ROMAN *

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Les Cahiers de Droit, vol 26, nº 2, juin 1985, p. 339-359

Introduction

It is rather difficult, at this early stage, to offer any firm conclusions as to the impact of the *Canadian Charter of Rights and Freedoms* on administrative law. The early *Charter* decisions have tended to be in the criminal law area, which is beyond the scope of this paper. Also, section 15 of the *Charter* only came into force on April 17, 1985. It is expected to have a major impact on administrative law. And, as yet, very few *Charter* cases have reached the Supreme Court of Canada.

Despite a strong temptation to speculate as to the probable fate of various laws or administrative practices in the Supreme Court of Canada, I have heeded the quiet internal voice of self-restraint which reminds me that he who lives by the crystal ball must be prepared to eat ground glass.

In the conventional perception of administrative law shared by most private law lawyers and, unfortunately, some of the more old-fashioned law schools, administrative law equals judicial review. In that narrow context, the *Charter* will have very little impact. For example, an applicant for *mandamus* will still have to convince the court that a legal duty is owed to him, regardless of the *Charter*; similarly, someone bringing an action for the currently fashionable remedy of declaration must still show that some legally recognized right or interest of his is affected. Fundamental concepts of standing and justiciability are unaffected by the *Charter* but administrative law is much broader than judicial review. It covers, in its broadest aspects, virtually all of the relationships between the citizen and the state and, at the very least, the administration of government, whether by a board, commission or tribunal, by a department, or even the Cabinet itself.

At its boundaries, administrative law overlaps with constitutional law. Both deal with the legal structure within which our system of government operates and both are preoccupied with the use and abuse of public power. Also, both are concerned with the allocation of government functions and powers among public authorities and officials, and with the procedures they employ in making decisions. In other words, constitutional law and administrative law provide the general principles of public law for conduct of the various aspects of the business of government [1]. The *Charter*, of course, is a constitutional document. Its entrenchment has broadened the constitutional bases upon which the courts may review the action of the administration, at every level of government.

1. For a fuller discussion of this question, see *Traité de Droit administratif* (Deuxième édition), R. Dussault, L. Borgeat, Québec, Les Presses de l'Université Laval, 1984 and the second edition of *Administrative Law, Cases, Texts and Materials*, by J.M. EVANS, H.N. JANISCH, D.J. MULLAN, R.C.B. RISK, Edmond-Montgomery Publications, 1984, p. 14 to 16.

Apart from section 15, the section of the *Charter* most likely to affect administrative law is section 7, which states that a person 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". This section, regardless of how it is eventually interpreted, has the effect of "constitutionalizing" procedural issues which, although subjected by the courts to the limited constraint of the "fairness doctrine", were formerly mainly within the control of Parliament. The courts have now been given the role of final arbiter on the procedures that may be adopted by, for example, the CRTC, the Immigration Appeal Board, Revenue Canada, and virtually any departmental official who decides any matter affecting rights or interests, whether he is acting in a judicial, quasi-judicial, or administrative capacity.

Not all *Charter* issues will be determined by courts of law. The reference in section 24 to a "court of competent jurisdiction" is much broader, and has important implications, to be explained below. The passage of the *Charter* may be seen as both an expression of confidence in the courts and a willingness to accept the possibility that legislative supremacy is to give way to a balancing or harmony between the various organs of the state — legislature, executive and judiciary. Although the *Charter* cannot resuscitate the legislative branch, it can revitalize the judiciary's control of the executive in this "age of executive government".

The provision of a new constitutional constraint on the operation of public authorities does not necessarily mean the administration will be forced into a judicial box. The early *Charter* cases at all levels of court have indicated substantial deference for the legitimate role of the executive. Nevertheless, the imposition of the *Charter* as the supreme law of the land does mean that the sources of Canadian administrative law have been substantially increased. The legality of bureaucratic conduct is now decided not only in accordance with fidelity to legislation, but also by the normative concepts contained in the *Charter*.

In concluding this introduction, it should be mentioned that an interesting open question is the extent to which the *Charter* will affect the tortious liability of statutory authorities. Notwithstanding the judgment of the Supreme Court of Canada in the *Saskatchewan Wheat Pool* case[2], constraining liability for the tort of breach of statutory duty, our courts may view a breach of the *Charter* as a constitutional breach rather than a statutory violation, thereby constituting a tort giving a right to damages under section 24(1). For example, in *Crossman v. The Queen*[3], a police

2. [1983] 1 S.C.R. 205.
3. (1984) 9 D.L.R. (4th) 588 (F.C.T.D.).

officer's denial of the right of counsel to a person in custody, in violation of section 10(b) of the *Charter*, was held to constitute a tort for which damages might be awarded. Even though the plaintiff ultimately pleaded guilty, and even though there was no real damage, he was awarded punitive damages of $500 as an expression of the court's indignation that *Charter* rights had been violated. In the administrative law area, searches and seizures or other coercive administrative acts in contravention of the *Charter* may well result in real damages, creating liability of both a compensatory and a punitive character.

1. The Scope of the Charter

A widespread misconception, even among lawyers, is that the primary focus of the *Charter* is criminal law and that its principal application is the nullification of unconstitutional legislation. Nothing could be further from the truth. Although criminal law applications of the *Charter* have been the most obvious and the plaintiffs in these cases the most desperate, once the handful of basic criminal law issues have been determined, the major preoccupation is likely to be administrative law.

The terms of the *Charter* and our experience with the *Canadian Bill of Rights* make it clear that administrative action is also subject to review[4]. For example, section 15(2) indicates that the guarantee of equality under the law is not upset by "any law, program, or activity" which is an affirmative action program. This consideration of "program or activity" contemplates a broader conception of what exists "under the law" than merely statutes or other statutory instruments. Also, section 6(3)(a) mentions any "laws or practices" of general application in a province, while section 6(4) talks about a "law, program, or activity". Such language demonstrates that administrative action is subject to judicial review.

Other sections of the *Charter* also seem to be directed to administrative action. For example, the legal rights sections dealing with unlawful search or seizure must, in order to have any meaning, apply to search or seizure by any government official, even if authorized by a statute or regulation. If we add to this the requirement of section 1 that the rights in the *Charter* are subject to such reasonable limits as are "prescribed by law", this would lead us to conclude that the bureaucratic activity of enforcement is subject to judicial review, even if authorized by law, unless the law itself is "reasonably necessary".

4. For a fuller discussion of this, please see K. SWINTON, "Application of the Canadian Charter of Rights and Freedoms (s. 30, 31, 32)", in G.-A. BEAUDOIN and W.S. TARNOPOLSKY (ed.), *The Canadian Charter of Rights and Freedoms*, Toronto, Carswell, 1982, p. 52-53.

Even under the *Bill of Rights*, there was a well-established tradition of examination of administrative practices [5]. Outside of the criminal law field, the courts will, in all probability, apply the *Charter* in the same way. Professor Weiler has suggested that a charter of rights should most frequently be applied for this purpose [6].

Professor Swinton regards the most difficult issue of applicability of the *Charter* as :

> [...] how far down the chain of governmental activity will the *Charter* reach ? [7]

There is little question that the *Charter* will apply to the actions of departmental officials in such matters as issuing regulations or approving and denying applications for licences or grants pursuant to statutes. This is because statutory discretion must be exercised in compliance with the *Charter*, and the regulations or statutes must themselves comply with the *Charter*. But how far beyond departmental activity should the *Charter* apply ? At present, there is no jurisprudence providing a clear answer, although some general principle must be formulated if arbitrary decisions are to be avoided. Professor Swinton suggests that commissions like the CTC or CRTC should undoubtedly be subject to the *Charter*, although the CBC might better be left to regulation by the CRTC or the Canadian Human Rights Commission, as are other broadcasters when they violate discrimination provisions. She recommends an express governmental function test : Is the subordinate agency exercising state authority in a way which can interfere with the individual right to freedom from unreasonable state action ?

Whatever the test that is ultimately adopted, it would seem that no administrative action which can affect rights can automatically be assumed to be immune from *Charter*.

2. Court of Competent Jurisdiction

Section 24(1) states that anyone whose rights or freedoms 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. What is a court of competent jurisdiction ?

In some cases the answer will be obvious ; in others, it will be a technical question of considerable complexity. There has already been some interesting

5. See, for example, *Curr v. The Queen*, [1972] S.C.R. 889, or *Mitchell v. The Queen*, [1976] 2 S.C.R. 570.
6. P. WEILER, *In the Last Resort*, Toronto, Carswell, 1974, p. 209.
7. *Supra*, note 4, p. 53.

jurisprudence on the point. In *Re Nash and The Queen*[8], it was held that the word "tribunal" in the French version of this subsection has a much broader meaning than the word "court" used in the English version, and would include a police disciplinary panel. Thus, an objection to the constitution of that panel, on the basis that it offended section 11(d) of the *Charter*, could be made to the panel itself. In *Law v. Solicitor General of Canada et al.*[9], it was held that the Immigration Appeal Board is a court of competent jurisdiction under the *Charter*, and this Board has now made its own determinations under the *Charter*[10].

The decision of the tribunal under the *Canadian Human Rights Act*[11] in *Kristina Potapczyk v. Alistair MacBain*[12] held that the tribunal was vested with jurisdiction to determine the merits of the complaint, but was not a court of competent jurisdiction to grant the relief sought by Mr. MacBain, or to determine that his rights under the *Charter* had been infringed. The tribunal stated:

> If it is a matter going to the appointment of the tribunal, then it appears that we are not a court of competent jurisdiction within the meaning of section 24 of the *Charter* to deal with the matter on an application, but rather it should be heard by the Federal Court; however, if in the process of hearing the merits of the complaint, there appears to be an infringement of the *Charter*, than the tribunal is a court of competent jurisdiction to consider and deal with the question.[13]

Putting the matter another way, the Ontario Divisional Court has held that section 24 does not create any new original jurisdiction in a court[14]. Thus, to be a "court of competent jurisdiction" under section 24, the court or tribunal must have, independently of the *Charter*, jurisdiction over the subject matter or general jurisdiction to grant the remedy sought.

Going somewhat further, Gordon F. Henderson, Q.C. has suggested[15] that section 19 of the *Broadcasting Act*[16] makes the CRTC a court of competent jurisdiction because it is a court of record; likewise section 5 of the *Tariff Board Act*[17], section 10 of the *National Energy Board Act*[18] and

8. (1982) 70 C.C.C. (2d) 490 (Nfld. Prov. Ct.).
9. (1983) 144 D.L.R. (3d) 549 (F.C.T.D.).
10. See, for example, *Brito v. M.M.I.*, Decision No. M82-1053, July 16, 1984.
11. S.C. 1976-77, c. 33.
12. April 10, 1984, reported in 5 C.H.R.R., Decision No. 391, October 1984, p. D/2302.
13. *Id.*, p. D/2303.
14. *Re Hussey et al. and Attorney General for Ontario et al.*, (1984) 9 D.L.R. (4th) 696.
15. In an address to the Canadian Bar Association, Ontario Branch, September 22, 1983, unpublished manuscript.
16. R.S.C. 1970, c. B-11.
17. R.S.C. 1970, c. T-1.
18. R.S.C. 1970, c. N-6.

section 6 of the *National Transportation Act*[19] for the CTC. Similarly, the *Federal Inquiries Act*[20], section 5, constitutes a commission of inquiry a court of competent jurisdiction.

If Mr. Henderson is correct (and I believe he is), a hypothetical complainant against a railway under section 15 of the *Charter*, alleging that the trains were not wheelchair accessible and, therefore, that the railway discriminated on the basis of physical disability, could bring the complaint to the Canadian Transport Commission, the Canadian Human Rights Commission or the Federal Court. Also, any of these three could make an order awarding damages, or a declaration that the complainant's *Charter* rights had been violated, or even issue an order similar to an injunction. The most difficult question is the scope of the remedies that may be given by a court of competent jurisdiction when that body is not a court of law, but has been vested with all of the powers of a superior court. Perhaps we will now begin to learn what a "superior court of record" is, or what the inherent, versus the statutory powers of a superior court are. This aspect of the *Charter* appears to be the heaven-sent solution to the problem of the over-supply of lawyers in Canada.

At a minimum, however, it will be important for lawyers both in private practice and in the public service to recognize that Charter rights may be determined by a broad range of bodies other than the traditional courts. In many instances, the expertise of specialized federal and provincial regulatory bodies may yield more sensitive *Charter* decisions than those likely to come from courts of law with concurrent jurisdiction.

3. Search and Seizure

The early contender for the *Charter* section least popular with administrators has to be section 8, which states:

> Everyone has the right to be secure against unreasonable search or seizure.

Mr. Justice David C. McDonald, in his excellent book on the subject of administrative searches[21], notes that American courts have held that warrantless searches are generally unreasonable, particularly for the purpose of administrative inspections, whether the premises searched are personal residences or commercial premises. Limited exceptions have been recognized in the case of specially regulated businesses such as the sale of firearms

19. R.S.C. 1970, c. N-17.
20. R.S.C. 1970, c. I-13.
21. *Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources*, Calgary, Carswell, 1982.

and liquor. Mr. Justice MacDonald suggests[22] that if this reasoning is adopted in Canada, many federal and provincial statutes that now permit entries for administrative purposes without warrant would be held void, and such searches would be held unreasonable.

His prophecy has proved to be correct in two areas we will consider below, income tax and combines. On the basis of the jurisprudence in these areas (the two leading cases were decided by the Supreme Court of Canada), it is clear that section 8 questions may be raised with respect to federal legislation allowing administrative searches and seizures related to fisheries, labour, textile labelling, hazardous products, motor vehicle safety, food and drugs, customs, and so on.

3.1. Income Tax

The leading case in this area now is *Re James Richardson & Sons Limited and Minister of National Revenue*[23]. The Supreme Court of Canada examined section 231(3) of the *Income Tax Act*[24], which allows the Minister "for any purposes related to the administration or enforcement of this *Act*... [to] require from any person any information...". Under this section, the Minister required the appellant, a commodities futures market broker, to reveal the names and addresses of its customers. It is significant that, first, neither the appellant nor any of its particular customers were under investigation at the time and, second, under section 221(1)(d) of the *Act*, the Governor-in-Council is empowered to make regulations requiring "any class of persons to make information returns".

The appellant brought actions for *certiorari* and a declaration that the requirement was unlawful. The actions were dismissed by both divisions of the Federal Court, but allowed by a unanimous Supreme Court of Canada. The latter held that a requirement of information under section 231(3) could only be made where the Minister was conducting a "genuine and serious inquiry into the liability of specific persons"[25]. This language suggests a judicial willingness to question the seriousness of the Minister, given that no one was under investigation. The court suggested, instead, that the appropriate conduct for the Minister was to obtain a regulation requiring that all traders file returns of their transactions. The court held :

> It seems to me that what the Minister is trying to do here, namely, check generally on compliance with the statute by traders in the commodities futures

22. *Id.*, p. 70.
23. (1984) 9 D.L.R. (4th) 1.
24. S.C. 1970-71-72, c. 63.
25. *Supra*, note 23, p. 1.

> market, cannot be done by conducting a "fishing expedition" into the affairs of one broker's customers under section 231(3) of the Act.[26]

If there is any general conclusion one can derive from the *Richardson* case, it is that the court will condemn overly broad or needless searches. The traditional administrative impulse may be to try to verify everything, from an abundance of caution. But that may not be what the *Charter* contemplates. The philosophical thrust of *Richardson* is that the administration must try to hit the target with a rifle rather than a shotgun. The traditionally cautious, broad, sweeping net may satisfy the goals of bureaucratic efficiency, but that is not all that matters. Administrative efficiency must now be balanced against the private constitutional right to be secure from unreasonable searches and seizures. Any search that is wider than strictly necessary may be considered, *prima facie*, to be unreasonable.

The acid test for the administrator should be to pose and to answer the question : If I put myself in the shoes of the person being searched, or whose goods are being seized, might I justifiably feel that the breadth or scope of this administrative activity is excessive ?

It is implicit in the *Richardson* decision, and is seen more clearly in cases discussed below, that what administrative lawyers refer to as "statutory conditions precedent" may have an effect on judges analogous to the supposed effect of waving a red flag before a bull. Language like "as he believes may be necessary" or "he believes" is intended by administrative lawyers to confer a very broad discretion to do anything the statutory "believer" wants, subject only to the precondition to form a subjective belief. Prior to the *Charter*, such statutory conditions precedent were considered wonderful devices which were more subtle and more effective than privative clauses. Today, it would seem, the situation may have changed.

Where the administrative response appears excessive, the tendency may be to second-guess the genuineness of the subjective belief. Thus, the court's perhaps rhetorical question in *Richardson*, "if the Minister seriously believes", suggests that the court finds it incredible that he can reasonably and seriously hold that view.

Morris Manning, Q.C., in his comprehensive examination of the *Charter*[27] is strongly critical of the administration of the *Income Tax Act*[28] :

> The coming-into force of the *Constitution Act*, 1982, containing as it does in Part I the *Canadian Charter of Rights and Freedoms*, gives hope to those who

26. *Id.*, p. 9.
27. *Rights, Freedoms and the Court*, Toronto, Emond-Montgomery, 1983, particularly in Chapter 9.
28. *Supra*, note 24.

> have long viewed with dismay the way in which the *Income Tax Act* of Canada has allowed the Minister of National Revenue and his investigative aides to put the burden on the taxpayer, not only to maintain records to compute the tax payable to the government, but also to authorize the conducting of searches and seizures in a way rarely countenanced by other statutes. Not only may there be a formal demand for information pursuant to an overly broad discretion, but taxpayers are required to assist in their own convictions. [...]
>
> The way the present scheme is administered, not only must the taxpayer prepare and submit at his own expense a net worth statement as a means of verifying whether his reporting of income over a number of years is inaccurate, but information is wrestled from the control of the banks about their customers and names of recipients of money are compelled to be divulged. The documents handed to accountants pertaining to their client's [*sic*] affairs are forced into the hands of the taxing authorities under threats of being charged with a breach of the *Act* if the documents are not handed over and last, but certainly not least, privileged information given to solicitors in the ordinary course of a solicitor/client relationship is forced from the solicitor into the hands of the taxing authorities. The demands made upon accountants and lawyers who advise clients with respect to tax matters raise concerns over the use of the powers which have been abused with impunity for many years. The *Canadian Charter of Rights and Freedoms* may see an end to this broad, and sometimes abusive, use of power.[29]

Mr. Manning's analysis of a number of cases suggests that where courts in the past have had to rule against the taxpayer, such as in *Granby Construction & Equipment Limited v. Milley et al.*[30], the abuse of process found in such cases is now remediable under the *Charter*.

Another important tax case, *MNR et al. v. Kruger Inc. et al.*[31], dealt with a search for evidence of the violation of any provision of the *Income Tax Act*[32], and the seizure and removal of documents. The majority held that section 8 of the *Charter* confines the Minister, in authorizing searches and seizures under section 231(4) of the *Income Tax Act*, to evidence relating to serious offences which he believes to have been committed. *Certiorari* was granted even though both parties agreed that the power of the Minister was purely administrative and not quasi-judicial or even subject to the rules of procedural fairness. The Federal Court's strongly-worded decision relied on the recent judgment of the Ontario Court of Appeal in *Regina v. Rao*[33], which dealt with warrantless searches under section 10(1)(a) of the *Narcotic Control Act*[34]:

29. *Supra*, note 27, p. 519.
30. [1974] C.T.C. 562 (B.C.S.C.).
31. [1984] C.T.C. 506 (F.C.A.).
32. *Supra*, note 24.
33. (1984) 46 O.R. (2d) 80.
34. R.S.C. 1970, c. N-1.

> Searches and seizures are intrusions into the private domain of the individual. They cannot be tolerated unless circumstances justify them. A search or seizure is unreasonable if it is unjustified in the circumstances. Section 8 does not merely prohibit unreasonable searches and seizures. It goes further and guarantees the right to be secure against unreasonable search and seizure. That is to say that section 8 of the *Charter* will be offended, not only by an unreasonable search or seizure or by a statute authorizing expressly a search or seizure without justification, but also by a statute conferring on an authority so wide a power of search and seizure that it leaves the individual without any protection against unreasonable searches and seizures. It is for that reason, in my view, that a statute authorizing searches without warrants may, as was decided in *R. v. Rao*, (*supra*), contravene section 8. A search without warrant may or may not be justified irrespective of the fact that it was made without warrant; however, save in exceptional cases, a statute authorizing searches without warrants may be considered as offending section 8 because it deprives an individual of the protection that normally results from the warrant requirement.
>
> I would be ready to concede that, in certain circumstances, the fact that a taxpayer has committed a serious offence under the *Income Tax Act* may justify the inference that he has probably also committed other offences under the *Act*. However, I cannot accept the general proposition that the mere fact that a taxpayer has, at a particular time, committed an offence under the *Income Tax Act* or the regulations, however trifling that offence, affords sufficient justification for the general power of search and seizure conferred by subsection 231(4). In my view, that subsection violates section 8 of the *Constitution Act, 1982* in that it contravenes the right of the taxpayer "to be secure against unreasonable search or seizure".[35]

In *Lipsey v. MNR*[36], Mr. Justice Cattanach took the extraordinary step of granting an injunction against the Minister and certain of his employees. He did this because an earlier seizure of the files of the taxpayer at his and his solicitors' offices had been quashed by another judge of the Trial Division (following the *Kruger* case referred to above) and was still under appeal by the Minister when the latter authorized officers of the Department to enter the taxpayer's place of business to conduct an audit and to require him to answer questions relating to it. The injunction restrained the Minister and the officers from continuing their investigation and from asking the taxpayer questions until the appeal from the order quashing the authorization had been concluded.

After saying a number of highly flattering things about the very distinguished taxpayer plaintiff, a world-renowned professor of economics, the court noted that the search had already been characterized by Mr. Justice Dube as a fishing trip that was unnecessary and ought not to be allowed.

35. *Supra*, note 31.
36. 84 D.T.C. 6192 (F.C.T.D.).

Cattanach J. held that this new audit was simply a different but similar means to stultify the order given by Mr. Justice Dube :

> More colloquially, doing something by the back door which could not be done by the front door.[37]

Although an injunction is normally not available to preclude a public officer from performing a statutory duty, having accepted the plaintiff's argument that the posing of the questions was a subterfuge to circumvent the order of Dube J., the court had no difficulty in concluding that such conduct fell outside of statutory duties and hence would be enjoinable.

In another recent case, *Lewis v. MNR et al.*[38], Mr. Justice Walsh of the Trial Division, following *Kruger*, held that a search and seizure was illegal under section 8 and ordered the seized documents returned to the taxpayer even though they might be required as evidence in subsequent proceedings. The Court, however, delayed the coming into effect of the order to enable the Crown to re-acquire possession of the documents in a legal manner. Whether this will ultimately result in the documents being held inadmissible at trial remains to be seen.

In addition to the searches and seizures of evidence, there is the related issue of garnishment. Although there do not appear to be any high level post-*Charter* decisions dealing with garnishment, the virtually unlimited powers granted to the Minister appear to be prime candidates for section 8 challenges, following the reasoning in *Kruger*.

3.2. The Combines Investigation Act

The most important single decision under this legislation is *Hunter et al. and Southam Inc.*, released by the Supreme Court of Canada on September 17, 1984[39]. The decision for the unanimous Court was written by Dickson J. (as he then was).

The Director of Investigation and Research of the Combines Investigation Branch instructed several officers to enter and examine documents and other things at the respondent's business premises in Edmonton and elsewhere in Canada. The authorization was certified by a member of the Restrictive Trade Practices Commission under section 10(3) of the *Act*[40]. The *Charter* was proclaimed after the authorization was made but before the actual search had begun. The respondents unsuccessfully sought an interim

37. *Id.*, p. 6197.
38. 84 D.T.C. 6550.
39. (1985) 11 D.L.R. (4th) 641.
40. *Combines Investigation Act*, R.S.C. 1970, c. C-23.

injunction pending trial of the question whether the search was in violation of section 8. The Alberta Court of Appeal ordered all documents taken to be sealed on an interim basis. The reasons for decision of the Supreme Court of Canada set out very clearly the new standard to be applied under section 8 of the *Charter*.

Appropriate prior authorization is indispensable to a valid search, in the absence of special circumstances. It is not enough to determine after the fact that the search should not have been conducted, since the citizen would then have been subject to an unlawful breach of his right of privacy. Therefore, unless it is virtually impossible to do otherwise, warrantless searches are, *prima facie*, unreasonable. The party seeking to justify a warrantless search bears the onus of rebutting the presumption of unreasonableness.

The search conducted in the *Southam* case was held to be constitutionally invalid for two reasons. The first was that the prior authorization was not by an individual who was entirely neutral and capable of acting judicially (although he need not be a judge). The Restrictive Trade Practices Commission has investigative and prosecutorial functions which preclude its members from acting in a judicial capacity since they lack the detachment necessary to balance the interests involved. In other words, the authorization process must be a real and meaningful one in which the person whose premises are being searched can have confidence, and not the mere formality of having another member of the executive branch provide an *ex parte* approval.

The second reason why the authorization procedure in this case was deficient is that it did not meet the newly imposed stantard that there must be reasonable and probable grounds, established upon oath, to believe that an offence has been committed and that evidence is likely to be found at the place of search.

Perhaps of greatest concern to government lawyers will be the court's ruling that where a statutory scheme fails to contain within it the appropriate standards for issuing a warrant, it is not the responsibility of the courts to fill in the details necessary to render the legislation constitutional. Correcting unconstitutional laws so as to render them constitutional is exclusively the role of Parliament.

Although it is too soon to tell from this single case whether the Supreme Court of Canada will soften its position somewhat, the impression given by the *Southam* judgment is that legislation authorizing seemingly excessive or unreasonable powers of search and seizure will be strictly construed and that the court will neither imply safeguards nor provide detailed blueprints as to how the particular legislation might be corrected.

It is also of some significance that the forecast in Mr. Justice MacDonald's book [41] that our courts would follow U.S. cases dealing with search and seizure was demonstrated to be accurate, at least by the judgment in *Southam*. It is not that particular U.S. cases were cited as precedents. Rather, the line of reasoning which appealed to the court was extracted from a number of U.S. cases. Central to the court's reasoning was the posing to itself of three important questions underlying the issue of the act of balancing the citizen's interest in being left alone by government with the government's interest in intruding on his privacy in order to enforce its laws.

3.2.1. When is the Balance of Interests to be Assessed?

Since the purpose of section 8 is to protect individuals by preventing unjustified searches before they happen, the constitutional intention can only be accomplished by a system of prior authorization. This demonstrates that the question of *timing* is central to an examination of these *Charter* rights. Although the Act in question [42] did have a system of prior authorization, the Cour then addressed whether section 10(3) provided for an acceptable authorization procedure.

3.2.2. Who must Grant the Authorization?

The Court was willing to acknowledge that it was not a necessary precondition to have all prior authorizations issued by judicial officers. Nevertheless, it did suggest a strong preference when it cited with approval the recent English case of *I.R.C. v. Rossminster* [43], in which Viscount Dilhorne stated [44] that the power to authorize administrative searches and seizures should be given to a "more senior judge". Our Court commented that this "may be wise" [45].

In a critique which may apply, *mutatis mutandis*, to a variety of authorization processes, the Court stated :

> the administrative nature of the Commission's investigative duties [...] ill accords with the neutrality and detachment necessary to assess whether the evidence reveals that the point has been reached where the interests of the individual must constitutionally give way to those of the state. A member of the R.T.P.C. [...] simply cannot be the impartial arbiter necessary to grant an effective authorization.[46]

41. *Supra*, note 21.
42. *Supra*, note 40.
43. [1980] 1 All E.R. 80.
44. *Id.*, p. 87.
45. *Hunter et al. and Southam Inc.*, *supra*, note 39, at p. 654.
46. *Id.*, p. 656.

3.2.3. On What Basis must the Balance of Interests be Assessed?

The Court's reasons under this part of its judgment are probably the most generally applicable. A large number of federal statutes contain subjective conditions precedent, of which the Court was somewhat critical.

> As Prowse J.A. pointed out, if the powers of a Commission member are as the Federal Court of Appeal found them to be, then it follows that the decision of the Director in the course of an inquiry to exercise his powers of entry, search and seizure, is effectively unreviewable. The extent of the privacy of the individual would be left to the discretion of the Director. A provision authorizing such an unreviewable power would clearly be inconsistent with section 8 of the Charter.[47]

There is, possibly, an analogy which may be drawn between this reasoning and the *rationes* of some of the recent section 96 cases such as *Crevier v. A.G. Quebec*[48] and *A.G. Quebec v. Farrah*[49]. Just as nature abhors a vacuum, the courts abhor trenching upon superior court functions in an attempt to create effectively unreviewable powers. Going even further, the judgment stated, *obiter*:

> Assuming, *arguendo*, that the Federal Court of Appeal was wrong, and the member *is* authorized, or even required, to satisfy himself as to (1) the legality of the inquiry and (2) the reasonableness of the Director's belief that there may be evidence relevant to the matters being inquired into, would that remove the inconsistency with section 8?
>
> To read s. 10(1) and 10(3) as simply allowing the authorizing party to satisfy himself on these questions, without requiring him to do so, would in my view be clearly inadequate. Such an amorphous standard cannot provide a meaningful criterion for securing the right guaranteed by section 8. The location of the constitutional balance between a justifiable expectation of privacy and the legitimate needs of the state cannot depend on the subjective appreciation of individual adjudicators. Some objective standard must be established.
>
> Requiring the authorizing party to satisfy himself as to the legality of the inquiry and the reasonableness of the Director's belief in the possible existence of relevant evidence, would have the advantage of substituting an objective standard for an amorphous one, but would, in my view, still be inadequate. The problem is with the stipulation of a reasonable belief that evidence *may* be uncovered in the search. Here again, it is useful, in my view, to adopt a purposive approach. The purpose of an objective criterion for granting prior authorization to conduct a search or seizure is to provide a consistent standard for identifying the point at which the interests of the State in such intrusions come to prevail over the interests of the individual in resisting them. To associate it with an applicant's reasonable belief that relevant evidence *may* be uncovered by the search would be to define the proper standard as the

47. *Id.*, p. 657.
48. [1981] 2 S.C.R. 220.
49. [1978] 2 S.C.R. 638.

> *possibility* of finding evidence. This is a very low standard which would validate intrusion on the basis of suspicion, and authorize fishing expeditions of considerable latitude. It would tip the balance strongly in favour of the State and limit the right of the individual to resist to only the most egregious intrusions. I do not believe that this is a proper standard for securing the right to be free from unreasonable search and seizure.[50]

Without wishing to read too much into this very important judgment, two observations might be made. First, this case, like several others, uses the words "fishing expedition". The clear implication is that someone requesting authorization for a search must be able to demonstrate (under oath, to an impartial adjudicator) first, that he has a fairly clear idea of what he is looking for, and second, that he has a strong reason to believe that something pointing to an offence will probably be found there. Mere intuition or hunch is not enough.

To be able to attest to this in an affidavit, the deponent must provide sufficient particulars from which the arbiter between the interests of the citizen and the state can assess the reasonableness of the belief. In other words, the affidavit should state why the deponent has reasonable and probable grounds to believe that there is more than a mere possibility that relevant evidence will be found if a search or seizure is conducted. To take any other view would be to assume that the court in *Southam* has done nothing but give advice as to how to swear technically correct affidavits. Surely that is too cynical an approach.

Since affidavits of this sort are usually presented to a judge *ex parte*, because he cannot himself cross-examine the deponent there should be sufficient information in the affidavit to enable the judge to satisfy himself that what is sought is not a fishing trip but is based on a substantial likelihood that relevant evidence will be found.

The Court recognized a special exception in security cases :

> Where the State's interest is not simply law enforcement as, for instance, where State security is involved, or where the individual's interest is not simply his expectation of privacy as, for instance, when the search threatens his bodily integrity, the relevant standard might well be a different one.[51]

It remains to be seen, however, how the court will respond to cases where state security is involved.

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50. *Supra*, note 45, p. 657-658.
51. *Id.*, p. 659.

3.3. Immigration

The security issue arises in a number of immigration cases in which persons claiming to be refugees may be deported to countries where, it is asserted, the individual may be tortured or killed for political reasons. If the Minister has information suggesting that the individual has a criminal record, or is for some reason a risk to our national security, he may resist releasing that information for fear of disclosing the identities of informants. Obviously, this requires a delicate balancing of the principle of fairness to the individual — providing him with an opportunity to know of what he is accused and to make a reply thereto — and the effectiveness of law enforcement in Canada and the other country.

An early decision of the Immigration Appeal Board [52] held that such a deportation is not a violation of the *Charter* because the state's interest in withholding such information from foreigners outweighs the latter's interest in disclosure. A group of cases of Sikh complainants [styled *Singh v. M.M.I.*[53]] has now been heard by the Supreme Court, but as of the date of this writing, the decision has not yet been released. These cases are somewhat different from *Brito*[54] in their fact situations but the court may use the opportunity to explain how the conflicting interests can be resolved with the least intrusion upon the rights of the individual. To indulge in a bit of speculation, it may be a possibility that the court will look for some halfway house between the two extremes, perhaps by analogy to some of the cases involving the Anti-Dumping Tribunal [now the Canadian Import Tribunal]. A good example of such a case is *Magnasonic Can. Ltd. v. Anti-Dumping Tribunal*[55], in which it was held that, although the details of evidence taken in confidence during an *in camera* hearing could not be disclosed, a reasonable summary thereof could be made and provided to the parties whose interests were affected. In the immigration context, it *may* be possible in some cases, although perhaps not in all, to disclose a summary of the information without thereby revealing, for example, the identity of the informant. It may then be possible for the immigrant to demonstrate, through his own evidence, that these allegations made against him are untrue.

Additionally, or alternatively, it may be possible to disclose the confidential information to a judge, to determine whether it has sufficient

52. *Supra*, note 10.
53. All seven are styled *Singh v. M.M.I.*
54. *Supra*, note 10.
55. [1972] F.C. 1239 (F.C.A.). See also *Sarco Canada Ltd. v. A.D.T.*, [1979] 1 F.C. 247 (F.C.A.) and *Brunswick v. A.D.T.*, (1979) 108 D.L.R. (3d) 216 (F.C.A.).

probative value, and whether it should be disclosed to the individual. This would enable someone outside the administration and an obviously impartial arbiter to adjudicate the conflicting interests involved and to ensure that the immigrant's rights are given their proper weight. These are the kinds of delicate compromises which may be necessitated by the *Charter*.

3.4. Other Statutes

There is a large number of statutes which authorize administrative practices which may offend the *Charter*. There is insufficient space to consider them all, but prime candidates would include anything containing a reverse onus clause or a right to search and seize. Generically, this would cover at least narcotics, prison law, immigration, income tax, shipping, fisheries, weights and measures, metrication, food and drugs, hazardous products, customs, motor vehicle safety, textile labelling, and safety services under the Canada Labour Code.[56]

[In addition to the major area of searches and seizures, consideration must be given to statutory provisions or administrative practices which may be discriminatory. These might include mandatory retirement provisions in the public service, certain deprivations of civil status found in the *Judges Act*[57], maternity provisions under various kinds of legislation, notably unemployment insurance, and so on.]

Let us consider two hypothetical scenarios to illustrate these points. First, let us assume that this month's issue of a $10 foreign art magazine has on its cover a photograph of the painting of Venus by Botticelli. Since it portrays female sexual organs which may be contrary to the customs guidelines[58], which expressly caution against pornography masquerading as artistic materials, all copies of the issue are seized at the border and shipped to Ottawa for further assessment. By the time senior officials in Ottawa finally get around to deciding that it is a legitimate art magazine, several months have gone by, and retailers will no longer stock a magazine that is three months out-of-date. The importer has to scrap them all. He then sues

56. Within provincial jurisdiction, an interesting application of the reasoning in *Southam, supra*, note 39, covered the seizure of movie projector and film under s. 4(2)(e) of Ontario's *Theatres Act*, R.S.O. 1980 c. 498, in *Nightengale Galleries Ltd. v. Director of Theatres Branch*, (1985) 48 O.R. (2d) 21. The Court held (at p. 30) that although the action of the seizing officials was reasonable the legislation permitting it was not appropriate under the *Charter*, hence the enabling law was *ultra vires* and so was the seizure. The reasonableness of the conduct was, therefore, irrelevant.

57. R.S.C. 1970, c. J-1.

58. Department Memorandum D9-1-1 and Policy Guidelines.

for a declaration that the publication in question was not obscene and that his *Charter* rights were violated. The judge, being an art fan, grants the declaration and also, pursuant to section 24, awards damages against the Crown equal to the plaintiff's pecuniary loss.

To make matters worse, a group of irate *Thorson*-inspired taxpayers brings an action against the individual customs officers and the officials in Ottawa, seeking to have them pay this loss personally. They argue that no legislation can protect public servants from the responsibility for violations of the liberties of the citizenry because such gross violation of the constitutional rights of Canadians is not part of the course of employment of any public servant, and the public officials involved were on a "frolic of their own".

This scenario may be a bit farfetched, but it underlines the anomaly of allowing customs officials in the field or in Ottawa to make what may, for all practical purposes, be *ex parte* final decisions about obscenity in the case of imported publications while the vendors of similar publications printed in Canada are protected by the full range of safeguards found in criminal procedure before a judge. Caution would suggest the development of a procedure whereby a customs officer would refer such a question to a court as expeditiously as possible so that the citizen may have his rights adjudicated by means of an adversary process applying a presumption of innocence.

As our second scenario, consider a search and seizure under section 8 of the *Textile Labelling Act*[59]. This Act allows an inspector to enter any premises in which *he reasonably believes* there is any textile fibre product, in order to conduct a physical examination or audit of books and records. Under section 10(1) of the *Act*, whenever *an inspector* believes on reasonable grounds that *any* provision of the Act or regulations has been violated, he may seize any textile fibre product or any labelling, packaging or advertising material by which he believes the violation was committed. He may detain these products until:

a) *in the inspector's opinion*, the provisions of the *Act* or regulations have been complied with; or
b) the expiration of ninety days or such other longer period as may be prescribed [by persons unspecified but, presumably the allusion is to regulations], unless before that time proceedings have been instituted, in which event the material seized may be detained until the proceedings are finally concluded [*quaere* whether this means that all appeals have been finally concluded].

59. R.S.C. 1970, c. 46.

The inspector's seizing samples and rushing off to a judge to obtain an injunction (or other appropriate order) would be uncontroversial. But the power to seize such goods in their entirety, and to retain them, perhaps until their commercial value is lost, in the absence of any clear emergency or danger to public health or safety, is questionable[60]. Potentially, such a seizure could amount to an expropriation. It is also interesting to note that the inspector — who probably has no formal legal training — is required to form an opinion of the *Act* and the regulations almost as would a judge, and the responsibility is shifted to the owner of the goods to try to obtain some timely judicial redress for what, for all practical purposes, might amount to an unreviewable opinion.

Conclusion

As indicated at the outset, the *Charter* is still in its infancy, and the *Charter* decisions of the Supreme Court of Canada relating to administrative law are few. The message for administrators, however, is already becoming clear. Three broad conclusions emerge.

1. The *Charter* must be taken seriously by administrators who, to date, may have had little, if any experience with the judicial process. It must be regarded as a limitation upon every administrative action and every statutory instrument. It has "constitutionalized" administrative law, procedure and practice.

There is no point in being irritated about it because it reduces administrative efficiency: that was precisely what it was intended to do. If the administration thinks that something is "reasonably justified", it must be prepared not merely to assert it, but to prove it. Gone are the days when one can simply say, "Trust us, we are the public service".

As the Constitution is the supreme law of the land, the role of government lawyers is not always to oppose the *Charter*. There is a higher responsibility: to the country as a whole. The message that government lawyers must take to the rest of the bureaucracy is that the age of broad discretion has been replaced by the new regime of legality. Statutory powers do not merely exist to shield the bureaucracy; the *Charter* has been superimposed to create a new balance, to protect the individual from the

60. In *Nightengale Galleries, supra*, note 56, the Court upheld (at p. 33) a different standard between a warrantless search and seizure of, for example, tainted poultry and printed materials:

> It is much easier to justify a warrantless seizure and quarantine of products which could constitute a health hazard to the population than a similar encroachment on a fundamental freedom.

unfortunately inevitable occasional excesses of mass government. The more quickly Crown lawyers absorb this and educate their clients, the less the likelihood that a court will find it necessary to wreak havoc with a carefully crafted regulatory scheme on a Friday afternoon.

2. The bureaucracy must learn to exercise no more power than is absolutely indispensable to achieve the legislature's purpose. It must learn, by a newly acquired reflex, to balance automatically the dictates of bureaucratic efficiency with the right of the citizen to be left alone. Draconian measures intended to deal with extreme cases must not be considered to be the norm.

3. As is often the case, an administrative scheme will deal with a broad array of heterogeneous situations. For example, the *Hazardous Products Act*[61] may cover relatively long-term hazards such as urea formaldehyde foam insulation and, also, dangerous poisons. A single set of powers designed to cover the worst possible situation will probably create a problem[62] in the many less serious cases. Rather than legislating the most intrusive powers for all situations, the law should provide a range of responses, each tailored to the relative severity of the threat to the public. More serious intrusions into citizens' liberties should be reserved for more serious circumstances. Sometimes in modern legal design, as in architecture, less is more.

61. R.S.C. 1970, c. H-3.

62. Of the sort encountered in *Nightengale Galleries, supra*, note 56.