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Book Review: Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources, by The Honourable David C. McDonald

Patrick Monahan
Osgoode Hall Law School of York University

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Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources. By The Honourable DAVID C. McDONALD.
Toronto: Carswell Co. Ltd. 1982. Pp. xxv, 275. (\$25.00)

The problem of the legitimacy of judicial review of a democratic polity, long an obsession of American constitutional scholars,¹ has never seriously stirred the imagination or the energies of Canada's legal community.² Justice David C. McDonald's *Legal Rights in the Canadian Charter of Rights and Freedoms*, while hinting at the relevance and richness of the American debate, remains firmly within the Canadian tradition. Rather than attempting the Herculean task of constructing a "theory of moral

⁹ P. 105.

¹⁰ The reviewer has detailed his argument more fully in an article which will shortly be published in (1982), 4 *Supreme Court L. Rev.*

* Ronald I. Cheffins, of the Faculty of Law, University of Victoria, Victoria, B.C.

¹ This preoccupation, far from abating, seems to be actually gaining momentum. See, for example, J. Ely, *Democracy and Distrust* (1980); J. Choper, *Judicial Review and the National Political Process* (1980); L. Tribe, *American Constitutional Law* (1978).

² There have, of course, been exceptions to this rule: see P. Weiler, *In the Last Resort* (1974); M. Gold, *Equality Before the Law in the Supreme Court of Canada* (1980), 18 *O.H.L.J.* 336.

rights against the state",³ Justice McDonald undertakes to discuss in general terms the difficulties which may arise in the judicial interpretation of the newly enacted Canadian Charter of Rights and Freedoms.⁴ The author focuses upon the "legal rights" sections of the Charter (sections 7 to 14) as well as the limiting clause (section 1) and the enforcement clause (section 24).

This book will no doubt be useful to the Canadian judge or lawyer looking for an introductory work that highlights possible issues arising under the Charter and suggests avenues of further inquiry. Relying on judicial decisions under the Canadian Bill of Rights, the United States Bill of Rights and the various International Conventions and Declarations on Human Rights, Justice McDonald sets out the differing interpretations that may be advanced under the Charter and points to arguments that could be marshalled in favour of these various interpretations. The latter third of the book comprises a series of appendices. These appendices reproduce the Charter, the American and Canadian Bills of Rights, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights. The final appendix contains a selection of judicial and extra-judicial writings on the interpretation of the American Constitution. While this final body of material would be helpful to a lawyer with little or no previous exposure to American constitutional writing, it omits reference to the leading recent works in the field such as the books by John Hart Ely⁵ and Lawrence Tribe.⁶

While this book may serve as a helpful starting point for discussion of the Charter's legal rights, one might have hoped for more. Justice McDonald makes a concerted effort to point to possible issues that may arise under the Charter without suggesting which interpretation is more compelling or persuasive. At times, this leaves the reader with the sense that the material is somewhat undigested. For example, in discussing the Charter requirement that an accused receive a hearing before an "independent and impartial tribunal"⁷ the author cites the recent Supreme

³ See Dworkin, *Taking Rights Seriously* (1977), p. 149, who argues that legal theory must be both normative as well as conceptual and that the normative theory "will be embedded in a more general political and moral philosophy which may in turn depend upon philosophical theories about human nature or the objectivity of morality". *Ibid.*, p. viii. Ironically, Justice McDonald opens his book with quotations from Dworkin and John Rawls, but he makes no attempt in his substantive discussion of the Charter to respond to their call for a fusion of constitutional law and moral theory. For some, this may be one of the book's strengths.

⁴ The Charter is Part I of the Constitution Act, 1982. The Constitution Act, 1982 was enacted as Schedule B of the Canada Act, 1982, c. 11 (U.K.).

⁵ *Op. cit.*, footnote 1.

⁶ *Ibid.*

⁷ See s. 11(d).

Court decision in *McKay v. The Queen*,⁸ a case decided under the "fair and public hearing" requirement of the Canadian Bill of Rights.⁹ Yet rather than offer an analysis of the case and of its relevance for the Charter, the author simply reproduces long extracts from the three judgments in *McKay* and moves on to discuss another question. This cautious technique is premised on the author's belief that "at this early stage it would be foolhardy to predict what Canadian judges will do, and it would be presumptuous for one of them to appear to be suggesting to others what the correct interpretation should be".¹⁰

Further, one would have hoped for some analysis relating the American literature reproduced in the appendix to the Charter provisions. This material would appear to be particularly relevant in terms of section 1 of the Charter, which provides that rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This section apparently invites judges to venture forth into the uncharted and dangerous waters of political and social theory. The judge will only be able to apply section 1 after he or she has constructed some background theory of the nature and requirements of the democratic polity.¹¹ Justice McDonald suggests a possible avenue of escape from this politicized judicial role. He argues that the courts should first identify other societies that are "free and democratic", those in which "as a matter of common knowledge, freedoms and democratic rights similar to those in section 2 and 5 are enjoyed".¹² The court would then ascertain what limits these other societies impose on the exercise of fundamental freedoms and

⁸ (1981), 114 D.L.R. (3d) 393.

⁹ S. 2(f) states that federal laws are to be construed so as not to deprive an accused of a "fair and public hearing by an independent and impartial tribunal". The *McKay* case also raised a problem of the individual's right under s. 1(b) to equality before the law.

¹⁰ P. 5.

¹¹ This is a highly controversial and difficult task since democracy is a "contested concept". See Gallie, *Essentially Contested Concepts* (1965), 56 *Procs. of Arist. Soc.* 167. Professor Ely, *op. cit.*, footnote 1, argues that judges can avoid questions of substantive political values by resorting to a "process-based" theory of democracy. Ronald Dworkin, among others, has argued that even this approach is covertly value-laden. Dworkin suggests that the abstract ideal of democracy cannot answer the question of what rights people have: ". . . [J]udges charged with identifying and protecting the best conception of democracy cannot avoid making . . . decisions about individual substantive rights. Judges may, of course, believe that the utilitarian answer to the question of individual rights is the correct one—that people have no rights. But that is a substantive decision of political morality. And, other judges will disagree. If they do, then the suggestion that they must defend the best conception of democracy will not free them from having to consider what rights people have." *The Forum of Principle* (1981), 56 *N.Y.U.L.Rev.* 469, at p. 510. The difficulty, of course, is whether it is possible to construct a theory of fundamental rights that is neither hopelessly vague nor blatantly "political" in nature. See Ely, *op. cit.*, *ibid.*, pp. 43-72 and Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship* (1981), 90 *Yale L.J.* 1063.

¹² P. 18.

interpret the Canadian Charter accordingly. Yet this methodology could only succeed if we knew in advance the limitations on freedom that were consonant with a "free and democratic society". Without such an overarching theory, the attempt to identify a set of free and democratic societies would be circular and futile.

Judicial review under the Charter will be unsettling and uncertain, requiring a synthesis of political and legal theory. This book is helpful in identifying some of the questions and problems that will arise in that enterprise, but the reader will have to look elsewhere for more profound or penetrating insights as to the form that the answers to those questions might take.

PATRICK MONAHAN*

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* Patrick Monahan, of Osgoode Hall Law School, York University, Toronto.

¹ (2nd rev. ed., 1975)