CASE COMMENTS
CHRONIQUE DE JURISPRUDENCE

The Cabinet and the Constitution: Participatory Rights and *Charter* Interests: *Manicom* v. *County of Oxford*

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Synopsis

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Introduction

In pursuit of often competing objectives, government regulatory activity affects individual welfare in a multitude of ways. It is not surprising then, that regulatory measures adopted as a result of deliberate policy choice often interfere with interests protected by the *Charter*. At the same time many regulatory decisions which threaten *Charter* rights will never be challenged, either because

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the harm they cause is significant only in a cumulative sense, or because the individuals or groups involved are ill-equipped to defend their interests before the courts. Examples of this abound in welfare,[1] health and safety,[2] environmental,[3] and prison settings,[4] among others. Given this reality the *Charter* must, to be fully effective, guarantee that regulatory processes dealing with *Charter* related interests do so with respect. Consistent with this objective, the *Charter* should be interpreted to require a maximum level of individual and public participation in any regulatory decision which threatens *Charter* protected rights. In this way, policy choices which affect entrenched rights will be subject to a greater measure of control, through advance public scrutiny as well as *ex post* judicial review.

In addition to increasing the *Charter*'s potential for safeguarding rights in the regulatory context, an interpretive approach which focusses on participatory rights and opportunities finds in the *Charter* a mechanism for enhancing the democratic tenor of public decision-making. Many critics of the *Charter* underline the serious challenge it poses for parliamentary democracy.[5] They point in

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[1]Bill C-21, the proposed amendment to the federal *Unemployment Insurance Act*, is a recent example of sweeping regulatory reform affecting welfare related interests, made without adequate participation by those affected. Federal Employment Minister Barbara McDougall characterized Senators as "frivolous and silly" for unduly prolonging Senate Committee study of the Bill, to which the Commons Committee devoted only four weeks; see "Senate's UI Bill defeated in Commons, *The [Toronto] Globe and Mail* (21 December 1989) A11. For a discussion of the effects of the Bill on the welfare of the unemployed, see Mouvement Action-chômage de Montréal, "Mémoire présenté au comité législatif chargé d'étudier le Projet de loi C-21", 15 August 1989; on the welfare of women, see Canadian Advisory Council on the Status of Women, *Submission to the Legislative Committee on Bill C-21, an Act to Amend the Unemployment Insurance Act* (Ottawa, Canadian Advisory Council on the Status of Women, September, 1989); and see generally M. Jackman, "The Protection of Welfare Rights under the Charter" (1988) 20 Ottawa L. Rev. 257.

[2]See for example K. Cox, "Pediatrician Sees Trauma Among Labrador Children", *The [Toronto] Globe and Mail* (9 October 1989) A4; and M. Wadden, "The Planes of Labrador", *Harrowsmith* (September/October 1989) 36, with regard to the impact of federal military policy on the health of Innu adults and children subject to noise from low-level NATO training flights over Labrador.

[3]For example, the Government of New Brunswick's decision, as part of its spruce budworm control program for 1989, to increase aerial spraying of a controversial chemical insecticide, fenithrothion, by 33%, despite allegations that the insecticide poses a health hazard to both humans and animals; see "New Brunswick Sprays More Chemical Insecticides in 1989" *Alternatives* (October/November 1989) 2.

[4]See the fact situations at issue in *Cardinal* v. *Kent Institution*, [1985] 2 S.C.R. 643, 24 D.L.R. (4th) 44; and *Collin* v. *Lussier*, [1983] 1 F.C. 218, 6 C.R.R. 89, rev'd in part by [1985] 1 F.C. 124, 22 C.C.C. (3d) 124 (F.C.C.A.). See also A.W. MacKay, "Inmates Rights: Lost in the Maze of Prison Bureaucracy?" (1988) 11 Dalhousie L.J. 698; M. Jackson, "The Right to Counsel in Prison Disciplinary Hearings" (1986) 20 U.B.C. L. Rev. 221.

[5]See for example A. Petter & A.C. Hutchinson, "Rights in Conflict: The Dilemma of Charter Legitimacy" (1989) 23 U.B.C. L Rev. 531; A.C. Hutchinson & A. Petter, "Private Rights/Public Wrongs: The Liberal Lie of the Charter (1988) 38 U.T.L.J. 278; R.I. Cheffins & P.A. Johnson, *The Revised Canadian Constitution — Politics as Law* (Toronto: McGraw-Hill Ryerson, 1986); A. Petter, "The Politics of the Charter" (1986) 8 Sup. Ct L. Rev. 473; H.J. Glasbeek & M. Mandel,

particular to the fact that it gives democratically unaccountable judges near-absolute power to rule on the propriety of policies adopted by elected and democratically responsible governments. However, the promise which the *Charter* holds for those seeking greater and better access to government should also be recognized. This is particularly important in light of the fact that much public decision-making no longer occurs in Parliament. Many of the decisions which have the greatest impact on individual welfare are made by Cabinet and by other parliamentary delegates within government departments, administrative agencies, and quasi-governmental bodies. To the extent that parliamentary control over much of this decision-making is tenuous at best, it is unrealistic to rely on representative democracy as the sole avenue for participation in modern government.[6]

If this interpretive reasoning applies to the *Charter* in general, it is particularly relevant for section seven, which contains the most basic human rights to life, liberty, and security of the person, and requires that any deprivation of these rights must accord with principles of fundamental justice. Considerable consensus exists in *Charter* scholarship and case law that section seven protects a relatively wide range of personal interests, including those relating both to physical and psychological security and well-being.[7] Once section seven is held to protect this wider range of interests, the notion of fundamental justice must also be given an expanded meaning. As Justice Lamer explains in *Reference Re*

"The Legalisation of Politics in Advanced Capitalism: The Canadian Charter of Rights and Freedoms" (1984) 2 Socialist Studies 84. For a pre-*Charter* formulation of this critique, see D.A. Schmeiser, "The Case Against Entrenchment of a Canadian Bill of Rights" (1973) 1 Dalhousie L.J. 15.

[6]See for example J.R. Mallory, "Curtailing 'Divine Right': The Control of Delegated Legislation in Canada" and R. Schultz, "Regulatory Agencies and the Dilemmas of Delegation" in O.P. Dwivedi, ed., *The Administrative State in Canada — Essays for J.E. Hodgetts* (Toronto, University of Toronto Press, 1982) 131 and 89 respectively; J.R. Mallory, "Can Parliament Control the Regulatory Process?" (Autumn 1983) *Canadian Parliamentary Review* 6; T. D'Aquino, G.B. Doern & C. Blair, *Parliamentary Democracy in Canada — Issues for Reform* (Toronto, Methuen, 1983); P.S. Elder, "The Participatory Environment in Alberta" in P.S. Elder, ed., *Environmental Management and Public Participation* (Toronto: Canadian Environmental Law Association, 1975) 101 at 104; D. Fox, *Public Participation in the Administrative Process* (Ottawa: Law Reform Commission of Canada, 1979) at 137; H. Chapin & D. Deneau, *Citizen Involvement in Public Policy-Making: Access and the Policy-Making Process* (Ottawa, Canadian Council on Social Development, 1978) at 9-10.

[7]See *Re Singh and Minister of Employment and Immigration*, [1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422; *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30, 44 D.L.R. (4th) 385; *Collin* v. *Lussier*, *supra*, note 4. See also: J.D. Whyte, "Fundamental Justice: The Scope and Application of Section 7 of the Charter" (1983) 13 Man. L.J. 455; C. Boyle, *Sexual Assault* (Toronto: Carswell, 1984) at 31-42; Jackman, *supra*, note 1; I. Morrison, "Security of the Person and the Person in Need: Section Seven of the Charter and the Right to Welfare" (1988) 4 J.L. & Social Pol'y 1; I. Johnstone, "Section 7 of the Charter and Constitutionally Protected Welfare" (1988) 46 U.T. Fac. L. Rev. 1; P. Garant, "Fundamental Rights and Fundamental Justice" in G.-A. Beaudoin & E. Ratushny, eds, *The Canadian Charter of Rights and Freedoms*, 2d ed. (Toronto: Carswell, 1989) 331.

Section 94(2) of the B.C. Motor Vehicle Act, a restrictive interpretation of fundamental justice "would strip the protected interests of much, if not most, of their content and leave the "right" to life, liberty and security of the person in a sorely emaciated state."[8]

To do justice to the "broad, affirmative language"[9] in which section seven rights are expressed, fundamental justice should be read to include the notion that regulatory decisions which threaten section seven interests are constitutionally unacceptable unless the persons or groups affected have had a meaningful opportunity to participate in the decision-making process. The opportunity to participate in decisions affecting one's life, liberty or personal security has been identified by the courts as a fundamental component of the right to be treated in accordance with principles of fundamental justice.[10] Participation not only enhances accuracy and accountability in decision-making, it also fosters the sense of justice and of human dignity which, as the courts have recognised, are integral aspects of the rights guaranteed under section seven.

One of the most significant barriers to participation in regulatory decision-making as it currently stands is the unilateral power to review regulatory decisions which Cabinet enjoys under a number of federal and provincial statutes.[11] Building upon the premise that participation is a necessary component of fundamental justice within the meaning of section seven,[12] the following discussion will suggest that where a section seven interest is at issue, failure to ensure access to Cabinet decision-making renders the outcome unconstitutional. The argument will be illustrated with reference to *Manicom* v. *County of Oxford*[13], an Ontario High Court case in which a section seven challenge to a Cabinet

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[8][1985] 2 S.C.R. 486 at 501, 24 D.L.R. (4th) 536 at 548.

[9]*Ibid.*

[10]See *Re Singh*, *supra*, note 7; *Jones* v. *R.*, [1986] 2 S.C.R. 284, 69 N.R. 241; *R.* v. *Robson* (1985), 19 D.L.R. (4th) 112, 19 C.C.C. (3d) 137 (B.C.C.A.).

[11]Section 67 of the *National Transportation Act*, R.S.C. 1985, c. N-20, for example, authorises the federal Cabinet to review decisions made by the Canadian Transport Commission and the Canadian Radio-Television and Telecommunications Commission in the following terms:

67. The Governor in Council may at any time, in his discretion, either on petition of any interested party, person or company or of his own motion, and without any petition or application, vary or rescind any order, decision, rule or regulation of the commission, and any order that the Governor in Council may make with respect thereto is binding on the commission and on all the parties.

The Ontario *Consolidated Hearings Act*, S.O. 1981, c.20, which is designed to consolidate the administrative hearings required by a number of provincial statutes, including the *Environmental Assessment Act*, R.S.O. 1980, c. 140, the *Ontario Municipal Board Act*, R.S.O. 1980, c. 347 and the *Planning Act*, S.O. 1983, c. 1, contains a similar provision; see *infra*, note 17.

[12]For a more thorough examination of this argument, see Jackman, *supra*, note 1, especially at 308-317; M. Jackman, "Rights and Participation: The Use of the Charter to Supervise the Regulatory Process" (1990) 4 C.J.A.L.P. 23.

[13](1985), 52 O.R. (2d) 137, 21 D.L.R. (4th) 611 [hereinafter cited as *Manicom* to D.L.R.].

appeal was rejected. Using the case as a background, the paper will conclude that, notwithstanding its policy rationale, the Cabinet appeal process fails to meet section seven standards of fundamental justice.

I. The Manicom Case

The *Manicom*[14] case arose against the background of a dispute between the Township of South-West Oxford and the County of Oxford over the latter's decision to locate a waste disposal site within the Township despite considerable local opposition. In order to obtain the requisite government approval for the proposed site, the County applied to a Joint Board appointed under the Ontario *Consolidated Hearings Act*[15] to consider the environmental and planning impacts of the application. After a lengthy public hearing, which lasted some sixty days and heard from a number of area and expert witnesses, the Board rejected the County's application. The Board reached its decision not to approve the site on a number of grounds. From a hydrogeological perspective, the Board found the site to be totally inappropriate. Because the soil on the site was composed of sand, silt and gravel and it was riddled with kettles of unknown depth, there was an inordinately high risk of contamination of underground water by leachate from waste disposed on the site. Such contamination would affect not only the immediate site, but the surrounding aquifers, and hence the domestic and agricultural water supply of all those living in the vicinity.

In addition to its hydrogeological unsuitability, the Board found the site unacceptable from a social planning perspective. The proposed site, located on a height of land, was in close proximity to the centre of the village of Salford and within view of the entire community. Heavy truck traffic to and from the site, numbering upwards of two hundred trips per day, would share local roads used by school buses, farm machinery, and pedestrians, including children on their way to the community centre and school bus pick-up points. Bulldozers and other heavy equipment working on the site during its hours of operation would also create serious noise pollution problems for those living in the neighbourhood. The Board concluded that local residents' enjoyment of their farms, homes and community, their physical security and that of their children, and their health, as well as the health of farm animals using the local water supply, would all be adversely affected by use of the site. In short, the Board argued: "[i]f established at this location, the proposed facility ... would constitute an integral detrimental element within the fabric of the community".[16]

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[14]*Ibid.*

[15]*Supra*, note 11.

[16]*Re Oxford (County) Salford Landfill Site* (1983), 15 O.M.B.R. 1 at 39 varying (1982), 15 O.M.B.R. 1. In concluding its decision on the application, the Board acknowledged the limited resources and difficult task facing the Township and the local residents in challenging the site

Following the hearing and the rejection of its application by the Joint Board, the County appealed to the Ontario Cabinet, pursuant to section thirteen of the *Consolidated Hearings Act*.[17] In its decision on the appeal, Cabinet explained that it had given careful consideration to the County's petition, and to replies submitted by all the parties, including the Township. It also indicated that a technical review undertaken by the provincial Ministry of the Environment, which found the proposed site feasible if certain engineering changes were made to the County's plan, was also circulated to the parties for comment. Cabinet concluded that, on the basis of the Environment Ministry's review and the parties' comments, it would vary the Board's order and approve the proposed site.[18]

Faced with the prospect of the disposal site going ahead against the Joint Board's findings, the Township launched an appeal to the Ontario High Court for a declaration that Cabinet's decision was void for violation of principles of natural justice and fairness. The Township based its claim on a number of grounds. First, the Township argued that Cabinet members, including the Minister of the Environment and the Minister of Municipal Affairs and Housing, were lobbied by representatives of the County but refused to meet with representatives of the Township. Second, it claimed that Cabinet accepted arguments that the waste disposal site was urgently needed, although the Township and the County had previously agreed not to raise the question of urgency, and the issue was never addressed before the Joint Board. Third, the Township asserted that the Ministry of the Environment made submissions and recommendations to Cabinet, involving matters it had not brought forward during the hearing, and at variance with the position it had taken before the Board. The submission which most disturbed the Township in this regard, and the one upon which the Cabinet relied in its subsequent decision, was that the waste disposal site could be engineered in such a way as to avoid the risks identified by the Joint Board. This claim posed particular problems for the Township since, in its decision on the County's application, the Board had expressed considerable scepticism about the feasibility of an acceptable engineered site. The Joint Board addressed this issue in the following terms:

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application, and ordered to County to pay the Township's costs, in the amount of $75,000; *ibid.* at 41.

[17]*Supra*, note 11. Section 13 provides that:

13(1) Upon application, the Lieutenant Governor in Council by order,

(a) may confirm, vary or rescind all or any part of a

decision of a joint board;

(b) may substitute for the decision of a joint board such decision as the Lieutenant Governor in Council considers appropriate; or

(c) may require a joint board or a different joint board to hold a new hearing as to all or any part of the matters in respect of which the joint board was established.

[18]*Re Oxford (County)*, *supra*, note 16 at 43.

> Surely a decision that virtually ignores the geology and hydrology of a site, and one that would rely solely on engineering as the first line of defence, would negate either the need for or the desirability of terrain assessments in the site selection process. The safety of any site approved on such a basis would rest entirely upon the soundness and appropriateness of any engineering technology employed to ensure safety which, on the evidence, the board is led to believe has not yet attained such a desirable level of sophistication.[19]

The Township's fourth objection related to the reports upon which the Ministry of the Environment's recommendations to cabinet were based. In particular, the Township objected to the fact that the reports were prepared by Ministry officials after the Board rendered its decision, at the urging of the County, and without notice to the Township. Fifth, the Township argued that while the Environment Ministry subsequently provided the Township with copies of its submissions to Cabinet, it refused to release the actual technical reports upon which these were based. Finally, the Township objected to the fact that it was never provided with an opportunity to fully respond to the issue of urgency, or to the Ministry of Environment recommendations and reports, before Cabinet made its decision to approve the site.[20]

In subsequent court actions, the Attorney-General of Ontario and the County applied unsuccessfully to have the Township's claim struck out,[21] and the Township applied unsuccessfully for access to Cabinet documents in relation to its claim.[22] In the latter case, the Township sought access to all letters and documents prepared, exchanged, or received by the Minister of the Environment in relation to the County's appeal to Cabinet, and to the Cabinet's deliberations on the issue. In its decision on the Township's claim for access, the Ontario High Court rejected the local Master's argument that the documents should be disclosed since they involved quasi-judicial proceedings rather than matters of government policy.[23] Instead the Court held that the government interest in non-disclosure of the documents should prevail over the private interest in access.[24]

The *Manicom* case involved a parallel action by the owners of farms adjacent to the proposed waste disposal site, on their own behalf. Using facts and arguments similar to the ones raised by the Township in its legal challenge, the plaintiffs asked for a declaration that Cabinet's decision to approve the site vio-

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[19]*Ibid.* at 37-38.

[20]The Township's statement of claim is extracted in *South-West Oxford (Township of)* v. *A.G. Ontario* (1985), 50 O.R. (2d) 297 at 311-12, 15 Admin. L.R. 1 at 19-21 (H.C.).

[21]*South-West Oxford (Township of)* v. *A.G. Ontario* (1985), 8 Admin. L.R. 30, 44 O.R. (3d) 376 (H.C.).

[22]*South-West Oxford (Township of)* v. *A.G. Ontario*, *supra*, note 20. The issue of access to Cabinet documents was comprehensively reviewed in the subsequent Supreme Court of Canada decision of *Ontario* v. *Carey*, [1986] 2 S.C.R. 637, 22 Admin. L.R. 236.

[23]*South-West Oxford (Township of)* v. *A.G. Ontario*, *ibid.* at 7-8.

[24]*Ibid.* at 21.

lated their rights under section seven of the *Charter*.[25] The majority of the Ontario High Court allowed the County and the Attorney-General's motion to dismiss the plaintiffs' claim on the grounds that the complaints related essentially to the use and enjoyment of property, and as such were not covered by section seven of the *Charter*.[26] In his dissenting opinion, Justice Potts disagreed with the majority's characterization of the issues at stake in the case. He argued that the plaintiffs' section seven claim was primarily health-based, and in particular, that it related to the injury which the plaintiffs and their families would suffer from contamination of the wells from which they drew their drinking water by leachate from the site. In Justice Potts' dissenting view, such health-based concerns were legitimate ones, which should be permitted to proceed to trial.[27]

II. The Cabinet Appeal Process

The dominant rationale for preserving the Cabinet appeal power is summarised by Justice Estey, in his decision in the *Inuit Tapirisat*[28] case, in the following terms:

> Indeed it may be thought by some to be unusual and even counter-productive in an organized society that a carefully considered decision by an administrative agency, arrived at after a full public hearing in which many points of view have been advanced, should be susceptible of reversal by the Governor in Council. On the other hand, it is apparently the judgment of Parliament that this is an area inordinately sensitive to changing public policies and hence it has been reserved for the final application of such a policy by the executive branch of Government.[29]

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[25]*Supra*, note 13. In addition to their *Charter* claim, the plaintiffs sought an injunction based on nuisance, negligence, the rule in *Rylands* v. *Fletcher*, and a breach of riparian rights.

[26]*Ibid.* at 619.

[27]*Ibid.* at 630.

[28]*A.G. Canada* v. *Inuit Tapirisat of Canada*, [1980] 2 S.C.R. 735, 115 D.L.R. (3d) 1 [hereinafter *Inuit Tapirisat* cited to D.L.R.]. In the *Inuit Tapirisat* case, the Canadian Radio-Television and Telecommunications Commission rendered a decision, following a lengthy public hearing involving a number of parties, approving an application by Bell Canada for a telephone rate increase. Pursuant to section 64(1) (now section 67) of the *National Transportation Act*, two of the intervenors at the hearing appealed the CRTC's decision to the federal Cabinet. The Cabinet received written submissions from some of the parties, but did not make these available to, or allow for replies by, all of the others. Instead, it based its decision to turn down the appeal on evidence and opinions provided by officials from the Department of Communications and the CRTC. For a similar, more recent decision, see *National Anti-Poverty Organization* v. *A.G. Canada*, [1989] 1 F.C. 208, 99 N.R. 181 (F.C.T.D.).

[29]*Inuit Tapirisat*, *ibid.* at 17-18. On the basis of this reasoning Justice Estey held that there was no need for Cabinet to hold any kind of a hearing, to give reasons for its decision, or even to acknowledge receipt of a petition. In short, in exercising its appeal power, Cabinet was under no obligation to act fairly. For a case where a court refused to read a statutory power of direction as tantamount to a Cabinet appeal power, see *Reference re Public Utilities Review Commission Act* (1986), 52 Sask. R. 53. In that case the Saskatchewan Court of Appeal reasoned that the Legislature expressly intended to "remove undue rate discrimination, potential political influence and activities

The idea that Cabinet must be able to intervene rapidly in certain regulatory areas to address new policy concerns is unconvincing as a justification for Cabinet appeals. As the Law Reform Commission of Canada points out, in many situations "it is known from the outset that a political solution will likely be imposed. Going through the motions of a decision prior to Cabinet intervening could be a costly and protracted exercise in futility".[30] Needless to say, this is especially true from the perspective of individuals and groups claiming a legitimate right to participate in the decision-making process.

A second variant of the political accountability rationale for Cabinet appeals, based on the notion that Cabinet should bear ultimate responsibility to Parliament and the public for decisions in certain sensitive policy areas, has also been criticized.[31] As the Economic Council of Canada argues, it is simplistic to believe that a mere grant of decision-making power to a political body such as the Cabinet automatically ensures political accountability. If political accountability means, as the Council suggests, "accountability to the public for achievement of public goals",[32] there must be some mechanism to ensure that Cabinet's decisions are consistent with the policy objectives established in the legislation under which it derives its authority. Otherwise a legitimate concern may arise that Cabinet is bending to the wishes of a particular interest group, or pursuing some other partisan motive, in rendering its decisions on appeal.[33]

Whether one endorses them or not, it is clear that traditional justifications for the Cabinet appeal power in no way detract from Cabinet's obligation to act in conformity with the *Charter*.[34] Many policy-based criticisms of the Cabinet appeal process are relevant to the question of its constitutional validity under section seven. Critics, including the Law Reform Commission of Canada and the Economic Council of Canada, point to a number of procedural defects in the ordinary exercise of the Cabinet appeal power.[35] There is, for instance, no

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on the part of lobbyists, by placing ratesetting in the hands of a commission, generally independent of the executive branch of Government...". *Ibid.* at 61.

[30]Law Reform Commission of Canada, *Report on Independent Administrative Agencies* (Ottawa: Law Reform Commission of Canada, 1985) at 37.

[31]See for instance M. Rankin, "The Cabinet and the Agencies: Toward Accountability in British Columbia" (1985) 19 U.B.C. L. Rev. 25 at 40-42; Economic Council of Canada, *Responsible Regulation — An Interim Report* (Ottawa: Supply and Services Canada, 1979) at 64.

[32]R. Schultz, F. Swedlove & K. Swinton, *The Cabinet as a Regulatory Body: The Case of the Foreign Investment Review Act* (Ottawa: Economic Council of Canada, 1980) at 88.

[33]*Ibid.* at 88.

[34]Any doubts with regard to Cabinet's susceptibility to the Charter were laid to rest by the Supreme Court in its decision in *Operation Dismantle Inc.* v. *R.*, [1985] 1 S.C.R. 441, 12 Admin. L.R. 16.

[35]See, for example, L. Vandervort, *Political Control of Independent Administrative Agencies* (Ottawa: Law Reform Commission of Canada, 1979) at 60-70; *Responsible Regulation, supra*, note 31 at 63-64; Rankin, *supra*, note 31 at 43-45; D.S. Kaufman, "Cabinet Action and the CRTC: An Examination of Section 23 of the Broadcasting Act" (1985) 26 C. de D. 841 at 859.

requirement that parties to the proceedings from which an appeal arises receive notice that a petition has been made to Cabinet. If other parties do learn that a petition has been presented, there is no obligation on Cabinet or the petitioning party to give them a copy. Interested parties who obtain a copy of the petition may file a response, but no duty is imposed on the government officials responsible for preparing recommendations to Cabinet to consult with other parties, or to take their interventions into account. Similarly, there is no requirement that comments and responses of one party be made available to others. Finally, Cabinet is not obliged to read the written submissions of the various parties, or to allow the parties to be heard, when it is making a final decision on the issue in question.[36]

The difficulties created by the Cabinet appeal power for individuals and groups attempting to participate in the regulatory process can be expected to generate feelings ranging from intense frustration to a sense of acute injustice. After expending scarce resources to participate in lengthy public hearings, a final decision may be made in secret by an ill-informed body not present at the original hearing, which has no obligation to entertain the views of those who will be most affected, and which may be motivated by extraneous or illegitimate considerations which the parties, or some of them,[37] have had no opportunity to address. David Mullan summarizes the effect of the existing Cabinet appeal procedure as follows:

> [T]he disappointed parties will inevitably believe that earlier participatory rights have been for naught. Instead, it will be believed that crass political considerations have overridden the carefully reasoned position of the administrative tribunal, and that hidden and more powerful lobbies have been at work in a way not permissible before the administrative tribunal.[38]

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[36]See C.C. Johnston, *The Canadian Radio-Television and Telecommunications Commission* (Ottawa: Law Reform Commission of Canada, 1980) at 85.

[37]In a 1979 report on regulatory reform, the Economic Council of Canada stated in this regard that: "It may fairly be argued that cabinet appeals benefit wealthy, well-organized and politically vocal interests at the expense of possibly larger groups that do not have these characteristics"; *Responsible Regulation, supra*, note 31 at 63.

[38]D.J. Mullan, "Administrative Tribunals: Their Evolution in Canada from 1945 to 1984" in I. Bernier & A. Lajoie, eds, *Regulations, Crown Corporations and Administrative Tribunals* (Toronto: University of Toronto Press, 1985) 155 at 175. Former CRTC President John Meisel's description of Cabinet appeals as "an invitation to vested interests and lobbyists to converge on ministers in an effort to undo, behind closed doors, decisions reached by the Commission and based on public hearings where interested parties can react to one another's arguments openly." goes some way towards confirming suspicions about the process; see A.J. Roman, "Governmental Control of Tribunals: Appeals, Directives and Non-Statutory Mechanisms" (1985) 10 Queen's L.J. 476 at 478.

III. The Constitntionality of the Outcome in *Manicom*

The manner in which the Cabinet appeal power under the *Consolidated Hearings Act* was exercised in *Manicom* not only supports generalized critiques of the process, but renders the decision it actually produced in the case unconstitutional for a number of reasons. Life, liberty and security interests were clearly at stake in the case.[39] The decision to allow waste disposal to go ahead on the proposed site posed a serious and direct threat to the plaintiffs' physical health through contamination of drinking water, garden fruit and vegetables and food crops, as well as of potential contamination of livestock using affected water. The plaintiffs' physical security and the security of their children would be jeopardized by the exponential increase in heavy traffic using local and village roads. The waste disposal site also threatened the plaintiffs' psychological health. The health and security hazards created by the site would be a source of anxiety, its visual prominence a constant reminder. The location of the site so close to the heart of the plaintiffs' village would also lead to more subtle forms of stress, through deterioration of neighbourhood relations and the sense of community which is important if not essential for human happiness, particularly, it might be argued, in rural areas.[40]

Measured against a definition of fundamental justice which insists on a right to participate in decisions affecting section seven interests, the Cabinet's decision to authorize the site fails on several counts. The plaintiffs, along with other local residents and the Township, went to considerable trouble and expense to participate in the proceedings of the Joint Board. Their participation was necessarily premised on the view that the Board's decision, derived after lengthy hearings and well-informed deliberations in which they had an important part, would be determinative. In fact, this did not prove to be the case. In spite of the expectations generated by the formal hearing process, their participation before the Joint Board was, in the end, rendered meaningless.

At the Cabinet appeal level, the plaintiffs, who were the parties most affected by the procedings and the outcome, were denied meaningful access to those with the actual power to decide, the members of provincial Cabinet. While representatives of the County enjoyed ongoing interaction with individual ministers, and with relevant officials in the Ministry of the Environment, the plaintiffs were denied any opportunity for direct input. A major issue, the urgent need for the site, was only addressed by the County and by Environment Ministry officials, this after formal opportunities for participation no longer existed for

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[39]See the cases cited *supra*, note 7.

[40]See, for example, P. Smith, "What Lies Within and Behind the Statistics? Trying to Measure Women's Contribution to Canadian Agriculture" in *Growing Strong — Women in Agriculture* (Ottawa, Canadian Advisory Council on the Status of Women, 1987) 123 at 189-190.

the other parties. The plaintiffs were also denied access to the information they needed for meaningful and effective participation. In particular, the plaintiffs did not have access to the Ministry of Environment report, which was produced subsequent to the Joint Board hearing, and which formed the basis of the Cabinet's ultimate decision to authorize the site. The scientific premises of the Ministry report, including the basis for the claim that the site could be engineered in such a way to make it safe, could not be tested. The recommendations in the report could therefore not be adequately addressed. This was particularly serious for the plaintiffs, since the factual content of the report, as well as its recommendations and conclusions, were entirely inconsistent with the findings of the Joint Board.[41]

IV. Cabinet Appeals and Fundamental Justice

The decision in the *Manicom* case highlights those aspects of the Cabinet appeal power which render it most susceptible to constitutional challenge. Cabinet's decision in the case violated principles of fundamental justice because it denied a meaningful right to participate to those most affected: the individuals and families who would become neighbours of the waste disposal site, and who would suffer the risk of physical and psychological harm as a consequence. Cabinet's decision in the *Manicom* case was the product of a decision-making structure which preferred certain interests and excluded others. Given its inconsistency with the Joint Board's findings, it is reasonable to suppose that it was based on considerations extraneous to those which the parties were invited to address during the hearings of the joint board, and to the overall purpose of the environmental and planning legislation which created the decision-making authority. In short, the decision appears to have been politically opportunistic. That the residents of the village and the farms surrounding the disposal site recognized this, and viewed it as profoundly unjust, is evident from the substance of the court challenges which they launched.

Some might suggest that outcomes such as the one in the *Manicom* case are inevitable; that this form of decision-making, based on political trade-offs instead of sound legislative policy, is an unavoidable feature of our present system of Cabinet government; and that injuries suffered by the "losers" in this process are an unavoidable cost. Whether or not this analysis is correct from a policy perspective, it is clearly untenable in constitutional terms. Principles of fundamental justice require that those threatened by government decisions in relation to their lives, liberty, or personal security have a meaningful right to participate in those decisions: a right to access to the actual decision-maker and a right to the information which is necessary for effective input. As the *Manicom* case illustrates, refusal to recognize such rights reflects disrespect for

[41]See *supra*, notes 16 and 19.

the dignity of the citizen, and generates a sense of injustice which is fundamentally incompatible with the specific guarantees provided by section seven, and the general values which underlie the *Charter*.[42]

Many reform proposals have been made in relation to the Cabinet appeal power. Some commentators have suggested procedural changes such as the imposition of a duty to hear representations, to create a record, and to give reasons, in order to bring the process in line with notions of procedural justice and fairness.[43] Others have viewed the appeal power as a form of "discretionary accountability"[44] contributing to "hypocrisy in government",[45] and have recommended that it be abolished altogether.[46] Whatever its susceptibility to reform, however, the Cabinet appeal power as it currently exists is constitutionally suspect in situations where section seven interests are involved. So long as its exercise has the effect of denying access to the actual decision-maker, of undermining participation at prior stages of decision-making, or of creating a fundamental sense of injustice in those whose section seven interests are at stake, the Cabinet appeal power violates rights which the constitution now guarantees.

Conclusion

In his decision in *R.* v. *Oakes*, Chief Justice Dickson referred to the dual purpose for which the *Charter* was entrenched, that is, to ensure that Canadian society is both free and democratic.[47] As suggested at the outset of the paper, the *Charter* should be read not only to protect rights, but to enhance democracy.

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[42]The depth of feeling generated by a denial of such rights is illustrated by the response of Baie-Comeau residents to the Québec government's decision, in August 1989, to store PCB-contaminated waste from the St-Basile-le-Grand fire in their community without prior warning or consultation. Following unsuccessful efforts to block unloading of the final shipment of PCB wastes in Baie-Comeau, a spokesperson for the Manicouagan Environment Coalition voiced the extreme frustration felt by local residents: "...we feel abused by the police, the government and the justice system. We have done everything we can and we can't get justice". A. Picard, "Judge clears second load of PCB waste", *The [Toronto] Globe and Mail* (31 August 1989) A1 at A2.

[43]See T.G. Kane, *Consumers and the Regulators — Intervention in the Federal Regulatory Process* (Montreal: Ihstitute for Research on Public Policy, 1980) at 74-75; *Responsible Regulation*, *supra*, note 31 at 65; *Independent Administrative Agencies*, *supra*, note 30 at 38; Vandervort, *supra*, note 35 at 69; W.A.W. Neilson, "Regulation and Public Participation: Recent Versus Desirable Trends, in H.V. Kroeker, ed., *Sovereign People or Sovereign Governments* (Montreal: Institute for Research on Public Policy, 1981) 121 at 133; Mullan, *supra*, note 38 at 176; Rankin, *supra*, note 31 at 54-55.

[44]D. Hartle, *Public Policy Decision-Making and Regulation* (Montreal: Institute for Research on Public Policy, 1979) at 126.

[45]Vandervort, *supra*, note 35 at 125.

[46]H.N. Janisch, "Policy Making in Regulation: Towards a New Definition of the Status of Independent Regulatory Agencies in Canada (1979) 17 Osgoode Hall L.J. 46 at 105; *Responsible Regulation*, *supra*, note 31 at 67; Rankin, *supra*, note 31 at 53-54.

[47][1986] 1 S.C.R. 103 at 136, 26 D.L.R. (4th) 200.

This second aspect of the *Charter* is particularly relevant since democracy in Canada can no longer be assured simply by an autonomous Parliament. As the *Manicom* case illustrates, many of the public decisions which bear most heavily on individual welfare are made by Parliamentary delegates, beyond the bounds of Parliamentary control.[48] If the *Charter* is to meet the complex demands of modern Canadian society, it must be read for its capacity to enhance the ability of all citizens to participate in government decision-making wherever it occurs. This because it is participation, and not merely representation, which sustains democracy.

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[48]See *supra*, note 6.