

CONSTITUTIONAL LAW OF CANADA, 3d ed. By Peter W. Hogg. Carswell, 1992. Pp. 1478+1xii. Student Edition. (\$68.00).

Having recently read two other books on constitutional law,¹ it was almost a challenge to find a genuine interest to read Professor Peter W. Hogg's CONSTITUTIONAL LAW OF CANADA in its third edition. In fact, the experience has been fascinating from cover to cover.

Of course, one would expect the classical outline: three parts dealing respectively with Basic Concepts, the Distribution of Powers and Civil Liberties; here a new fourth part deals briefly with Practice. As well, appendices contain the text of the most important constitutional documents and, finally, a bibliography is included.

The "originality", if this is the appropriate word, lies rather in the authority, the strength, and the depth with which this author analyses the topics. On the one hand, Professor Hogg has appeared personally before the Supreme Court of Canada for some of the decisions on which he is commenting, and he warns the reader about this fact² — "just in case my objectivity has been impaired" — as he clarifies in the preface. On the other hand, his comments are constantly cited by courts of all levels,³ usually with approval but sometimes not, and he brings both to the attention of the reader.⁴

Further, the strength and depth of Professor Hogg's analysis is evident in the constancy and solidity of his logical argumentation and by the ease with which he is able to compare the Canadian law on an issue with the law of other countries, be they "unitary" like England and New Zealand or "federal" like Australia and the United States. And what is most amazing is that this can be affirmed in any part of the book.

Of course, some statements are questionable, such as this one: "[t]he case [*Construction Montcalm v. Minimum Wage Commission*].... may pave the way for recognition of a provincial power of expropriation of federal Crown property".⁵ It is hard to advance such a provincial power in light of section 91(1A) of the *Constitution Act, 1867* and of section 13 of the *Federal Real Property Act*, the latter providing that

¹ G.A. Beaudoin, *LA CONSTITUTION DU CANADA* (Montréal: Wilson & Lafleur, 1990) [reviewed in (1991) 23 OTTAWA L. REV. 443-46]; H. Brun & G. Tremblay, *DROIT CONSTITUTIONNEL*, 2d ed. (Cowansville, P.Q.: Yvon Blais, 1990) [reviewed in (1991) 22 R.G.D. 243-47].

² Pp. 152 n. 42; 218 n. 95; 307 n. 27; 361 n. 93; 459 n. 140; 527 n. 39; 570 n. 22; 1207 n. 48; 1231 n. 21; & 1255 n. 64.

³ It is interesting to note that Professor Hogg has foreseen the problem — and solution — of citing the right page of his text. Because of the pagination of the new loose-leaf version, which will soon be different from that of the hard-cover and soft-cover bound versions, the author chooses to give the section number rather than the page, so as not to bother with mentioning the version.

⁴ Pp. 311 n. 43; 331 n. 74; 407 n. 180; 431 n. 71; 492 n. 159; & 1199 n. 3 with approval. Pp. 25 n. 111; 199 n. 176; 398 n. 124; 551, 625 n. 12; & 1229 n. 7 with disapproval.

⁵ P. 705, n. 42. Emphasis mine.

"except as expressly authorized by or under an Act of Parliament, no person acquires any federal real property *by virtue of a provincial Act*".⁶

To give a detailed account of the contents of the fifty-seven chapters would require too much space and time. It is sufficient to set out their main features. To describe the importance of the task of updating such a long book, it seems relevant to mention Professor Hogg's statistics on the work of the Supreme Court of Canada — let alone the courts below and all the books and articles published — during the last seven years:

When the second edition was completed in 1985, the Court had decided only three Charter cases. Now it has decided another 178. The Court has also decided 40 federalism and 28 other constitutional cases in the last seven years.⁷

Part I on Basic Concepts, grouping fourteen chapters on topics such as sources of constitutional law, the amendment of the Constitution, and our public institutions has been updated to include the Meech Lake Accord but was written before the August 1992 Charlottetown Accord was rejected by Canadians. The most remarkable statement within this Part, knowing that it comes from an expert specially consulted during the constitutional negotiations, is that "[i]t is only realistic to acknowledge that a substantial alteration in the division of powers between the federal and provincial governments is neither practicable nor desirable".⁸

Part II, on the Distribution of Powers between the federal and provincial spheres, has been updated and augmented by the addition of chapters on Criminal Justice, Financial Institutions, and Bankruptcy and Insolvency. By comparison with other authors whose study of the distribution of powers can be perceived as "federalist" (Professor Beaudoin) or "nationalist" (Professors Brun and Tremblay), the reader encounters difficulties in classifying Professor Hogg's view. For example, Professor Hogg does not see any special problem⁹ with *R. v. Crown Zellerbach Canada Ltd.*,¹⁰ a decision that was seriously criticized by Professor Beaudoin¹¹ and Professors Brun and Tremblay.¹²

On the other hand, Professor Hogg is not shy in his criticism of Supreme Court of Canada decisions on the distribution of powers issues. One can even be surprised by the regularity with which he clearly shows his disagreement, particularly with respect to decisions written by the late Chief Justice Bora Laskin.¹³

⁶ S.C. 1991, c. 50. Emphasis mine.

⁷ P. iii.

⁸ P. 92.

⁹ Pp. 445-49.

¹⁰ [1988] 1 S.C.R. 401, 11 C.C.C. (3d) 113.

¹¹ *Supra*, note 1 at 292, 318, & 614.

¹² *Supra*, note 1 at 490-93.

¹³ Pp. 303 n. 11; 407 n. 179; 459-60, 491, 494, 505, 511 n. 72. At p. 459 there is a hint that this goes back to *Reference re Anti-Inflation Act* (1975), [1976] 2 S.C.R. 373, 68 D.L.R. (3d) 452, where Chief Justice Laskin wrote the majority decision while Professor Hogg was counsel for the losing side (*see also*, p. 361 n. 93).

Part III on Civil Liberties deals with their protection at common law and under statutes such as the *Canadian Bill of Rights*, but mainly under the *Canadian Charter of Rights and Freedoms*. As the quotation above indicates, the increase in the number of judicial decisions under this 1982 constitutional statute has been simply phenomenal and plenty of people have commented upon them. Professor Hogg, having written many articles, has added eighteen new chapters in which he explains the general principles and analyses the different rights and freedoms. Except for readers who are concerned with criminal law or very specific rights and freedoms, the most interesting chapters are 34, 35, 44, and 52 dealing respectively with general issues such as interpretation, limitation of rights (section 1), fundamental justice (section 7), and equality (section 15).

Professor Hogg also gives advice as to the proper judicial approach to *Charter* claims:

Does it make much difference whether the Court gives a wide interpretation to rights and relaxes the standard of justification under s. 1, or gives a narrow interpretation to rights and maintains the stringent standard of justification called for by *Oakes*? If we assume that the outcomes of cases will be much the same under either approach, the second approach is surely preferable, because it will reduce the volume of litigation and limit the policy-making role of the courts.¹⁴

One very interesting aspect of this part is that Professor Hogg provides, in footnotes, the history of each provision of the *Charter*.¹⁵ This will be very helpful for research and litigation purposes. Another very good idea is to mention the fact that reference to a decision is given to a specific report because the "official" report does not contain it.¹⁶ In this part, like the others, references to books and articles are abundant and up-to-date.¹⁷

Part IV, entirely new, consists of three chapters on the effect of unconstitutional law, procedure (procedural issues, standing, mootness, ripeness, alternative grounds, intervention), and proof.

¹⁴ P. 813.

¹⁵ See, e.g., p. 1188 nn. 184 & 186 concerning s. 28.

¹⁶ See, e.g., p. 167, n. 29, "*Scott v. A.G. Can.*, [1923] 3 W.W.R. 929 (P.C., unreported in A.C.)" and p. 1268, n. 32, "*Finlay v. Can.* (1990), 71 D.L.R. (4th) 422 (F.C.A.) (not in F.C.R.)." Similarly with different editions of books, see, e.g., p. 229, nn. 5 & 6, and p. 672, n. 46.

¹⁷ However, at p. 264, n. 25, with respect to "Crown Privilege", reference should have been made to the extensive analysis found in R. Dussault & L. Borgeat, *ADMINISTRATIVE LAW: A TREATISE*, 2d ed. (Toronto: Carswell, 1989) v. 3, c. 4 at 165-273. At p. 646, n. 6, on the impact of the *Canadian Charter* on family law, reference could have been made to the major text on the issue, J. Rhéaume, *DROITS ET LIBERTÉS DE LA PERSONNE ET DE LA FAMILLE* (Montréal: Wilson & Lafleur, 1990) Part III. Readers who understand French may like to note that a French updated version of the book *CROWN LAW* published by Butterworths in 1991 (see p. 257, n. 1) is now available: Ministère de la Justice du Canada, *LA COURONNE EN DROIT CANADIEN* (Cowansville, P.Q.: Yvon Blais, 1992).

In his preface to the second edition in 1985, when he incorporated his first detailed comments on the *Charter*, Professor Hogg acknowledged that his update had been a tremendous undertaking. In his new preface, he commits himself to prepare annual supplements to the loose-leaf version of this new edition and readers will undoubtedly look forward to their arrival.¹⁸

In a word, Bravo!

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¹⁸ In a future update, Professor Hogg might like to reconsider his statement that "there is no case applying the doctrine of interjurisdictional immunity to *federal* laws in order to protect provincially-incorporated companies or provincially-regulated undertakings" — p. 403, taking into account the authorities he mentions at pp. 615-16 (*but see* authorities cited at 611 n. 41 & p. 704 n. 38).

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