BOOK REVIEWS

CONSTITUTIONAL LAW OF CANADA (2d ed.). By Peter W. Hogg. Carswell, 1985. Pp. lxxv, 988. ($42.50)

There can have been few periods of less than a decade which have brought such profound and far-reaching constitutional changes to a federal state as the period between the first publication of Professor Hogg's valuable treatise on Canadian constitutional law in 1977[1] and the publication of the second edition in 1985. It would not, in fact, be misleading to describe this second edition as a substantially new work. The original volume of some 500 pages dealt with the constitutional law of the "pre-*Charter*" era, focussing mainly on the *British North America Act, 1867 (B.N.A. Act)*[2] and its amendments, the division of powers, the "supremacy of parliament" and the unentrenched civil liberties of Mr. Diefenbaker's 1960 *Canadian Bill of Rights*.[3] The intervening changes have been enormous. The division of powers test for constitutional validity of statutes must now be supplemented by a further test requiring provincial and federal laws to conform to the prescriptions of the *Canadian Charter of Rights and Freedoms*.[4] As well, subsection 52(1) of the *Constitution Act*, 1982[5] has substantially limited the "supremacy of parliament" by making the enactment of laws by Parliament and the provincial legislatures subject to "the supreme law of Canada".

The present edition, of approximately twice the former length, adds nine new chapters, including chapter 3 on independence, chapter 4 on the amending process and seven entirely new chapters on the main subdivisions of the *Charter*. The patriation of the Canadian Constitution with an entrenched enumeration of rights and freedoms and a domestic amending formula has so altered the public law of Canada that only Professor Hogg's extensive revised text could do justice to the revolutionary changes that have taken place.

There is surely something in the Canadian psyche which values a stable and continuous, or "uninterrupted" constitutional order. We are not a revolutionary people. In his new examination of Canadian independence, the author contrasts the laborious efforts taken by Canadians to "patriate" the *B.N.A. Act*, with the "do-it-yourself" approach of the American founding fathers.[6]

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1 P.W. Hogg, CONSTITUTIONAL LAW OF CANADA (Toronto: Carswell, 1977).

2 Now cited as the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3.

3 S.C. 1960, c. 44, *reprinted in* R.S.C. 1970, App. III.

4 Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter the *Charter*] The *Charter*, unlike its 1960 precursor, is entrenched.

5 Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

6 P. 45.

The American Constitution grew out of a revolutionary war which explicitly rejected any further British authority over local laws or institutions. It was "autochthonous" because it sprang from the local soil without external legislative assistance, although it borrowed such concepts as "due process", "trial by jury" and "habeas corpus" from antecedent British law. It also borrowed, and sometimes distorted, concepts such as the "separation of powers" from the liberal French political thought of the eighteenth century. The more conservative and "orderly" Canadian approach raises some interesting questions. If there is a postulated underlying legal order, "does the United Kingdom Parliament," Professor Hogg asks, "retain the legal power to enact a law extending to Canada?"[7] This question he answers firmly in the negative. Even if it is theoretically impossible, on Austinian grounds,[8] for a sovereign parliament to limit or repudiate its sovereignty, the courts of Canada would simply not recognize or enforce a future British law purporting to apply to this country. They could readily invoke section 52 of the *Constitution Act, 1982*,[9] which sets out those laws which are to be construed as "the supreme law of Canada". This would exclude any such British law, even if the notion of continuing "imperial" jurisdiction were not preposterous.

Regrettably absent in the book is a discussion of the "political legitimacy" of the new Constitution as distinguished from its "constitutional legitimacy". Given that amendments were duly obtained from the United Kingdom Parliament,[10] does this purely mechanical process serve to "legitimize" the new organic law? Can a constitution be fully legitimate, however formally correct its legal adoption may be, without sufficient evidence of its acceptance by the people who must live under it? This question has been discussed by Dr. B.L. Strayer, Q.C. (as he then was) in the 1982 *Cronkite Memorial Lectures* at the University of Saskatchewan.[11] Dr. Strayer notes that the Constitution was never adopted by popular referendum and that it resulted largely from the efforts, with the notable exception of the Quebec legislature, of Canadian political elites operating in the context of executive federalism.[12] There was little scope for public sanction of the final product. He adds that the referendum device which might conceivably have been used to submit the Constitution

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7 P. 49.

8 "[T]he power of a monarch properly so called, or the power of a sovereign number in its collegiate and sovereign capacity, is incapable of *legal* limitation." J. Austin, *The Province of Jurisprudence Determined* in Lord Lloyd of Hampstead, INTRODUCTION TO JURISPRUDENCE, 4th ed. (London: Stevens & Sons, 1979) at 236.

9 Being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11.

10 *See*, however, E.A. Driedger, *The Canadian Charter of Rights and Freedoms* (1982) 14 OTTAWA L. REV. 366 at 377-8.

11 B.L. Strayer, "The Patriation and Legitimacy of the Canadian Constitution" (*Cronkite Memorial Lectures*, 3d series, October, 1982, College of Law, University of Saskatchewan) 3-26ff.

12 *Ibid.* at 3-26 to 3-31.

to the popular will was one of the casualties of the pre-patriation political process.[13] There were, however, substantial indicators of public support for the new Constitution. But, if one can speak of this matter in terms of degrees, it is unlikely that the Constitution can have "political legitimacy" in the fullest sense until the Province of Quebec has assented to its terms.[14]

In the new chapter on the amending process, the author mentions that the 1982 provisions[15] were the culmination of a 55-year search, which began in 1927, and which was littered with such "near-successes" as the 1964 Fulton-Favreau and the 1970 Victoria Charter formulas.[16] The latter formula was agreed to by the Prime Minister and all the provincial premiers, but it was subject to ratification and Quebec decided in the end not to ratify it.[17] Canada was the only federal state in the world without the power to amend its constitution domestically until the 1982 reforms were made. The three new amending provisions include a general formula requiring the concurrence of Parliament and two-thirds of the provinces having in aggregate at least fifty percent of the population (section 38); a unanimity provision requiring the concurrence of Parliament and all of the provinces for certain defined amendments (section 41);[18] and, where only some of the provinces are affected by an amendment, the concurrence of Parliament and of only those provinces concerned must be obtained for the amendment (section 43).

Obviously, most amendments will be obtained under section 38 and the threshold is a high one — it is not frequent that Parliament and seven premiers with the required population weighting agree on anything. An important question that is not addressed by the book is whether or not the formula is too rigid. Perhaps Professor Hogg might also have examined more closely the important section 41, which requires unanimity for change. For example, section 41 requires unanimity among all members of the federation for an amendment affecting "the office of the Queen". This provision makes the possible creation of a non-monarchical form of government in Canada very difficult. The requirement for unanimity, of course, signifies that *one* determined province could wield a veto power even if the other nine desired a new non-monarchical form of government. There was some speculation that section 41 was insisted upon by Premiers Davis and Hatfield, both strong monarchists and Prime Minister Trudeau's sole provincial allies in the patriation battle, in return for their support for

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13 *Ibid.* at 3-32, 3-34.

14 Professor Hogg's discussion at footnote 10 and the accompanying text on page 53 indicate that although there is "constitutional legitimacy" for the *Charter* without Quebec, the issue of whether there is "political legitimacy" is still open to question.

15 *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, ss. 38-49.

16 P. 54.

17 Pp. 54-5.

18 The subject matter of these defined amendments include, for example, the office of the Queen and her local representatives, the use of the English and French languages and the composition of the Supreme Court of Canada.

patriation. The provision will certainly make institutional reform in this important area very difficult.

The seven concluding chapters dealing with the *Charter's* provisions on rights and freedoms are thoughtful and crisply-written, but tend to be a melange of *a priori* statements and dated precedents not extending beyond 1984. Professor Hogg says of "fundamental justice"[19] that "the phrase retains its pre-*Charter* meaning as including only the procedural rules of natural justice".[20] He then cites conflicting precedents, but does not cite the 1985 decision of the Supreme Court of Canada in *Re British Columbia Motor Vehicle Act*,[21] which strongly inclines towards a concept of "substantive" rather than "procedural" due process. This decision, if it is followed, could have enormous implications for *Charter* interpretation.[22]

A rare lapse occurs in Professor Hogg's discussion of the "override" power in section 33, where he cites only federal and two provincial counterparts.[23] In addition to the Alberta and Quebec statutory "overrides", there is, however, a parallel provision in *The Saskatchewan Human Rights Code*.[24] Thus, in his dispute with government employees, ordering them back to work during a 1986 strike,[25] Saskatchewan's Premier Devine invoked both section 33 of the *Charter* and section 44 of the *Code* to override the respective *Charter* (subsection 2(d)) and *Code* (section 6) "freedom of association" provisions. He thereby immunized from attack in the courts his legislation sending government workers back to their jobs. The Saskatchewan use of the override in section 33 was the first use of the provision outside Quebec;[26] if it is followed in later cases and in other provinces, it could make the enjoyment of rights and freedoms by Canadians a precarious affair.

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19 The *Charter*, Part I of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11, s. 7.

20 Pp. 748-9.

21 [1985] 2 S.C.R. 486, (*sub nom. Reference re Section 94(2) of the Motor Vehicle Act*) 24 D.L.R. (4th) 536, *aff'g* (*sub nom. Reference re S. 94(2) of Motor Vehicle Act, R.S.B.C. 1979, c. 288*) 42 B.C.L.R. 364, (*sub nom. Reference re Section 94(2) of the Motor Vehicle Act*) 147 D.L.R. (3d) 539 (C.A.). Professor Hogg does, however, discuss the decision of this case by the British Columbia Court of Appeal. *See* p. 749, n. 41.

22 *See, e.g.* K. Makin, "Charter Ruling Worries Legal Experts", *The [Toronto] Globe and Mail* (24 February 1986) 1.

23 P. 692. The overrides cited include the *Canadian Bill of Rights*, S.C. 1960, c. 44, s. 2, *reprinted in* R.S.C. 1970, App. III; the *Alberta Bill of Rights*, R.S.A. 1980, c. A-16, s. 2; and *Quebec's Charter of Human Rights and Freedoms*, R.S.Q. 1977, c. C-12, s. 52.

24 S.S. 1979, c. S-24.1 [hereinafter *Code*]. Section 44 declares: "Every law of Saskatchewan is inoperative to the extent that it authorizes or requires the doing of anything prohibited by this Act unless it falls within an exemption provided by this Act *or unless it is expressly declared by an Act of the Legislature to operate notwithstanding this Act.*" (emphasis added).

25 Bill 144, *An Act to provide for Settlement of a Certain Labour-Management dispute between the Government of Saskatchewan and the Saskatchewan Government Employees' Union*, 1984-85-86 (Sask.).

26 For a discussion of the Quebec "omnibus" invocation of section 33 (the validity of which is now being tested in the courts), *see* p. 691.

The second, much amplified, edition of this now standard treatise, gracefully written and fully documented,[27] will be an important addition to the small but growing library of recent publications on Canadian constitutional law.

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[27] In addition to extensive documentation, the book includes a number of helpful appendices. Among the appendices are: the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3; the *Canada Act 1982* (U.K.), 1982, c. 11; the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c. 11; the *Canadian Bill of Rights*, S.C. 1960, c. 44; the *International Covenant on Civil and Political Rights*, 19 December 1966, 1976 Can. T.S. No. 47, 1977 U.K.T.S. No. 6, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368; and the *Optional Protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 1976 Can. T.S. No. 47, 1977 U.K.T.S. No. 6, 999 U.N.T.S. 171, *reprinted in* 6 I.L.M. 368.

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