

1986

Book Review: The Revised Canadian Constitution: Politics as Law, by Ronald I. Cheffins and Patricia A. Johnson

Peter W. Hogg
Osgoode Hall Law School of York University

Source Publication:

Canadian Bar Review. Volume 64, Number 4 (1986), p. 770-772.

Follow this and additional works at: https://digitalcommons.osgoode.yorku.ca/scholarly_works



This work is licensed under a [Creative Commons Attribution-NonCommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Hogg, Peter W. "Book Review: The Revised Canadian Constitution: Politics as Law, by Ronald I. Cheffins and Patricia A. Johnson." *Canadian Bar Review* 64.4 (1986): 770-772.

This Book Review is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

The Revised Canadian Constitution: Politics as Law. By RONALD I. CHEFFINS and PATRICIA A. JOHNSON. Toronto: McGraw-Hill Ryerson Ltd. 1986. Pp. xii, 244. (\$14.95)

This book provides an account of the Constitution of Canada occupying 154 pages of narrative. The full text of the Constitution Act, 1867 and the Constitution Act, 1982 occupies a further 85 pages. The book includes chapters on the nature of constitutions, sources of constitutional law, constitutional history, amendment, executive authority, legislative authority, judicial authority, federalism and civil liberties. In other words, the book is quite comprehensive in its coverage, although in such a short compass it cannot, and makes no attempt to, detail the minutiae of the constitutional case law which is so beloved of law professors. For this reason, the book is probably most suitable as an introductory text for law students beginning their studies of constitutional law, and for students of political science and government and other law-related disciplines. The book is in no sense a reference work and is not aimed at the practitioner of law. However, as this review will show, a lawyer, and especially a constitutional lawyer, will find much in the book to enjoy and learn from.

The book is similar in size, scope and purpose to an earlier book by Professor Cheffins and a different co-author, namely, Cheffins and Tucker,

* Alan C. Cairns, of the Department of Political Science, University of British Columbia, Vancouver, British Columbia.

The Constitutional Process in Canada, of which the first edition was published in 1969 and the second in 1976. In the present book, although the authors are at pains to emphasize that Canada did not obtain a "new" constitution in 1982, they have obviously concluded that the Constitution Act, 1982 has so changed the character of constitutional discourse in Canada that a root-and-branch rewriting was called for. The text is almost all new, and this is reflected in a new title. However, the new book enjoys the same virtues of succinctness and clarity that readers of the old book appreciated.

It is difficult to write a brief account of a complex body of law that is not extremely dull. But this book is not at all dull. It is not a tedious digest of judicial decisions and other people's ideas. On the contrary, it is a happy blend of law, political science and history. Several theses run through the narrative, giving it a unity and an interest which make it an enjoyable book to read.

The major thesis could perhaps be described by the word "continuity". The authors do not believe that the constitution was created out of whole cloth in 1867, let alone 1982. The most important principle of the Canadian constitution, they argue, is responsible government, which of course was a feature of the pre-1867 colonial constitutions. The book constantly reminds us of the roots of our constitution in historical facts and philosophical ideas that were not and could not be captured in the text of any constitutional document.

The major thesis of continuity leads to two sub-theses, which take the form of provocative criticisms of the 1982 amendments. The first criticism relates to the amending procedures that are enacted in Part V of the Constitution Act, 1982. The effect of these procedures is to render any significant change in the constitution so difficult that the *status quo* is essentially frozen: a naturally evolving organism has been forced into a procrustean bed. Not only is it difficult to obtain the level of federal-provincial agreement that is necessary for significant amendments, but the process is entirely controlled by the Prime Minister and the ten premiers (who control the legislative bodies to which they are responsible). Thus, any change that would diminish the powers of the Prime Minister or premiers must be ruled out in advance. The authors take the view that the most pressing fault in the Canadian constitution is the inordinate power that is now concentrated in the office of Prime Minister or Premier. But any attempt to restore real policy-making power to the elected assemblies is doomed to failure. This is an important point with which I wholly agree. Unfortunately, the authors do not offer an alternative amending formula which would avoid these pitfalls. They certainly disapprove of the pre-1982 situation which permitted unilateral action by the federal government, with only a "conventional" requirement of "substantial" provincial consent. One suspects that they would also disapprove of my

theory (American-derived), which is that popular initiative and referendum ought to be one of the procedures of amendment.

The second criticism of the 1982 amendments relates to the Charter of Rights, which is, of course, Part I of the Constitution Act, 1982. In their view, the adoption of a Charter of Rights was an unfortunate step for three reasons. First, it unduly augments the power of the courts at the expense of parliamentary sovereignty. Secondly, it centralizes and unifies the law of civil liberties at the expense of provincial autonomy. Thirdly, it unreflectively copies an American institution that embodies distinctively American ideas of individual liberty which have never taken firm root in Canada. On this last point, the authors stress the French Canadian and British Loyalist elements of the population of British North America, and Canada's continuing acceptance of more traditional, ordered and communitarian public policies. The Charter, on this view, becomes an illegitimate break in the continuity of Canada's public life, foisted on the nation by Prime Minister Trudeau. The authors' criticism of the Charter of Rights is very interesting indeed. In my view, however, the authors underestimate the quality of the public debate that preceded the adoption of the Charter. The shift of power to the courts was rather clearly articulated by the dissenting Premiers during the 1981-82 period. As well, I think the authors underestimate the efficacy of the device that finally reconciled all Premiers (save for the Premier of Quebec) to the Charter. That device is, of course, the override clause in section 33. It is in section 33 that we find the ultimate answer to the augmented power of the courts, to the diminution of provincial autonomy, and to the charge of unreflective copying of the Americans. All of the Bill-of-Rights issues that have proved so controversial in the United States—pornography, school prayers, police powers, capital punishment, abortion, even desegregation and reapportionment—are in Canada subject to the ultimate control of the Parliament or Legislature through the exercise of the override power under section 33.

Enough has been said, I hope, to demonstrate the quality and interest of this book. The controlling ideas will already be familiar to those who have studied under Professor Cheffins, to those who have been his colleagues (as I was for six months), and to those who have read his other writings on law and politics. We are fortunate indeed that he and his co-author were able to put these ideas into their present mature form before his appointment to the British Columbia Court of Appeal. As I re-read my last sentence, it occurs to me that it treats judicial appointment as if it were a kind of death. All I mean is that the workload of the British Columbia Court of Appeal may well preclude the kind of reflective, original writing on the constitution that Professor Cheffins has produced throughout his academic career, and which is so brilliantly synthesized in this admirable book.

PETER W. HOGG*

* Peter W. Hogg, of the Osgoode Hall Law School, York University, Toronto.