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Book Review: Constitutional Law of Canada, by Peter W. Hogg

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Book Review



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Abstract

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CONSTITUTIONAL LAW OF CANADA, PETER W. HOGG, Toronto: Carswell, 1977. Pp. 548.

It is not easy and perhaps not entirely appropriate for a political scientist to review the handiwork of a constitutional lawyer. Let me say at the outset, however, that Peter Hogg's book is likely to be the most widely used reference on the Canadian constitution for those in my discipline for many years to come. Those of us who have not had the sanctification of formal training in the law are somewhat ill-at-ease using casebooks such as those of Laskin-Abel and Lyon-Atkey. For we non-lawyers, it is thus invaluable to now have a reference where we can conveniently find an authoritative account of the current law of the constitution as it relates to, say, proceedings against the Crown, the inter-delegation of legislative powers or the regulation of securities.

Professor Hogg's book is, of course, more than a reference work—it is the most comprehensive treatise on the Canadian constitution ever published. Obviously, such a work could not have been written in the absence of a flourishing scholarship on the specialized aspects of the Canadian constitutional system. This latter development is heartening in face of the presently fashionable denigration of this system and the fantasies of members of the Committee for a New Constitution who proceed on the basis that the current crisis requires Canadians to act as if they have no constitutional experience behind them.

Professor Hogg defines Canadian constitutional law broadly, in contrast to Laskin's text which is confined to the distribution of legislative power. The first thirteen chapters—nearly half the book—are devoted to what the author calls "Concepts," including basic aspects of the federal system, the principles and workings of judicial review, responsible government, delegation, etc. In these circumstances, what is to be included in the constitutional system must perforce be defined somewhat arbitrarily. For example, a case could be made for a discussion of the Rules of the House of Commons, the legal status of federal-provincial and inter-provincial agreements, and the law defining citizenship. These are minor cavils, however. In his crisp analysis of the basic principles of federalism (Chapter 3) and in the next chapter on federal-provincial financial relations, complex matters are handled in a very competent and authoritative manner.

Of all the parts of the book, Chapter 8 on "Responsible Government" is the least satisfactory. It is, perhaps, understandable that a lawyer will deal less sure-footedly with the conventions and usages of the constitution than with legal rules enforced by courts. Despite the tradition of scholarship on the parliamentary aspects of the Canadian constitutional system, we do not yet have our Bagehot, Dicey and Jennings. Yet, Professor Hogg could have done much more with the materials that are available. The office of the Prime Minister is relegated to a half-page with no mention made of the Minutes of the Privy Council of 1935 delineating the powers of that office. The principle of ministerial responsibility is dealt with in a summary and superficial manner, with no mention of how this relates to Crown corporations and other agencies on which statutory responsibilities have been conferred. The Senate also receives only a half-page with no reference at all to the long-standing dispute

over whether that body has the constitutional authority to amend money bills. It may be that the parliamentary dimensions of the Canadian constitution require a separate, more extensive treatment of their own, but Professor Hogg's efforts here are disappointing.

Part II of the book deals with the distribution of powers between Parliament and the provinces in a topical fashion. Chapter 14 on "Peace, Order, and Good Government" is extraordinarily interesting—the only treatment of which I am aware that gives the non-lawyer a fighting chance to attain a working knowledge of those mysteries. (Any Canadian who believes that fine-spun dialectics prevail only in the socialist world should examine the turgid exegesis of the O'Connor Report,¹ and G. P. Browne's refutation of it,² or the complex argument made by Chief Justice Laskin in the *Reference Re Anti-Inflation Act case*.³) The other chapters in this part are clear, concise and presumably authoritative.

Civil liberties as they relate to the common law, the *British North America Act* and the 1960 Bill of Rights are dealt with in Part III, the shortest section of the book. The discussions here are relatively brief and readers are referred to the more detailed treatises of Schmeiser⁴ and Tarnopolsky.⁵

There is, to repeat, much of interest in Professor Hogg's treatise for the political scientist; training law students along these lines can only result in a convergence of perspectives between the two disciplines. For example, Chapter 5 on "Principles of Judicial Review" analyses the elements of this process in a lucid manner not duplicated, to my knowledge, anywhere else in the literature. An admirable discussion of the inter-governmental delegation of powers in Chapter 13 suggests possibilities under the existing constitution for kinds of federal-provincial cooperation that are too rarely recognized. I disagree with Hogg's judgments on certain points. At pp. 36-37 he discusses the "unitary" aspects of the constitution: reservation and disallowance, the federal appointment of provincial court judges, federal powers to protect the rights of denominational minorities in education, and the declaratory power. He concludes, accurately I think, that ". . . the development of case law, convention and practice has virtually eliminated the elements of provincial subordination in the constitution." Yet, the unitary elements by which the federal government can unilaterally extend its jurisdiction do not reside here but rather in the spending power, emergency powers (particularly as defined in the *Anti-Inflation Reference*) and, possibly, in the power with respect to criminal law.

¹ *Report to the Honourable the Speaker by the Parliamentary Counsel relating to The Enactment of the British North America Act, 1867, any lack of consonance between its terms and judicial construction of them and cognate matters* (Ottawa: Printer to the King, 1939).

² G. Browne, *The Judicial Committee and the British North America Act, An Analysis of the Interpretative Scheme for the Distribution of Legislative Powers* (Toronto: University of Toronto Press, 1967).

³ [1976] 2 S.C.R. 373, 68 D.L.R.(3d) 452.

⁴ D. Schmeiser, *Civil Liberties in Canada* (London: Oxford University Press, 1964).

⁵ W. Tarnopolsky, *The Canadian Bill of Rights* (2d ed. Toronto: McClelland & Stewart, 1975).

So far as the spending power is concerned, Professor Hogg (at 71) is too willing to accept the general dictum of Frank Scott that "making a gift is not the same as making a law." This distinction is an artificial one in those cases where the financial penalties imposed on individuals, groups or governments who fail to meet the federal requirements for eligibility are high. More fundamentally, there should have been a discussion of the role of judicial review in determining the federal balance in Canada during the past generation, i.e., an evaluation of the fact that the decisions of the Supreme Court of Canada have been overwhelmingly in favour of the federal government.

Professor Hogg is conservative in his constitutional philosophy. He has little sympathy for those who dispense and imbibe the current conventional wisdom that the Canadian constitution is defective in not containing a ringing statement of national goals, but concludes, perceptively: "The one real disadvantage of the absence of a comprehensive constitutional document is that the rules of the constitution are not readily accessible to non-lawyers." (at 4-5) This book is of considerable assistance in this regard. Hogg opposes finding an implied Bill of Rights in that part of the preamble to the *British North America Act* decreeing that Canada should have "a Constitution similar in Principle to that of the United Kingdom" on the general ground that the fundamental operating principle of the U.K. constitution is parliamentary sovereignty, which in a federal context means an exhaustive distribution of powers. (at 429-30) He is conscious of the "limitations of judicial review" and concludes that "the judges upon whom the large task of judicial review rests are not well suited to the policy-making which is inevitably involved", this being occasioned by the unaccountability of the judiciary, the narrow social and professional spectrum from which judges are recruited, and the limited sources of information available to courts in the Anglo-Canadian tradition. (at 46-47) Hogg opts for a "presumption of constitutionality" in judicial review by which "a proper respect is faced to the legislators, and the dangers of covert (albeit unconscious) imposition of judicial policy preferences is minimized." (at 47) However, it might be argued that the effect of such a presumption would be more difficult in division-of-powers cases than in those where legislation is challenged in terms of the provisions of a Bill of Rights, whether entrenched or otherwise. Simply put, if courts decide all but a few cases in the former category in favour of the enacting legislature, this must inevitably mean that the federal balance will be shifted in the direction of the level of government most active in extending its powers and which has been given more plausible rationales in the constitution for doing so. The general beneficiary of this presumption of constitutionality would be the federal government.

In writing any serious book on contemporary Canada, an author is almost inevitably up-ended by recent developments. Hogg refers to the Quebec election of 1976 in his Preface and briefly deals with the legal aspects of Quebec secession in Chapter 3. Yet, in terms of the more immediate context, he has very little to say of the constitutional and legal dimensions of linguistic legislation, and there is no mention of Claude-Armand Sheppard's exhaustive treatise.⁶ Neither does he deal with the claim of some Quebec lawyers that the

⁶ *The Law of Languages in Canada* (Ottawa: Information Canada, 1971).

provision of Section 133 relating to the French and English languages in the legislature and courts of Quebec may be overridden by the Quebec legislature under its powers to amend its own constitution in Section 92(1). Although much constitutional controversy in Canada has centred around the educational privileges of denominational minorities, Hogg gives little attention to this and he does not examine the argument put forth by Frank Scott and some of his McGill colleagues that certain rights of a linguistic nature adhere in these denominational guarantees.

Professor Hogg writes in the kind of direct and muscular style that makes his book a pleasure to read. How this work will be regarded by his fellow lawyers I cannot judge, but it seems reasonable to believe that it will be seen as a major contribution by other students of Canadian government. Yet price will be a barrier to its accessibility; it is suggested that perhaps an abridged edition be published at a lower cost for the benefit of the wider community.

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