

# Book Review: Canadian Constitutional Law in a Modern Perspective, edited by Noel and Ronald G. Atkey

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Book Review

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## Book Reviews

CANADIAN CONSTITUTIONAL LAW IN A MODERN PERSPECTIVE,  
EDITED BY NOEL AND RONALD G. ATKEY, Toronto: University of Toronto  
Press. 1970. Pp. liv, 1351. (\$25.00).

In a book of 1351 pages divided into six parts, seventeen chapters and numerous sections, the editors have compiled in a single volume an impressive work on Canadian constitutional law. Recognizing the important part played by lawyers in the formation, development and perpetuation of a constitution, the editors state in the preface that their purpose is to expand the role of the lawyer and the scope of the law, doing so in the context of the Canadian constitution.

In a treatise on the constitution it would appear appropriate to commence with a reference to the venerable "rule of law". The meaning of this principle is fortified by John Stuart Mill's definition of liberty followed by Dicey's well known three-fold explanation of the supremacy of the rule of law. It is interesting to observe that the general principles found by Dicey in 19th century England were endorsed by the Declaration of Bangkok as recently as in February 1965 by a conference of over 100 jurists from 16 countries of the South-East Asian and Pacific Region. This meeting affirmed that "lawyers should be a vital and courageous element in a developing community, and that they should always be conscious of the social, economic and cultural aspirations of the people to the realization of which they should commit their skills and techniques." Further on the subject of the place of the lawyer in a developing country, the committee concluded that "the lawyer has a deep and moral obligation to uphold and advance the rule of law in whatever sphere he may be engaged or in which he has influence, and he should fulfil that obligation even if it brings him into disfavour with authority or is contrary to current political pressures. He can give effect to many of the principles underlying the rule of law in his daily work; for the rest, it is his responsibility as a citizen in a developing community to apply them for the benefit of society and his fellow-men."

The book is new, new in the sense of having been recently published, but also new in its concept, new in its arrangement and new in subject matter, for it embraces sociological subjects, conscience and religious activities, the bonds of human affection, the evolution of language rights, rectitude, economic processes and enlightenment.

The various chapters are usually prefaced by explanatory notes followed by illustrative cases. To do this successfully requires skillful arrangement of subject matter plus the ability to select the applicable legal decision to support the legislation or principle involved. One of the classic cases which illustrates the principle of the rule of law is *Roncarelli v. Duplessis*, [1959] S.C.R. 121 in which a Montreal restaurateur was notified that his license for the sale of liquor was cancelled and that no future license would ever issue to him. The defendant was the premier of Quebec as well as the Attorney General of the province. The plaintiff was an adherent of what Mr. Justice Rand described in his judgment as "a rather militant Christian religious sect known as the Witnesses of Jehovah." The Witnesses diligently propagated their teachings, *inter alia*, by the distribution of tracts. A large number of adherents were arrested for selling these publications on the streets and charged under a by-law requiring a licence for peddling. The majority of the Court found that the plaintiff's liquor license was cancelled upon the order of the defendant for which he had no statutory power.

The other illustrative authority in this chapter is the Report of the Disruption of Shipping on the Great Lakes by Honourable T. G. Morris in July, 1963, which reviews the important subject of inland shipping in Canada.

The arrangement of material and chapter headings are not in the traditional forms of most text books. Neither are some of the words. Thus chapter 2 is on Policy and Logic in Constitutional Decision and here the editors declare that an established body of legal principles is "purposive". In considering what the editors call "the articulation of policy considerations", two cases are considered *viz. Noble and Wolf v. Alley et al.*, [1951] S.C.R. 64 and *Re Drummond Wren*, [1945] O.R. 778. These decisions were the subjects of considerable public attention and discussion at the time but effectively dealt with provocative discriminatory restrictive covenants in conveyances of land. Consideration is also given to the conviction under a zoning by-law of the Borough of Etobicoke for maintaining on the property of the accused an election sign and its treatment by the Supreme Court of Canada. (*McKay v. The Queen*, [1965] S.C.R. 798.)

*What is the Canadian constitution?* is the title of the third chapter and while it is an apt question, the authors have provided courageous answers by discussing the shared goals of Canadian society and the form of the constitution.

It is not intended in this brief review to comment on each and every chapter as this would take too long. But it is interesting to note that the actual formation of the constitution is dealt with in chapters headed respectively *The Formal Institutions of Decision (Parliament and the Legislatures)* and *The Informal Institutions of Decision*. Other chapters deal with constitutional practices and procedures, fundamental rights, the allocation of public power and the all important matter of constitutional review and reform.

In considering the formal institutions of decision in Canada, one inevitably turns to Britain which has and maintains an inflexible doctrine of parliamentary supremacy. To prove that the British Parliament can do anything

is illustrated by the prolongation of the life of the Parliament elected in December 1910 but which sat throughout the first Great War and was not dissolved until 1918, having five times renewed its own existence which was limited to five years by its own enactment, the Parliament Act, 1911. The Parliament at Westminster alone possesses the power to legalise past illegality and this power denies supremacy to the courts. The doctrine of parliamentary sovereignty does not apply in the same manner to a federal system. Thus in Canada we have a division of parliamentary powers and in the early days of Confederation it was decided by the Privy Council in *Hodge v. The Queen* (1883), 9 A.C. 117 that provincial legislatures enjoy plenary powers within their area of competence. In cases of disagreement between parliamentary authorities as to distribution of powers the final authority in Canada to settle the same has been conferred upon the courts. (*Ottawa Valley Power v. Hydro Electric Power Commission*, [1937] O.R. 265.)

Amongst the informal institutions of decision are included mass media, pressure groups and protest groups. An excellent illustration of the last named is the general strike in Winnipeg in 1919 involving the protest activities of certain trade unions which were loosely connected in an organization called the O.B.U. or One Big Union. A strike was precipitated by a union of metal workers. Other unions were called out by the Winnipeg trades and labour council in sympathy and by the time the strike became a general one most organized workers were included except the typographical union. The protesters included employees of the railways, street railway, telephone system, post office, express companies, milk and bread companies, the fire department, city health departments, hotels and restaurants. Meetings were held and several of the recognized strike leaders delivered inflammatory speeches at gatherings held indoors and outdoors in support of the strike. Some of these orators incited listeners to violence and openly advocated the adoption of a governmental system comparable to that area of the world that was to become the Soviet Union. After about six weeks the strike collapsed and several leaders were tried and convicted on charges of seditious conspiracy. Parliament amended the Criminal Code making it illegal for any association to be formed where the purpose was to bring about social, political or industrial change through the use of force (section 98). This provision was however repealed in 1936.

In a lengthy part on fundamental rights the subjects of the bill of rights, human rights legislation, as well as the proposed Canadian charter of human rights are given thorough treatment. In this part but under the heading of Protected Value Processes, the editors contend that it is not enough to ask what human rights have been recognized and given legal protection, but inquiry must be made into the full range of fundamental human values which we as a people believe ought to be protected. Reference is made to the prosecution of Miss Cameron who while operating a commercial art gallery in Toronto was convicted of exposing to view obscene pictures, under section 150 (2) et seq. of the *Criminal Code*. On appeal in *Regina v. Cameron*, [1966] 2 O.R. 777, four justices of the Court of Appeal of Ontario solemnly decided that there was ample evidence before the convicting magistrate by inference or otherwise, including the drawings themselves, to enable him to

reach the conclusions that the drawings offended against the prevailing sense of morality by the exploitation of sex as a dominant characteristic of the works. Mr. Justice Laskin dissented and found that there had been artistic merit and that the pictures were not obscene.

In *Dominion News and Gifts (1962) Ltd. v. The Queen*, [1964] S.C.R. 251 the subject of obscenity was again dealt with in a case arising out of the sale of two magazines. A conviction was made by a County Court Judge (1963), 42 W.W.R. 65 and upon appeal to the Court of Appeal of Manitoba, Mr. Justice (now Chief Justice) Freedman dissented and in doing so made some interesting comments. His Lordship observed that community standards must be contemporary, that times change and ideas change with them. The case for the prosecution depended on the dominant characteristic of the alleged offending magazines being the undue exploitation of sex. His Lordship went on to state that "compared with the Victorian era this is a liberal age in which we live. One manifestation of it is the relative freedom with which the whole question of sex is discussed. In books, magazines, movies, television and sometimes even in parlour conversation, various aspects of sex are made the subject of comment with a candour that in an earlier day would have been regarded as indecent and intolerable," and later "Community standards must also be local. In other words they must be Canadian . . . we must determine what is obscene by Canadian standards regardless of attitudes which may prevail elsewhere."

The findings of Mr. Justice Freedman were unanimously adopted by the Supreme Court of Canada thereby establishing a considerable advance in judicial tolerance in the field of obscenity.

The last chapter of this large book is devoted to Current Issues of Review and Reform and summarizes the studies leading to and forming parts of a basis for a complete overhaul of the constitution of Canada. Besides the problems of the past, many of which are not completely solved, there are many new subjects to be dealt with and if at all possible settled. Some of these are language rights, taxation, ecology, the increasing costs of governments, new mechanisms for federal-provincial co-ordination, spending power of governments, and many others.

The editors deserve commendation and in this reviewer's opinion have admirably tackled an old subject in a modern perspective.

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