**Les Cahiers de droit**

# *Judicial Review of Legislation in Canada*, by B. L. STRAYER, Toronto, University of Toronto Press, 1968, 275 pages, $15.00.

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Volume 11, numéro 1, 1970

URI : https://id.erudit.org/iderudit/1004805ar
DOI : https://doi.org/10.7202/1004805ar

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Éditeur(s)

Faculté de droit de l'Université Laval

ISSN

0007-974X (imprimé)
1918-8218 (numérique)

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Citer ce compte rendu

Hutchins, P. W. (1970). Compte rendu de [*Judicial Review of Legislation in Canada*, by B. L. STRAYER, Toronto, University of Toronto Press, 1968, 275 pages, $15.00.] *Les Cahiers de droit*, *11*(1), 186–188. https://doi.org/10.7202/1004805ar

textes du professeur Baxter (« A proposed New Matrimonial Regime for a Common Law Juridiction ») et le mien (« L'état actuel de la réforme des régimes matrimoniaux en droit québécois ») peuvent avoir un intérêt spécial étant donné qu'on traite dans les deux cas respectivement des réformes ontariennes et québécoises.

Malgré l'absence d'étude comparée, le comparatiste averti saura tirer profit par exemple des textes de Baur, Diaz Palos, Doral, Espin et Larrea sur des aspects de la possession en Allemagne, en Espagne et en Equateur. Il en va de même pour ceux de Bonet, Conde-Púmpido, Léon, Santos, Soto et Yung sur des aspects de la responsabilité en droit espagnol et en droit suisse.

Finalement, signalons, dans le domaine de la propriété dite incorporelle (industrielle, littéraire, etc.), les études d'Alvarez, Puente et Rotondi, le dernier présentant des aspects d'une uniformisation possible de la législation des brevets, marques, modèles, etc.

Evidemment, nous ne prétendons pas avoir fait ici une présentation complète de cette collection. Nous n'en avons signalé que des aspects bien fragmentaires, soient ceux qui nous ont semblé les plus intéressants pour les comparatistes, et encore dans ce domaine, avons-nous laissé beaucoup de choses de côté.

Nous avons plutôt voulu présenter quelques échantillons de ce monument de la bibliographie juridique qui rend un hommage tout justifié au grand juriste que fut José Castán. La collection fait aussi preuve du travail très sérieux des éditeurs, les professeurs Fuenmayor et Sancho et est tout à l'honneur de l'Université de Navarre.

Ernest CAPARROS

**Judicial Review of Legislation in Canada,** by B. L. STRAYER, Toronto, University of Toronto Press, 1968, 275 pages, $15.00.

Mr. Justice B. Laskin while reviewing 'Judicial Review" in (1969) 19 U. of T. Law Journal 86, wrote :

> "Although the analysis of the basis of judicial review is carefully done, it left me with the impression that the author was carrying on an argument whose result was a forgone conclusion." P. 86.

With respect it is here submitted that in human affairs it is not only important to know where we are but especially how we arrived. Certainly this principle has always applied in law and in particular when the discussion is centered upon the role of the courts in a federal system. For judicial interpretation has moulded Canadian federalism and continues to do so. What authority do the courts have, how are they exercising that authority, is judicial review as such a valid instrument, how can it be improved ? These are the questions which the author of *Judicial Review* attempts to answer. In a healthy evolving federalism there should be no "foregone conclusions" to such questions.

One of Mr. Justice Laskin's "foregone conclusions" is undoubtedly the fact that there exists in Canada the phenomenon of judicial review of legislation. Yet surely we must ask ourselves why, by virtue of what authority are the laws of the land subject to judicial scrutiny. It is with this question that B. L. Strayer deals in his Introduction. The idea of judicial review in Canada is a colonial heritage which along with British garrisons was an evitable consequence of Empire. Briefly, colonial laws were not to be repugnant to those of the mother land. This idea pervaded early imperial statutes, charters and instructions culminating in the *Colonial Laws Validity Act*, 1865 . The courts were the watchdog but contrary to the United States situation where the constitution embodied such eternal principles as "justice", "liberty", "freedom" and "due process", the limitation which the courts enforce in Canada are, in the author's words "mainly quantitative not qualitative". B. L. Strayer makes the point that after Confederation the courts almost naturally carried on the job of judicial review without any clear text of law specifically empowering them to do so.

> "The ease with which they [the Canadian courts] could take up judicial review of legislation after Confederation must have been the result of the situation existing prior to 1867. There was a continuing of judicial practice because the Imperial structure had not changed basically." P. 21.

In Chapter 2, B. L. Strayer deals with the nature of the power of judicial review. He traces the difficulty of the early courts in reconciling the concept of the supremacy of Parliament with judicial review. We see Lord Watson in the *Local Prohibition Case* 1896 using a municipal by-law case *City of Toronto* v. *Virgo*, [1896] A.C. 88 in restricting the Parliament of Canada's power to prohibit trade or the reference by Chief Justice Meredith of the Quebec Superior Court in *Langlois* v. *Valin* 1879 to Chief Justice Marshall's judgment in *Marbury* v. *Madison*, (5 U.S. 87). B. L. Strayer adopts the point of view that the

Canadian constitution embodies the principles of the United Kingdom's constitution rather than that of the United States — that is that Parliament is supreme and the courts have only such jurisdiction as Parliament confers upon them. However, he concedes that "constitutional limitations or legislative power (through the *B.N.A. Act*) imply in the absence of some conflicting principle, a judicial power to enforce these limitations" (p. 37). There are a number of American constitutional law writers who would not entirely agree with the author's contention that judicial review was guaranteed by the American constitution. Learned Hand has written :

> "There was nothing in the United States Constitution that gave courts any authority to review the decisions of Congress, and it was a plausible-indeed to my mind on unanswerable-argument that it invaded that 'Separation of Powers' which as so many then believed, was the condition of all free government."

Here I am more inclined to agree with Mr. Justice Laskin when he questions the point of a tortured reconciliation of judicial review with the idea of the sovereign parliament. It would seem that any system which places various levels of government in juxtaposition must also establish a process of arbitration. To think that governments, anymore than men, would live in perfect harmony, never encroaching upon one another would be to say the least, somewhat naive.

Chapter 3 of "Judicial Review" deals with these legislative limitations of the power of review. With Mr. Justice Laskin, once again, we must conclude that a discussion of "private clauses" does not provide a valid example of limitations on constitutional adjudication since there is in fact a distinction between judicial review of constitutionality and judicial review of administrative action. B. L. Strayer discusses the possibility of provincial legislation to impose procedural requirements but only insofar as they do not preclude judicial review. The point is also made that a legislature cannot dictate the conclusion which the court must reach on a constitutional question ! As for the question of Crown immunity we agree with the author that "In the struggle between judicial review and the perogative, judicial review has emerged supreme" (p. 89).

In his chapter on the elements of a constitutional case, B. L. Strayer argues, we think rightly, that the courts should not self-impose too many restrictions in deciding constitutional cases. His point in favour of creative leadership of the courts, McWhinney's "judicial activism", is a valid one. At page 146 he says :

> "As the courts have been left with such a large measure of discretion, the opportunity exists for development of a rational policy. It is suggested that they should, when confronted with a precise constitutional issue, lean in favour of judicial determination. If courts in a federal system are too reluctant to decide question of legislative jurisdiction, the controversy will be carried on indefinitely in other forms. This can result in uncertainty for private citizens and the deterioration of intergovernmental relations. If, on the other hand the courts are willing to decide such issues they may provide the creative leadership which is essential in the evolution of a federal constitution."

Nor can one dispute B. L. Strayer's contention in favour of a more general recourse to question of fact in constitutional adjudication. To answer the two basic questions involved in judicial review of a statute (1) what is the effect, or what are the effects of the legislation in question ? and (2) are the most significant effects those which are permitted to the enacting legislature under the *B.N.A. Act ?* It seems obvious that factual considerations are of great importance. In a modern, complex intergovernmental question there is no excuse for a court to ignore evidence of surrounding circumstances on strict legalistic grounds as, for example, the Supreme Court of Canada did in *Home Distributors Ltd.* v. *Attorney General for British Columbia.*

B. L. Strayer includes an interesting chapter on the Constitutional Reference case pointing out the pros and cons of this particular institution. As the author himself points out, the reference system has had a great impact, if not always beneficial, on the evolution of Canadian federalism. We have only to look at such cases as the *Radio Case*, the *Aeronautics Case*, the *Labour Conventions Reference* (*A.-G. for Canada* v. *A.-G. for Ontario*, [1937] A.C. 326) or more recently the *Reference re The Farm Products Marketing Act*, ([1957] S C.R. 198). As to the critism often levied that the reference decisions are too abstract in quality the author offers the constructive comment that such dicisions should be taken for what they are and not given undue precedent value, "an opinion on an abstract question should be regarded as of limited value, valid only in relation to the assumptions and facts on which it was rendered" (p. 202). The modern courts would do well to bear this in mind while pondering some of the more restrictive rulings of their Lordships in areas such as the commerce power.

The most important argument in B. L. Strayer's book is that for greater judicial creativity. He is not the first to so plead yet the question is of such importance that every contribution to the position is valuable. We agree with the author when he says that the opportunity for judicial creativity exists for the taking. We agree with him when he says that in the process of adaptation of the constitution the courts must take more cognizance of the world of facts. We agree that parties and their counsel must take the initiative in fact introduction. The problems of Canadian federalism, and there are many, will be solved finally not by rhetoric but by the often laborious technical adjustments to the systems itself. But there is little use in changing the rules of the game if the referee is not equipped to apply them. That is why B. L. Strayer's book is important.

(The book includes a useful appendix consisting of (1) a consolidation of the *British North American Acts* 1867–1965 ; (2) extracts from the *Supreme Court Act*, and (3) *The Constitutional Questions Act*).

Peter W. HUTCHINS

**Legal Aspects of Architectural Practice**, 2nd edition, Stanley R. KENT (éd.), Ontario Association of Architects, Toronto, University of Toronto Press, 1969, 137 p.

L'Ordre des Architectes de l'Ontario publie la seconde édition d'un cours de droit appliqué à la pratique de la profession d'architecte. L'ouvrage rédigé en collaboration est destiné aux étudiants en architecture pour les initier aux problèmes juridiques qu'ils rencontreront au cours de leur vie professionnelle. Il ne traite que du droit ontarien, à part quelques références au droit des autres provinces de *common law* et de la province de Québec.

Les deux premiers chapitres contiennent des conseils pratiques relatifs au contrat de l'architecte avec son client et à celui de ce dernier avec l'entrepreneur. Les deux derniers chapitres traitent respectivement des associations d'architectes et de la réglementation relative à la construction.

Les deux chapitres centraux, les plus denses, sont consacrés l'un aux *bonds* et à l'assurance et l'autre au *mechanic's lien*. Ils sont suivis de questionnaires comportant les réponses.

Le chapitre intitulé *Surety Bonds and Insurances in Construction*, par L. R. Freeman, prend bien soin de distinguer les deux questions réunies sous la même rubrique. Les *bonds*, dont l'auteur indique la teneur, constituent une sûreté exigée de tout entrepreneur par le maître de l'ouvrage relativement à la conduite à bonne fin des travaux. C'est une garantie de solvabilité et de fiabilité de l'entrepreneur, qui est vitale dans un domaine où les capitaux en jeu sont si importants. L'auteur les distingue à la fois des sûretés données par l'entrepreneur aux bailleurs de fonds pour obtenir du crédit et des assurances qui doivent normalement être souscrites pour la protection de l'entrepreneur et du propriétaire. A ce propos, les avantages de l'assurance conjointe sont mis en relief, aussi bien en matière de responsabilité vis-à-vis des tiers que de dommages aux biens.

Le chapitre intitulé *Mechanic's Lien*, par D. N. Mackleen, est également d'un grand intérêt par les précisions qu'il apporte sur cette sûreté destinée à protéger les sous-entrepreneurs, fournisseurs et ouvriers contre l'insolvabilité de l'entrepreneur. Cette sûreté est une réplique du privilège de l'article 2013 du Code civil mais elle présente avec elle des différences dont la plus marquante est que le *lien* n'appartient par à l'architecte lui-même, à la différence du privilège. Le *lien* oblige essentiellement le propriétaire à retenir un pourcentage, variable suivant le montant du contrat, sur le prix qu'il doit à l'entrepreneur, pour payer éventuellement les créanciers de ce dernier. Le *lien* ne porte que sur cette retenue obligatoire, à la différence du privilège qui grève la plus-value conférée à l'immeuble par les travaux. Cette institution est d'autant plus importante au point de vue du droit comparé qu'elle a inspiré les amendements, pas toujours heureux, des articles du Code civil concernant le privilège. Au moment où il est question de supprimer les privilèges du Code civil, on notera que la même question s'est posée à propos du *mechanic's lien* à l'*Ontario Law Reform Commission*, qui a décidé de le maintenir : il n'est pas question de supprimer cette institution centenaire en *common law*, qui permet d'assurer que « the land which receives the benefit shall bear the burden ».

M. TANCELIN

***Pour une réforme de la Justice***, par CALDUS, Paris, Collection « Vivre son temps », Les Editions Ouvrières, 1970,, 192 pages, 12.50 F.

Voici un livre qui arrive fort à propos sur un certain nombre de sujets qui, non seulement divisent les juristes mais aussi troublent l'opinion publique et suscitent bien des discussions et des polémiques.