

## Les Cahiers de droit



J.D. WHYTE, W.R. LEDERMAN, *Canadian Constitutional Law, cases, notes and materials*, 2<sup>nd</sup> edition (1977), 7<sup>th</sup> printing (1982), Toronto, Butterworths, P. xxi, 933 (unnumbered), 34,95\$.

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(...) l'éducation est ce que l'on peut offrir de mieux aux détenus, à condition qu'elle soit bien fondée sur une vision profonde de Dieu, de l'homme, de la nature et de la société, sur une vision de l'homme en tant que projet à construire et de la vie humaine en tant que possibilité créatrice inépuisable (p. 13).

C'est précisément à cette conception de l'éducation que ce livre cherche à nous amener.

Mario FERLAND

J.D. WHYTE, W.R. LEDERMAN, *Canadian Constitutional Law, cases, notes and materials*, 2<sup>nd</sup> edition (1977), 7<sup>th</sup> printing (1982), Toronto, Butterworths, P. xxi, 933 (unnumbered), 34,95 \$.

Canadian judges, particularly those of the Supreme Court of Canada, tend to write long opinions. Moreover, in a given case, on occasion it is not only a question of one long opinion but of several. Perhaps this is best illustrated by such cases as the *Constitutional Amendment Reference 1981*, [1981] 39 N.R. 1, the *Anti-Inflation Act Reference*, [1976] 2 S.C.R. 373, *Vapor Canada Ltd, Vapor Canada Ltd v. MacDonald*, [1976] 7 N.R. 477, and other similar cases. It would indeed be presumptuous for the author of this review to say whether this is good or bad. However, he can safely say, he hopes, that this renders the task of the teacher of Canadian constitutional law, as well as that of the compiler of cases and materials on Canadian constitutional law, very difficult. Not only most of the cases be carefully edited and much valuable material left out, but often it is difficult to determine what the opinion of the Court on various issues presented actually is, although the positions of the individual justices are clear.

In their book of cases, notes and materials on Canadian constitutional law, professors J.D. Whyte and W.R. Lederman cope very well with this problem of long cases. As they indicate in the Preface to the first edition of their book, in editing the

court decisions that are included in their book the authors endeavored in every instance to place a satisfactory statement of facts at the start of the report of each case. In some instances this was done by changing the order of the judgments in the case, in other instances it was done by supplying a statement of facts (Preface, p. viii). That has made possible the inclusion of a larger number of cases than one might expect, as well as the inclusion of a substantial amount of notes and materials.

As the authors express it in their preface, like Caesor's Gaul the book is divided into three parts (Preface, p. vi). Part I is entitled « General Considerations »; Part II is entitled « Federal Distribution of Legislative Powers by Subjects Between the Canadian Parliament and the Provincial Legislatures »; and Part III, « Limitations on Legislative Powers in Favour of Basic Rights and Freedoms. »

Part I is divided into six chapters in which are found cases and materials on the « Nature of Constitutions and Constitutional Law » (ch. 1), « The Extension of Governmental Institutions and Systems to British North America in the Colonial Period » (ch. 2), « The Development of the Independence of Canada Since 1867 » (ch. 3), the « Interpretative Doctrines for the Distribution or Limitation of Legislative Powers » (ch. 4), the « Canadian Judicial System » (ch. 5), and the « Inter-Governmental Delegation of Legislative Powers » (ch. 6). Part II relates to the federal general power, trade and commerce, taxation, the incorporation of companies, transport and communication, criminal law, property and civil rights, civil and criminal procedure, marriage and divorce, natural resources and public property, and the implementation of treaties. Part III relates to such basic rights as equal protection (both before and after the Canadian Bill of Rights of 1960), speech and association, religion, and language and education.

Although the book is in its seventh printing (April, 1982), it was first published

in August, 1977. As a result, much constitutional water has flowed over Canada's constitutional dam since the book first appeared that is not reflected in its contents. For instance, Quebec's first *Official Language Act* (Bill 22) has been replaced by the *Charte de la langue française*, parts of which have already been declared *ultra vires* by the Supreme Court of Canada, *Blakie v. Le Procureur Général de la Province de Québec*, [1979] 30 N.R. 225, as has Manitoba's 1890 *Official Language Act*, *Forest v. A.G. of Manitoba*, [1979] 30 N.R. 213. In addition, there is the entire «Patriation» scenario which included the *Constitutional Amendment Reference*, [1981] 30 N.R. 1, and which was brought to fruition with the proclamation of the Constitutional Act of 1982 by the Queen in Ottawa on April 17, 1982, [1982] 16 *Canadian New Facts* 2863. However, these are materials and court cases that can be easily presented in a manner supplementary to what already exists in the book. Indeed, it might be just as well to present these materials in that manner for the time being since it is still too soon for anyone to be able to predict how the *British North America Act* as amended in 1982, now the Canadian Constitution, will be interpreted. It may well take several years, and certainly a number of decisions rendered by the Supreme Court of Canada, before a definite trend is discernable. Therefore, the ideal method of keeping the book up to date might be by annual supplements to an already excellent book until it is time for a revised edition.

The notes and materials included in the book are well chosen and add much to the cases presented in it. For instance, in chapter 1, at the very start of the book, there appears a portion of the Report of the Royal Commission Inquiry into Civil Rights (McRuer Report). This discusses constitutional law in the broad sense, constitutional law in the limited sense, and the constitutional division of legislative powers in Canada. These are all matters which must be understood by any student of Canadian constitutional law, and it is

convenient to have them presented in the manner that they are. In this first chapter there is also a portion of the Report of the Royal Commission of Inquiry on Constitutional Problems (Tremblay Report) which serves to explain the nature and goals of a federal state.

Chapter 2 of the book is completely made up of historical materials. These serve to explain the extension of British governmental institutions and legal systems to British North America during the eighteenth and nineteenth centuries. Presented in the form of historical highlights, just about every aspect of the historical development of Canada from the time of the Conquest and even before is covered. Included are such matters as the special case of Newfoundland, the civil law in Quebec, Quebec as a Royal Colony from 1760 to 1791, Upper and Lower Canada from 1791 to 1841, the Province of Canada from 1841 to 1867, the Hudson's Bay Company Territory, Vancouver's Island and British Columbia, Paramount British statutes, the Durham Report and Responsible Government, etc.

Chapter 3 is very similar to Chapter 2. Except for one case, *Attorney General for Ontario v. Attorney General for Canada*, decided in 1947 by the Privy Council, [1947] A.C. 127, it is made up completely of materials. The one case and the materials relate to judicial independence, legislative independence and constitutional amendment, and to executive independence. Included among the materials in this chapter are such landmarks as the *Statute of Westminster* 1931, Favreau's White Paper on the amendment of the Constitution of Canada, the Victoria Charter, and a discussion of the possible secession of a Province from this Canadian Confederation.

The other chapters of the book are made up primarily of cases with materials added wherever appropriate, some in the form of introductory notes. Among the cases, perhaps the *Anti-Inflation Act Reference*, [1976] 2 S.C.R. 373, illustrates best the problems presented in fitting some of

the longer and more complicated judgments of the Supreme Court of Canada in a book such as this one. One part of Chief Justice Laskin's opinion in the *Reference* appears in Chapter 1 of the book which relates to the Nature of Constitutions, another part of his opinion, as well as those of Ritchie and Beetz, J.J., appear in Chapter 7 on the Federal General Power under the subheading « The Modern Era. » In addition, the *Reference* is commented on in a « Note on the "Emergency" Power » which appears in Chapter 7 under the subheading « Depression, New Deal and Two World Wars. » In the light of this, it will be interesting to see how the *Constitutional Amendment Reference 1981*, [1981] 39 N.R. 1, with all of its ramifications will be treated in a later edition as well as elsewhere.

The pagination of the book is different from what one generally expects. Each chapter has its own pagination starting off with page 1, with the number of the page in the chapter hyphenated after the number of the chapter. This is carried on even through the index.

The book has a good index as well as a table of contents and a table of cases. There are two appendices. The first gives a small number of the most important sections of the *British North America Act*; the second gives the text of *The Canadian Bill of Rights* of 1960. The book is well organized and it is not difficult to find anything that one looks for in the book. Indeed, the book includes so much material and it is so well arranged that it can serve as a reference book as well as a book with which to teach Canadian Constitutional Law.

Edward G. HUDON

Gérald-A. BEAUDOIN, *Le partage des pouvoirs*, deuxième édition, Ottawa, Éditions de l'Université d'Ottawa, 1982, 527 p., 18 \$.

La première édition du *Partage des pouvoirs* de Gérald-A. Beaudoin fut épuisée à peine huit mois après sa publication à la fin de

décembre 1980. Déjà, au mois de mai 1982, paraît une deuxième édition tenant compte des événements constitutionnels importants qui se sont produits depuis la première. Au moment où le professeur Beaudoin écrivait les dernières lignes de cette nouvelle édition, le Parlement de Westminster entreprenait l'adoption de la *Loi sur le Canada* et de la *Loi constitutionnelle de 1982*. Par conséquent, c'est avec raison que l'auteur pouvait prédire que cet amendement à la Constitution du Canada serait le dernier adopté par le Parlement de Westminster.

Une fois accompli le rapatriement des différents *Actes de l'Amérique du Nord britannique*, rebaptisés *Lois constitutionnelles de 1867-1982*, c'est au Canada que la Constitution du pays doit être modifiée. Mais même si maintenant la Constitution du Canada comporte sa propre formule d'amendement, on ne peut pas s'empêcher de se demander si ce n'est pas le commencement plutôt que la fin de la bataille. Peut-être est-ce pour cette raison, parmi d'autres, que le professeur Beaudoin écrit dans son avant-propos : « L'adoption de la *Loi sur le Canada* et de la *Loi constitutionnelle de 1982* aura des conséquences juridiques importantes ». Car, au Québec, la Loi n° 62, sanctionnée le 23 juin 1982, vise déjà à mettre de côté l'application de la *Charte canadienne des droits et libertés* de la nouvelle Constitution, ce qui est permis par l'article 33 de la *Loi constitutionnelle de 1982*. Reste aussi le problème des droits à l'instruction dans la langue de la minorité, la « patate chaude » de la Constitution canadienne qui abroge une partie de la *Charte de la langue française* du Québec.

La deuxième édition du *Partage des pouvoirs*, quoique suivant de très près le plan de la première, est considérablement augmentée. Notamment, il a fallu ajouter au chapitre V une explication de la portée de la *Charte canadienne des droits et libertés* (pp. 147-150) et refaire en partie le chapitre XVI sur l'amendement et le rapatriement de l'*Acte de l'Amérique du Nord britannique* (pp. 361-400). De plus, des modifications