BOOK REVIEWS

CANADIAN CONSTITUTIONAL LAW. By Whyte and Lederman. Butterworths. 1975. Pp. XXIV and 808. $25.00.

Canadian Constitutional Law marks a return to the orthodox constitutional scholarship from which Lyon and Atkey's *Modern Perspective* was so conspicuously a departure. Here, the message is division and limitation of legislative powers, and the medium is the appellate court opinion.

This is exclusively a teaching book. As the editors say in their preface, it was not intended to be complete as a treatise or bibliography of materials. The cases reproduced are from the highest level. There is only a smattering of decisions from any court other than the Supreme Court or Privy Council.[1] Even at that, the proportion of lower court judgments reproduced is probably higher here than in *Laskin's Canadian Constitutional Law*. The big difference is that the great volume of lower court decisions, and the opinions of the highest court in cases not reproduced, go unnoticed in Whyte and Lederman, but are carefully noted and made the subject of question, reference and comment in *Laskin*.

While the story of the federal general (or peace, order and good government) and trade and commerce powers is told with essentially the same cases in *Laskin* as in the book under review, the selection of cases elsewhere is quite different. The difference is critical because the editors' decision not to reproduce a case in complete or edited form is almost always a decision not to mention it at all. Having chosen to do a casebook rather than a more comprehensive source book, the editors cannot afford the luxury of including any but the most important cases, of labouring any point or of omitting any essential decision.

The necessary economy manifests itself in a number of ways. Important constitutional issues upon which there is as yet no authoritative judicial pronouncement (for example, the power of Parliament to create a civil cause of action for breach of a criminal prohibition) are not treated. The limitation applicable to all provincial powers, that they be exercised "in the province", is dealt with by reproducing only the recent decisions in *Interprovincial Cooperatives Ltd. & Dryden Chemicals Ltd.* v. *The Queen*[2] and *Morgan* v. *Attorney-General for Prince Edward Island*;[3] the particular development of the limitation in the context of the provincial taxing power is not treated at all. In some places, separate issues are treated together with cases seemingly carefully chosen to expose both issues concurrently. In the chapter on transport and communication, for example, the series of thirteen cases reproduced gives adequate coverage to two related questions: what undertakings are federal in nature, and what kinds of

[1] In some of these decisions, the Supreme Court has expressed its concurring view by affirming the result (*Nickel Rim Mines Ltd.* v. *Attorney-General of Ontario* (1966), 53 D.L.R. (2d) 290; aff'd. [1967] S.C.R. 270) or denying leave to appeal (*Re C.F.R.B. and Attorney-General of Canada* [1973] 3 O.R. 819; *The Queen* v. *Klassen* (1960), 20 D.L.R. (2d) 406).

[2] (1975) 53 D.L.R. (3d) 321.

[3] (1974) 42 D.L.R. (3d) 603.

laws may Parliament and the provinces enact with respect to such undertakings. Economy is also evident in the choice of cases which test the limits of a principle rather than cases which plot its pedestrian application. So, in the chapter on taxation, the test of direct taxation established in *Bank of Toronto* v. *Lambe*[4] is then seen applied in two cases which require the reader to wrestle with the distinction between a tax on gross revenue and a tax on profits. The same approach is evident, I think, in the choice of *Mann* v. *The Queen*[5] over *O'Grady* v. *Sparling*[6] on the paramountcy question, as the principle at work in both cases is given a more extended application in *Mann*.

In terms of overall subject matter, the editors stretch the "elastic limits" chosen for *Laskin* to include a brief but useful textual treatment of the historical evolution of government institutions in Canada, and a much expanded consideration of civil liberties embracing the impact of the Canadian Bill of Rights. In the latter respect, there is apparent acceptance of the view that such fundamental matters as civil liberties are "crippled by being forced into the Procrustean bed of sections 91 and 92 of the British North America Act".[7] For the basic rights and freedoms are dealt with not as matters in relation to which legislative powers are divided, but in Part III of the book, as matters in favour of which legislative powers are limited. In other words, Canadian constitutional law is presented as comprising two essential subjects: federalism and civil liberties.

Having described the basic rights and freedoms as matters protected against the exercise of legislative power, the editors begin, as do Lyon and Atkey, by demonstrating that any protection of civil liberties that results from the distribution of powers is purely fortuitous: provincial denial of a basic right may[8] or may not[9] withstand an orthodox constitutional challenge. Whatever limitation of legislative power there is, it is not effected by the distribution of powers. *Christie* v. *The York Corporation*[10] is then reproduced, by Lyon and Atkey, to show that the judicial preoccupation with division of powers may contribute to a failure even to recognize that a fundamental right is at stake, or, by Whyte and Lederman, to show that such constitutional protection as exists for fundamental rights does not operate outside the context of direct governmental action. At this point, the editors introduce their readers to the self-imposed limitation of the Canadian Bill of Rights. But even here, one is not safely away from the Procrustean bed, for the decisive variable in the Indian Act trilogy of *Drybones*,[11] *Lavell*[12] and *Canard*[13] appears to be nothing other than the support offered by section 91(24) of the B.N.A. Act for the legislative provisions in question.

When the casebook switches from equality under the Bill of Rights to guarantees of free speech and association, and freedom of religion, one finds that in nine of the fourteen cases reproduced, the analysis of the

[4] (1887) 12 App. Cas. 575.
[5] [1966] S.C.R. 238.
[6] [1960] S.C.R. 804.
[7] Lyon and Atkey, *Canadian Constitutional Law in a Modern Perspective*, v.
[8] *Cunningham* v. *Tomey Homma* [1903] A.C. 151.
[9] *Union Collieries* v. *Bryden* [1899] A.C. 580.
[10] [1940] S.C.R. 139.
[11] *R.* v. *Drybones* [1970] S.C.R. 282.
[12] *Attorney-General of Canada* v. *Lavell* (1973) 38 D.L.R. (3d) 481.
[13] *Attorney-General of Canada* v. *Canard* (1975) 52 D.L.R. (3d) 548.

basic rights at stake is carried on within the conceptual frame of reference established by sections 91 and 92 of the B.N.A. Act. In these cases, the issue, ostensibly, is not whether a law may be enacted but who may enact it. Why, then, are the cases presented as embodying limitations of legislative power? The answer must be that in the view of the editors, the judges are not merely applying the distribution of powers, but are using federalism as an instrument to accomplish the protection of basic liberties. Certainly, Paul Weiler has said that in these cases the court "was forced to, and did, use the constitutional device of federalism in order to achieve its objectives as an activist defender of unpopular minorities against the oppression of a majority government".[14]

We have then a casebook that presents federalism first as a distinctive form of government and secondly as an instrument for judicial policy making. This, however, is not the book's purpose. Federalism is presented as simply one instrument in the judicial armoury for protection of basic rights and freedoms. Another is the principle that only the plainest legislative language will accomplish a denial of fundamental freedoms,[15] which is shown here applied in *Boucher* v. *The King*[16] and *Smith and Rhuland Ltd.* v. *The Queen.*[17]

In Part II of the book, Federal Distribution of Legislative Powers by Subjects, there is an arrangement of the material along familiar lines. Lyon and Atkey had eschewed the categories of the constitution itself and adopted their own frame of reference letting what powers will operate in its various categories. The distribution of powers was examined in the context of seven separate "values". Laskin chose an organizational scheme tied principally to the major sources of power in sections 91 and 92, but involving certain categories of his own, and so have Whyte and Lederman. There is the federal general power, trade and commerce, criminal law and marriage and divorce. But there is also transport and communication, and natural resources and public property, topics without any direct reference to a single source of legislative power.

Within individual chapters, there is not a consistent method of case organization. In two major chapters, the cases are presented chronologically, to emphasize, I suppose, the dramatic change over time in the judicially perceived content of the federal general, and trade and commerce powers. The editors have included the Federal Court of Appeal decision in *Vapor Canada Ltd.* v. *MacDonald*[18] as their last entry in the Trade and Commerce chapter, there being a nice coincidence in the case's recent vintage and its expansive interpretation of the "general component" of section 91(2) of the British North America Act. Since the casebook's publication, however, the Supreme Court of Canada has reversed the decision and as a consequence, there will be some question whether it belongs conceptually with *Burns Food*[19] and *Caloil*[20] or with the *Board of Commerce*[21] and *Eastern Terminal Elevator*[22] cases. In the

[14] *The Supreme Court and the Law of Canadian Federalism* (1973) 23 U.T.L.J. 307 at 343.

[15] This is what Weiler calls the "clear statement" technique, *In the Last Resort* 192, 193.

[16] [1951] S.C.R. 265.

[17] [1953] 2 S.C.R. 95.

[18] [1972] F.C. 1156.

[19] *Burns Food Ltd.* v. *Attorney-General for Manitoba* (1974) 40 D.L.R. (3d) 731.

[20] *Caloil Inc.* v. *Attorney-General of Canada* [1971] S.C.R. 543.

[21] *In Re Board of Commerce Act* [1922] 1 A.C. 191.

[22] *The King* v. *Eastern Terminal Elevator Co.* [1925] S.C.R. 434.

Transport and Communication chapter, the organizational standard shifts from history to contrivance, as the cases are grouped according to particular means of transport and communication. The Criminal Law chapter is similarly organized in terms of types of activities, and the reader faces the concurrent impact of federal and provincial penal laws on highway driving, raising of children, gambling, professional practice, and expression. There is at the same time no neglect of the conceptual problems associated with the criminal law power. The chapter opens with a group of cases which takes the reader through the different tests used to measure the scope of the federal power, including Viscount Haldane's "domain of criminal jurisprudence",[23] Lord Atkin's "prohibition with penal consequences",[24] and Justice Rand's "public evil".[25]

I am disappointed in the absence from the book of any attempt to define the essential nature of the Canadian federal system. To what institution has passed the sovereign authority of the United Kingdom Parliament? Does constitutional change require the concurrence of all the provinces? What is the status of a province, and is it free to withdraw from the Union? To be sure, the book includes the opinion of Justice Rand in the *Winner* case,[26] the *Offshore Minerals Reference*,[27] the *Nova Scotia Inter-delegation* case,[28] and the *Labour Conventions* case,[29] each of which has much to say on these questions, but the cases are contained in widely separated parts of the casebook, each devoted to a different issue. It does not include the fundamental *Liquidators* case.[30] If a student questions the implications of the recent threat of unilateral federal repatriation of the constitution, he will not find answers here. Some of the most useful non-case material might have included writings upon the compact theory of Confederation, including the recent excellent study by Professor Mackenzie.[31]

A dominant and useful theme of the casebook is the decision-making technique in constitutional cases. The editors see this technique as involving cognizance of relevant social facts, logical analysis, value preferences and selection of governing precedents. Only the first of these techniques is made the subject of separate treatment in the casebook. But awareness of all four is sustained throughout by the editors' notes and comments. The reader is asked to note of the judgment in *Walter* v. *Attorney-General of Alberta*[32] that the Supreme Court was not troubled, as was the Court of Appeal, by the lack of pertinent factual data on the local impact of the Hutterite colonies. Attention is directed to the highly functional analysis of aviation in *Johanneson* v. *West St. Paul*,[33] apparently in the absence of anything in the nature of a Brandeis brief, and to an alleged lack of appreciation for relevant and significant social facts in the *Winner* case.[34] The interplay of logical analysis and

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[23] Seen rejected in *Proprietary Articles Trade Association* v. *Attorney-General for Canada* [1931] A.C. 310.

[24] *Id.*

[25] *Reference Re Validity of Section 5(a) of the Dairy Industry Act* [1949] S.C.R. 1.

[26] *Winner* v. *S.M.T. (Eastern) Ltd. and Attorney-General of Canada* [1951] S.C.R. 887.

[27] *Reference re Ownership of Off-Shore Mineral Rights* [1967] S.C.R. 792.

[28] *Attorney-General of Nova Scotia* v. *Attorney-General of Canada* [1951] S.C.R. 31.

[29] *Attorney-General for Canada* v. *Attorney-General for Ontario* [1937] A.C. 326.

[30] *Liquidators of Maritime Bank of Canada* v. *Receiver General of New Brunswick* [1892] A.C. 437.

[31] *Planning the BNA Act* (1974), 6 Ottawa L. Rev. 332.

[32] [1969] S.C.R. 383.

[33] [1952] 1 S.C.R. 292.

[34] *Attorney-General of Ontario* v. *Winner* [1954] A.C. 541.

value judgment invites editorial comment on *Munro* v. *National Capital Commission,*[35] the opinion of Duff J. in the *Board of Commerce* case,[36] and the group of paramountcy cases. The editors bring to notice the use of precedent in *Quebec Minimum Wage Commission* v. *Bell Telephone,*[37] the *Labour Conventions* case,[38] and *The Queen* v. *Klassen,*[39] and they are critical of the failure of the Supreme Court of Canada and the Privy Council, respectively, to articulate in understandable fashion what it is that distinguishes *Attorney-General for Canada* v. *Lavell*[40] from *R.* v. *Drybones*[41] and *Cunningham* v. *Tomey Homma*[42] from *Union Collieries* v. *Bryden.*[43]

Although this preoccupation with the decision-making technique is not inordinate, it does provide a large part of the content for the editors' notes and comments, and it highlights what is characteristic of the casebook: it is largely self-contained. Presenting Canadian constitutional law as it does with a minimal number of cases, it is not a book for the shelves of the practitioner or researcher. As a teaching book, this characteristic may have the virtue of preventing the subject matter from overwhelming the reader as tends to be the case with both *Laskin* and *Lyon and Atkey.*

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[35] [1966] S.C.R. 663.
[36] *Supra,* n. 21.
[37] [1966] S.C.R. 767.
[38] *Supra,* n. 29.
[39] (1960) 20 D.L.R. (2d) 406 (Man. C.A.).
[40] [1974] S.C.R. 1349.
[41] [1970] S.C.R. 282.
[42] *Supra,* n. 8.
[43] *Supra,* n. 9.
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EVIDENCE BEFORE INTERNATIONAL TRIBUNALS. By Durward V. Sandifer. Charlottesville: University Press of Virginia. Revised Edition, 1975. Pp. xxi and 519. $27.50.

Too many people, both lawyers and laymen alike, are unaware of the true character of the International Court of Justice and assume that because it is *the* international court it is the supreme court for people everywhere or the court of last resort for every petitioner who maintains that he has suffered an injustice, particularly at the hands of his own state. There is probably even a greater number of people completely unaware of the truly judicial character of this as of other international tribunals. In fact, these tribunals are as much aware of rules of evidence, procedure and the like, as are the national tribunals of any state. On one of these technical aspects, Sandifer's *Evidence Before International Tribunals,* originally published in 1939 and now brought up to date, has long been regarded as one of the leading standard works.

From the point of view of the practitioner, be it the legal adviser appearing before the World Court on behalf of his government, or the counsel undertaking a case for a private client before, for example, the United States Foreign Claims Settlement Commission, the bulk of the