

CHARTER JUSTICE IN CANADIAN CRIMINAL LAW by Don Stuart (Toronto: Carswell, 1991)

In the Preface of *Charter Justice in Canadian Criminal Law*, Don Stuart identifies his goal as follows:¹

What this book seeks to do, then, is to identify the central authorities, secondary sources and arguments concerning the *Charter* in the specialized context of the criminal trial and to point to some new possibilities.

I believe that Stuart's work achieves these general objectives admirably. Professor Stuart analyzes the *Canadian Charter of Rights and Freedoms*² section by section, with a particular emphasis upon provisions relating to criminal and quasi-criminal matters, and Supreme Court of Canada [hereinafter referred to S.C.C.] jurisprudence. The book begins with a detailed Table of Contents which is quite useful. The discussion of various *Charter* sections is broken down into very specific issues and sub-issues, allowing the reader to quickly isolate the discussion of a particular point. The same cannot be said about the index, which is not nearly as complete or organized as it could have and should have been.

In *Charter Justice*, Professor Stuart provides a very complete and scholarly analysis of the *Charter* as it relates to criminal jurisprudence. One of the strongest features of this book is Professor Stuart's ability to identify trends, trace connections between decisions in different areas of the law, and show how the jurisprudence is evolving. It is pretty apparent that Professor Stuart has a fairly "liberal" outlook, and he generally speaks with approval of those cases where the S.C.C. has interpreted the *Charter* in a "broad, purposive" way. However, Professor Stuart is also capable of providing acute criticism where he thinks it is warranted. For instance, he expresses deep concern over recent S.C.C. jurisprudence on section 1 of the *Charter*, accusing the Court of "stunning inconsistency."³ His criticism, although expressed in colourful terms, is measured and logical. Professor Stuart explains exactly how the Supreme Court in the *Prostitution Reference* case⁴ has decided to "play fast and loose" with the *Oakes* proportionality test.⁵ This kind of intelligent criticism is surely a healthy and refreshing thing to find in a scholarly work.

This work makes very good use of footnotes. Stuart has quite properly decided to emphasize S.C.C. jurisprudence in the main body of the text. Footnotes are used to refer to other scholarly works and authorities from the lower courts. This gives the reader the opportunity to digress if desired, without detracting from the "big picture." The footnotes also contain some pithy editorial comments. For instance, after referring to the conclusion

¹ Don Stuart, *Charter Justice in Canadian Criminal Law* (Toronto: Carswell, 1991) at vi.

² Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11 [hereinafter *Charter*].

³ Stuart, *supra* note 1 at 17.

⁴ *Reference Re ss. 193 and 195.1(1)(c) of the Criminal Code* (1990), 56 C.C.C. (3d) 65.

⁵ Stuart, *supra* note 1 at 87.

of the S.C.C. in *R. v. Mills*⁶ that evidence cannot be excluded at a preliminary inquiry following a violation of the *Charter*, Stuart notes drily that "the notion of committing on inadmissible evidence is strange."⁷

Another strong point in this book is Professor Stuart's identification of various background issues. I think that this is something which is often overlooked in scholarly writing on the *Charter*. Professor Stuart skilfully identifies the common law principles which shape and are shaped by various legal rights established under the *Charter*. He also notes other statutory instruments which deal with the same issues, including the Canadian, English and International Bills of Rights as well as the various amendments to the U.S. constitution, and so on. All of this has the effect of showing the reader that many of the supposedly novel and unique rights established by the *Charter* have deep roots in Anglo-American jurisprudence.

A few negative points ought to be noted. As stated previously, the index is inadequate. There were a number of typographical errors in the first edition. Professor Stuart appears to have somewhat of a pre-occupation with dissenting opinions in S.C.C. jurisprudence (particularly where he agrees with them). Occasionally, he seems to spend almost as much time on the dissenting opinions as he does on the majority. In the Preface, he expresses regret at not having been able to make his book shorter; reducing the discussion of dissenting opinions might have been an obvious solution.

Unfortunately, the usefulness of this text has been reduced substantially by recent S.C.C. jurisprudence. In the Preface, Professor Stuart states that the law in the first edition is stated as of September 1, 1991. Unfortunately, in the 18 months or so which have passed since then, many important decisions have been handed down by the S.C.C. which call into question some of the conclusions expressed. Many examples of this may be cited. There is a discussion of the impact of the *Charter* on jury selection;⁸ this has clearly been dealt with by the S.C.C. in *R. v. Bain*.⁹ Professor Stuart comments on the application of section 8 to motor vehicle searches in the "stop check" situation;¹⁰ this issue was addressed comprehensively in *R. v. Mellenthin*.¹¹ The worst example is clearly the discussion on section 11(b) of the *Charter*, the right to be tried within a reasonable time.¹² Unfortunately this book was written before the release of the recent S.C.C. decisions in *R. v. Sharma*¹³ and *R. v. Morin*.¹⁴ The S.C.C. has effectively reversed many of the principles previously expressed in *R. v. Askov*,¹⁵ hence, about 16 pages of the text have been rendered obsolete.

⁶ *R. v. Mills* (1986), 26 C.C.C. (3d) 481.

⁷ Stuart, *supra* note 1 at 24.

⁸ *Ibid.* at 120.

⁹ *R. v. Bain* (1992), 69 C.C.C. (3d) 481.

¹⁰ Stuart *supra* note 1 at 180.

¹¹ *R. v. Mellenthin* (1992), 76 C.C.C. (3d) 481.

¹² Stuart, *supra* note 1 at 225-241.

¹³ *R. v. Sharma* (1992), 77 C.C.C. (3d) 184.

¹⁴ *R. v. Morin* (1991), 71 C.C.C. (3d) 1.

¹⁵ *R. v. Askov* (1990), 59 C.C.C. (3d) 449.

At times Professor Stuart displays remarkable prescience in anticipating future S.C.C. decisions. For instance, he comments that the bail provisions in the Criminal Code are "ripe for a void for vagueness challenge"¹⁶ which is exactly what occurred in the recent decision of *R. v. Morales*.¹⁷

In any event, Professor Stuart can hardly be faulted for failing to anticipate future changes to the law. Unfortunately there have been so many significant developments since the publication of the first edition that perhaps 10% of the commentary has now been rendered inaccurate. One can only hope that the publishers will provide us with frequent new updated editions. Another solution might be to publish this book in a loose-leaf edition which could be updated periodically.

There is no dearth of scholarly writing on the *Charter*. However, I believe that Professor Stuart's book fills a unique niche. *The Canadian Charter of Rights Annotated*¹⁸ provides frequent updates for current jurisprudence. However, an annotated *Charter* cannot provide the kind of analysis and critical comment which is such a valuable part of Professor Stuart's text. David M. Paciocco's *Charter Principles and Proof in Criminal Cases*¹⁹ attempts to analyze the *Charter* as it relates particularly to evidentiary issues. Professor Paciocco, like Professor Stuart, does a fine job of putting *Charter* issues into historical perspective, however, his text would clearly be less useful for someone seeking assistance in a criminal or quasi-criminal case. The same can be said of the *Canadian Charter of Rights and Freedoms, A Commentary*.²⁰ This book places more emphasis upon issues like the right to vote, freedom of association, and freedom of expression. Mr. Justice D.C. McDonald's *Legal Rights in the Canadian Charter of Rights and Freedoms*²¹ also has a broader focus than Professor Stuart's work. Like Professor Stuart, Justice McDonald provides comprehensive historical analysis. Unfortunately his work has, like Professor Stuart's, been overtaken to a large extent by recent jurisprudence.

In summary, *Charter Justice in Canadian Criminal Law* should prove to be a useful addition to Canadian writing on the *Charter*. This book provides a rare combination of a practical and cogent summary of the law with a measured and intelligent commentary on the reasons *why* the law has developed in the way it has. It behooves everyone

¹⁶ Stuart, *supra* note 1 at 275.

¹⁷ *R. v. Morales* (1992), 77 C.C.C. (3d) 91.

¹⁸ Laskin *et al.* eds., *The Canadian Charter of Rights Annotated* (Toronto: Canada Law Book Inc., 1993).

¹⁹ David M. Paciocco, *Charter Principles and Proof in Criminal Cases* (Toronto: Carswell, 1987).

²⁰ Tarnopolsky and Beaudoin, eds., *Canadian Charter of Rights and Freedoms, A Commentary* (Toronto: Carswell, 1982).

²¹ D.C. McDonald, *Legal Rights in the Canadian Charter of Rights and Freedoms* (Toronto: Carswell, 1989).

involved in the administration of justice to step back occasionally from the minutiae of individual cases to enjoy the kind of comprehensive discussion and analysis which this book so capably provides.

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