CONSTITUTIONAL LAW OF CANADA, 2nd ed., by Peter Hogg, Carswell, Toronto, 1985, pp. lxxv and 988.

Since publication in 1977, Professor Peter W. Hogg's *Constitutional Law of Canada* has been a standard reference in the area, consulted by students, academics and practitioners. Professor Hogg has up-dated his text, and added important new chapters dealing with amendments to the Constitution, and particularly with the Canadian Charter of Rights and Freedoms. The revisions are substantial and have significantly increased the length of the text, which, as Professor Hogg points out in his preface, is not surprising in view of the large amount of recent political, legislative, and judicial activity relating to the Canadian Constitution.

As with the First Edition, the Second Edition is arranged in three parts. The first, entitled Basic Concepts, contains material that is somewhat unusual in law reference books, as it goes beyond legal authorities to provide an historical summary of the Canadian Constitution, including recent developments involved in the adoption of an amending formula and patriation of the Constitution. This part of the text provides an excellent background to the practicing lawyer or law student, and would also be of interest to non-lawyers seeking an understanding of the Canadian political constitution. Throughout the text, the writing is lucid and can be understood by those unfamiliar with the subjects, but is also detailed, thoughtful and thought-provoking. In addition to providing an historical context, Professor Hogg also gives a comparative context, discussing differences in the basic approaches to the larger issues of distribution of powers and judicial review in Canada as opposed to Australia and the United States.

Of particular relevance and use to the practitioner are chapters relating to what might be described as collateral constitutional issues, such as the constitutional limits of jurisdiction of federal and provincial courts and administrative tribunals, the nature of the Crown, including principles of Crown agency, Crown privilege and Crown immunity, and questions relating to extra-territorial legislative competence. These issues may arise in the course of any practice, and many practitioners may not be aware that Professor Hogg's work provides an excellent reference source for them. The subjects are complex, and are clearly and comprehensively dealt with in the text.

The second part, entitled Distribution of Powers, deals with basic interpretive principles of constitutional review relating to division of power. The application of those principles is divided into eleven chapters dealing with the various heads of federal and provincial powers. There is a new chapter on natural resources, and a chapter on aboriginal peoples which discusses not only the federal legislative power relating to Indians and lands reserved for the Indians, but also provides an introduction to native rights as protected in the Constitution. This introduction is brief, as the subject is largely unexplored at this time, but, in common with the rest of the text, is very well-footnoted, providing references to case law and academic literature in the area.

The practitioner will also be interested in the new third part, Civil Liberties, which has been completely revised from the First Edition.

Professor Hogg again provides a summary of common law protections of civil liberties, and general constitutional protections found in the distribution of powers and the "implied bill of rights" theory. Further, he discusses the impact (or lack thereof) of the Canadian Bill of Rights and comments on its continuing relevance. The remaining eight chapters in this section all relate to the Canadian Charter of Rights and Freedoms. Professor Hogg commences with an extensive discussion of basic principles relating to the Charter, including rules of interpretation, questions relating to the benefit and burden of rights, the limitation of rights, and the enforcement of rights. Succeeding chapters deal with specific rights, such as fundamental freedoms in s. 2, voting and mobility rights, legal rights, equality, and language and educational rights. This is an excellent summary of the law relating to the Charter, giving a good comparative analysis with references to American constitutional law and international human rights law. The references are thorough and include early Charter cases, American and international jurisprudence, and academic literature.

The caveat which might be attached to this portion of the text is that Professor Hogg tends to be conservative in his conclusions on basic unresolved Charter issues. On a few occasions this conservatism has proved to be ill-founded in view of subsequent Supreme Court of Canada decisions. One such instance relates to the issue of whether or not the reference in s. 7 to fundamental justice includes any form of substantive protection, as opposed to merely procedural protection. Professor Hogg describes the issue in dichotomous terms which, to be fair, was the general approach adopted by many scholars at the time of the writing of the text, prior to the Supreme Court of Canada decision in *Reference re Section 94(2) of the Motor Vehicle Act*.[1] Having done this he simply concludes "on balance" that the better interpretation is the narrower one, granting procedural protection only. This conclusion was in the face of case law that he described as "mixed", which included appellate level support for the broader view, including the British Columbia Court of Appeal decision in the *Reference*. The conservative prediction in light of the subsequent Supreme Court decision was incorrect and is disappointing simply because its inclusion in a source so widely regarded as authoritative might have had the effect of discouraging further litigation raising this important Charter issue.

There appear to be two basic reasons for Professor Hogg's tendency to be conservative in his approach to the Charter. The first is his general view that the power of judicial review should be used with considerable restraint. He is concerned about the political element of Charter decisions, which he sees as an inherent and continuing aspect of these decisions. He notes that this political power could be exercised, as it was during the infamous *Lochner* era of the United States judicial history of the Bill of Rights, so as to become an illiberal and reactionary restraint on government action. Because of this concern Professor Hogg supports the s. 33 override, and considers it a prudent concession to democratic political processes. He suggests such a tool could have been appropriately used as a solution to the *Lochner* era in the United States. However, apart from a

1. (1985) 24 D.L.R. (4th) 536 (S.C.C.); *affg.* 147 D.L.R. (3rd) 539 (B.C.C.A.).

brief comment on a footnote, Professor Hogg does not discuss the other side of the coin — namely that the power of the Charter in enforcing civil libertarian values in eras of reactionary political views is substantially diminished by the presence of the override.

Another explanation for Professor Hogg's sometimes conservative views is his approach to Charter interpretation. While he is supportive of the method subsequently approved in the Supreme Court that rights should first of all be interpreted in a reasonably generous fashion, and subsequently limited under s. 1 (at which point the onus shifts to the Crown), he tends to minimize the importance of this two stage procedure with regard to Charter rights that contain some qualification in their terms. Thus, relating to the issue of s. 10 rights upon detention, Professor Hogg does not distinguish the Canadian Bill of Rights decision of *Chromiak* v. *The Queen* [2] on the basis that interpretation under the Charter should proceed in a different fashion than under the Bill of Rights. He also does not comment on the effect of this approach to Charter interpretation as it relates to the right to be presumed innocent, and violation of that right by reverse onus provisions. In the post-publication Supreme Court of Canada decisions dealing with both of these issues, the two stage interpretation under the Charter has formed an important part of the analysis.[3]

Because of the foregoing difference in Professor Hogg's approach and the Supreme Court developments, one must question his opinion that the decision in *Miller* v. *R.*[4] upholding the death penalty from an attack as being cruel and unusual punishment and in violation of the Canadian Bill of Rights, would be determinative in a similar challenge under the Charter. As noted by Professor Hogg, the majority decision in that case relied upon the "frozen concepts" theory of the Canadian Bill of Rights, which has been discredited as an approach to Charter interpretation. Further, Chief Justice Laskin, who wrote a minority decision in the case, held that there was no onus on Parliament to justify the death penalty, whether by proof of general deterrence or otherwise.[5] Under the Charter, it would at least be arguable that the death penalty would *prima facie* constitute cruel and unusual treatment or punishment, thus placing the onus upon the Crown to justify it as a s. 1 limit.

To be fair to Professor Hogg, these latter observations are made the benefit of Supreme Court of Canada decisions delivered after the printing of the text which have revealed much more judicial activism than had been generally expected. If Professor Hogg is conservative on some issues, he nonetheless sets out the limits of the issues, and discusses contrary arguments and authority. For these reasons, and because Part 3 like the rest of the text is written in lucid and comprehensive fashion, it will be an important guide to the Charter for some time to come.

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2. [1980] 1 S.C.R. 471.
3. *R.* v. *Therens* (1985) 18 D.L.R. (4th) 655 (S.C.C.); *R.* v. *Oakes* (1986) 65 N.R. 87 (S.C.C.).
4. [1977] 2 S.C.R. 680.
5. *Id.* at 695.