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Book Reviews

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BOOK REVIEWS

Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982. Morris Manning. Toronto: Emond-Montgomery Ltd., 1983. Pp. xiv, 760.

As a result of the Constitution Act of 1982, Canadians now have a constitutional guarantee of fundamental rights, including the freedoms of speech and religion and the right to a fair trial.

Toronto attorney and legal scholar Morris Manning, in *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982*,¹ argues that the explicit provision of fundamental rights in a constitution will require changes in the Canadian approach to cases involving these constitutional rights. Manning maintains that Canadian lawyers and judges need to look to the experiences of other nations for guidance on how cases should be argued and decided under the new Charter of Rights and Freedoms.² Manning examines courts' interpretations of the U.S. Constitution, international covenants proclaimed by the United Nations and the European Community, and the constitutions of British Commonwealth members such as India and Nigeria. He argues for an interpretive approach similar to that used by the U.S. Supreme Court, the European Court of Human Rights and the courts of Commonwealth countries with constitutional bills of rights. Yet he also refers to a need to use this borrowed experience in a way that will be uniquely Canadian.

Manning expects the Canadian approach to be different from that of the United States and other countries because of the "notwithstanding" clause in section 33 of the Charter, the general "reasonable limits" on rights and freedoms set out in section 1, and Canada's own form of federalism. But he argues against clinging to pre-Charter approaches. The Charter, he says, will require Canadian courts to break with the past and undertake a new role as "supreme arbiters of the supreme law."³ This will engender what Manning calls a compromise between the traditional British doctrine of parliamentary supremacy and the American model of judicial checks on the legislative and executive branches of government. Man-

¹ M. MANNING, *RIGHTS, FREEDOMS AND THE COURTS: A PRACTICAL ANALYSIS OF THE CONSTITUTION ACT, 1982* (1983).

² *Id.* at vii.

³ *Id.* at 23.

ning finds support for moving toward the American model in both the section 52 provision that the Constitution of Canada, including the Charter, is the supreme law of Canada, and the section 24 provision for enforcement of rights and freedoms through the courts.

Manning rejects the "frozen law" theory that the Charter merely recognizes and confirms rights and freedoms as they existed in Canada before the Charter. Before the Charter, he says, those rights had a "negative" character; individual rights were only the residue not preempted by legislative action. In the Charter, however, the rights and freedoms, binding on Parliament and the provinces, take on a "positive" character. Again, the "positive" approach of the new Charter is more like the American model than the British. Manning finds that the intent to effect this change in Canada's approach to rights and freedoms is reflected in the language of the preamble to the Canada Act.

Manning notes that some elements of the British model are retained, in particular, the rights of legislative bodies, under section 33 of the Charter, to declare their legislation to operate notwithstanding the fundamental freedoms proclaimed by section 2 or the legal and equality rights guaranteed by sections 7-15 of the Charter.

Still, the emphasis of the book is on change, change that will require Canadian lawyers and judges to break away from their old fears and habits. Manning says that Canadian lawyers developed the habit under the 1960 statutory Bill of Rights of raising bill of rights arguments as "throwaway" arguments, arguments which courts did not take seriously.⁴ He says that a carryover of this attitude and the judicial fear of basing decisions on fundamental rights would thwart the new Charter and, he concludes, harm Canadian freedoms. He also expresses concern that Canadian courts will be reluctant to assume their broadened role for fear of following American courts down a path to judicial lawmaking, a role that he believes to be more media image than truth.

Manning points out issues that are likely to be raised by application of the Charter, including determining the "reasonable limits" on rights and freedoms under section 1 of the Charter; setting standards of "fundamental justice" under section 7; establishing forms of equitable relief under section 24(1), which allows remedies "as the court considers appropriate and just in the circumstances"; deciding whether application for relief should come before or after infringement; deciding the meaning of "infringement" and "denial" of rights; and deciding what is a "court of competent jurisdiction" from which to seek relief under section 24(1). The courts will also have to decide when searches and seizures are unreasonable under section 8 or when detention is arbitrary under section 9. In all of these areas, Manning argues for a strong presumption against attempts to limit guaranteed rights.

⁴ *Id.*

Much of the book is devoted to comparing Canadian law with the experiences of other nations with constitutionally provided rights and freedoms. Division of the book into small subsections makes it a valuable, quick reference work on comparative constitutional treatment of the whole spectrum of rights and freedoms. With an average length of about one page per subsection, the book enables the reader to quickly refer to background information and practical advice on a specific application of the Charter.

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The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms. William R. McKercher, ed. Toronto: Ontario Economic Council, 1983. Pp. 241.

The Constitution Act of 1982 in Canada has generated an outpouring of legal speculation on its implications for Canada and her citizens. Contributing to this wealth of words on the most controversial legal development in Canada in several years is a publication of a Special Research Report of the Ontario Economic Council entitled, *The U.S. Bill of Rights and the Canadian Charter of Rights and Freedoms*. This publication is the product of a conference on "The U.S. Bill of Rights: Implications for Canada" held at the University of Western Ontario in March 1982. Some of the most renowned experts in the field of Canadian and American constitutional law, such as Walter Tarnopolsky of the University of Ottawa and Paul Bender of the University of Pennsylvania, presented papers at the conference.

The christening of the Charter commenced an inevitable comparison to the American experience with the Bill of Rights. The conference contributors explored, inter alia, the potential effect the Charter would have on civil liberties in a nation governed by Parliamentary supremacy, not judicial legislation. The conference papers covered a breadth of topics one would hope to find in a comparative constitutional environment, including an analysis of socio-political forces, individual versus collective rights and civil rights enforcement. In addition, three of the most penetrating subjects covered in this publication are the papers focusing on the Charter's influence upon Canada's political tradition, judicial statesmanship and Quebec relations.

The editor and conference coordinator, William McKercher, an assistant professor of political science at the University of Western Ontario, traced some patterns inherent in American constitutional law and compared them to the experience in Canada. One area McKercher examined was the notion of a national standard of rights protection. The United States, according to the author, underwent a rather arduous process before the Bill of Rights protections were eventually deemed applicable to the states. From the birth of the Fourteenth Amendment in 1868 until the "selective incorporation" doctrine of Justice Benjamin Cardozo in 1937, the application of the Bill of Rights to the states remained ambiguous.

In Canada, before the Charter, there existed an often unjust patchwork of rights protection which varied from province to province. Under the Charter, however, McKercher asserts that a national standard of rights protection will emerge in Canada without the painful and lengthy incorporation process experienced by the United States. As the Charter

specifically applies to both the federal government and the provinces, McKercher posits that Canadians will not entangle themselves in an incorporation debate.

There will, however, be debate about the “notwithstanding clause” of section 33. This Charter section allows Parliament and the provincial legislatures to override provisions protecting Fundamental Freedoms (section 2), Legal Rights and Equality Rights (sections 7-15) for an initial period of five years (with a potential for renewal). McKercher notes that the “‘notwithstanding clause’ gives flexibility to the provincial legislatures and the federal Parliament: but the Charter also makes the protection of rights a national, as opposed to a mainly provincial, concern” (p. 12).

The relative notion of a limited government is also explored. McKercher suggests that the United States government is limited not only by the Bill of Rights, but by other constitutional provisions as well. Canada, however, has a different political past:

In Canada, where limitations on governmental power depend only upon jurisdictional authority, governments *were not* limited. This means that the Charter of Rights and Freedoms as part of the written constitution is a more prominent document for it stands as the major constitutional barrier between limited and unlimited power The responsibility for defining these limitations now rests with the courts, which could make the judiciary—who can use the Charter rather than considerations of federalism as a reference—the ultimate guardians of the rights of the people (p. 17).

McKercher also notes that one result of nationalizing civil liberties may be the loss of provincial identity: “[P]rovincial governments must ensure that they are not viewed as impediments to the expansion of rights and freedoms. To help preserve their provincial autonomy, they must lead, rather than follow the national standards of protection” (p. 25).

This rhetoric concerning nationalizing and expanding the civil liberties in Canada assumes that the text of the Charter will somehow awaken the rather dormant Canadian judiciary. While the U.S. Supreme Court continually confronts highly controversial issues such as abortion, executive power and civil rights, the Canadian Supreme Court avoids controversy and remains subservient to Parliament. According to conference contributor Walter Berns of Georgetown University, “[T]he question of interest to Canada is whether, with the new Charter of Rights, we can expect the Canadian judges to follow the examples of their American brethren and seize powers properly belonging to other branches of government” (p. 99). Berns points out that the “United States is now to a considerable extent governed by its federal judges who . . . hold life appointments” (p. 99). Berns suggests that the public interest, media coverage and influence of the Canadian judiciary would be heightened if the

Court decided cases involving abortion and Parliamentary power. This will happen if the "Canadian judges prove to be as vain as Americans and cover the attention that comes with 'bold', 'innovative', 'creative' adjudication" (p. 100).

The opportunity for the Canadian judiciary to enhance its reputation and influence may depend on the delicate balance between judicial activism and judicial restraint. Rainer Knopff and F.L. Morton, of the University of Calgary, define activism as, "the judicial readiness to overrule the more overtly political branches of the government in the name of controlling constitutional standards" (p. 185). The question arises, then, of how aggressive the Canadian judiciary will be under the Charter. In terms of activism, Knopff and Morton apparently believe that the Charter was designed to "overcome ambiguities" of the Canadian Bill of Rights and allow sufficient room for judicial intervention. This, however, is offset somewhat by the section 33 "notwithstanding clause" since it arguably would allow the "legislative review of judicial review" (p. 185).

Despite the limitation of section 33, the judiciary possesses unambiguous textual ammunition in the Charter to override Parliamentary and provincial legislation on constitutional grounds, a novel concept in Canada. In the United States, the power of judicial review depends upon "the 'automatic' compliance with Supreme Court decisions" (p. 188). Knopff and Morton conclude that "establishment of such a convention in Canada will partly depend upon judicial statesmanship" (p. 188), which means, to some degree, willingness to consider political questions and legislate judicially.

The Canadian judiciary, however, has not yet adopted the notion of judicial legislation. In *Regina v. Drybones*,¹ the Canadian Supreme Court hinted at judicial legislation with its definition of equality pursuant to the Bill of Rights as "to repudiate discrimination in every law of Canada" (pp. 486-87). A *Drybones* dissenter, Justice Abbott, warned of such judicial review and stated that "it would require the plainest words to impute to Parliament an intention to extend to the courts, such an invitation to judicial legislation" (p. 477). Abbott's view prevailed as the Supreme Court has not repealed a federal statute since *Drybones* in 1970.

Knopff and Morton contend that the Court's extreme deference to Parliament will subside under the "equality under the law" provision found in section 15(1) of the Charter. This section will force the courts to develop what they have preferred to avoid, some criterion similar to a doctrine of reasonable classification (p. 194). Knopff and Morton summarize the potential effects of section 15(1) with a quote from Canadian constitutional law expert Peter Hogg: "[I]t forces the court to leave the safe area of conventional legal materials, and embark on an inquiry into the rationality and acceptability of legislative policy" (p. 194).

¹ 9 D.L.R.3d 473 (1970).

Such an "inquiry into legislative policy" by the Canadian courts may trigger provincial animosity if a popular piece of provincial legislation is struck down by the Supreme Court. This is the ultimate fear of Charter supporters, and the most likely place for animosity and non-compliance is Quebec. Gordon Robertson, President of the Institute for Research and Public Policy, notes that the Charter of Rights was not accepted by the Government of Quebec and that the Charter imposes certain limits on powers of the Assemblée Nationale that were previously unlimited (p. 147). The result may be conflict: "Loyalty on one hand to a Rule of Law, and loyalty on the other to provincial powers that have traditionally been seen as a prime guarantee of the security of the French culture and language of Quebec" (p. 147).

Robertson predicted that such a scenario would occur in a conflict between the Quebec Language Law, Bill 101, and section 23(1)(b) of the Charter. Under Bill 101, parents have the right to have their children educated in English if either parent was educated in English in a *Quebec* school (p. 148). Under Charter section 23(1)(b), parents are entitled to have their children educated in their own official language if they themselves were educated in that language *anywhere* in Canada. The provisions collide on the sensitive issue of language rights, and a "challenge to the Quebec Language Law is inevitable," according to Robertson.

Robertson's prediction became reality in the case of *Quebec Association of Protestant School Boards v. Attorney General of Quebec* (No. 2).² The Quebec Supreme Court acknowledged the incompatibility of Bill 101 and section 23 (1)(b) and held that "[b]y virtue of section 52 of *Constitution Act, 1982*, the Charter must prevail."

The Bill 101 case portrays the strengths and weaknesses of this publication. Its strength stems from the opinions expressed by such experts as Robertson, who accurately predicted the Bill 101 litigation. Its weakness lies in the potential for outdatedness as the predicted conflicts are resolved by the courts, such as the Bill 101 example. Thus, the publication provides general background information on the Charter in relation to the U.S. Bill of Rights, but should not be relied upon for detailed research.

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² 140 D.L.R.3d 33 (1982).

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