REVUE DES LIVRES

BOOK REVIEWS

The Canadian Bill of Rights. By WALTER SURMA TARNOPOLSKY. Second Revised Edition. Carleton Library Series. Toronto: McClelland & Stewart Ltd. 1975. Pp. xii, 436. ($4.95.)

Professor Tarnopolsky has done an excellent revision of his book which is the standard text on the Canadian Bill of Rights.[1] This edition no less than its predecessor is the point of departure and an indispensable reference for anyone who wants to understand the Canadian Bill of Rights.

The first half of the book deals with the historical and legislative background to the Canadian Bill of Rights as well as subsequent amendments (Chapter 1); the distribution of legislative power with regard to civil liberties (Chapter 2); the question of the entrenchment of the Bill (Chapter 3); and, its effects on Canadian law (Chapter 4). The latter part of the book (Chapters 5 to 8) examines political, economic, legal as well as egalitarian civil liberties and the Canadian Bill of Rights. Chapter 9 treats the possible effects on the Bill when the War Measures Act[2] is in force as well as the apprehended insurrection of October 1970. Appendices of the Canadian and American Bills of Rights, the proposed Canadian Charter of Human Rights and the parts of the Victoria Charter that deal with civil liberties are included. Tables of statutes and cases, a detailed bibliography and an index complete the book.

Except for Chapter 3, extensive changes and additions have been made to all chapters of the first edition that was published in 1966. It should be noted that before the 1970 *Drybones*[3] case, only two cases had dealt in any length with the Canadian Bill of Rights.

Two essential problems have arisen with respect to the application of the Canadian Bill of Rights. Firstly, the Supreme Court of Canada was divided between those who believed that

[1] R.S.C., 1970, Appendix III.
[2] R.S.C., 1970, c. W-2.
[3] *The Queen* v. *Drybones*, [1970] S.C.R. 282.

it was no more than a canon of construction much like a statute of interpretation, and those who were in favour of giving it overriding effects. The latter interpretation has been accepted by the court generally with the possible exception of Mr. Justice Pigeon who, it would seem, views the *Drybones* case as *un cas d'espèce.* Secondly, the remaining eight justices are divided between those who are for a forthright and vigorous application of the Bill of Rights and those who seem to be uncomfortable with it and overly concerned about the possible effects of its blanket application. Given the likely groupings of the court as to the disposition of any particular case, we get some curious results. The *Lavell*[4] case is one example. As Mr. Justice Beetz observed: "Considering the division of opinion in *Lavell*, it is admittedly difficult, if it is possible, to formulate the *ratio decidendi* of the case."[5]

Professor Tarnopolsky concedes that the Canadian Bill of Rights "could have been more precisely drafted".[6] Throughout his study, however, he clearly demonstrates by judicious and concise analysis of the legislative history of the Bill that Parliament surely did not intend that all the effort, money and time that had gone into its preparation and enactment was simply to adopt additional canons of interpretation with regard to federal statutes, however useful these may be.[7] This history unequivocally and fully supports the court's majority position in *Drybones* and its subsequent elaboration primarily in the court's minority opinions.

In Chapter 3, the author makes a convincing argument concerning Parliament's power to entrench the Canadian Bill of Rights or any other legislation by prescribing that a particular "manner and form" is required for its abridgement, modification or repeal. He also sets to rest the illusion that incorporating the Bill into the British North America Act[8] would necessarily make any difference. Firstly, he points out that the Bill could be incorporated into the British North America Act but not be entrenched. This is the case with the whole of our federal constitution except as regards the exceptions in section 91 (1) of the Act concerning language, education, the division of powers, the re-election of the House of Commons every five years and the necessity for Parliament to meet at least once a year. His second argument is that however we classify the Canadian Bill of Rights — whether as a statutory or as a constitutional document

[4] *A.-G. of Canada* v. *Lavell*, [1974] S.C.R. 1349.
[5] *A.-G. of Canada* v. *Canard* (1975), 52 D.L.R. (3d) 548, at p. 575.
[6] P. 150.
[7] See, *e.g.*, at pp. 130, 228 and 264.
[8] 1867, 30 & 31 Vict., c. 3, as am. (U.K.).

— such classification should not necessarily influence the court's interpretation of the Bill. The overriding power of the Bill, he concludes,[9] was recognized by Parliament in section 12 of the Public Order (Temporary Measures) Act, 1970,[10] which included the notwithstanding clause of the Bill of Rights.

Entrenchment of the Bill would not necessarily be a panacea for the forceful protection of our liberties. In *Hogan* v. *The Queen*,[11] the accused was refused the right to consult his lawyer before taking a breathalyzer test. However, the court ruled the breathalyzer evidence admissible since it was both relevant and cogent. In siding with the majority, Mr. Justice Pigeon stated that "even if the Canadian Bill of Rights is given the same effect as a constitutional instrument, this does not mean that a rule of absolute exclusion, which is in derogation of the common law rule, should govern the admissibility of evidence obtained wherever there has been a breach of one of the provisions contained in that Bill".[12] It would perhaps be useful to entrench certain rights beyond Parliament's reach, such as those concerning the denaturalization or deportation of Canadian citizens that arose at the end of World War II with respect to Japanese Canadians.

In discussing the effect of the Canadian Bill of Rights on Canadian law, Professor Tarnopolsky describes the procedures followed by the Minister of Justice in the application of section 3 of the Bill as amended, which provides that he is to report to the House of Commons any inconsistency between proposed laws and regulations and the purposes and provisions of the Bill of Rights.[13] It should, however, be noted that this statutory examination of federal legislation does not seem to include referencial legislation. There is a myriad of ever-changing provincial laws and regulations that have been adopted by the federal Parliament[14] and that are not examined pursuant to section 3 of the Bill.

In *Rose* v. *The Queen*[15] the accused challenged the composition of the jury from which women were excluded by law. His argument was based on section 1 of the Canadian Bill of Rights that includes provisions dealing with the non-discrimination by reason of sex, due process of law and equality before the law.

---

[9] P. 143.

[10] S.C., 1970-71-72, c. 2.

[11] (1975), 48 D.L.R. (3d) 427.

[12] *Ibid.*, at p. 435.

[13] P. 125 *et seq.*

[14] See, for example, the Motor Vehicle Transport Act, S.C., 1953-54, c. 59 discussed in *Coughlin* v. *Ontario Highway Transport Board*, [1968] S.C.R. 569 and *The Queen* v. *Smith*, [1972] S.C.R. 359.

[15] (1972), 19 C.R.N.S. 66, commented on in (1972), 32 R. du B. 303.

Section 534 (now section 554) of the Criminal Code[16] adopts provincial legislation as concerns the qualifications for jurors who serve on criminal juries. The Quebec Jury Act in force at the time provided only for male jurors. Insofar as the federal Parliament has adopted provincial law, that law is obviously subject to the Canadian Bill of Rights in its federal aspect. Consequently, Rose pleaded that federal law applicable to a criminal trial jury was in conflict with the Bill of Rights. The court side-stepped the issue in a judgment that can only be described as paternalistic towards women. However, many other inconsistencies between the Bill and applicable referential legislation no doubt also exist.

The book provides us with a critical analysis of all the important Bill of Rights' cases. In *Robertson and Rosetanni* v. *The Queen*,[17] the first such case, Mr. Justice Ritchie's majority opinion was somewhat unclear as to the ambit of the rights and liberties guaranteed by the Bill as well as the scope of freedom of religion. He subsequently cleared up some of the uncertainty in *Drybones*. Many of the issues left unanswered are canvassed by Professor Tarnopolsky[18] in the light of the subsequent case law, Canadian doctrine as well as American and Australian materials. Another valuable analysis is that of the *Lavell* case[19] which should help us explain that precedent in the context of other cases to other judges.

Each section and clause of the Bill is thoroughly examined. The "right to counsel" (section 2 (c) (ii) and (d)) is illustrative of this procedure.[20] Firstly, the relevant Supreme Court and lower court decisions are analyzed. Some of the limitations of this provision as judicially determined are then discussed. For example, there is no obligation on the part of a police officer to inform the accused of his right to counsel. As well, relevant evidence even if illegally obtained is admissible. Professor Tarnopolsky then deals with the lack of enforcement mechanisms concerning this provision. He explores the possibility of section 115 of the Criminal Code being applied to those who abridge or infringe those rights and freedoms recognized by the Bill. This latter Criminal Code catchall provision makes every one who wilfully contravenes any Act of Parliament liable to two years imprisonment when no other penalty or punishment is expressly provided by law.

---

16 R.S.C., 1970, c. C-34, as am.
17 [1963] S.C.R. 651.
18 Pp. 170-179.
19 Pp. 148-163, 297-304.
20 Pp. 244-255.

He sums up this and other recourses in the following comment:[21]

> However, both criminal and civil remedies are of limited value. There is considerable question over the applicability of s.115 of the *Criminal Code*. Realistically, how likely is a single accused to convince a court, beyond a reasonable doubt in a criminal charge, if he is contradicted by one or several police officers. As far as civil remedies are concerned, what value have they to one too poor to risk hiring his or her own lawyer? Even if the plaintiff should succeed, what damages would be awarded, particularly if the plaintiff's reputation or way of life are not such as to be highly evaluated by a court? Would it cover the lawyer's fees?

Surely if section 115 is applicable to individual actions with regard to the Canadian Bill of Rights, it will create the most vaguely defined offenses possible which would be a negation of the principles underpinning the Bill itself. As Professor Tarnopolsky notes, the illusion of an efficacious civil remedy in these circumstances is often followed by disillusion.

The whole approach to the right to counsel in this section of the book is an example of Professor Tarnopolsky's continuous meshing of the practical and the theoretical. His final remark is directed towards legislative action to tighten up the enforcement of this fundamental right.

The book is extremely rich in comparative materials—the American, Indian and Nigerian Bills of Rights; as well, cases from these and other jurisdictions are reviewed. These materials serve as mirrors in which we can view the weaknesses, the strengths and the scope of our Canadian Bill of Rights. Surely, it is useful (if not necessary) to look at the American Bill of Rights and case law for guidance in the interpretation of our own Bill.[22]

A study of the legislative and judicial processes with regard to our Bill of Rights also serves to illustrate how much more generally conservative are our judges than our legislators or politicians. Pierre Elliot Trudeau as Minister of Justice, giving the government's point of view concerning the right to counsel in the Bill, suggested that if an accused is refused counsel, any evidence obtained under such circumstances should be inadmissible and that no conviction should be founded on such evidence.[23] As noted above, the majority of the Supreme Court of Canada rejected such a rule in the *Hogan* case.[24] Judges often

[21] P. 254.

[22] See, for instance, pp. 228-229.

[23] A Canadian Charter of Human Rights (1968), pp. 21-22.

[24] *Supra*, footnote 11.

take refuge behind the reasoning that Parliament can vary their judicial interpretations knowing full well that if Parliament was to seriously occupy itself with a watch-dog role over judicial decisions it would hardly have time for other matters.

If human rights are given a high priority by our present federal government, why not amend the Canadian Bill of Rights in order to over-come judicial reluctance as to its application first enunciated in minority opinions in the *Drybones* case and clothed in other language in subsequent minority as well as majority opinions. Perhaps too, more attention should be given to the civil liberty opinions of those appointed to the Supreme Court even though such opinions may change with time.

In this classic work, Professor Tarnopolsky has given us a succinct study of the legislative approach as well as the judicial interpretation of our Bill of Rights. Moreover, he has identified potential areas of conflict of the Bill and federal law for which he suggests certain solutions. Written in an easy-to-read style, he has lightened the task for all of us who have to apply, plead or study the Canadian Bill of Rights.

HERBERT MARX*

* Herbert Marx, of the Faculty of Law, University of Montreal.