The Canadian Charter of Rights and Freedoms: Commentary. Edited by WALTER S. TARNOPOLSKY and GÉRALD-A. BEAUDOIN. Toronto: The Carswell Co. Ltd. 1982. Pp. liii, 590. ($60.00)

This provocative *Commentary* on Canada's recently-entrenched rights guarantees, appearing only a few months after the Canadian Charter of Rights and Freedoms itself, contains interpretative articles by six francophone and nine anglophone constitutional scholars on all aspects of the Charter.

Like the *Federalist,*[1] the anthology explores the ramifications of a constitutional document the operation of which could not be foreseen with clarity when the authors wrote. Such an undertaking is always risky, but the result can be enormously stimulating. Hamilton, Madison and Jay, of course, wrote their *Federalist* essays in 1787-88 as propaganda tracts to support the adoption of the United States Constitution in New York where strong opposition had arisen to its ratification. They wrote also, before the United States Bill of Rights was enshrined in the Constitution on December 15th, 1791, although Hamilton discussed the omission at length in *Federalist* No. 84.[2] But despite their immediate practical purpose, their work has endured and remains one of the great classics of political theory, cited often in subsequent works on statecraft,[3] and, whether explicitly acknowledged or not, powerfully influencing subsequent constitutional decisions.[4]

The present *Commentary* likewise appears at a time of constitutional change, and its authors, conscious of the divisive debate on patriation

[1] A good recent edition of the 1787-88 work by Hamilton, Madison and Jay is Jacob E. Cooke (ed.), The Federalist (1961).

[2] *Ibid.*, pp. 575-587.

[3] *Cf. e.g.*, Alexis de Tocqueville, Democracy in America (P. Bradley, ed., 1980), vol. 1, p. 269 where Tocqueville cites Madison's fulminations against tyranny of the majority in Federalist No. 51, a persistent theme in de Tocqueville's own influential political writings.

[4] Such important early constitutional decisions by Chief Justice John Marshall as *Marbury* v. *Madison* (1803), 1 Cranch. 137, and *McCulloch* v. *Maryland* (1819), 4 Wheat 316, drew heavily on Madison's writings in the Federalist (particularly No. 44), see, *e.g.*, Louis H. Pollak, The Constitution and the Supreme Court: A Documentary History (1968), vol. 1, p. 220.

through which the country has passed, are also trying to persuade important elites of the benefits of the new constitutional order. While the Canadian writers would no doubt modestly disavow any comparison of their work with the *Federalist,* it is quite likely also to have an influence in shaping subsequent judicial decisions, particularly until a body of precedent develops on the rights and freedoms set out in the Charter.

In the introductory chapter Professor Peter Hogg makes a lucid and useful comparison between the Charter and the Canadian Bill of Rights, which preceded it, and with which it continues to coexist. An obvious distinction, of course, is that while the former instrument is entrenched, applying both to provincial and federal law, the latter is purely statutory and limited in its incidence to "laws of Canada".

Unlike Diefenbaker's Bill, the author mentions that the Charter, explicitly, in section 1, subjects the enumerated rights and freedoms to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society".[5] Even were such a clause absent, the author contends, the courts would never construe rights as "absolutes" anyway. All entrenched rights mutually modify each other, and judicial interpretation leads to their accommodation with other perceived needs (for instance freedom of expression is qualified to the extent that laws respecting sedition, obscenity and defamation are upheld).

Perhaps in this instance, however, the author is being too optimistic. To place in the very first section of the Charter a proviso that subjects the mentioned rights to undefined limitations by ordinary statute is implicitly almost to invert the concept of "higher law" on which bills of rights are typically based. It could lead to a distorted form of "First Amendment Absolutism" very dismaying to libertarians in the tradition of Black and Douglas.

Professor Hogg certainly perceives the threat, but would tend to minimize it more than I would. Potential for evisceration of rights also resides in the use by Parliament or the respective provincial legislatures of the "override power" in section 33, which should perhaps be viewed in combination with section 1, the former being a legislative and the latter a judicial means of salvaging statutes which *prima facie* might conflict with the rights contained in the Charter. One hopes with Hogg that these expedients will be used rarely.

In a stimulating article on "The Democratic Rights", Professor Gérald-A. Beaudoin foresees some changes as a result of the entrenchment of the right to vote (section 3). (Other "democratic rights" include a maximum duration of five years for legislative bodies (section 4); and the requirement, potentially forestalling executive tyranny, of annual sessions for legislative bodies (section 5).) Beaudoin believes, after some hesita-

[5] Pp. 8-9.

tion, that judges should be allowed to vote. In other countries, judges vote without jeopardizing their independence, for example Judge John Sirica who presided over the "Watergate" hearing related that he had voted for President Nixon in 1972, and even in Canada, some judges previously barred from voting by statute invoked section 3 at the polls and were granted the right to vote in the Saskatchewan provincial election of April, 1982 (only a few days after the Charter was proclaimed by the Queen). "It goes without saying", the author adds, "that judges may not participate in electoral meetings, nor can they belong to any political party. . .".[6] The author would also extend the right to vote to inmates of penal institutions: "At a time when rehabilitation is a stated societal goal, it is our belief that courts will come to recognize prisoners' voting rights and that, eventually, such an exception will be considered contrary to s. 3 of the Charter."[7]

Professor Beaudoin cautions against reading Charter provisions too much in isolation from one another. There is no mandate in section 3 which would require in Canada the "one person, one vote" result arrived at by the American Supreme Court in *Baker* v. *Carr*,[8] but legislative redistricting on a more limited scale might be required by reading section 3 along with the "equality" provisions in section 15(1), both modified by the "reasonable limits" rule in section 1 which might allow somewhat more "tolerance" in marginal constituencies.[9] The work of Professor Beaudoin and the other authors who originally wrote in French has been crisply and readably translated into English in this volume. All the articles are available in either official language.

After a detailed survey of the sometimes tortured judicial interpretation of section 1(b) of the Canadian Bill of Rights which led to the threefold definition of "equality" in section 15(1) of the Charter, Professor Tarnopolsky concludes that the incorporation in the Charter of the clauses (1) "equality before and under the law"; (2) "equal protection of the law", and (3) "equal benefit of the law", "must have been intended to cover all possible interactions between citizens and the law, not just for protection, but for benefit as well".[10]

In *R.* v. *Drybones*,[11] for example, the majority of the Supreme Court of Canada found it a denial of "equality before the law" to impose more severe penalties on Indians than on persons of other race for essentially the same criminal offence. In *Lavell*,[12] however, it was held by the same court that women who lost their status (pursuant to federal statute) for marrying

[6] P. 222.

[7] P. 223.

[8] (1962), 369 U.S. 186.

[9] P. 229.

[10] P. 422.

[11] [1970] S.C.R. 282.

[12] *A.-G. of Can.* v. *Lavell*, [1974] S.C.R. 1349.

whites were *not* deprived of "equality before the law" on the basis of sex, although similarly-situated Indian males suffered no penalty. In the latter case Ritchie J. interpreted "equality before the law" according to the 1885 Diceyan concept that all persons, whether officials or not, were equal in a purely administrative sense before the courts of the realm.[13] Professor Tarnopolsky correctly regards this as a legalistic anachronism, and considers that the mandate in section 15(1) requiring equal treatment "under the law" will preclude the repetition of *Lavell*-like situations. One is not merely equal before the courts of the realm in the application of a particular law, but must be treated "equally under the law" with persons similarly situated, with inherently suspect legal categories such as race or sex being strictly scrutinized. Similarly Stella Bliss, who would have qualified for unemployment insurance were she male, but was found disentitled because of her pregnancy, which shifted her to another classification,[14] would presumably succeed under the Charter because she would now enjoy "equal benefit of the law" with males.

Professor Tarnopolsky's learned analysis of the provenance of section 15(1) indicates that the respective Charter guarantees of equality have arisen out of a few Supreme Court cases in which overly-restrictive interpretations have been made of the term "equality before the law" in section 1(b) of the Canadian Bill of Rights. The draftsmen of the Charter have analyzed some specific historical difficulties and have tried to overcome them by more inclusive phraseology. Have they, one wonders, covered all of the problem cases? Might not some conservative bench in future seize on section 1 to qualify extensively some of the anticipated egalitarian rights and benefits? The considerable emphasis on equality, including the special concession made for "affirmative action" programmes in section 15(2), leads one to query whether equality may not outweigh liberty, whenever the two concepts come into conflict under the new fundamental law, as political philosophers such as Hobbes, Locke, Rousseau, Tocqueville and Mill have discussed. Does the Charter reflect more collectivism than classical liberalism?

Unlike the situation in the United States, where there is no entrenched enforcement machinery in the Constitution, the addition of section 24 to the Charter affords persons whose rights are violated an express means of having their rights and freedoms legally protected. In discussing the vital issue of enforcement in the final chapter of the book, Professor Dale Gibson argues that section 24 must not be regarded as an exhaustive or exclusive means of implementing "rights". In addition, the "supremacy clause" in section 52(1) might be seen as a "separate and more 'general' enforcement provision",[15] much like the United States supremacy

[13] P. 421.

[14] *Bliss* v. *A.-G. Can.*, [1980] 2 S.C.R. 183.

[15] P. 526.

clause.[16] Section 52(1), for example, might form the basis for enforcing "existing aboriginal and treaty rights" in section 35, which are outside the purview of the Charter rights. Perhaps the worst thing that might happen to section 35 rights would be for courts to infer an intent, because they were outside the scope of the express remedial provision, that although they are ideal norms they are of a non-enforceable character, and that no implementing machinery is envisaged. They might essentially be reduced to admonitions to legislative draftsmen, or canons of interpretation to resolve ambiguities.

The inclusion of a specific remedial provision limited to some but not all of the rights mentioned in the Constitution can be mischievous in that it virtually invites the judiciary to classify rights into first- and second-class categories. Perhaps the supremacy clause in section 52(1), without section 24(1), would have constituted a more inclusive and effective guarantee of rights, since it would not have implied such a dichotomy. Gibson views section 24(1), as, reasonably, "establishing a new and non-discretionary *right* to standing to members of the public who contend that their rights and freedoms under the Charter have been interfered with".[17] In contrast to the discretionary remedy available in *Thorson*,[18] *McNeil*[19] and *Borowski*,[20] section 24(1) would confer an unqualified right of standing whenever a person considered his rights to have been violated. This could create a formidable problem of congested dockets if there were no means of judicial control. With section 24(1) being entrenched, also, if Gibson's interpretation is correct it is difficult to see how the remedy could be curtailed by ordinary legislation. Inevitably, the judiciary may have to devise techniques of rather summarily disposing of claims deemed to be relatively weak in order to avoid an unmanageable backlog of cases.

Professor Gibson argues for a generous interpretation of section 24(2) which would not limit the power to exclude evidence which might bring the administration of justice into disrepute merely to (as the text of section 24(2) says) "proceedings under subsection (1)"—or allegations of infringement of Charter rights. "Everyone who discussed the question before the Special Joint Committee, whether pro or con", he adds, "seemed to have criminal prosecutions in mind".[21] If this is so, section 24(2) would appear to be incredibly badly drafted. By advocating the adoption by the courts of the "golden rule" of interpretation in relation to section 24(2), the writer impliedly concedes that the literal rule could

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[16] U.S. Constitution, art. VI (2).

[17] P. 496.

[18] *Thorson* v. *A.-G. of Canada* (1974), 43 D.L.R. (3d) 1 (S.C.C.).

[19] *Nova Scotia Bd of Censors* v. *McNeil* (1975), 55 D.L.R. (3d) 632 (S.C.C.).

[20] *Minister of Justice of Canada and Minister of Finance of Canada* v. *Borowski et al.*, [1982] 1 W.W.R. 97 (S.C.C.).

[21] P. 512.

lead to a different and less liberal result. One can list numerous cases, where language was more carefully used, in which the expectations of legislative draftsmen have been defeated. Perhaps in the case of the Charter it will be different. Gibson continues with a helpful and detailed analysis of variables which could "bring the administration of justice into disrepute".

Other contributions in this valuable and timely anthology range over such subjects as interpretative canons and presumptions; application;[22] "Fundamental Freedoms"[23] has detailed and useful articles by Professor Clare Beckton on freedom of expression and Professor Irwin Cotler on the other associated fundamental freedoms. Professor Kenneth M. Lysyk, Q.C. (as he then was) writes with authority and insight on the Charter provisions on aboriginal peoples. Language rights, mobility rights, legal rights or what the Americans call "due process" are all extensively covered in other contributions.

This volume must surely be one of the most indispensable works of legal reference to be published at a time of constitutional renewal, and is bound to have a great impact on the bar, in classrooms and on the various courts. Like navigators on uncharted seas, the writers have sometimes had to be daring, but the result is most worthwhile.

W.H. McConnell*

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The Canada Act 1982 Annotated. By Peter Hogg, Q.C. Toronto: The Carswell Co. Ltd. 1982. Pp. xlii, 155. ($18.50)

In March of 1982 Queen Elizabeth gave Royal Assent to the last in a long line of British statutes and Orders-in-Council which generally form the bottom line of the Canadian Constitution. The Canada Act 1982,[1] and its accompanying statute, the Constitution Act, 1982, were the result of an intensive struggle between the federal government and eight provinces over the content of this legislation. Professor Hogg, in his book, *Canada Act 1982 Annotated,* has added another valuable contribution to his already

[22] Ss 30-32.

[23] S. 2.

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[1] C. 11 (U.K.).

voluminous collection of writings on the Canadian Constitution. This work was remarkably produced and marketed within three months after the Canada Act was proclaimed in Ottawa on April 17th by Queen Elizabeth in her capacity as Queen of Canada.

Except for a brief three page historical introduction, the author starts with the preamble to the Canada Act and provides comments and analysis right through to section 60 of the Constitution Act, 1982. Professor Hogg quite rightly keeps his historical section to a minimum, starting this survey by referring to the May 20th, 1980 Quebec referendum on sovereignty-association. As undoubtedly time was of the essence, he did not bother to cover previous attempts to revise the Canadian Constitution as those events are comprehensively dealt with in other works.[2] The short, succinct summary of events, however, after the May 20th referendum should prove very valuable to law teachers trying to put together the chronology of rapidly moving events which lead to the proclamation of April 17th, 1982.

It is obviously impossible in a short review of this kind to explore in any depth the section by section analysis of this legislation by Professor Hogg. Persons without a deep understanding of the Canadian Constitution should be warned, however, that many of these commentaries assume a very detailed understanding of the constitutional law of Canada prior to 1982. This observation is particularly true of the commentary on the Canada Act 1982 as that statute directly relates to the very technical provisions of the Statute of Westminster[3] and the whole doctrine of repugnancy. Anyone wishing to comprehend Professor Hogg's analysis of the Canada Act should in advance undertake to familiarize themselves with the Statute of Westminster, 1931 and British North America (No. 2) Act, 1949.[4]

The commentary on the Constitution Act 1982 does not require quite the degree of expertise outlined for the Canada Act. However, there are frequent references to important constitutional cases of the past such as *Nova Scotia Board of Censors* v. *McNeil*,[5] without any detail as to the facts or holding in that case. Thus again persons without considerable background in Canadian constitutional law will find much of the analysis difficult to follow. The foregoing however is a warning to readers and not a rebuke to Professor Hogg. This work was intended to be an addendum to his now very widely known book, *Constitutional Law of Canada*.[6] In fact, the publishers have printed a separate student edition which puts *Constitu-*

[2] See, for example, D.V. Smiley, Canada in Question: Federalism in the Eighties (3rd ed., 1980), ch. 3.

[3] 1931, 22 Geo. 5, c. 4.

[4] 1949, 13 Geo. 6, c. 81.

[5] [1976] 2 S.C.R. 265, 55 D.L.R. (3d) 632, 5 N.R. 43, 12 N.S.R. (2d) 85.

[6] (1977)

tional Law of Canada and *Canada Act 1982 Annotated* under the same cover.

One of the interesting points raised by the author in his commentary on section 2 of the Constitutional Act, 1982 is the diversity of terminology used in the Charter of Rights. For example, he points out that the Charter uses the words "everyone", "any person", "any member of the public", "anybody", and at other times refers to "citizens". He raises the very valid question as to whether all of these words include a corporation.

Section 23 which deals with minority language educational rights refers to "Citizens of Canada". Professor Hogg does not comment on the political rationale for the use of the term "Citizens of Canada" in this section rather than more general words such as "everyone", "any member of the public", and so on. It would have seemed appropriate to mention that this was a concession to Quebec so as to assure that immigrant children were still bound by Quebec language legislation which essentially requires that they attend French language schools. In fact the commentary on section 23 generally does not meet the high calibre of discussion achieved elsewhere. More background was needed on existing language legislation, as well as political subtleties which underlie the wording of this important section.

On one matter of very particular importance the reviewer takes issue with Professor Hogg. It should be noted that in section 41 an amendment to the "Composition of the Supreme Court" requires the unanimous consent of the provinces and the federal Parliament. With respect to matters other than the composition of the Supreme Court the general amending formula involving eight governments must be utilized as provided for in section 38(1). Professor Hogg assumes that because the Supreme Court Act[7] is not among the listed statutes in the schedule to the Constitutional Act 1982, it is not entrenched despite specific references to the Supreme Court in sections 41 and 42. He accordingly makes the statement ". . . it probably follows that the Federal parliament can continue to enact statutes relating to the Supreme Court of Canada, acting under s. 101 of the B.N.A. Act".[8] In my view this is an expression of a wish rather than a statement of the existing law. The amending formula was drafted by the provinces and it was most certainly their intent to remove the Supreme Court of Canada from unilateral federal control. It should also be noted in section 52(2) that when defining the "Constitution of Canada", the Act uses the words "includes" which implies that the list in the schedule is not exhaustive and that other statutes can also be entrenched. Professor Hogg does deal with this point but however reaches the conclusion ". . . surely no court would be so bold as to make additions to the thirty instruments in the schedule. It seems only

[7] R.S.C. 1970, c. S-19.

[8] P. 94.

realistic therefore to regard the definition as exhaustive''.[9] The reviewer not only totally disagrees with this statement as it applies to the Supreme Court, but also takes the view that by virtue of the entrenchment of the office of the Queen, the Governor General and the Lieutenant Governor of a province, by section 41(a), a substantial number of other matters are entrenched that are not listed in the schedule to the Constitution Act, 1982.[10]

The above comments, however, are not meant to derogate from my appreciation of this very excellent work produced so quickly and effectively by the author. It contains a wealth of valuable information and insights for any lawyer invoking the provisions of the Constitution Act, 1982. It is strongly recommended for anyone involved in the teaching or the practice of Canadian constitutional law.

RONALD I. CHEFFINS*

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Legal Rights in the Canadian Charter of Rights and Freedoms: A Manual of Issues and Sources. By The Honourable DAVID C. MCDONALD. Toronto: Carswell Co. Ltd. 1982. Pp. xxv, 275. ($25.00)

The problem of the legitimacy of judicial review of a democratic polity, long an obsession of American constitutional scholars,[1] has never seriously stirred the imagination or the energies of Canada's legal community.[2] Justice David C. McDonald's *Legal Rights in the Canadian Charter of Rights and Freedoms,* while hinting at the relevance and richness of the American debate, remains firmly within the Canadian tradition. Rather than attempting the Herculean task of constructing a ''theory of moral

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[9] P. 105.

[10] The reviewer has detailed his argument more fully in an article which will shortly be published in (1982), 4 Supreme Court L. Rev.

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[1] This preoccupation, far from abating, seems to be actually gaining momentum. See, for example, J. Ely, Democracy and Distrust (1980); J. Choper, Judicial Review and the National Political Process (1980); L. Tribe, American Constitutional Law (1978).

[2] There have, of course, been exceptions to this rule: see P. Weiler, In the Last Resort (1974); M. Gold, Equality Before the Law in the Supreme Court of Canada (1980), 18 O.H.L.J. 336.

rights against the state",[3] Justice McDonald undertakes to discuss in general terms the difficulties which may arise in the judicial interpretation of the newly enacted Canadian Charter of Rights and Freedoms.[4] The author focuses upon the "legal rights" sections of the Charter (sections 7 to 14) as well as the limiting clause (section 1) and the enforcement clause (section 24).

This book will no doubt be useful to the Canadian judge or lawyer looking for an introductory work that highlights possible issues arising under the Charter and suggests avenues of further inquiry. Relying on judicial decisions under the Canadian Bill of Rights, the United States Bill of Rights and the various International Conventions and Declarations on Human Rights, Justice McDonald sets out the differing interpretations that may be advanced under the Charter and points to arguments that could be marshalled in favour of these various interpretations. The latter third of the book comprises a series of appendices. These appendices reproduce the Charter, the American and Canadian Bills of Rights, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the European Convention on Human Rights. The final appendix contains a selection of judicial and extra-judicial writings on the interpretation of the American Constitution. While this final body of material would be helpful to a lawyer with little or no previous exposure to American constitutional writing, it omits reference to the leading recent works in the field such as the books by John Hart Ely[5] and Lawrence Tribe.[6]

While this book may serve as a helpful starting point for discussion of the Charter's legal rights, one might have hoped for more. Justice McDonald makes a concerted effort to point to possible issues that may arise under the Charter without suggesting which interpretation is more compelling or persuasive. At times, this leaves the reader with the sense that the material is somewhat undigested. For example, in discussing the Charter requirement that an accused receive a hearing before an "independent and impartial tribunal"[7] the author cites the recent Supreme

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[3] See Dworkin, Taking Rights Seriously (1977), p. 149, who argues that legal theory must be both normative as well as conceptual and that the normative theory "will be embedded in a more general political and moral philosophy which may in turn depend upon philosophical theories about human nature or the objectivity of morality". *Ibid.*, p. viii. Ironically, Justice McDonald opens his book with quotations from Dworkin and John Rawls, but he makes no attempt in his substantive discussion of the Charter to respond to their call for a fusion of constitutional law and moral theory. For some, this may be one of the book's strengths.

[4] The Charter is Part I of the Constitution Act, 1982. The Constitution Act, 1982 was enacted as Schedule B of the Canada Act, 1982, c. 11 (U.K.).

[5] *Op. cit.*, footnote 1.

[6] *Ibid.*

[7] See s. 11(d).

Court decision in *McKay* v. *The Queen*,[8] a case decided under the "fair and public hearing" requirement of the Canadian Bill of Rights.[9] Yet rather than offer an analysis of the case and of its relevance for the Charter, the author simply reproduces long extracts from the three judgments in *McKay* and moves on to discuss another question. This cautious technique is premised on the author's belief that "at this early stage it would be foolhardy to predict what Canadian judges will do, and it would be presumptuous for one of them to appear to be suggesting to others what the correct interpretation should be".[10]

Further, one would have hoped for some analysis relating the American literature reproduced in the appendix to the Charter provisions. This material would appear to be particularly relevant in terms of section 1 of the Charter, which provides that rights are subject to "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". This section apparently invites judges to venture forth into the uncharted and dangerous waters of political and social theory. The judge will only be able to apply section 1 after he or she has constructed some background theory of the nature and requirements of the democratic polity.[11] Justice McDonald suggests a possible avenue of escape from this politicized judicial role. He argues that the courts should first identify other societies that are "free and democratic", those in which "as a matter of common knowledge, freedoms and democratic rights similar to those in section 2 and 5 are enjoyed".[12] The court would then ascertain what limits these other societies impose on the exercise of fundamental freedoms and

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[8] (1981), 114 D.L.R. (3d) 393.

[9] S. 2(f) states that federal laws are to be construed so as not to deprive an accused of a "fair and public hearing by an independent and impartial tribunal". The *McKay* case also raised a problem of the individual's right under s. 1(b) to equality before the law.

[10] P. 5.

[11] This is a highly controversial and difficult task since democracy is a "contested concept". See Gallie, Essentially Contested Concepts (1965), 56 Procs. of Arist. Soc. 167. Professor Ely, *op. cit.*, footnote 1, argues that judges can avoid questions of substantive political values by resorting to a "process-based" theory of democracy. Ronald Dworkin, among others, has argued that even this approach is covertly value-laden. Dworkin suggests that the abstract ideal of democracy cannot answer the question of what rights people have: ". . . [J]udges charged with identifying and protecting the best conception of democracy cannot avoid making . . . decisions about individual substantive rights. Judges may, of course, believe that the utilitarian answer to the question of individual rights is the correct one—that people have no rights. But that is a substantive decision of political morality. And, other judges will disagree. If they do, then the suggestion that they must defend the best conception of democracy will not free them from having to consider what rights people have." The Forum of Principle (1981), 56 N.Y.U.L.Rev. 469, at p. 510. The difficulty, of course, is whether it is possible to construct a theory of fundamental rights that is neither hopelessly vague nor blatantly "political" in nature. See Ely, *op. cit.*, *ibid.*, pp. 43-72 and Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship (1981), 90 Yale L.J. 1063.

[12] P. 18.

interpret the Canadian Charter accordingly. Yet this methodology could only succeed if we knew in advance the limitations on freedom that were consonant with a "free and democratic society". Without such an overarching theory, the attempt to identify a set of free and democratic societies would be circular and futile.

Judicial review under the Charter will be unsettling and uncertain, requiring a synthesis of political and legal theory. This book is helpful in identifying some of the questions and problems that will arise in that enterprise, but the reader will have to look elsewhere for more profound or penetrating insights as to the form that the anwers to those questions might take.

PATRICK MONAHAN*

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Discrimination and the Law in Canada. By WALTER S. TARNOPOLSKY, Q.C. Don Mills, Ontario: Richard De Boo Limited. 1982. Pp. 595. ($65.00)

Professor Tarnopolsky has done it again. Following his classic work on *The Canadian Bill of Rights*[1] he has produced a lucid, comprehensive and thoughtful exposition of the law related to discrimination in Canada. *The Canadian Bill of Rights* has established itself as an invaluable reference work which has been cited frequently in judicial decisions and legal articles. *Discrimination and the Law* is bound to achieve similar success.

The law and practice related to racial discrimination is far from being an academic exercise. It is a significant area of legislative regulation of conduct into which almost any lawyer in the country may be thrust with the entry of the next client into his or her office.

The lawyer may be confronted with questions such as the extent of the employer's obligation to accommodate the religious practices of a Seventh Day Adventist who will not work on Saturdays. Can a Sikh taxi driver lawfully be dismissed for refusing to abandon his turban in favour of the peak cap worn by all other drivers of the company in question? What if it is a safety helmet that the Sikh worker is required to wear as a safety measure? At what point do "jokes" with sexual connotations between supervisor and employee constitute sexual "harassment"? The consequences of a finding of discrimination can be significant whether through settlement negotiated by a Human Rights Commission or through the order of a board of inquiry which has conducted a formal hearing and concluded that unlawful dis-

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[1] (2nd rev. ed., 1975)

crimination has been established. Such orders may be substantial. They may, for example, require reinstatement of an employee or monetary compensation in the thousands of dollars. Many respondents are even more concerned about the adverse publicity which may be generated by a board hearing and adverse decision.

Initially, most lawyers will be ill-equipped to deal with these cases. Few practitioners have studied this area of law at law school and many are familiar with human rights laws only through what they may happen to read in the newspapers. Although a number of excellent articles have been written on the subject (Professor Tarnopolsky's book contains a comprehensive bibliography), until now, there has not been *the* single source to which the practitioner or researcher may turn with confidence for context, analysis and comprehensiveness. *Discrimination and the Law* ably fills this void.

The book is divided into four parts. Part I, which is entitled "Background and Setting", commences with slavery in New France in the seventeenth century. The historical background and detailed discussion of salient cases such as *Union Colliery Co. of British Columbia* v. *Bryden*[2] and *Cunningham and A.G. for B.C.* v. *Tomey Homma and A.G. for Canada*[3] provide fascinating reading. The author goes on to trace the rise and spread of anti-discrimination legislation and then to analyze the constitutional authority of the federal and provincial governments to enact such legislation. Typical of his work, Professor Tarnopolsky concludes his detailed and scholarly examination with a straightforward, practical statement of his conclusion:[4]

> Therefore, human rights legislation in Canada, which prohibits discrimination with respect to employment, residential and commercial accommodation, goods, services, facilities and public accommodation, and publication or broadcasting with respect thereto, is essentially within the legislative jurisdiction of the provinces. Where, however, the employment, service, facility, accommodation or publication with respect thereto is integrally bound up with a federal work, undertaking, service or business, it will be within the jurisdiction of Parliament because it is then a "matter" coming within section 91 of the B.N.A. Act.

The last chapter of Part I contains an excellent treatment of the crucial definition of "discrimination", drawing liberally upon the American and British experience. The author deals with the definition in Canada from three perspectives: the necessity of an "evil motive of animus"; the existence of "differential treatment" in the absence of justification; and, discriminatory "consequences or effects", that is, a discriminatory result in the absence of "evil motive" or "differential treatment". The chapter concludes with a discussion of the practices of "contract compliance" and "affirmative action".

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[2] [1899] A.C. 580.

[3] [1903] A.C. 151.

[4] P. 80.

Part II contains a detailed exposition of "The Prohibited Grounds of Discrimination". In respective chapters, the author examines "Race, Colour, National or Ethnic Origin"; "Religion or Creed"; "Age"; and, "Sex". Canadian and all provincial human rights laws contain prohibitions against discrimination on these grounds although the definitions vary in some respects (and Quebec does not have a specific provision with respect to age). The author then discusses "all other grounds", the presence of which varies from jurisdiction to jurisdiction in Canada. These include "marital status", "physical handicap", "political opinion", "social origin", "sexual orientation" and the "basket" prohibition against discrimination "unless reasonable cause exists".

Part III logically proceeds to deal with "The Activities in Which Discrimination is Prohibited". In separate chapters, the following areas are canvassed: "Notices, Signs, Symbols, Advertisements and Messages"; "Goods, Services, Facilities and Accommodation Customarily Available to the General Public"; "Employment"; and, "Rental and Purchase of Real Property".

The author does not hesitate to express his personal views and is openly critical of the Supreme Court of Canada decision in *Gay Alliance Towards Equality* v. *Vancouver Sun*,[5] and the Ontario Court of Appeal decisions in *Bannerman* v. *Ontario Rural Softball Association* and *Cummings* v. *The Ontario Minor Hockey Association*.[6] In the first case, the Supreme Court found no contravention of the British Columbia Human Rights Code in the refusal of the respondent newspaper to publish, in its classified advertising section, the complainant's advertisement to its magazine, *Gay Tide*. In the latter two cases, the Ontario Court of Appeal refused to uphold findings of discrimination by boards of inquiry, where a nine year old girl was not allowed to participate in the playoffs for the sole reason that she was a girl who wanted to play on a boys' softball team and where a ten year old girl, who was selected as the goalie of a hockey all-star team, was refused registration for no other reason than her sex.

The author contrasts these decisions with those of the British Columbia Court of Appeal in *Heerspink* v. *Insurance Corporation of British Columbia*[7] which he refers to as examples of a "fair, large and liberal spirit" of interpretation. Since publication of the book, this case was further appealed to the Supreme Court of Canada, where the decision of the British Columbia Court of Appeal was upheld. In concurring majority reasons, Mr. Justice Lamer commented:[8]

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[5] (1979), 97 D.L.R. (3d) 577.

[6] (1979), 102 D.L.R. (3d) 303.

[7] (1978), 91 D.L.R. (3d) 520, (1979), 108 D.L.R. (3d) 123, and [1981] 4 W.W.R. 103.

[8] Aug. 9th, 1982, not yet reported.

> When the subject matter of a law is said to be the comprehensive statement of the "human rights" of the people living in that jurisdiction, then there is no doubt in my mind that the people of that jurisdiction have through their legislature clearly indicated that they consider the law, and the values it endeavours to buttress and protect, are, save their constitutional laws, more important than all others. Therefore, short of that legislature speaking to the contrary in express and unequivocal language in the Code or in some other enactment, it is intended that the Code supercede all other laws when conflict arises.
>
> As a result, the legal proposition *generalia specialibus non derogant* cannot be applied to such a code. Indeed the Human Rights Code, when in conflict with "particular and specific legislation", is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.

No doubt, Professor Tarnopolsky (and many other legal scholars) would approve.

Indeed, we may be witnessing the dawn of a whole new era of sensitivity to human rights issues by our Supreme Court. Since publication of *Discrimination and the Law,* the court has also rendered its decision in *Ontario Human Rights Commission et al.* v. *Borough of Etobicoke*.[9] There, Mr. Justice McIntyre, delivering the judgment of a seven member court, dismissed the contention that an employee had "contracted out" of his protection under the Ontario Human Rights Code[10] through the provisions of a collective bargaining agreement:

> Although the Code contains no explicit restriction on such contracting out, it is nevertheless a public statute and it constitutes public policy in Ontario as appears from a reading of the Statute itself and as declared in the preamble. It is clear from the authorities, both in Canada and in England, that parties are not competent to contract themselves out of the provisions of such enactments and that contracts having such effect are void, as contrary to public policy.

The court allowed the appeal and reinstated the order of the board of inquiry which held that the compulsory retirement of the complainant fire-fighters at age sixty amounted to a contravention of the Ontario Code. These two recent cases provide a welcome contrast to the court's earlier decisions in the *Gay Alliance* case,[11] *Bhadauria* v. *The Board of Governors of the Seneca College of Applied Arts and Technology*[12] and *Bell* v. *Ontario Human Rights Commission,*[13] all of which have been the subject of considerable scholarly criticism.

Part IV of *Discrimination and the Law* is the shortest of the four. However, it is likely to be of greatest value to the practitioner who needs a quick introduction to this area of administrative law. In Chapter 14, the author briefly describes the nature of a human rights commission, its staff, mandate and accountability. Chapter 15 deals with the administration and enforcement of human rights legislation, by tracing each of the stages: (1)

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[9] Feb. 9th, 1982, not yet reported.

[10] R.S.O. 1980, c. 340.

[11] *Supra,* footnote 5.

[12] (1981), 124 D.L.R. (3d) 193.

[13] [1971] S.C.R. 756.

The complaint of discrimination; (2) The investigation of the complaint and attempts at conciliation and settlement; (3) The appointment of an independent board of inquiry to conduct a formal hearing into the complaint (if such attempts are unsuccessful); (4) The order of such a board by way of remedy (if unlawful discrimination is found).

With respect to "hearings", the book provides an invaluable reference for almost every practical procedural question which is likely to arise: the application of the rules of evidence and the rules of natural justice; adjournments; production and discovery of documents; the effect of a prior labour arbitration; burden of proof and others. This section also contains a valuable survey of the "remedies" which boards of inquiry have ordered in the past following a finding that the legislation in question has been contravened.

In sum, it is difficult to offer any negative comment with respect to this important work. The only significant shortcoming is the absence from the book of decisions rendered subsequent to its printing but prior to publication. In addition to the *Heerspink* and *Borough of Etobicoke* decisions of the Supreme Court of Canada,[14] for example, there is the recent decision of the Ontario Divisional Court in *Re Ontario Human Rights Commission and Teresa O'Malley (Vincent) and Simpson-Sears Limited*,[15] dealing with the definition of discrimination and onus of proof. In *Re Alberta Human Rights Commission and Alberta Blue Cross Plan*,[16] Smith J., of the Alberta Court of Queen's Bench, held that the privilege of confidentiality operated to render documents immune from production at a human rights hearing. An opposite conclusion was reached by the Ontario board of inquiry in the *Complaint of Bezeau Against the Ontario Institute for Studies in Education*.[17]

However, these omissions can hardly be described as criticisms of the book. Nor do they detract from its importance as a reference. Rather, they stress the vitality of this area of the law and the very need for such a thorough and comprehensive treatise. Researchers relying upon *Discrimination and the Law* may easily check for more recent decisions through a reporting service such as the *Canadian Human Rights Reporter*.

Professor Tarnopolsky is to be congratulated upon this significant achievement. Indeed, there is no individual who has made a greater scholarly contribution to the fields of human rights and civil liberties in Canada over the past two decades. He has also contributed in many practical ways: as chairman of numerous, seminal boards of inquiry in

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[14] *Supra*, footnotes 7 and 9.

[15] (1982), 36 O.R. (2d) 59, recently upheld by the Court of Appeal on Aug. 12th, 1982, not yet reported.

[16] (1982), 128 D.L.R. (3d) 122.

[17] Interim decision rendered April 21st, 1982, not yet reported.

Ontario; as a consultant to provinces establishing human rights legislation; as president of the Canadian Civil Liberties Association during the development of the Canadian Charter of Rights and Freedoms; as a part-time Commissioner of the Canadian Human Rights Commission; as the Canadian member of the Human Rights Committee of the United Nations; as Director of the Human Rights Research and Education Centre of the University of Ottawa, Faculty of Law; and in countless other ways. His knowledge and experience permeate *Discrimination and the Law* without distorting its objectivity.

While awaiting sufficient developments for a second edition, perhaps in three of four years time, Professor Tarnopolsky should consider filling his "idle" time with a similar treatise on the *Canadian Charter of Rights and Freedoms*. While a variety of reporting services and collections of essays and comments are emerging, a comprehensive and integrated work along similar lines to *Discrimination and the Law* would be most welcome.

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