BOOK REVIEW:
THE CONSTITUTIONAL PROCESS IN CANADA, 2ND ED. CHEFFINS AND TUCKER†

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In considering the worth of any book it is only proper to make an assessment from the perspective of the author's intended audience. In the preface of the first edition of his book, Cheffins tells us that it is to be a "general work, geared primarily to the needs of those university undergraduates in arts and law who are studying the constitution".[1] He goes on to say however that he hopes the "members of the general public will find it of value, both in assisting them to better understand Canada, and especially in helping them follow the intricacies of the federal-provincial discussions about our constitutional future".[2] There is nothing in the preface to this second edition of the work to indicate that the authors have strayed from that original purpose. That purpose is achieved in both the first and second editions, and one would hope that the wider constituency — the general public — to whom the book was directed will read it as a first step to becoming an aware Canadian, a Canadian who does better understand how he is governed.

The narrower audience to which it is directed, the constitutional student in arts and law, the lawyer, the civil servant, and the politician ought to place it with those reference books that bear re-reading every so often.

It is, as the author suggests, a "general work"; it is not a textbook, and it can be easily digested in two or three sittings. This is not to say however that it falls into that class of books that proclaim all you need to know in fifty pages, or in the class of the outline that skims the peaks of innumerable valleys. It is not an endless string of encyclopedic facts on the constitution, nor is it a bland description of the constitutional process reduced to a lowest common denominator

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† McGraw-Hill Ryerson (1976) 135 pp.

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1 Cheffins, *The Constitutional Process in Canada*, McGraw-Hill, 1969, p. vii.

2 *Ibid*, foreword, p. vii.

of acceptable ideas. The author does not hesitate to tell us what he thinks and as Fox pointed out in the forward to the first edition "Professor Cheffins' readiness to state his own views on a number of constitutional issues is a refreshing aspect of this book".[3] It should be emphasized however that in expressing his opinions he does not hesitate to inform the general reader that they are hardly universally held.

The subject matter of the book is either not taught in our secondary schools or is not presented in such a way as to make a lasting impression. It has been this reviewer's experience that much of the detail of our constitutional process is unknown to students in constitutional and administrative law courses. This is all the more regrettable in lieu of the fact that most of these courses in Canadian Law Schools start from the supposition that the student is familiar with our constitutional framework. From the point of view of a teacher of constitutional or administrative law, a general book on the constitutional process is necessary to bring the class to a common point of departure, and ought to be required reading. Cheffins and Tucker have provided a book that suits this purpose well. This is especially so in that, as was pointed out earlier, the book is not so lengthy as to make it an unreasonable amount of required reading in the first week of a course in constitutional or administrative law.

The second edition of this book is not without disappointments however, though these are largely errors of omission and, in some minor points, failure to correct erroneous impressions.

There is one particular deficiency that I would have expected to be remedied in this second edition, that is, the authors express faith in the judicial system as a forum for settling constitutional disputes but fail to offer some criticism of the consultative process which as largely replaced it.

The authors are quick to recognize the importance of an independent judiciary and the role of such a judiciary in our constitutional system:

> "It is difficult to envisage constitutionalism, in the sense of some degree of shared power and limitation on power, operating effectively without a recognition of the independence of the judiciary".[4]

They point out that we do have a strong and independent judiciary with a good track record in the determination of constitutional disputes.[5] They then go on to advocate the entrenchment of the court

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3 *Ibid*, foreword, p. vi.

4 Cheffins and Tucker, *The Constitutional Process in Canada*, 2nd, ed., 1976, McGraw-Hill Ryerson, p. 91.

5 *Ibid*, p. 95-96.

and measures to allow it to spend more time on the adjudication of public law matters. Given this, it seems inconsistent that the authors did not, in their second edition, after having time to reflect on the federal-provincial consultative process, offer some criticism of that process as an alternative to the judicial determination of disputes between the federal and provincial governments. That they recognize the occurrence of such a shift is clearly demonstrated in Chapter 6 where they state that:

> "At least for the time being, it appears that the courts are no longer the focal point for the resolution of disputes over the allocation of powers between the federal and provincial levels of government. The struggle between the central and regional governments for power has shifted from the courts to a variety of federal provincial conferences and committees".[6]

In their first edition the authors noted the paucity of scholarly examination of the federal-provincial conferences.[7] In the second edition they note the filling of that void[8] and though a survey of that body of writing is understandably beyond the scope of their book I would have thought some criticism of the ouster of the courts from this area would be in order. One would have thought that, given the authors' apparent predisposition to the judicial process for solving constitutional disputes, they might have asked some searching questions about the ability of the federal-provincial consultative mechanism to handle those disputes in the years which have elapsed since the first edition of their book.

The lawyer knows, of course, that jurisdiction cannot be consented to, and though the federal-provincial conference may as a practical matter solve a problem, it can more aptly be described as a means to avoid a problem. I take it that the authors are referring in part to this problem when they say that:

> "Purists might argue that the decisions reached at federal-provincial Premiers' conferences are not legally binding and that it is therefore improper to consider these meetings as part of the process of authoritative decision making."[9]

The agreement coming out of a federal-provincial conference can never have the same cathartic effect as a judicial decision which applies to the question in issue very different principles and logic. And if, as Cheffins and Tucker suggest, there must be an emergence of some political consensus prior to a wholesale revision of our written constitution[10], it is pertinent for them to ask whether the federal-

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6 *Ibid*, p. 114.

7 *Supra ref.* 1, p. 140.

8 *Supra ref.* 4, p. 114.

9 *Ibid* p. 114.

10 Supra ref. 4, p. 15.

provincial consultative process hastens or delays the formulation of that consensus. The judiciary, it must be remembered, does not forestall the making of a decision in the pursuit of unanimity amongst eleven protagonists.

The authors state that "a central question facing Canada's political leadership is the extent to which the Constitution should be formally altered or rewritten in order to accomodate Quebec's demands".[11] The principle thesis carried into the second edition, and adverted to above, is that as yet no particularly well-argued case has been presented on why Canada needs a new Constitution, or why necessary changes are not possible within the existing framework.[12] In several places in their book the authors identify those calling for a wholesale revamping of the constitution with those civilian lawyers who "prefer the grand legal design in the form of a Constitution with a maximum elucidation of details". Further we are told that:

> "The civilian perhaps reflecting the traditions of his culture is inclined to prefer to start from a theoretical framework and then attempt to resolve problems according to this previously worked out theory. This cultural difference is very much reflected in the different attitudes of French — and English — speaking Canadians toward constitutional change".[13]

Though this idea has been expressed elsewhere one wonders whether we make too much of it. Does not their heritage pale beside their aspirations as the prime motivational force for a new constitutional arrangement? If anything, events in the years between the two editions of this book have tended to prove the thesis that a political consensus must precede any constitutional change and that:

> "If we failed to resolve social and political problems, that has been the fault of men in authority and not due to any flaw in the constitutional mechanism."[14]

One final criticism of this edition is its failure to correct the misleading interpretation of the state of the law surrounding s.96 of the *BNA Act*. In the authors' interpretation of the courts' present view of s.96, as a bar to the delegation of certain provincial responsibilities, they leave the reader the impression that courts have been unwilling to strike down the validity of provincial delegation by use of the s.96 argument.[15] Further they cite the *John East Iron Works*

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11 *Ibid*, p. 14.

12 *Ibid*, p. 15.

13 *Ibid*, p. 5.

14 *Ibid*, p. 101.

15 *Ibid*, p. 73.

case[16] as if it were the last word on the matter.[17] In doing so they completely ignore the *Olympia Bowling Alley* case[18] in which the Supreme Court completely ignored the *John East* case. Though the *Olympia* case was the subject of an exhaustive criticism by the then Professor Laskin[19], nevertheless it is still good law in Canada and has been religiously followed by at least one Provincial Court of Appeal.[20]

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16 *Labour Relations Board of Saskatchewan v. John East Iron Works*, (1948) 1 D.L.R. 771

17 *Supra ref.* 4, p. 73

18 *Toronto v. Olympia Edward Recreation Club Ltd.* (1955) S.C.R. 454.

19 Laskin, *Municipal Tax Assessment and Section 96 of the British North America Act: The Olympia Bowling Alleys Case* (1955) 33 Can. Bar R. 993.

20 *The Minister of Municipal Affairs v. L'Eveque Catholique Romain D'Edmundston.*