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## Marine Policy

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# Reviews

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*Marine Policy*: The International Journal for Economics, Planning and Politics of Ocean Exploitation: Editor Tony Loftas. Little Steading, 58 Queens Road, Thames, Oxon OX9 3NQ, United Kingdom.

For a good many years, the major law reviews in Canada, the United States, United Kingdom and France have devoted a considerable number of their pages to problems of the law of the sea, as this topic has increased in importance and consequent concern among international lawyers. With this development came the appearance of a number of new law journals dealing with the law of the sea such as the *Journal of Maritime Law and Commerce* in 1969, *Ocean Development and International Law* in 1973, the *Journal of Coastal Zone Management* in 1973 to name but three. These and other specialized journals have attempted to deal with the complex multi-disciplinary issues posed by the law of the sea by publishing articles of a character too specialized for general international law reviews or by opening their pages to authors whose primary concerns lie essentially in other disciplines such as economics, maritime transport, hydrography, marine resource management *etc.* These and other journals have been important to scholars, students, government officials and the legal community at large in promoting a better understanding of the development of law of the sea. Now a new journal has joined this already large but distinguished company with the publication of volume 1, no. 1 of *Marine Policy* in January 1977.

As the subtitle of *Marine Policy* indicates, the scope of this journal goes beyond that of international law and takes in questions of economics, planning and the politics of ocean exploitation. This multi-disciplinary approach to the law of the sea might not of itself have justified a new journal. However, the principal originality of this new journal lies in its format and purpose. Rather than serve as simply another forum for lengthy scholarly articles, *Marine Policy* attempts to offer in each issue a number of short and clearly written articles dealing with a variety of questions. The relatively brief format of each article allows not only the publication of articles dealing with a range of issues in each number but also allows for the presentation of a great deal of current information on developments in the field, whether it be

scientific, technical or legal, the holding of recent conferences or the promulgation of new government policies.

The journal is divided into a main part, devoted to several short articles, and then a second part entitled "reports" devoted to such ongoing issues as marine pollution and marine scientific research under discussion at the Law of the Sea Conference and reports on recent studies or government documents of a policy or an economic interest. There is a third section dealing with conferences which includes information on conferences both of a commercial, of a purely scientific character and of an intergovernmental character. The fourth part deals with book reviews while a fifth and final part headed "meetings" is designed to furnish information on current events of interest to readers.

For those concerned that the new format would tend towards journalism rather than scholarship, the composition of the editorial board must be of considerable reassurance. It ranges from admiralty lawyers such as Professor Edgar Gold of the Faculty of Law of Dalhousie University to policy oriented lawyers such as Professor Arvid Pardo and Dr. Mario Ruivo. It includes representatives of international oceanographic institutions such as Dr. Peter Fricke, international civil servants such as Dr. Thomas Mensah of I.M.C.O. and Professor Oscar Schachter and a Judge of the International Court of Justice, Judge Schigeru Oda. The International Editorial Board includes, as is proper, a cross-section of scholars from a number of countries, including economists, political scientists, biologists, zoologists and a member of the United States Senate, Senator Ernest F. Hollings. This distinguished group is completed by the omnipresent Professor Lewis Alexander of the University of Rhode Island and the editor Mr. Tony Loftas, who invites contributions to be sent directly to him, c/o Marine Policy, Mr. T. Loftas, Little Steading, 58 Queens Road, Thames, Oxon OX9 3NQ, U.K

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*Constitutional law of Canada* by Peter W. Hogg. Toronto: Carswells, 1977, pp. V, 548. Price: \$34.50. *Commentary on the British North America Act* by W. H. McConnell. Toronto: Macmillan Co. 1977., pp. viii, 469. Price: \$24.95

For enthusiasts of Canadian constitutional law, the past three years have been exciting times. In November 1976 Quebec elected a Parti Quebecois government which almost immediately announced that it would be working to take Quebec out of the Canadian federation. In addition it enacted a new official languages act to replace one enacted by the preceding Liberal government. Prime Minister Trudeau in 1977 established a Task Force on Canadian Unity to study the issue across Canada and to make recommendations. Prior to the Task Force's report the Prime Minister presented a document entitled *a Time for Action* and introduced legislation to effect the major constitutional reforms discussed in the paper. It is at times like these that general interest in constitutional law revives and many more people want a better understanding of the existing federal system in order to appreciate the inherent problems which are now requiring such a dramatic change.

Fortunately for students of constitutional law two books were published in 1977 which will fill a void previously existing in this area of law. Both Professors Hogg's and McConnell's books will be of tremendous value to the student of law, political science or history who is striving to obtain an understanding of the complexities of the Canadian federal system. Although the structure of each book is significantly different from the other, the wise reader can use them as a complement to one another.

Professor Hogg's book is based upon the notes from his lectures on constitutional law given at Osgoode Hall and is, therefore, primarily designed with the law student in mind. The book is divided into three parts — Basic Concepts, Distribution of Powers, and Civil Liberties — which provide an overview of Canadian constitutional law.

Part I provides a much needed discussion in Canadian law of concepts that are fundamental to an understanding of the British North America Act. In the past teachers and students of constitutional law had to scramble through British constitutional and Canadian political science texts to formulate this groundwork. Part I, however, should be approached as a source for obtaining a general perspective of the subject rather than an in depth

knowledge. Professor Hogg has thoroughly documented references to texts and articles in each area in order to assist the student who wishes to further his knowledge.

A brief discussion of the term "constitution" and its meaning when applied in the Canadian context opens Part I. Professor Hogg makes some attempts to specify which statutes are part of the Canadian constitution but ultimately must leave this to more specific classifications attempted by other authors. From this he proceeds to a general discussion of the *B.N.A. Act*, federalism, and what it means in the Canadian context. The chapter on federalism nicely ties together the development of federalism in Canada and the role played by the courts in this process, terminating with an analysis of the possibilities for secession in such a system. Although the discussion is not lengthy it does provide some insight into the potential constitutional and international implications of Quebec's avowed path to sovereignty or sovereign association.

Chapter 4 on federal provincial financial arrangements provides students with an historical overview of a complex and controversial aspect of Canadian federalism. With the imbalance in the division of power created by the major taxing powers having been allocated to the federal government and the major responsibilities for welfare of the citizens to the provincial governments, a constant series of financial adjustments have been required to enable the financially less secure provinces to maintain services and programmes at an acceptable level. Although Quebec for many years has opted out of these programmes, most of the provinces have voluntarily participated. Professor Hogg completes this chapter with a brief comparison to the fiscal power arrangements under the Australian and American constitutions.

What is the "matter" is a question which students soon learn to ask in attempting to determine whether a particular piece of legislation is in relation to a federal or provincial class of subjects. They must also use the various doctrines evolved by the courts to assist in this classification process. Professor Hogg has done an admirable job in clarifying, simplifying and making sense of the multiplicity of doctrines created by the Privy Council and the Supreme Court. In view of the few decisions actually involving paramountcy it probably was not necessary to include a separate chapter on this subject. This could readily have been included in his discussion of principles of judicial review in the section on interpretation of the *B.N.A. Act*.

From doctrines the book proceeds to a discussion of administration of justice, and from there to a chapter on responsible government, which reads like a political science text. It will, however, be useful to those students who lack previous exposure to Canadian political science and history. Part I is completed with chapters on the Crown, treaties, parliamentary sovereignty, extra territorial competence and delegation. Thus Part I leaves the student with a good framework of the elements of our system — the legislative, executive and judicial functions.

Part II focuses on the constitutional division of power in sections 91 and 92. Each chapter analyzes one of the more controversial classes of subjects with a documentation of the judicial and also the historical evolution where pertinent. Included in most chapters is a brief discussion of the more significant judicial decisions concerning that class of subjects. For example, in the discussion of the Peace, Order and Good Government clause, Professor Hogg outlines the nature of the power, and then proceeds to discuss the various tests evolved by the Privy Council and Supreme Court since 1867 to interpret this power. This takes the reader from the early liberal interpretation given by the Privy Council in *Russell v. The Queen* (1882)<sup>1</sup> (p. 246) to the more restrictive emergency doctrine developed in cases such as *Fort Frances Pulp and Power Co. v. Man. Free Press* (1923)<sup>2</sup> (p. 252) to the most recent interpretation by the Supreme Court in the *Anti-Inflation Reference* (1976)<sup>3</sup> (p. 254). He completes his analysis with an attempt to reconcile the various tests articulated. Whether, in fact, his reconciliation is a satisfactory one remains in doubt, as even Professor Hogg seems to point out in the final paragraph of his discussion (p. 265).

The student must be wary that he does not simply read these discussions and conclude his knowledge of constitutional law is substantial. Without a basic familiarity with the major court decisions in each area the discussion would lose much of its value. The particular significance of the section 91 and 92 discussions is to provide a means of synthesizing and rationalizing the knowledge gleaned from reading the cases. This will greatly assist the student and teacher of constitutional law by providing a supplement to the traditional casebook style of teaching but not a substitute for it.

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1. (1882), 7 App. Cas. 829

2. [1923] A. C. 695

3. [1976] 2 S. C. R. 373

No text on constitutional law would be complete without a chapter on civil liberties as this is a very significant subject in Canada as well as in a number of other countries of the world. Professor Hogg provides a discussion of civil liberties apart from the *Bill of Rights*, including a general discussion of the common law protection of liberties by the application of such doctrines as the rule of law, strict interpretation of criminal law statutes and other statutes restricting traditional "rights", and also a discussion of the "availability of remedies to citizens injured by illegal official action" (p.420). The chapter on the *Canadian Bill of Rights* is very short, but since Canadians are blessed with a comprehensive treatise on the Bill by Walter Tarnopolsky, there is no need to duplicate the discussion but merely to provide an introductory overview. Any student who wishes to further his knowledge may then proceed to the treatise or the innumerable articles written discussing the Bill.

Professor McConnell's book is exactly as the title suggests — a section by section analysis of the *British North America Act* — with an appendix containing a brief discussion of the *Canadian Bill of Rights*. Ostensibly the book was written for the major purpose of assisting students and teachers in political science, comparative federalism, history and law. The serious scholar will, however, find a tremendous wealth of knowledge and information in these commentaries.

With Professor McConnell's background in law, political science and history he is able to combine in his commentary the most significant elements pertaining to the constitution of all three disciplines. Any individual reader professing one particular discipline as his major area of interest will be most pleased to discover that he has learned far more than he had anticipated.

The book is extremely well written, concise and yet encompassing all of the significant events, decisions and themes relating to each specific section of the constitution. The reader will glean a substantial knowledge about the Canadian system of government from his discussions of the provisions concerning the House of Commons, the executive, and the Lieutenant Governor. In particular the portion describing the preamble is most informative as to the general system of government in Canada, Great Britain and the United States, with a comparative analysis of the large and subtle differences that exist among these systems. Professor McConnell has used the preamble as a stepping stone to educating the reader about Canadian parliamentary development, responsible govern-

ment and political parties. Thus, in his twenty-five introductory pages he has managed to give a miniature political science course.

In his portion on sections 91 and 92 Professor McConnell manages to combine an historical analysis — including historical anecdotes, a discussion of the major decisions of the Supreme Court and Privy Council, along with critical commentary. In addition, where appropriate, he interjects a comparison with the American approach, views, doctrines and reforms.

For example, as an introduction to his analysis of the Peace, Order and Good Government power, he discusses the prelude to Confederation in 1867 and the subsequent effect this had on the manner in which legislative power was ultimately distributed. He then proceeds to discuss the procession of Privy Council and Supreme Court decisions which clothed the naked bones of the power, sometimes not in what many federalists believed was the most appropriate dress. Professor McConnell then traces the expansive interpretation of *Russell* (p. 141) to the most recent Supreme Court pronouncements in *Reference re the Anti-Inflation Act* (p. 157). He boldly asserts that Lord Watson and Lord Haldane of the Privy Council deliberately limited the ambit of the federal general power as a “counterweight to federalism” (p. 145) in order to prevent the emasculation of provincial powers and to ensure that federalism, as they perceived it, would be preserved. This is contrary to an often voiced view that the Privy Council simply did not understand the Canadian system — but perhaps they understood Sir John A. Macdonald’s true intentions so well that they wished to prevent them from materializing.

After discussion of the doctrines of interpretation of the POGG power he points out that POGG has always had a parallel normal extension or purely residual role to fill in areas where jurisdiction had not been specifically granted to either level of government. Professor Hogg had described this aspect as the “gap” test where “gaps”, such as whether companies could be incorporated federally, were filled by this power. This is seen by both authors as a means of rationalizing some of the decisions such as *The Radio Reference* (1932)<sup>4</sup> dealing with radio communication, and *Jones v. A. G. Canada* (1974)<sup>5</sup> pertaining to the *Official Languages Act*.<sup>6</sup>

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4. [1932] A. C. 304

5. (1974), 45 D. L. R. (3d) 583

6. R. S. C. 1970, c. O-2



The concluding discussion on the *Canadian Bill of Rights* is brief but very informative. Professor McConnell manages to include the major decisions and interpretation problems experienced by the courts from the time of *R. v. Drybones* (1970)<sup>7</sup> to the present with a number of critical comments interspersed with his analysis of each decision. This will provide an interesting supplement to Tarnopolsky or a quick source of obtaining an insight into some of the more difficult problems surrounding the Bill.

Throughout the book Professor McConnell has woven the thread of his own theories and criticisms of courts and governmental systems. Although the reader need not necessarily agree with these comments they do add spice to the discussion of constitutional law and make events come alive.

In summation, these two books fill a long felt need and have been published at a most opportune time in Canadian constitutional development. Needless to say books of this nature cannot maintain a constantly updated analysis of fast moving events but they do provide a substantial framework from which to comprehend the significance of the new proposed changes in our constitution. Both are very readable and informative, Professor McConnell's providing more depth in many areas for the interdisciplinary studies but Professor Hogg's being ideally suited for the law student.

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7. [1970] S. C. R. 282

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*Biko*. By Donald Woods. New York and London: Paddington Press Ltd., 1978. Pp. 288. Price \$12.95. Distributed by Random House of Canada Ltd.

Einstein proved that light is affected by gravity. It follows from this, that when a star contracts or collapses in upon itself it can shrink to a point of such incredible density that no light can escape from its gravitational field. It then drops below our "event horizon" into a black hole.

The heroes and villains of contemporary South Africa carry out their struggles in a black hole. Donald Woods' book on Biko is a

terribly interesting and important book because it is one of the few rays of light which have managed to escape the operation of the South African security laws to reach our world.

The best thing about Woods' book is that it contains so many excerpts from the written and spoken words of other people that it turns out as a kind of Biko scrap book. Biko is shown through the eyes of a great many friends and enemies. His death in detention comes across as a particularly sad event because he was such a gifted and charismatic individual. In one sense, of course, it would be wrong to say that Biko's exceptional qualities make his death more regrettable than the deaths of the other thirteen people who died in detention last year in South Africa, but the fact that this particular young man could have done so much for his countrymen, black and white, does leave one with a particularly strong sense of futility and waste.

This is the legal framework in which Biko operated: the common law of South Africa has been buried under a great mass of statutes which create and define new crimes related to politics and security. Not content, however, with these comprehensive overlapping new statutes, the state has given itself unlimited power to "ban" its opponents (this is a kind of personal black hole in which one's freedom of association, movement and speech are severely curtailed) and to detain them incommunicado for any length of time. It was during such a ban, in his second period of detention, that Biko, who was for some reason kept naked and in chains for much of the time, met his death.

The new Minister of Justice and Police, Mr. Jimmy Kruger reacted to the news of his death with the phrase "Dit laat my moud" which means "It leaves me cold". Kruger later explained the phrase really means "I am sorry, I am neutral about it". This explanation is, to use an Afrikaans idiom, sommer 'n klamp kak — completely false. The credibility of Kruger's next statement, that Biko had died as a result of a hunger strike, evaporated when the medical testimony at the inquest made it quite clear that brain injuries were the cause of death.

Woods' book contains a partial transcript of the inquest into Biko's death. A remarkably clear picture emerges from the testimony of how Biko met his death.

The Magistrate's finding "that on the available evidence the death cannot be attributed to any act or omission amounting to a criminal offence on the part of any person" was so predictable that

it can hardly be viewed as a disappointment. It was also beside the point, in a sense, because the recorded testimony is the real verdict. Look, for instance at this exchange between the Biko family's lawyer, and a doctor who had examined Biko at the behest of the security police:

[Kentrige is asking Dr. Tucker why he did not object to the police driving Biko (naked) in the back of a landrover from Port Elizabeth to Pretoria when he was clearly ill]

Mr. Kentridge: Let us assume that some holidaymakers from Pretoria had come to see you in Port Elizabeth about their child who had been acting in a bizarre way. The parents suspected that the child did not want to go back to school, but it showed a plantar reflex, was lying on the floor, had red cells in its spinal fluid, froth at the mouth, was hyperventilating and was weak in the left limbs. Would you have permitted his parents to drive 700 miles to Pretoria?

Dr. Tucker: The circumstances were different. I would have insisted that the child should go into hospital immediately. Here there was an uncertainty.

Mr. Kentridge: Shouldn't that have made you more careful rather than less careful? Isn't the only difference that in Biko's case Colonel Goosen insisted that he did not go into a hospital?

Dr. Tucker: I wouldn't say insisted. He was averse to the suggestion.

Mr. Kentridge: Why didn't you stand up for the interests of your patient?

Dr. Tucker: I don't know that in this particular situation one could override the decisions made by a responsible police officer.

Dr. Gordon\*: Why didn't you say that unless Biko went to hospital you would wipe your hands of it?

Dr. Tucker: I did not think at that stage that Mr. Biko's condition would become so serious. There was still the question of a possible shamming.

Mr. Kentridge: Did you think the plantar reflex could be feigned?

Dr. Tucker: No.

Mr. Kentridge: Did you think a man could feign red blood cells in his cerebral spinal fluid?

Dr. Tucker: No.

Mr. Kentridge: In terms of the Hippocratic Oath are not the interests of your patients paramount?

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\*An assessor who sat with the magistrate.

Dr. Tucker: Yes.

Mr. Kentridge: But in this instance they were subordinated to the interests of Security?

Dr. Tucker: Yes. (p. 238)

The author of this book has been bitterly attacked by the pro-government press in South Africa as a mock hero with a taste for melodrama. His critics predict that he will soon sink into homesick obscurity. As far as I can tell Woods performed his job as editor of the East London *Daily Dispatch* with courage and imagination, even if he does show a taste for the dramatic. It is surprising that so many others continue to criticize the government from the standpoint of radical disagreement. Logic would seem to indicate that South Africa's security apparatus must have reduced all the country's newspapers to the level of the Halifax daily press, but a glance at such South African newspapers as the Johannesburg *Rand Daily Mail* is enough to confirm the remarkable fact that it has not. It is ironic that some of our newspapers, although there is freedom of the press in this country, show less willingness to question authority than those in South Africa.

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