

THE LOST CONSTITUTION

by

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In 1985 I started my Ph.D. in Cambridge. My goal was to try to find a neutral interpretation of the distribution of powers provisions in the *Constitution Act, 1867*, so that I could evaluate the numerous judicial decisions that have interpreted those sections.

I had earlier read G. P. Browne's book, *Documents on the Confederation of British North America*, where all of the records of the various constitutional conferences had been collected. These records show that while there were a number of contentious issues to the confederation agreement, like the number of senators to which each province would be entitled, the distribution of legislative powers appears not to have been a contentious issue. In fact, the original proposed distribution had been accepted without any discussion at all, and although there were later minor changes to that initial proposal, even those changes were accepted without discussion.

To me, this suggested that the proposed classes of legislative powers were coming from somewhere, and the parties to the constitutional conferences had some understanding—and therefore acceptance—of how the distribution of legislative power was going to work. The question is, where were these heads of power coming from?

I had gone through the National Archives in Ottawa, and the National Archive at Kew Gardens, and I could find nothing to support my theory. I was reduced to working my thesis based solely on a linguistic analysis of sections 91 and 92 themselves.

My thesis was mostly completed when I left Cambridge after three years. I was moving to Montreal, with my new wife Joanna, and I was going to be studying civil law so that I could understand the class “property and civil rights” a bit more. I had stowed two bags for the trip, and I discovered on landing that they hadn't arrived with me. I had carried wedding presents on board, and had left my thesis on computer disks in stowed baggage, and now it was lost.

It took three months for the bags to arrive in Montreal. It turns out that they had been sitting in Jeddah Airport the whole time. Fortunately, no one had taken my computer disks. In the end, my thesis hadn't been lost but merely misplaced.

During the viva defence of my thesis, my examiners gave their decision away by suggesting I should publish my thesis as a book right away. It was a nice compliment, but I wasn't satisfied. More work needed to be done.

We moved to Toronto in 1992, and I spent some time researching in the Great Library. It was there that I made the most amazing discovery—the origin, and indeed the foundation, of sections 91 and 92.

For people who studied Canadian history, you may remember that in 1840 Upper and Lower Canada were joined together into one province. That meant that they had one Parliament. However, that one Parliament did not make all of its laws apply to the whole province.

Although the primary goal of the *Union Act, 1840* was to assimilate the French, they used their political power wisely. While the English generally voted along party lines, the French would unite across party lines when it came to legislation that was important to them.

As a result, they demanded that certain types of legislation—broadly defined as those that generally affected their property and civil rights—would be drafted in the context of the French legal mentality and they would apply to Lower Canada only. The *Civil Code of Lower Canada*, which was enacted just before confederation and applied only to Lower Canada, is but one example. Of course, if Lower Canada had a particular law, Upper Canada had to have its own version of that law and those were often drafted with an English or common law flavour. However, there were certain laws that both the Lower and Upper Canadians could agree should apply throughout the province. These often involved economic powers, and other matters of common interest such as the criminal law power.

After 20 years, all of these laws were handily organized through *three* consolidations, two that occurred in 1859 and the other in 1861. These books—the Consolidated Laws of Canada, the Consolidated Laws of Upper Canada, and the Consolidated Laws of Lower Canada (together with the *Civil Code of Lower Canada*)—clearly showed that before 1867 there was a *de facto* federalism in the province of Canada. An analysis of those laws shows definitively that that *de facto* federalism formed the basis for the various classes of powers set out in sections 91 and 92.

I had discovered the foundation for one of the most important parts of our Constitution, 125 years after it had been formed. In a sense, it had been lost this whole time, but not because it couldn't be found. These laws hadn't been hidden in some file folder, or in some archive, or misplaced on the library stacks. Instead, they had been hiding in plain sight, on the library shelves where they were supposed to be. However, because the early courts had treated the *Constitution Act, 1867* as a piece of legislation, which in fact it was from a British perspective, legislative interpretive rules at the time dictated that the courts were not entitled to examine the social or legal situation prior to the enactment of the legislation. Instead, they were restricted to the words of the *Constitution Act, 1867* itself.

That view has, rightly, now changed. In fact, if you look at other jurisdictions, the source or the foundational thinking of the Constitution is considered vitally relevant.

In this case the foundation of the distribution of power—the origins of sections 91 and 92—hadn't been lost. They had, however, been ignored because of a legal mistake.

Examining these laws, I discovered that it was possible to know the foundation for every class of power, either by the law itself or by the various headings that the laws were found under. An analysis of those laws or headings showed clearly what the parties to the constitutional conferences intended when they described various classes of power. Moreover, they showed why it was possible to make each class operate exclusively to other classes, and why they made exclusivity a constitutional imperative. An analysis of the content of these laws showed not only what matters were intended to come within each class, but perhaps more importantly what the reference to “matters” in the *Constitution Act, 1867* was intended to mean.

By following the blueprint set out in these pre-confederation laws, it was possible to provide—for the very first time—a neutral basis for interpreting sections 91 and 92. With this neutral basis, it was possible to see where the courts have veered off track, and why they had done so.

This find was extremely important, but it presented a problem. I could write an article about my find immediately, and that would give me credit for the find. However, the bulk of my time was in practicing law. In order to write about the constitution, I had to work night times, weekends, and holidays. Once it became known that the foundation for sections 91 and 92 had been discovered, I believed that there were others out there who could do that analysis faster than I could. So, I decided to keep the information to myself and incorporate it into a much more detailed book about the distribution of powers.

In order to describe classes and matters differently from the way they have been described by the courts, I had to show that my analysis works—not just in a single case, or in a number of cases, or even in most cases. I had to show that it worked all the time, and that meant I had to examine and include every federalism case that had ever been decided.

At the time when much of that work was undertaken, the internet didn't exist, and neither did databases like QuickLaw or Westlaw. Moreover, there was no constitutional book that even looked at every class of power, much less every case. So, to figure out what the courts had decided, I had to find the cases using traditional methods—the cases judicially considered volume of the Canadian Abridgement. Then, I had to photocopy every case, read every decision, and type out the parts of the reasons that I considered relevant. All of that was bound into a separate book for each class of power, so that I could study and organize all of the information in each book before writing about that particular class or set of matters.

Naturally, I accumulated a great deal of information on my computer, and at one point in time I started to have problems with my hard drive. Whenever I tried to make a back-up copy of the materials, the computer crashed. So, I took it in to get fixed.

When I picked up my computer a week later, I was told that they had re-installed a copy of Windows, and in order to do that they have re-formatted the hard drive. In short, I now had a working hard drive, but all of my work had been lost.

It took me a few months, and a particular programme that I bought, to restore each file. Fortunately, when the repair company re-installed the operating system, it occupied that part of the hard drive that the old operating system had occupied. The work hadn't in fact been lost, but had simply been erased, and I was able to un-erase it.

I finally got the book done, and it was published in the spring of 2016. It was a rather large book of about 1787 pages, and I had heard through various contracts that at least two professors had reserved the book through their libraries for the summer. I understand that they intended to provide a review of it, but no such reviews came. My guess is that when they saw the book, and weighed it against doing something more pleasurable during the summer, they chose the latter.

The book was bought by most large law firms with libraries, and of course all of the public law libraries in the country. But, it wasn't put on the LexisNexis electronic database. As it turns out, this is the only way that young lawyers find law these days.

As a physical book, Library and Archives Canada gave it the catalogue number KF4483.D55B87. Now, I know that most people don't care about catalogue numbers, but it turns out they are very important. They allow researchers to find book. Generally what happens is that a researcher finds a particular book on a subject they are researching, and then they go to the library shelves where that book is found. If they get lucky, the book they were looking for is the only one they need. However, if they are not so lucky, around the book they searched for they see other books written by different authors on the same subject that supplement their search.

In Canada, for some reason, we have two numbers that are relevant to constitutional law—KF4482 and KF4483. KF4482 is supposed to be for “general works” of constitutional law, whereas KF4483 is for special works. D55, apparently, designates the book as dealing with the distribution of powers.

I don't really know what the difference is between general works and special works. I do know that most constitutional books that are published are given the catalogue number KF4482. Thus, there are lots of detailed books on particular constitutional subjects that have that number—*Constitutional Litigation in*

Canada, Constitutional Remedies in Canada, Discrimination and the Law, The Law of Human Rights in Canada, and Canadian Charter of Rights and Freedoms Annotated. Because the bulk of current constitutional publication is situated in KF4482, that is where people look.

In particular, KF4482 contains Peter Hogg's book *Constitutional Law of Canada*. It is the one constitutional book that most lawyers in Canada know, and when they want to search for constitutional books they are likely to put his name into the search engine, and then go to the shelves where that book is located.

My book is a whole catalogue number away, and I've noticed that there are hardly any new books added to KF4483. I suspect that this is for two reasons. First, a thorough discussion of a single topic like the distribution of powers is simply too difficult, unless you have a map like I had created with the foundational legislation I had discovered. Second, at least since 1982 most constitutional books are about the *Charter*, but more particularly about some specific aspect of the *Charter*, which is then treated as a general work.

And so, my poor book has been lost these last seven years. Alone. Ignored. Unread. Mislaid.

I don't believe that it has been totally ignored. Some libraries have placed it in a special location with recent books, and I understand that people have used the book as a resource because, of course, it refers to almost every decision ever made on the distribution of powers. However, with a few limited exceptions, I don't think the book has yet revealed its greatest attribute, which is of course the pre-confederation legislation that formed the foundation of sections 91 and 92.

Hopefully, that information has not been irretrievably lost. There is now a second edition. This edition makes the link between sections 91 and 92 and their pre-confederation foundation even more clear. LexisNexis has also decided to put the book on Quicklaw. Maybe, someone, will discover it again.