COMMENTS
COMMENTAIRES

CONSTITUTIONAL LAW—TAXATION "WITHIN THE PROVINCE"—SUCCESSION DUTIES OF AN "ACCESSIONS" TYPE.—The issue in *Canada Trust Company* v. *A.G. of B.C.*[1] is simple. It is whether a provincial legislature has the power under section 92(2) of the British North America Act, to levy a tax on a resident beneficiary in respect to personal property, situated outside the province, which was acquired on the death of a person who was domiciled outside the province. Although a simple issue, it is also a novel one, because until 1972, the provinces rarely attempted to impose a succession duty with respect to any property outside the province unless the deceased died domiciled in the province.[2]

The deceased, Francis Ely Ellett, died on September 2nd, 1975, domiciled in Alberta. He died leaving a gross estate of approximately $235,000.00, consisting of personalty almost all of which was situated in Alberta. By his will, he bequeathed to his widow all his furniture, furnishings, household effects and automobiles and in regard to the residue, he provided her with a life estate, with the

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[1] [1978] 4 W.W.R. 162 (B.C.S.C.).

[2] New Brunswick did attempt to tax more broadly from 1896 to 1915. The Succession Duty Act, 1896, S.N.B., 1896, c. 42, s. 5 provided that: "All property, whether situate in this Province or elsewhere other than property being in the United Kingdom of Great Britain and Ireland, and subject to duty, whether the deceased person owning or entitled thereto had a fixed place of abode in or without this Province at the time of his death . . . shall be subject to a Succession Duty. . . ." This extremely wide charging provision was restricted by S.N.B., 1897, c. 36, s. 2, which amended s. 5 by providing that it should not apply "to property outside this Province, owned at the time of his death by a person not then having a place of residence within the Province, except so much thereof as may be devised or transferred to a person or persons residing within the province". As this was a tax on property, it could not really be described as an "accessions" type of tax. In any case, it ceased to be levied and was replaced by the more modest taxing provisions of The Succession Duty Act, 1915, S.N.B., 1915, c. 27. The broad taxing provision was referred to in *The King* v. *Lovitt*, [1912] A.C. 212, at pp. 217-218. However, the case was concerned only with property alleged to be within the province belonging to a person domiciled outside the province.

remainder to three residents of British Columbia. The Minister of Finance of British Columbia assessed the remaindermen to tax under section 6A of the Succession Duty Act.[3] The relevant subsection provides:

> 6A.(1) Where property of a deceased was situated outside the Province at the time of the death of the deceased, and the beneficiary of any of the property of the deceased was a resident at the time of the death of the deceased, duty under this Act shall be paid by the beneficiary in respect of that property of which he is the beneficiary.

The Canada Trust Company, as executor, paid the tax on behalf of the remaindermen under protest and sought a declaration that it was entitled to recover the amount paid. A case was stated for trial on the following question: "Whether section 6A of the Succession Duty Act is *ultra vires* of the Legislative Assembly of British Columbia?" The case was heard on October 4th and 5th, 1977, by Mr. Justice Berger who pronounced judgment on April 13th, 1978. He found section 6A to be *ultra vires* of the province to the extent that it purported to tax a resident beneficiary on the receipt of personal property situated outside the province on the death of a domiciliary of another province where the beneficiary became entitled to succeed under the law of that other province. Counsel for the Attorney General made application for a *per saltum* appeal direct to the Supreme Court of Canada.[4] A panel of three judges denied leave to appeal directly, but indicated that the Supreme Court would be prepared to hear the case after it had the benefit of a judgment rendered by the British Columbia Court of Appeal.[5]

It is submitted that the decision of Mr. Justice Berger was an unfortunate and unnecessary decision which unduly restricts the legislative power of the province under section 92(2) of the British North America Act, "Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes". Certain policy considerations influenced the judge in holding that the tax levied in this case was beyond the competence of the province. It is probably no longer debatable that policy considerations always have been, presently are and should continue to be a factor in constitutional interpretation. It is, however, of the utmost importance that the

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[3] Succession Duty Act, R.S.B.C., 1960, c. 372 as am. by S.B.C., 1972, c. 59, s. 14.

[4] This was pursuant to s. 39 of the Supreme Court Act, R.S.C., 1970, c. S-19 as am. by R.S.C. 1970, c. 44 (1st Supp.), s. 2.

[5] The application for leave to appeal *per saltum* was heard on June 19th, 1978 by Martland, Spence and Dickson JJ. and on June 28th was dismissed with costs. I am indebted to counsel (H.L. Henderson for the Attorney General and R.B. Hutchison for the Canada Trust Company) for the information that the judges indicated that they would be prepared to hear the case after the British Columbia Court of Appeal had rendered a decision.

policy considerations should promote the development of a workable constitution which meets the political and economic needs of Canada. It is contended that the taxing power is such an important power that unless the words of the constitution or binding authority clearly indicate that the tax is *ultra vires*, a judge should strive to find the tax to be constitutionally valid.[6] It has been said that taxation provides the sinews of war but it is also true that taxation provides the very sustenance of government. Taxation is to government as air, food and water are to man.

It is important to recognize that the taxation power of the federal parliament is unlimited while that of the provincial legislatures is confined by section 92(2). The provinces and the municipalities have been seriously short of taxing capacity, particularly because of the dominance of the federal government in the field of income tax. Thus, when the judiciary is construing section 92(2), the provincial taxing power, there are good policy reasons for interpreting the power as broadly as the constitution and binding authority permit so as not to exacerbate the revenue problems of the provinces.

One of the critical problems of a federation is to achieve a reasonable balance between governmental functions and the revenue

[6] It is submitted that judicial restraint or an initial presumption of constitutionality is more clearly warranted in regard to a provincial taxing statute than for other kinds of statutes for the reasons subsequently set out in this comment. Perhaps the clearest and most recent affirmation of this presumption of validity is that contained in the majority decision of Mr. Justice Ritchie in *Re Nova Scotia Board of Censors and McNeil* (1978), 84 D.L.R. (3d) 1 (S.C.C.) who, at p. 20, stated: "In all such cases the Court cannot ignore the rule implicit in the proposition stated as early as 1878 by Mr. Justice Strong in *Severn* v. *The Queen*, 2 S.C.R. 70, at p. 103, that any question as to the validity of provincial legislation is to be approached on the assumption that it was validly enacted." It is, I believe, significant that the proposition of Mr. Justice Strong in *Severn* v. *The Queen* was enunciated in a case which involved the constitutionality of a provincial taxing measure—the licensing of manufacturers of beer to raise revenue. The statement of Strong J. which was approved by Ritchie J. was as follows: "It is, I consider, our duty to make every possible presumption in favour of such Legislative Acts, and to endeavour to discover a construction of the British North America Act which will enable us to attribute an impeached Statute to a due exercise of constitutional authority, before taking upon ourselves to declare that, in assuming to pass it, the Provincial Legislature usurped powers which did not legally belong to it. . . ." After concluding that a broad construction should be placed on the words "other licenses" in section 92(9), Strong J. stated what might be regarded as his policy reason for his dissenting decision. At p. 108, he stated:

> "The result of it is, that the people of the Provinces have the power, through their representatives, to tax themselves for Provincial, local or municipal purposes, by means of licenses, to any extent they may choose; which may, perhaps, not be considered to be an extravagant power, when it is remembered that the license tax is the only source of Provincial Revenue other than the Public Lands, the subsidy from the general government, and money raised by direct taxation, which, however ample in this particular Province, and at the present time, may not, in other Provinces, or in this, at some future time, be productive of sufficient income to meet the expenditure required for carrying on the Provincial Government."

sources of each level of government. The political realities of present day Canada are such that we can expect the provinces to make greater use of their existing constitutional powers, and that any constitutional change will undoubtedly be toward an enhancement of the power of the provinces. A decision which restricts the taxing power of the provinces strikes a discordant note.[7]

The force of the policy argument advanced is weakened because the Succession Duty Act of British Columbia has been repealed,[8] as have all the other six provincial succession duty statutes[9] which levied an "accessions" tax on a resident beneficiary even though the deceased was not domiciled in the province and the property was not situated in the province. Only Ontario and Quebec continue to levy a succession duty and these provinces do not presently utilize the "accessions" type of tax which was held to be *ultra vires* in this case. However, in Quebec, on June 21st, 1978, first reading was given to a new Succession Duty Bill containing a charging provision of an "accessions" type very similar to section 6A of the British Columbia Act which was held in this case to be *ultra vires*. It would be exceedingly unfortunate if Quebec's legislative objective were to be frustrated by an unwarranted construction of section 92(2). It would also be regrettable if an "accession" type of succession duty were an option which was unnecessarily foreclosed to the other provinces in the future. An "accession" tax is much more difficult to avoid. A wealthy Canadian, by acquiring a domicile in a tax haven jurisdiction and by arranging that all his property has a situs in the

[7] In these days of taxpayer revolts as exemplified by Proposition 13 in California, it may be argued that, where there is doubt about the constitutionality of a provincial taxing statute, it would accord with the mood of the general public for the doubt to be resolved against an impugned taxing statute. The judiciary should be responsive to democratic forces but not to what may only be a temporary gust of opinion. The Californian phenomenon may have occurred because of an unusual coalescing of conservative opinion opposed to large government spending and liberal opinion opposed to financing local government expenditures through such a regressive tax as the municipal real property tax. Although there may be a legitimate and growing feeling that greater value should be obtained from our taxes, there is little indication that the public would be content with a lower level of government services. In spite of governmental economy measures, increasing amounts of revenue will have to be raised in the future simply to maintain existing public services. Proposition 13 of California may simply indicate the vulnerability of the municipal real property tax. As a regressive tax, it should probably never have carried the burden of expenditures which were not directly related to the enjoyment of land, such as, primary and secondary education.

[8] S.B.C., 1977, c. 20, s. 1 repealed the Succession Duty Act retroactively to January 24th, 1977.

[9] For details see the Provincial Inheritance and Gift Tax Reporter and Bale, Temporal Equity in Taxation (1977), 55 Can. Bar Rev. 1, at pp. 15-16. Subsequent to the writing of that article succession duties have also been repealed in Saskatchewan effective January 1st, 1977, in British Columbia effective January 24th, 1977, and in Manitoba effective October 11th, 1977.

tax haven by incorporating a holding company there, will not avoid a succession duty of an "accessions" type if his beneficiaries are resident in a province levying such a tax. Tax planning can easily and conveniently change the situs of property through a holding company, but it is much more difficult and disruptive if the beneficiary must uproot himself from his home. The provinces, if they wish, should be able to levy a death duty which is much more difficult to avoid than are either the current Ontario or Quebec Succession Duty Acts, unless section 92(2) clearly forbids such a tax.

It is submitted that the argument presented by counsel for the Attorney General should have been accepted by the judge. The argument is simply that section 6A imposes a tax only on beneficiaries who are resident in the province with the measure of their liability being determined by the value of the benefits conferred under the will of the deceased. This is a direct tax within the province even though the deceased died domiciled in Alberta with his personal property situated there. The words of Professor Laskin (as he then was) in a paper delivered in 1960 to the Canadian Tax Foundation seem to be precisely appropriate to section 6A. They are:[10]

> The effective charging provision is against the beneficiary; and, on this view, it should not matter—if a province wishes to take full advantage of its legislative power—whether the decedent died domiciled in the province or outside, so long as his successors, or one of them, are within the province. In either case, the measure of tax is referable to the benefits conferred. The property may therefore be outside the province or inside. It was long ago held in *Bank of Toronto* v. *Lambe* ((1887), 12 App. Cas. 575), that a person found in the province may be taxed there if taxed directly; and I can think of no tax more direct than one imposed on the beneficiary of a deceased's estate.

It has also been held that a province can levy an income tax on a resident of the province even with regard to foreign source income. In *Kerr* v. *Superintendent of Income Tax*,[11] Alberta sought to tax a resident of Alberta in regard to dividend income from a company, incorporated in the state of Washington, which had no office in Alberta and did not carry on any part of its business in Alberta. The taxpayer also cashed most of the dividend cheques outside Alberta and deposited them to his accounts maintained with a bank in Los Angeles, California and in Victoria, British Columbia. It was unanimously held that it was *intra vires* the Alberta legislature to tax such foreign source income as the tax was levied on the Alberta resident. Mr. Justice Rinfret stated:[12]

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[10] Report of Proceedings of the 1960 Conference of the Canadian Tax Foundation 171, at p. 173.

[11] [1942] S.C.R. 435, [1942] 4 D.L.R. 289.

[12] *Ibid.*, at pp. 439 (S.C.R.), 294 (D.L.R.).

> In such a case the person is validly charged because he is a resident within the province; and it must be conceded that the legislature in such a case may use the foreign property together with the local property as the standard by which the person resident within the province is to be charged.
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> The legality of the tax, under those circumstances, results from the fact that the person is found within the province.

Also Mr. Justice Hudson stated: "But if the tax is imposed on a person and that person is resident and domiciled in the province, it must, I think follow that the tax is imposed within the province."[13]

In *Alworth* v. *The Minister of Finance*[14] in a unanimous decision in which the judgment was delivered by Laskin C.J. the important principles contained in *Kerr* v. *Superintendent of Income Tax* were recently reaffirmed. Laskin C.J. stated:[15]

> In short, it was open to a Province to impose a tax on persons in the Province and to measure it by extra-provincial attributes without the tax losing its character as taxation within the Province. . . .
>
> Moreover, a Province is not put to a choice of imposing a direct tax on persons or on property (or income) but may constitutionally tax on both bases.

The cases of *Bank of Toronto* v. *Lambe*,[16] *Kerr* v. *Superintendent of Income Tax*[17] and the *Alworth* case are decisive authorities to support the validity of a tax levied on a resident in regard to property acquired outside the province as either income or a succession. It is direct taxation within the province.

It appears artificial that a different approach should be adopted in regard to the taxation of a resident recipient because in one case, the receipt is classified as income and in another a bequest or inheritance. The Royal Commission on Taxation (Carter Report) recommended that gifts and inheritances should be included within the income tax base of the recipient.[18] If income had been redefined to include gifts and inheritances, it would be difficult to contend that such a tax on a recipient resident in the province is *ultra vires* the province in cases in which the succession consisted of property situated outside the province and the deceased died domiciled outside the province.

There appears to be no reason for succession duty cases to be regarded as a separate and discrete category of tax cases to which the general principles of interpreting the scope of section 92(2) of the British North America Act as developed by other tax cases are

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[13] *Ibid.*, at pp. 449 (S.C.R.), 304 (D.L.R.).

[14] [1978] S.C.R. 447.

[15] *Ibid.*, at p. 451.

[16] (1887), 12 App. Cas. 575 (P.C.).

[17] *Supra*, footnote 11.

[18] Report of the Royal Commission on Taxation (1966), Vol. 3, pp. 465-519.

inapplicable. This was accepted by Mr. Justice Hart in *Cowan* v. *Minister of Finance of Nova Scotia*[19] who was considering whether section 8 of the Nova Scotia Succession Duties Act was constitutionally valid. He stated: "Although the last few cases deal with problems under income tax statutes I am satisfied that the principle is the same as should be applied under the Succession Duty Act."[20] The *Cowan* case is distinguishable on its facts from the case under consideration. In the *Cowan* case the deceased died domiciled in Nova Scotia. However, section 8(2) of the Nova Scotia Act[21] was substantially the same as section 6A(1) of the British Columbia Act. Mr. Justice Berger was incorrect when he stated: "The Nova Scotia legislation does not go so far as the British Columbia legislation."[22] If the fact situation in the case which we are considering were the same except that the remaindermen were resident in Nova Scotia rather than British Columbia, Nova Scotia would have taxed the resident beneficiaries or successors in respect of the Alberta property even though the deceased died domiciled in Alberta. Mr. Justice Hart in upholding the constitutional validity of section 8(2) does not attach any importance to the fact that the deceased died domiciled in Nova Scotia. He stated:[23]

> The Nova Scotia Succession Duties Act under s. 8 makes resident successors to property of deceased persons situated outside the Province liable for payment of succession duties. . . . In my opinion this is clearly direct taxation upon residents of the Province. . . .
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> It is not taxation on property outside the Province but rather on persons within the Province to the extent to which they have been benefited. . . .

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[19] (1977), 78 D.L.R. (3d) 66 (N.S.S.C.). On June 28th, 1978, MacKeigan, C.J.N.S. with whom Cooper J.A. and Glube J. concurred dismissed the appeal from the decision of Mr. Justice Hart and adopted his reasons for holding the statute to be *intra vires*. MacKeigan C.J.N.S. concluded his reasons for judgment by stating: "I add that the legislation does not affect transmissions in Alberta or title to personal property situate in Alberta. It does not seek to tax a beneficiary with respect to personal property passing to him by virtue of a transmission under the law of another province; here the beneficiaries became entitled under Nova Scotia law." In this particular case, the beneficiaries did become entitled under the law of Nova Scotia because the deceased died domiciled there but it is submitted that this is immaterial. It is also true because of the definition of "transmission" that the beneficiary is not being taxed by virtue of a transmission under the law of another province. A transmission requires the deceased to die domiciled in the province and that the beneficiary should also be resident or domiciled in the same province. The Nova Scotia legislation does, however, tax a resident beneficiary in regard to all property situated outside the province which is acquired on the death of a person no matter where that deceased was domiciled or where he resided.

[20] *Ibid.*, at p. 89.

[21] An Act Respecting Succession Duties, S.N.S., 1972, c. 17.

[22] *Supra*, footnote 1, at p. 171.

[23] *Supra*, footnote 19, at p. 89. The portions omitted deal with section 2(5) of the Nova Scotia statute and are not relevant to this case.

One reason why Mr. Justice Berger's judgment is unsatisfactory is that he failed to identify clearly upon whom or what the tax was levied. He initially states that: "The case at bar deals with a tax on succession to personal property situate outside the province."[24] Subsequently, he says that he is concerned with "a tax levied on a beneficiary with respect to personal property outside the province."[25] It is of the utmost importance to determine the object of the tax. Section 6A(1) provides that: "duty under the Act shall be paid by the beneficiary in respect of that property of which he is the beneficiary."[26] The tax is imposed on the beneficiary resident in British Columbia while the tax base is the property situated outside the province of which he has become the beneficiary. Any doubt can be resolved by looking at section 6 of the Act which clearly imposed a duty on all property situated in the province which passed on the death of a person regardless of where he was domiciled. If it had been clearly appreciated that it was a direct tax levied on a person resident in British Columbia, it should not have been material that the liability was measured by the value of property situated outside the province which passed on the death of a person who was not domiciled in the province. In *C.P.R.* v. *Provincial Treasurer of Manitoba*, Freedman J. (as he then was) stated:[27]

> A province may directly tax any person found within its borders. . . . If, however, the tax is not a tax on a person but rather a tax on specific property, or income apart from the person, such property or income must be within the Province. . . . It is apparent, therefore, that the crucial point for determination is whether the tax is a tax on the person, or a tax on income.

Even if Mr. Justice Berger had made this crucial determination, he may not have concluded that section 6A was valid because he seems to believe that the constitutional validity of succession duty cases cannot be determined in the same way as other tax cases.[28] One must sympathize with Mr. Justice Berger in that once one permits oneself to fall into the morass of cases dealing with the constitutionality of succession duties, the tangled confusion that they present makes it very difficult to struggle back to firm ground.

The confusion in this area has probably developed because judges and writers have failed to appreciate that many of the statements made in previous judgments do not purport to define the

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[24] *Supra*, footnote 1, at p. 163.

[25] *Supra*, footnote 1, at p. 165.

[26] *Supra*, footnote 3.

[27] [1953] 4 D.L.R. 233, at pp. 236-237, 10 W.W.R. (N.S.) 1, at pp. 4-5 (Man. Q.B.).

[28] It is surprising, for instance, to find that Mr. Justice Berger regards the residence of the recipient to be a slender reed upon which to tax. It is the chief basis upon which Canadian income tax, both federal and provincial, have been and are levied. See *supra*, footnote 1, at p. 164.

minimum requirement which must be satisfied in order that any Succession Duty Act should be constitutionally valid. This is to be expected because it is generally considered wise for a judge to refrain from passing judgment upon an issue which is not before him. As an "accessions" type of succession duty has only been levied since 1972, it is not surprising that there is no Privy Council or Supreme Court of Canada authority which is directly relevant. There are, however, many cases where rules of construction, used to determine the scope of a taxing provision which fails to define explicitly its own scope, and the actual construction of a particular Succession Duty Act, have both become inextricably mixed with the constitutional requirements of section 92(2).

Mr. Justice Berger has come to the conclusion that an essential element of a provincial succession duty which levies tax, even a tax on a resident recipient, in regard to property situated outside the province, is that the deceased died domiciled in the province. A case upon which he placed great reliance for such a conclusion is *Alleyn* v. *Barthe*.[29] In this case, the Privy Council held that a tax levied by Quebec on the transmission of personal property situated outside the province where the deceased was domiciled within the province was constitutionally valid. Lord Phillimore stated:[30]

> For this purpose 4 Geo. 5, c. 10, is the relevant statute. The conditions there stated upon which taxation attaches to property outside the Province are two: (1.) That the transmission must be within the Province; and (2.) That it must be due to the death of a person domiciled within the Province. The first of these conditions can, in their Lordships' opinion, only be satisfied if the person to whom the property is transmitted is as the universal legatee in this case was either domiciled or ordinarily resident within the Province; for in the connection in which the words are found no other meaning can be attached to the words "within the Province" which modify and limit the word "transmission." So regarded the taxation is clearly within the powers of the Province.

It is valid to argue that this statement is simply a statutory construction of the relevant taxing provision which states "All transmissions within the Province, owing to the death of a person domiciled therein, of movable property locally situated outside the Province at the time of such death, shall be liable to the following taxes . . .".[31] The second condition "That it must be due to the death of a person domiciled within the Province" is a requirement of the taxing provision itself. It is not legitimate to infer that the tax would necessarily have been constitutionally invalid if this requirement had been omitted. When what is taxed is the "transmission", it may be that it is necessary for the deceased to die domiciled in the taxing jurisdiction. However, it appears that there is simply no

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[29] [1922] 1 A.C. 215, 62 D.L.R. 515 (P.C.).

[30] *Ibid.*, at pp. 228 (A.C.), 523 (D.L.R.).

[31] S.Q., 1914, c. 10, s. 1 which added s. 1387b to the R.S.Q., 1909.

justification for inferring that the *Alleyn* case requires that the deceased should die domiciled in the taxing province before a tax can be levied validly on a resident beneficiary with regard to property situated outside the province passing to him on the death.

Provincial Treasurer of Alberta v. *Kerr*[32] was another case upon which the judges relied for the proposition that a constitutionally essential element for a valid provincial succession duty with regard to personal property outside the taxing province is that the deceased died domiciled in the province. This case, it is submitted, is only authority for the proposition that the Succession Duties Act of Alberta was *ultra vires* because it levied a tax on personal property outside Alberta and therefore was not a tax "within the Province," and because it made the personal representative personally liable, it was also *ultra vires* as an indirect tax in regard to both the foreign personalty and the property situated in Alberta. Mr. Justice Berger, however, quotes and relies upon the *obiter* dictum of Lord Thankerton which is as follows:[33]

> In their Lordships' opinion, the principle to be derived from the decisions of this Board is that the Province, on the death of a person domiciled within the Province, is not entitled to impose taxation in respect of personal property locally situate outside the Province, but that it is entitled to impose taxation on persons domiciled or resident within the Province in respect of the transmission to them under the Provincial law of personal property locally situate outside the Province.

This statement is an accurate description of the situations in which the Privy Council has found that a valid tax has been imposed on the person entitled to a "transmission" of personal property situated outside the taxing jurisdiction. However, unless it is assumed that the provinces have fully exploited their power to levy a succession duty in regard to property outside the jurisdiction, it is an unacceptable leap in logic to conclude that the statement means that a tax may not be imposed on a resident beneficiary in respect to property situated outside the province which was acquired on the death of a person domiciled outside the province.

Lord Thankerton's statement should be construed as simply an example of a constitutionally valid tax on a person in receipt of a transmission of foreign property. As the proposition is restricted to foreign personalty the requirement that "the deceased died domiciled in the province" and that "the transmission occurs under the law of the province" are synonymous provided the foreign personalty is movable property.[34] If Lord Thankerton's statement is

[32] [1933] A.C. 710, [1933] 4 D.L.R. 81 (P.C.).

[33] *Supra* footnote 1, at p. 166 quoting from *supra*, footnote 32, at pp. 718 (A.C.), 84 (D.L.R.).

[34] It is also subject to the proviso that the situs of the movable property adheres to the conflict of laws rule that succession to movables is governed by the law of the

regarded as an exhaustive formulation of when a province can levy a succession duty, it would seem that a province lacks the constitutional power to levy any kind of succession duty in respect to real property outside the province. It is submitted that a province can levy a tax on a devisee who is resident or domiciled in the province in regard to land which he has acquired on the death of a person and that it is not necessary that the deceased should have been resident or domiciled in the taxing province.

It appears unlikely that section 92(2) makes the provincial legislatures totally impotent to levy a succession duty in respect to realty outside the province when a resident acquires such realty on death.[35] The province can certainly tax the income from realty outside the province and therefore it would seem strange if it could not tax the devisee who acquired the realty outside the province. The fact that Lord Thankerton's formulation does not mention realty outside the province probably does not flow from constitutional incapacity. It seems likely that the omission is simply a manifestation of the fact that even among nations with unlimited tax power, it was, until recently, the prevailing view that only the jurisdiction of the situs of land should impose a death duty.[36]

In *Provincial Treasurer of Alberta* v. *Kerr*,[37] the death knell was sounded to an argument that had persisted for some time. This was that the maxim *mobilia sequuntur personam* permitted the province to treat personal property situated outside the province as though it were "within the Province" for the purpose of section 92(2). The Privy Council clearly indicated that the maxim is simply a conflict of laws rule which establishes that succession to movable property is governed by the law of the domicile. It seems ironic that Mr. Justice Berger relies on the *Kerr* case which deprived the maxim

domicile and not the law of the nationality. If an Italian national died domiciled in British Columbia leaving personal property situated in Italy to a resident or domiciliary of British Columbia, a literal application of Lord Thankerton's statement would prevent British Columbia from levying a tax on the B.C. resident who benefited from the transmission. This result would occur because the property would pass by virtue of Italian law since the succession to all property is governed by the law of the nationality according to Italian private international law. This it is submitted would be an absurd conclusion to draw about the limits of the taxing power of a province.

[35] Section 6A purported to tax the devisee resident in B.C. in respect to real property outside the province. The Succession Duty Acts of the four Atlantic provinces and of Manitoba and Saskatchewan also levied a similar tax.

[36] Canada was one of the first countries to levy a death tax on foreign realty which belonged to a deceased person who died domiciled within Canada. The Estate Tax Act, S.C., 1958, c. 29 levied such a tax commencing January 1st, 1959. Both the United States (Revenue Act of 1962, Publ L. 87-834, s. 18) and the United Kingdom (Finance Act, 1962, c. 44, s. 28) subjected foreign realty to a death tax for the first time in 1962.

[37] *Supra*, footnote 32.

of constitutional law content and then attempts to resuscitate the maxim into a different constitutional law doctrine. Mr. Justice Berger in regard to the maxim *mobilia sequuntur personam* stated:[38]

> Thus, a principle developed in private international law to determine the law by which devolution should be governed has been used to limit provincial taxing power in relation to succession to personal property situate outside the province to those instances where devolution is governed by the law of the province. A line had to be drawn somewhere for policy reasons, even if its logic was not altogether unassailable. There had to be some practical means of dividing up taxing power as between the provinces.

I believe that Lord Thankerton would be very surprised to find the maxim *mobilia sequuntur personam* being put forward in a fresh reincarnation as a constitutional law principle which limits the provincial taxing power under section 92(2). The earlier manifestation which he slew in the *Kerr* case had been used to attempt to enhance, not limit, the provincial taxing power. It is not a constitutional law principle. It is merely part of the usual succession duty definition of a "transmission" which is personal property situated outside the province that passes on the death of a person domiciled in the province to a person domiciled or resident in the province. There is no more reason to emphasize the domicile of the deceased than the residence or domicile of the beneficiary in the definition of a transmission. It is submitted that there is no reason to say that an essential element of a provincial succession duty statute is that the deceased died domiciled in the province, where the tax is levied on the beneficiary with respect to property, outside the province, which is acquired on death.

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[38] *Supra,* footnote 1, at pp. 167-168. It is unfortunate that the warning against taking the maxim *mobilia sequuntur personam* too seriously made by John D. Falconbridge was ignored by Mr. Justice Berger. In Administration and Succession in the Conflict of Laws (1934), 12 Can. Bar Rev. 66, at p. 67, Falconbridge stated: "The maxim *mobilia ossibus inhaerent* is not so bad, because no one would think of taking the words literally, and obviously the maxim is merely a somewhat quaint mode of referring to some principle or rule of which it is not itself an intelligible statement or expression. When however, the same thing is put in the words *mobilia sequuntur personam,* more harm is done, because the absurdity resulting from a literal translation of the words is not quite so obvious — though on second thought the vision of all Mary's movable goods taking their cue from her little lamb and following her wherever she goes is not much less grotesque than that of their all adhering to her bones." It is interesting, however, that the decision of Mr. Justice Berger obtains some support from the late Professor Falconbridge in the same article. At p. 75, he stated that "assuming the validity of the principle that the legislature cannot do indirectly that which it cannot do directly, a tax upon a person in the province in respect of property situated outside the province is likewise invalid". In a footnote, he expresses a doubt as to whether the principle should be applied to tax cases. At page 78, he discerns a trend which would favour the theory that "a person in the province can be directly taxed in respect of property situated outside the province".

It would seem appropriate to consider briefly the policy consideration which influenced Mr. Justice Berger to conclude that section 6A was *ultra vires*. He states on several occasions that it is necessary to draw a line for policy reasons to provide an orderly division of taxing power as between the provinces.[39] It would be very desirable for there to be an orderly division of taxing power as between the provinces. However, even if Mr. Justice Berger's judgment is correct, it fails to achieve this. Double taxation would still be possible. If a person died domiciled in province A possessed of personal property situated in province B which was bequeathed to a resident of province A, both province A and B could levy a tax. Province A could levy a tax on the person receiving the transmission in respect to the personal property situated in province B and province B could levy a tax on the personal property situated in province B. Both taxes would receive Mr. Justice Berger's approval.

Duff C. J. in *The King* v. *National Trust Company*[40] after enunciating the proposition that for the purpose of section 92(2) all property can have only one situs which is unalterable by the provinces stated that: "it is necessary to distinguish a tax upon property and a tax upon persons domiciled or resident in the province".[41] Duff C. J. did not think that he had provided for an orderly division of taxing power between the provinces in the field of succession duty.

Mr. Justice Berger's policy objective of achieving an orderly division of taxing power has not and cannot be achieved by judicial interpretation of section 92(2). Double taxation can be avoided only through co-operation between the provinces. It is submitted that the judge should have considered the new section 10[42] added to the Act at the same time as section 6A. Section 10 provided that where tax was levied on a resident beneficiary of British Columbia in respect to property situated in a co-operating province, there was to be a deduction in tax equal to the lesser of the succession duty levied by the co-operating province of the situs of the property and the duty otherwise payable under the British Columbia Act on that property. The British Columbia statute itself provided for an orderly division of taxing power. It is submitted that the efforts of Mr. Justice Berger to achieve an orderly division of taxing power were misdirected.

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[39] *Supra*, footnote 1, at pp. 167-168, 170 and 172.

[40] [1933] S.C.R. 670, [1933] 4 D.L.R. 465.

[41] *Ibid.*, at pp. 673 (S.C.R.), 467 (D.L.R.).

[42] S.B.C., 1972, c. 59, s. 15 added s. 10 to the Act. There is a totally misleading marginal note attached to this section which reads "Real property in another Province". The section, however, clearly applies to both real and personal property.

The final aspect of the case upon which some comment should be directed is the rejection of opinion of Professor Laskin (as he then was) that a succession duty levied on a resident beneficiary regardless of the situs of the property and the domicile of the deceased is a direct tax within the province. Mr. Justice Berger seems to infer that this is only the provocative opinion of one former professor. This is not the case.

Perhaps the first person to address this issue was H. E. Manning in 1926.[43] He considered eight alternative examples to illustrate the succession duty taxing power of the province. The seventh one is the situation where the personalty is situated outside the taxing jurisdiction, the deceased died domiciled outside the province but the beneficiary is domiciled within the taxing province. Manning stated that "*Lamb's* case . . . doubtlessly makes it *intra vires* the Legislature to impose a tax upon the beneficiary personally, but the Provinces do not usually see fit to attempt such taxation in express terms . . .".[44] The explanation which he gave for not levying such a tax was that enforcement would be difficult because provincial authorities would not be aware of the fact of death outside the province where there was no property in the province.

Professor W. P. M. Kennedy in 1931 clearly distinguished between a tax on a transmission and a tax on the beneficiary. In regard to the tax on the transmission, he stated that: "In order to bring such taxes within the rubric of taxation within a province, both the deceased and the beneficiary must be domiciled within the taxing province."[45] However, he immediately went on to state that: "It would also appear that the province can tax a beneficiary on the transmission or succession to him of benefits from a decedent domiciled elsewhere. Such a tax would be levied on what has been called the accrual of the benefit."[46] Professor Kennedy does not provide any case authority for the latter proposition. It is, however, submitted that a reading of Kennedy's Chapter V, "Provincial Powers of Taxation" subsection II "Within The Province" indicates that he relied on *Bank of Toronto* v. *Lambe*[47] as authority for the levying of such a tax on the beneficiary. He quoted the Privy Council which in that case stated:[48]

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[43] Succession Duties, [1926] 3 D.L.R. 449.

[44] *Ibid.*, at p. 456.

[45] Kennedy and Wells, The Law of the Taxing Power in Canada (1931), p. 132.

[46] *Ibid.*

[47] *Supra,* footnote 16.

[48] *Op. cit.*, footnote 45, at p. 66 quoting Lord Hobhouse in *Bank of Toronto* v. *Lambe, ibid.*, at p. 584.

> It is urged that the bank is a Toronto corporation, having its domicile there, and having its capital placed there; that the tax is on the capital of the bank; that it must therefore fall on a person or persons, or on property, not within Quebec. The answer to this argument is that class 2 of section 92 does not require that persons to be taxed by Quebec are to be domiciled or even resident in Quebec. Any person found within the province may be legally taxed there if taxed directly.

Professor Kennedy derived from this Privy Council decision the reasoning which clearly supports the provincial power to tax a resident beneficiary in regard to the acquisition of property situated outside the province as a result of the death of a person domiciled outside the province. He stated:[49]

> Accordingly no difficulty arises in determining when persons are liable to a provincial tax. They are liable if they are there, that is, if they are found within the province. And as will be seen, a tax levied directly on the person can be measured by any scale which the legislature chooses. It is quite proper to tax persons within the province, for example, on the basis of their foreign possessions, for it is the persons and not the possessions which are taxed.

In 1937, J. R. Anderson approved the same constitutional law proposition. He stated:[50]

> Where the beneficiary is resident in the province but the decedent was not so resident, and the property is outside the province, the provinces do not as a rule attempt to tax the transmission to the beneficiary. It is doubtless *intra vires* the Legislature to impose a tax upon the beneficiary personally, but the provinces do not usually see fit to attempt such taxation in express terms.

Professor Vincent C. MacDonald in 1941 in an article on "Taxation Powers in Canada" states in regard to provincial succession duty acts that: "A Province may impose a direct tax on persons domiciled or resident in the Province in respect of the transmission to them of property under or by virtue of Provincial law".[51] His footnote to this proposition provides important clarification and states: "Since a tax on transmission is really a tax on the person to whom it takes place the rule that the subject-matter must be within the Province is satisfied if the beneficiary is resident or domiciled within."[52] Thus Professor MacDonald did not believe that it was necessary for the deceased to die domiciled in the taxing province.

Professor Gerald V. LaForest in 1967 wrote in regard to the provincial taxing power that:[53]

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[49] *Op. cit., ibid.*, at p. 66.

[50] Succession Duties — Double Taxation (1937), 15 Can. Bar Rev. 620, at p. 624.

[51] (1941), 19 Can. Bar Rev. 75, at p. 91.

[52] *Ibid.*, at p. 91 in footnote 101.

[53] The Allocation of Taxing Power under the Canadian Constitution (1967), pp. 88-89. Emphasis has been added by the commentator.

> A general estate tax on property wherever situate is impossible, not only because it includes property outside the province, but because it must of necessity be collected from the executor. But a tax on property or a transmission of property in the province for which no personal responsibility lies on the executor, or *a tax on a beneficiary in respect of property received by him*, or the transmission to him within the province of property locally situated outside is valid. In short the provinces may levy death duties on all property passing on death except property locally situated outside the province that passes to a non-resident, but this has to be framed in a form that avoids the twin restrictions to "direct taxation" and "within the province".

La Forest also states that a province may levy a succession duty in respect to "all property inherited by a person domiciled or ordinarily resident in the province even if the deceased was domiciled outside the province"[54] but that careful drafting is required to achieve that result.

In 1967, the Ontario Committee on Taxation (Smith *Report*) considered that the constitutional power of the province to tax was settled. It stated:[55]

> There appears to be no legal reason why Ontario could not tax anyone in Ontario with respect to property he receives from any source and situation, and anyone, no matter where he lives, with respect to property in Ontario. In fact the Province only taxes a beneficiary in Ontario if the deceased person had his domicile in the province, but taxes property in the province wherever the beneficiary may reside. This has been the common practice of taxing jurisdictions.

As a result of the withdrawal by the federal government from the estate and gift tax field at the beginning of 1972, six provinces imposed a new succession duty system with the most notable change being the replacement of the transmission basis with the "accessions" basis, which was challenged in this case. Mr. W. D. Goodman in analyzing this new legislation made the following statement about its constitutionality:

> It can hardly be doubted that the province can validly impose an income tax on a resident of the province, based on his income earned outside the province; it would seem equally clear that there is nothing to prevent a province from taxing a person who is within the province in respect of property situated outside the province that passes to him from a decedent who died domiciled outside the province.[56]

In 1973, The Advisory Committee on Succession Duties (Langford Committee) stated with reference to the tax imposed by the six provinces and then subsequently by British Columbia that: "The opinions which the Committee has received indicate that such

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[54] *Ibid.*, p. 86.

[55] The Ontario Committee on Taxation Report (1967), Vol. 3, p. 148.

[56] Goodman, The New Provincial Succession Duty System: An Examination of the Succession Duty Acts of the Atlantic Provinces, Manitoba and Saskatchewan (1972), p. 12.

a tax, on what is sometimes referred to as an 'accessions basis' is undoubtedly valid constitutionally.''[57] It is thus submitted that the tentative argument put forward by Professor Laskin, first in 1941[58] and then in 1960,[59] is one which has been in circulation since at least 1926 and that this argument rather than being tentatively held by one former professor is the prevailing view of the proper interpretation of section 92(2). It is submitted that Mr. Justice Berger erred by inferring that Professor Laskin was alone in his views and that they ''should not be regarded as altogether considered''.[60] Professor Laskin's views are not heretical but if anything represent the new orthodoxy about the scope of section 92(2) of the British North America Act in regard to an ''accessions'' type of succession duty.

It is, of course, our courts which determine whether a statute is within the power of the enacting legislature and not the prevailing view within the legal profession. In order that the provincial taxing power is not unnecessarily restricted, it is to be hoped that the prevailing view within the profession will soon be given a stamp of approval by both the British Columbia Court of Appeal and the Supreme Court of Canada.[61]

GORDON BALE*

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ADMINISTRATIVE LAW—REFORM OF THE PUBLIC LAW REMEDIES IN ENGLAND.—Commenting on the state of English Administrative Law in 1968, in his seminal work, *Judicial Review of Administrative Action,* the late Professor S. A. de Smith said:[1]

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[57] The Advisory Committee on Succession Duties Report (February 23, 1973), p. 48.

[58] Laskin, Taxation and Situs: Company Shares (1941), 19 Can. Bar Rev. 617, at p. 625.

[59] *Supra,* footnote 10.

[60] *Supra,* footnote 1, at p. 169.

[61] When the issue of the constitutionality of an ''accessions'' type of succession duty has been determined, there will probably remain only one major area of debate concerning succession duty. This issue is whether a province can levy a tax on a ''succession'' of movable property which is situated outside the province which passes to a resident also outside the province upon the death of a person domiciled in the taxing province. This controversy appears to have been initiated by Stuart Thom who contended in (1938), 3 Sask. Bar Rev. 6 that such a tax would be *ultra vires.* Samuel Quigg replied in an article entitled Constitutionality of Succession Duties (1938), 16 Can. Bar Rev. 344 that it was, in his opinion, valid.

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[1] (2nd ed., 1968), p. 4.

> In place of integrated coherence we have an assymetrical hotch-potch, developed pragmatically by legislation and judicial decision in particular contexts, blending fitfully with private law and magisterial law, alternately blurred and jagged in its outlines, still partly secreted in the interstices of medieval forms of action.

Five years later, a flurry of judicial activity had resulted in Professor de Smith amending that judgment and writing that:[2]

> . . . the courts have steadily been evolving coherent principles in several areas of administrative law.

This process has since continued and, though there have been occasional set-backs,[3] important recent cases demonstrate clearly the new found confidence of the judiciary in its ability to control and supervise executive action.[4] English public lawyers may even be prepared to share the optimistic view of Lord Denning M.R. when he said:[5]

> It may truly now be said that we have a developed system of administrative law.

It had long been recognized,[6] however, that the law relating to remedies suffered from grave procedural defects which detracted from their general effectiveness and the removal of which was required if administrative law was to continue to develop. In 1969, the Law Commission proposed a wide-ranging inquiry into all aspects of administrative law including the law of remedies,[7] but this, unfortunately, was never undertaken. Instead, the Law Commission was asked to pursue a far narrower investigation, reviewing the remedies for the judicial control of administrative acts and omissions with a view to evolving a simpler and more effective procedure. In 1971, it published a consultative document[8] proposing a new and exclusive procedure for judicial review, an investigation of remedies in damages, and an examination of statutory ouster clauses and time

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[2] (3rd ed. 1973), p. 4.

[3] See *e.g.*, *R* v. *Secretary of State for the Environment ex p. Ostler*, [1976] 3 W.L.R.288 and *R* v. *Secretary of State for the Home Department ex p. Hosenball*, [1977] 3 All E.R. 452.

[4] See *e.g.* two important recent cases involving the control of discretionary powers: *Laker Airways* v. *Department of Trade*, [1977] 2 All E.R. 182 and *Secretary of State for Education and Science* v. *Tameside Metropolitan Borough Council*, [1976] 3 All E.R. 665. In the latter case, the House of Lords appeared to go a long way towards accepting a "substantial evidence" rule.

[5] In *Breen* v. *Amalgamated Engineering Union*, [1971] 2 Q.B. 175, at p. 189.

[6] Professor de Smith had himself proposed a new and simplified scheme to the Franks Committee in 1958.

[7] Law Commission No. 20 (1969), Cmnd. 4059.

[8] Law Commission Working Paper No. 40, Remedies in Administrative Law, October 1971.

limits. Its final proposals were published in 1976,[9] and were limited to an investigation of the existing law of remedies and the way in which it might be improved.[10]

At the heart of the problems associated with the remedies was the fact that the procedure for obtaining the prerogative orders was special. An applicant had to apply *ex parte* for leave to apply for the prerogative order he desired to the Divisional Court of the Queen's Bench Division. Normal interlocutory facilities were not available[11] and certiorari was generally subject to a six month time limit.[12] The major limitation was that an application for a prerogative order could not be made in conjunction with an application for the private law remedies of declaration, injunction or damages: the procedures were incompatible. The declaration itself, of course, is a very useful remedy and can be obtained in respect of a wide-range of acts of public authorities and is procedurally advantageous to the litigant: he does not need to obtain leave, there is no fixed time limit and the usual interlocutory facilities are available. Its main defect is that it is only available where the action complained of is *ultra vires*[13] and in this respect is more limited than certiorari, which will issue to quash a decision tainted by error of law on the face of the record.[14]

As a result of all this, a litigant could find himself in a dilemma:

> The scope and procedural particularities of one remedy may suit his case except in one respect; but another remedy which is not deficient in this respect may well be unsatisfactory from other points of view; and to add to his difficulties, he may not be able to apply for both remedies in one proceeding.[15]

Accordingly, the Law Commission recommended[16] that there should be a new procedure[17]—the "application for judicial review"—under cover of which a litigant would be able to obtain any of the prerogative orders or, in appropriate circumstances, a declaration or injunction. It further recommended that the *ex parte*

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[9] Law Commission No. 73 (1976), Cmnd. 6407.

[10] The Commission took the view that the wider investigation was after all outside its terms of reference. See Law Commission No. *73*, *ibid.*, paras 5-9.

[11] See *e.g. Barnard* v. *National Dock Labour Board*, [1953] 2 Q.B. 18, for a discussion of the problems associated with this.

[12] See generally *R* v. *Hillingdon London Borough Council ex p. Royco Homes Ltd.*, [1974] Q.B. 720.

[13] This is the result of the decision of the Court of Appeal in *Punton* v. *Ministry of Pensions and National Insurance (No. 2)*, [1964] 1 W.L.R. 226.

[14] The leading case is *R* v. *Northumberland Compensation Appeal Tribunal ex p. Shaw*, [1951] K.B. 711.

[15] Law Commission No. 73, *op. cit.*, footnote 9, para. 31.

[16] *Ibid.*, paras 43-45.

[17] Similar to that introduced in Ontario by The Judicial Review Procedure Act 1971, S.O., 1971, c. 48.

hearing be retained (as the prerogative order procedure is "relatively simple, inexpensive and speedy"[18]), and that on an application for judicial review, the court should be empowered to order such discovery and interim relief as it considers appropriate in the circumstances. With regard to time limits, it was recommended that, except where a time limit is fixed by statute, relief should not be refused solely on the ground that there has been delay in making the application, unless the court considers that the granting of the relief would cause substantial prejudice or hardship to any person or could be detrimental to good administration. The Divisional Court should also be given the power, in circumstances where it is satisfied that there are grounds for quashing a decision, to remit the case to the deciding tribunal or authority for reconsideration.[19] These proposals were generally welcomed[20] and swiftly implemented by the adoption of new Rules of Court[21] which became effective on January 8th, 1978.

By Rules 1 and 2 of the new Order 53, it is provided that while an application for an order of mandamus, prohibition or certiorari *shall* be made by way of an application for judicial review, a declaration or injunction *may* be sought by this procedure. The effect of this latter provision will presumably be that some applicants for a declaration or injunction will not proceed by way of the new arrangements if they wish to avoid the requirement of leave. An applicant will still have to specify the order or orders he requires,[22] but the court may allow the applicant's statement to be amended "whether by specifying different or additional grounds of relief or otherwise, on such terms, if any, it thinks fit".[23]

The issue of standing is one of central importance and here the Law Commission recommended that the *locus standi* necessary to make an application for judicial review should be "such interest as the Court considers sufficient in the matter to which the application relates".[24] This formula is adopted in the new Order[25] and it will be

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[18] Law Commission No. 73, *op. cit.*, footnote 9, para. 36.

[19] While this discretion to remit was not generally possessed by the Divisional Court in its supervisory capacity, specific legislation has occasionally required the court to remit in certain circumstances. See *e.g.* Town and Country Planning Act 1971, c. 78, ss 246-247.

[20] See *e.g.* the comments of H.W.R. Wade in (1976), 92 L.Q. Rev. 334.

[21] Rules of the Supreme Court (Amendment No. 3) 1977, S.I. 1977/1955.

[22] Order 53, Rule 3(2).

[23] See Order 53, Rule 3(4), which allows the amendment to be made on hearing the application for leave, and Rule 6(2), which allows the amendment to take place on the hearing of the motion.

[24] Law Commission No. 73, *op. cit.*, footnote 9, para. 48.

[25] Order 53, Rule 3(5).

interesting to see how it is developed by the courts. While it may generally be assumed that the test of *locus standi* is the same for the prerogative orders,[26] the criteria may be stricter with regard to declaration, because unlike the prerogative orders, the declaration is designed to protect personal legal rights.[27] The Law Commission thought that the formula it suggested would allow for "further development of the requirement of standing by the courts having regard to the relief which is sought".[28] Clearly, insofar as the new Rule can only guide the court in the exercise of its discretion, it is possible that the old distinctions may be perpetuated, although it is hoped that its effect will be to encourage the development of a uniform requirement of standing, which is clearly in keeping with the spirit of the new procedure.

With regard to time limits, the Rules broadly follow the recommendations of the Law Commission, but depart from them in the case of an application for certiorari.[29] Previously an application for certiorari had to be made within six months of the decision which it was sought to impugn, a limitation which was subjected to a large measure of criticism by those commentators who responded to the Law Commission's *Working Paper* of 1970. Accordingly, in its final *Report*, the Law Commission decided that a general limitation rule would inevitably be arbitrary and thought that a more satisfactory way to meet the criticisms would be to give the court more precise guidance as to the circumstances in which its discretion should be exercised on the issue of delay in making the application.[30] The new Rules do not fix a time limit, except in the case of certiorari where it is three months, and even this time limit is subject to the general provision that if the court considers that there has been undue delay in making an application for judicial review, it may refuse leave, if granting such leave "would be likely to cause substantial hardship to or substantially prejudice the rights of any person or would be detrimental to good administration".[31] Insofar then as the time-limit is generally left to the discretion of the court, it is difficult to

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[26] See the comments of Lord Denning M.R. in *R* v. *Liverpool Corporation ex p. Liverpool Taxi Fleet Operators Association*, [1972] 2 Q.B. 299, at p. 308.

[27] See *e.g. Gregory* v. *Camden L.B.C.*, [1966] 1 W.L.R. 899, where an applicant who would have been inconvenienced by the building of a school at the rear of his land was refused a declaration that the grant of planning permission was void (which it undoubtedly was), because he had no legal rights to protect and therefore lacked *locus standi*. *Cf. Lee* v. *Department of Education and Science* (1967), 66 L.G.R. 211.

[28] Law Commission No. 73, *op. cit.*, footnote 9, para. 48.

[29] Order 53, Rule 4(2).

[30] Law Commission No. 73, *op. cit.*, footnote 9, para. 50.

[31] Order 53, Rule 4(1). The marked similarity between this formulation and s.5 of the Ontario Judicial Review Procedure Act is worthy of note.

understand why the Rules Committee ignored the recommendation of the Law Commission and imposed a reduced time-limit on the applicant for certiorari. If the courts decide to apply it strictly, it can be circumvented, in appropriate cases, by seeking instead a declaration: if it is not applied strictly, it would seem to have little purpose. It is submitted that the Rules Committee would have done far better to have not prescribed any special rule for certiorari.

A number of final matters can be dealt with briefly. By Rule 7, on an application for judicial review, the court may award damages to an applicant "if the court is satisfied that if the claim had been made in an action begun by the applicant at the time of making his application, he could have been awarded damages". As can be seen, this is a purely procedural change and does not affect any substantive rule of law relating to the award of damages. The old anomalies with regard to the availability of interlocutory relief on an application for a prerogative order are removed by Rule 8, which provides that the usual interlocutory orders may be made on an application for judicial review, although it is still not possible to obtain an order corresponding to an interim injunction against the Crown.[32] Finally, the new Rules adopt the suggestion of the Law Commission that where the relief sought is an order of certiorari, and the court is satisfied that there are grounds for quashing the challenged decision, the court may, in addition to quashing it, remit the matter to the tribunal concerned with a direction to reconsider it and reach a decision in accordance with the findings of the court.[33] This is a most welcome reform which will obviate the need to start the challenged proceedings again from the beginning.

There is no doubt that in adopting the recommendations of the Law Commission so swiftly, the Rules Committee of the Supreme Court has rendered a conspicious service to administrative law in the United Kingdom. The system of remedies always was broad and far-reaching: freed from its procedural strait-jacket it will become even more effective in controlling governmental action. Much, however, remains to be done. The remedies are only as effective as the substantive law allows them to be. There are limits to what the judges can do in developing principles of review. Perhaps one unfortunate result of the adoption of the new procedure is that it may have made less likely the possibility of the wide-ranging survey of all aspects of administrative law suggested by the Law Commission in 1969.

J. L. LAMBERT*

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[32] This reform was recommended by the Law Commission. See Law Commission No. 73, *op. cit.*, footnote 9, para. 51 and Order 53, Rule 8(3).

[33] Order 53, Rule 9(4).

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EVIDENCE—HEARSAY AND THE HEARSAY RULE: A FUNCTIONAL VIEW*—I offer two propositions about hearsay and the hearsay rule, which will seem heretical to many lawyers and would-be law reformers.[1] First, the rule makes good sense in its place within that body of legal doctrine governing the working of the adversary trial system. Second, without benefit of statutory backing, judges should admit any item of hearsay evidence at a trial when the purposes of the hearsay rule within our litigation system would be served no more than barely under the particular circumstances.

To begin discussion of the first proposition, I give an example of what every lawyer will agree is hearsay evidence barred by the rule. I posit a murder trial. The deceased, a farmer's wife, was killed by a revolver shot. A hired hand on the farm is the accused. His

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* With some minor amendments to the text and with footnotes added, this comment reproduces the author's prepared remarks at the session on hearsay evidence of the workshop on Recent Developments in the Law of Evidence, held at the Faculty of Law, University of British Columbia, on Feb. 28th, 1978.

[1] As an example, in *Myers* v. *D.P.P.*, [1965] A.C. 1001, at p. 1019, Lord Reid expressed the view that "the law regarding hearsay evidence is . . . absurdly technical". Then, after emphatically refusing to countenance any judicial reform, he excluded a particular item of hearsay evidence the admission of which in the particular proceedings would not have harmed any interest worthy of judicial protection. Support for this kind of thinking appeared in the discussion of *Myers* in the English law reviews:

"It was . . . argued [in *Myers*] again unsuccessfully that one's common sense rebels against the rejection of the evidence. Sound though this argument is, common sense is not generally allowed to overrule established principles of law. If the law has got itself into an unsatisfactory state, as it has, it is for the legislator rather than for judicial common sense to rectify it. . . ."

Andrews, The Shackles of Rigidity and Formalism (1964), 27 Mod. L. Rev. 606, at p. 609:

"The rule against the admission of hearsay, like so many of our rules of evidence, is probably too narrow and is capable of working an injustice. . . . But it is, in the main, a clear, simple and well-established rule and, as such, is to be modified only by Parliament and not by the reforming zeal of judges."

Moore, Case and Comment, [1965] Camb. L.J. 14. See also the less than sympathetic analysis of the hearsay rule and its impact in the reports of official law reform agencies in England. Law Reform Committee, Thirteenth Report: Hearsay Evidence in Civil Proceedings (Cmnd. 2964, 1966), paras 7-10; Criminal Law Revision Committee, Eleventh Report: Evidence (General) (Cmnd. 4991, 1972), paras 227-233. *Myers* is discussed at length *infra*.

In Canada, an academic commentator, recognizing little good in the rule, has called for wholesale statutory reform. Murray, The Hearsay Maze: A Glimpse at Some Possible Exits (1972), 50 Can. Bar Rev. 1. For their part, law reform commissions in Canada, while critical, have opted for retention of the rule subject to new statutory exceptions. Comment to section 27 of proposed Evidence Code in Law Reform Commission of Canada, Report on Evidence (1975); Ontario Law Reform Commission, Report on the Law of Evidence (1976), pp. 12-15. As discussed *infra*, the thinking of the Supreme Court of Canada in *Ares* v. *Venner*, [1970] S.C.R. 608, gives some support to the second proposition.

defence is that not he, but the deceased's husband shot her. The only persons present at the shooting, other than the deceased, were the accused and the husband. At the trial the Crown calls as a witness another hired hand, who is prepared to testify that, as the wife lay on the ground shortly after the shooting, she said to him or wrote on a piece of paper which he recovered and will present in evidence, "My husband did not shoot me".[2]

Based on that example, I offer this rather conventional verbal formula describing the offending evidence: evidence offered by a party-litigant—whether a witness's testimony or a writing—setting out an assertion of some relevant matter previously made by a person, which evidence the party-litigant offers to prove the matter. About this formula you will observe this: unlike that offered by some English commentators,[3] it encompasses evidence of the previous statements of the witness himself. That is so because I see no good reason to invent some rule other than the hearsay rule to account for exclusion when the evidence is offered to prove the matter asserted.[4]

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[2] To avoid any thought in the reader's mind that the hearsay exception for dying declarations might apply, I perhaps should have added to this statement the assertion, "I know that I am going to live". In defense I plead that, in the absence of any evidence tending to show the wife's "settled, hopeless expectation of impending death" when she spoke the words in the example, the exception could not apply. *E.g.*, *R.* v. *Buck*, [1941] 1 D.L.R. 302 (Ont. C.A.); R. Cross, Evidence (4th ed., 1974), pp. 473-474 (hereinafter cited as Cross).

[3] Maugham, Observations on the Law of Evidence with Special Reference to Documentary Evidence (1939), 17 Can. Bar Rev. 469, at p. 473; R. Baker, The Hearsay Rule (1950), p. 1; Phipson on Evidence (10th ed., by M. Argyle 1963), s. 631, repeating language by the original author in S. Phipson, The Law of Evidence (6th ed., 1921), p. 218; R. Cross, Evidence (3rd ed., 1967), pp. 4, 380. On occasion Canadian courts have *obiter* dictum offered definitions with a like limitation. *National Fire Ins. Co.* v. *Rogers*, [1924] 2 D.L.R. 403 (Sask. C.A.) (quoting the 6th edition of Phipson's book); *Dalrymple* v. *Sun Life Assur. Co.* (1966), 56 D.L.R. (2d) 385 (Ont. C.A.), aff'd without reference to the point (1967), 60 D.L.R. (2d) 192n (S.C.C.); *R.* v. *O'Brien*, [1978] 1 S.C.R. 591. The formula set out in the two latest editions of Phipson's book is substantially identical to that offered here. *E.g.*, Phipson on Evidence (12th ed., by J. Buzzard, R. May & M. Howard, 1976), s. 625, p. 263.

[4] *E.g.*, *R.* v. *Campbell* (1977), 38 C.C.C. (2d) 6, at p. 18 (Ont. C.A.); Law Reform Committee, *op. cit.*, footnote 1, para. 5 (previous consistent statements); Cross, pp. 6-7, 401 (all previous statements). Apparently limiting the discussion to the witness's own testimony about his previous statement, Professor Cross puts forward a separate rule "sometimes spoken of as the 'rule against narrative' or the 'rule against self-corroboration' ". Cross, p. 401. To justify the separate rule, his explanation has been that "the evidence . . . would be superfluous and it certainly seems to be etymologically incorrect to speak of it as hearsay". Cross, The Scope of the Rule Against Hearsay (1956), 72 L.Q. Rev. 91, at p. 101. Giving the "rule against narrative" a broader sweep than Professor Cross, another English commentator nevertheless distinguishes it from the hearsay rule by limiting its impact to evidence offered to support the witness's credibility. Scott, Admissibility of Statements in Criminal Evidence (1976), 140 J.P. 301, at p. 301. American

You will also note that the formula is similar to the exclusive definition of hearsay adopted by the Law Reform Commission of Canada in section 27(2) of its proposed Evidence Code.[5]

What good reasons are there for the solid rule of the legal doctrine governing the working of the adversary trial system which says, evidence falling within that formula shall not be admitted? We know the conventional wisdom offered by many commentators: hearsay evidence, untested as it is at the trial, may mislead the trier of fact.[6] And, because of what judges have said for a long time to explain the rule, we know what "untested" means in this context: the person who made the assertion at the earlier time, whose words the witness narrates or the writing sets out— we will call him "the declarant"—was not subject to cross-examination when he spoke or wrote and probably, depending on the circumstances, was not under oath.[7] But the conventional wisdom is historically wrong and functionally inadequate,[8] while the explanation of "untested",

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commentators are clear that, when any evidence of a witness's previous statement is barred as proof of the matter asserted, the hearsay rule is the culprit. J. Wigmore, Evidence in Trials at Common Law, vol. 3A (Chadbourn rev., 1970), s. 1018, pp. 996-998 (hereinafter cited as Wigmore); McCormick's Handbook of the Law of Evidence (2nd ed., by E. Cleary *et al.* 1972), s. 251, at p. 601 (hereinafter cited as McCormick).

[5] "27 (2) In this Code (a) 'hearsay' means a statement, other than one made by a person while testifying at a proceeding, that is offered in evidence to prove the truth of the statement; and (b) 'statement' means an oral or written assertion or non-verbal conduct of a person intended by him as an assertion."

[6] *E.g.*, Nokes, The English Jury and the Law of Evidence (1956), 31 Tulane L. Rev. 153, at p. 170; Davis, Hearsay in Nonjury Cases (1970), 83 Harv. L. Rev. 1362, at p. 1366; J. Sopinka and S. Lederman, The Law of Evidence in Civil Cases (1974), p. 40; see R. Baker, *op. cit.*, footnote 3, pp. 17, 24.

[7] *Not subject to cross-examination*: *E.g.*, *R.* v. *Paine* (1696), 87 E.R. 584 (K.B.); *R.* v. *Eriswell (Inhabitants)* (1790), 100 E.R. 815 (K.B.); *The Berkeley Peerage* (1811), 171 E.R. 128 (H.L.) (Bayley, Lawrence, Heath JJ., Macdonald C.B. & Wood B.); *Wright* v. *Tatham* (1837), 112 E.R. 488 (Ex. Ch.) (Coltman & Bosanquet JJ.); *Sturla* v. *Freccia* (1880), 5 App. Cas. 623 (Lords Hatherley & Blackburn); *Dysart Peerage Case* (1881), 6 App. Cas. 489 (Lord Blackburn). *Not under oath*: *E.g.*, *The Berkeley Peerage*, *ibid.* (Lawrence J.); *Wright* v. *Tatham* (1838), 7 E.R. 559 (H.L.). Canadian judges have almost always coupled absence of oath and absence of opportunity to cross-examine. *Ferrie* v. *Jones* (1850), 8 U.C.Q.B. 192 (Burns J.); *Neary* v. *Fowler* (1869), 7 N.S.R. 495 (N.S.S.C. in banco); *Robinson* v. *Tapley* (1880), 20 N.B.R. 361 (N.B.S.C. en banc) (Palmer J.); *Victoria Mutual Fire Ins. Co.* v. *Davidson* (1883), 3 O.R. 378 (Ont. H.C.J.); *Price* v. *Dominion of Canada Gen'l Ins. Co.*, [1938] S.C.R. 234; *Mitchell* v. *Hanan*, [1943] 3 W.W.R. 431 (Sask. C.A.); *Dalrymple* v. *Sun Life Assur. Co.*, *supra*, footnote 3; *R.* v. *O'Brien*, *supra*, footnote 3.

[8] Professor Edmund Morgan has shown that the hearsay rule had long crystalized before judges in the early 19th century began to offer this justification. *E.g.*, E. Morgan, Some Problems of Proof Under the Anglo-American System of Litigation (1956), pp. 106-117. For the earliest judicial statements to this effect, see *The Berkeley Peerage*, *supra*, footnote 7 (Mansfield C.J.); *Wright* v. *Tatham* (1837),

although right, is far from the whole story. And the whole story strongly supports my first proposition.

Think of the demands the adversary trial system puts on a person who comes to testify at a trial about some particular relevant matter.[9]

First of all, one or both counsel will probably interview him at an early moment about what he personally knows relevant to the dispute. And, if counsel are wise, during the interview they will obtain his written signed statement. Then, just before the trial, counsel who plans to call him as a witness will go over the proposed testimony with him, perhaps taking him through a mock examination-in-chief and cross-examination. In the course of this, counsel will use the witness statement and other relevant documents to revive his responsible memory. Counsel will explain to him the necessity of speaking the truth and testifying only about what is relevant and about what he personally knows. Counsel will probably also explain the impact pertinent rules of evidence might have on his testimony.[10]

Of course, a prospective witness can always escape interview and preparation by refusing to talk to counsel until, forced by the power of a subpoena, he enters the witness box. But only a few do that, and indeed many believe that there is a public if not a legal duty to talk to a party's lawyer. I therefore think it not inappropriate to include what I have outlined in my description of the demands our trial system puts on witnesses.

Be that as it may, from the time the trial begins, the demands are beyond doubt.

When called, the witness must testify in a court open to the public,[11] in the presence of the judge and jury (if any), the parties,

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112 E.R. 488 (Ex. Ch.) (Bosanquet J., Parke B. and Tindal C.J.). As for function, the rule clearly applies even if the trier of fact is a judge, presumably well-trained to assess the probative value of any evidence, and not a jury of untrained laymen.

[9] At this point I acknowledge my debt (indeed, the debt of all students of the hearsay rule) to Professor Morgan's illuminating discussion of "hearsay dangers", from which the following analysis takes its inspiration. Morgan, Hearsay Dangers and the Application of the Hearsay Concept (1948), 62 Harv. L. Rev. 177. Another important discussion, little noted in the literature, may be found in Strahorn, A Reconsideration of the Hearsay Rule and Admissions (1937), 85 U. Pa. L. Rev. 484, at pp. 484-486, 500-501.

[10] This paragraph merely synopsizes standard practice of competent counsel which may be found described in the extensive literature on trial practice. *E.g.*, Nizer, The Art of the Jury Trial (1946), 32 Cornell L.Q. 59, at pp. 65-68; R. Keeton, Trial Tactics and Methods (2nd ed., 1973), ss 2.9, 2.14.

[11] *McPherson* v. *McPherson*, [1936] 1 D.L.R. 321 (P.C.) (Canadian appeal); *Snell* v. *Haywood*, [1947] 1 W.W.R. 790 (Alta S.C., App. Div.); *Scott* v. *Scott*,

their counsel and the spectators. Before speaking he must swear an oath or affirm.[12] He must be shown to have perceived or had an opportunity to perceive the relevant matter he will talk about.[13] He must be shown to have had the ability at the time of perception to understand it.[14] And, at least upon challenge from the opponent, he must also be shown to have had capacity at the time to perceive the matter accurately, capacity spanning the instant of perception and the instant of testimony to remember accurately what he then perceived and capacity as he testifies verbally to communicate that memory to the trier of fact.[15] Once qualified, he must speak in response to questions put to him during the examination guiding both the format and content of what he says. When examination-in-chief is done, he must respond to questions from the opponent, often in leading form, designed for any one or more of a number of purposes:[16] to show that he really had no opportunity to perceive the matter he talked about in chief;[17] to show that, even if he had the opportunity, he did not have the ability to understand it;[18] to show that, even if he did understand, he did not preceive it accurately[19] or his memory of what he perceived has faded between then and now;[20] to show that, when he spoke during examination-in-chief, he deliberately did not set out his memory;[21] and to show that there has not been accurate verbal communication of his memory to the trier of fact because the meaning he gives to the language he has used is different from what the trier would expect.[22]

[1913] A.C. 417. Ss 440 and 442 of the Criminal Code give a presiding judge authority to order a closed trial in stated circumstances. S. 12 of the Juvenile Delinquents Act, R.S.C., 1970, c.J-3, contemplates closed trials of children under that Act.

[12] *R.* v. *Antrobus*, [1947] 2 D.L.R. 55 (B.C.C.A.); *R.* v. *Pawlyna*, [1948] 2 D.L.R. 327 (Ont. C.A.); Wigmore, vol. 6 (Chadbourn rev., 1976), s. 1824(2).

[13] *Jaroshinsky* v. *Grand Trunk Ry* (1916), 31 D.L.R. 531 (Ont. S.C., App. Div.) (Meredith C.J.C.P.); Wigmore, vol. 2 (3rd ed., 1940), ss 650, 654, 657-658.

[14] Wigmore, vol. 2 (3rd ed., 1940), ss 555-561.

[15] Wigmore, vol. 2 (3rd ed., 1940), ss 493-495, 506-508. The Court of Appeal for Ontario recently adopted Wigmore's indentification of "the capacity to observe, . . . to recollect, and to narrate". *R.* v. *Hawke* (1975), 22 C.C.C. (2d) 19, at p. 28, quoting from Wigmore, vol. 2 (3rd ed., 1940), s. 492, at p. 586.

[16] *See, e.g., Wallace* v. *Davis* (1926), 31 O.W.N. 202 (Ont. S.C., H.C. Div.); *White* v. *The King* (1947), 89 C.C.C. 148 (S.C.C.) (Estey J.). The matter is dealt with at more length in S. Schiff, Evidence in the Litigation Process (1978), pp. 195-197.

[17] Wigmore, vol. 3A (Chadbourn rev., 1970), s. 994(1).

[18] Wigmore *ibid.*, ss 939, 991(1).

[19] Wigmore, *ibid.*, ss 931-934a; McCormick, s. 45, pp. 93, 94.

[20] Wigmore, *ibid.*, s. 995(1).

[21] *See* Morgan, *op. cit.*, footnote 9, pp. 186, 188.

[22] Morgan, *op. cit.*, pp. 186-188. Dean Wigmore gave several excellent examples while illustrating cross-examination directed to a witness's inability to

More than that. During cross-examination the opponent may attempt to cause the witness to withdraw his assertion made in chief about the relevant matter or at least cause the witness to alter it. And, of course, although it is not pertinent to my analysis of the reasons for the hearsay rule, the opponent may also seek to have the witness assert matters not touched on in chief which are otherwise helpful to the opponent's case or harmful to the case of the calling party.[23]

Before I leave this picture of the trial witness to compare the hearsay declarant, it is important to notice this. All the demands beginning when the witness enters the box, the law puts on him with the condition that, if any one is not satisfied, his testimony about the relevant matter will not be heard.

I turn to the declarant, evidence of whose words previously uttered a party-litigant offers to prove precisely the same relevant matter as the testimony of the witness whose plight I have described. Indeed, in the light of what the proponent wants the evidence to prove, the declarant's words are the functional equivalent of a statement the witness to the matter would make during examination-in-chief. But when the declarant spoke or wrote he was not subject to any of the demands the law puts on witnesses. He spoke or wrote outside any public courtroom, outside the presence of judge, counsel, trier of fact and audience of spectators. There was no assessment of his testimonial capacity and no oath, no interview by counsel and preparation for testimony in advance and no prospect of cross-examination to follow. And, as I have said, the demands imposed when a witness enters the box must be satisfied or he cannot speak at all.

Functionally, then, the hearsay rule bars evidence of words offered to prove the matter they assert when none of the standard demands imposed upon testimonial evidence has been satisfied. These demands go beyond the witness's oath and the opponent's opportunity to cross-examine. But, when the focus is upon that opportunity, it must be understood in the light of the potential results of its skillful use.

Moreover, the hearsay rule bars the evidence to serve, not the interests of the trier of fact, but almost entirely the interests of the

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understand the subject of his testimony. Wigmore, vol. 3A (Chadbourn rev., 1970), s. 991(1), pp. 923-924.

[23] *E.g., Dickson* v. *Pinch* (1861), 11 U.C.C.P. 146 (Richards J.); *Ringuette* v. *Hébert* (1905), 37 N.B.R. 68 (N.B.S.C. en banc); *Jones* v. *Burgess* (1914), 43 N.B.R. 126 (N.B.S.C., App. Div.) (Barry J.), rev.'d in part on another ground, unreported (S.C.C.), see 15 Can. Abr., para. 3433 (3rd ed., 1969); *Lyone* v. *Long* (1917), 36 D.L.R. 76 (Sask. S.C. en banc); *R.* v. *McDonald* (1958), 120 C.C.C. 209 (Ont. C.A.).

opposing party-litigant. To see this, consider again the demands the system imposes on witnesses.

Pre-trial interviews by counsel when witness statements are taken. Who cares that this happens? The answer surely is, only the two counsel—and very much the opponent when he later cross-examines the witness armed with ammunition to challenge the testimony-in-chief which, like a previous inconsistent statement, he got during the interview.

Last-minute review of the evidence with the witness, refreshing his responsible memory, mock examinations, explanation about relevancy, personal knowledge and applicable exclusionary rules. Here, counsel who will call the witness has the main stake. And, while due preparation of witnesses may minimize risk that the trier of fact will be misled, counsel may omit all preparation and let the witness have his head to the detriment of the trier's adequate job.

Open court with testimony in the presence of judge, trier of fact, parties and spectators. Clearly all this is designed to protect the parties against possible bias and corruption of judges and triers of fact.

Witness's oath or affirmation. Here is a prerequisite that in Canada (unlike what may happen in some of the American states)[24] probably the parties cannot waive. If so, since it operates apart from the opponent's decision, it is designed to assure that the trier hears sincere testimony.

Witness's perception or opportunity to perceive. This prerequisite the opponent cannot waive.[25] But, I think, it functions more to avoid wasting time at the trial—to keep the adjudicative process speedy and inexpensive—than it does to protect the trier of fact from error.

Witness's abilities to understand, perceive, remember and relate. The court assumes the qualifications of a lay witness unless the opponent objects or disqualification is suggested by some aspect of the witness's surroundings.[26] Indeed, present even an expert witness, the opponent could surely waive the advance showing of his

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[24] J. Wigmore, vol. 6 (Chadbourn rev., 1976), s. 1819(b) (cases gathered at n. 2). The one case authority cited under the heading "Canada" was actually decided by the Court of Queen's Bench in England: *Richards, Tweedy & Co.* v. *Hough* (1882), 51 L.J.Q.B. 361.

[25] J. Wigmore, vol. 2 (3rd ed., 1940), s. 654 (text at n. 3); McCormick, s. 10, p. 21.

[26] *Ability to understand*: J. Wigmore, vol. 2 (3rd ed., 1940), ss 559-561; *Ability to perceive, remember and relate*: J. Wigmore, vol. 2 (3rd ed., 1940), ss 497(a), 508. The Court of Appeal for Ontario quoted s. 497(a) with approval in *R.* v. *Hawke, supra,* footnote 15, at p. 27.

special knowledge. Ordinarily, then, while the disqualifications are imposed to avoid wasting time and misleading the trier of fact, they are triggered only when the opponent demands protection of his interests.

Witness's words in response to questions. Counsel may examine fully or in a rudimentary fashion and, according to standard practice in this country, the trial judge should play a decidedly minor role.[27] Thus, if the trier of fact does not get the information necessary for accurate fact-determination, we do not worry very much. The method is clearly designed to protect the interests of the parties and not to protect the trier from error.

The opponent's opportunity to cross-examine. There is no obligation upon the opponent to cross-examine. And, for good tactical considerations or because of sheer bad judgment or incompetence, he may choose not to. If he makes that choice, all the possible defects in the witness's opportunity to perceive, his ability to understand, his perception and memory, as well as his appreciation of the meaning of language may remain hidden. Moreover, the witness will not be induced to withdraw or modify the assertion about the relevant matter he made in chief. The trier of fact therefore may be misled. But we do not worry: that is the opponent's affair. Clearly then, the opportunity to cross-examine is designed to protect the opponent and not the trier of fact. And, you will note, the lack of this opportunity respecting a hearsay declarant is the reason for the hearsay rule judges and commentators have most often stressed.

In sum, the hearsay rule functions almost not at all to protect the trier of fact from making erroneous findings. It functions mainly to protect the opposing party against evidence of relevant matters presented in a fashion not satisfying the well-settled demands of witness examination in our trial system. In this light, the rule makes good sense in the context of a system with those demands.

The factual example of the murder trial I first used contained the declarant's direct and deliberate assertion about the relevant matter the Crown wanted the jury to determine from the evidence of the declarant's words. The verbal formulation of hearsay I then based on the example also contemplated that direct and deliberate assertion. But, in the light of the reasons for the hearsay rule, the formulation is too narrow. An adequate formulation should cover not only the declarant's direct assertions of the matter but also his implied

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[27] *E.g.*, *R.* v. *Darlyn*, [1947] 3 D.L.R. 480 (B.C.C.A.); *Delaney & Co.* v. *Berry* (1964), 49 D.L.R. (2d) 171 (Man. C.A.); *Majcenic* v. *Natale* (1967), 66 D.L.R. (2d) 50 (Ont. C.A.).

assertions by either words or non-verbal conduct.[28] To illustrate, I vary the facts of the original example a little bit to bring them closer to what actually happened in *Rex* v. *Wysochan,*[29] a case in Saskatchewan, upon which the example has been modelled. At the trial the Crown calls the second hired hand to testify, not as I previously hypothesized, but as follows: "As she lay on the ground, I saw the wife reach out to her husband as he approached her and, when he came over, she hugged him tightly and said to him, 'I love you, dear'."

The purpose for which the Crown offers the testimony, and the only purpose getting it over the basic hurdle of relevancy, is to establish the matter the Crown wants the trier of fact to conclude the wife impliedly asserted by the described conduct—that the husband did not shoot her. But that was the precise purpose for which the hearsay evidence was offered in the original example. Moreover, the testimony here raises the same difficulties as there: the wife was not subject to any of the witness conditions at any time before or while she acted in the way described and, were the evidence admitted, the opponent and the trier of fact would suffer exactly the same disadvantages. To demonstrate in part, I may focus on defense counsel's lack of opportunity to cross-examine her—the rationale for the hearsay rule most often stressed. Quite clearly, he cannot challenge her on any of the elements of credibility I earlier canvassed. Here, two seems particularly important. The first is accurate communication of memory to the trier of fact: did she really mean by her conduct what the Crown asks the jury to infer? The second, logically precedent, is perception or opportunity to perceive: did she even see who was actually holding the gun?

In *Wright* v. *Tatham,*[30] a case decided in the early nineteenth century, the judges of England assembled and the House of Lords agreed that evidence of such implied assertions offered to prove the implication is hearsay subject to the rule. However, since then, without any analysis, the House of Lords in *Lloyd* v. *Powell Duffryn Steam Coal Co.*[31] and the Judicial Committee of the Privy Council in *Ratten* v. *The Queen*[32] have disagreed. So did the Court of Appeal

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[28] Excellent analyses may be found in Morgan, Hearsay and Non-Hearsay (1935), 48 Harv. L. Rev. 1138; Morgan, *op. cit.*, footnote 9, at pp. 205-219; Maguire, The Hearsay System: Around and Through the Thicket (1961), 14 Vand. L. Rev. 741; Finman, Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence (1962), 14 Stan. L. Rev. 682.

[29] (1930), 54 C.C.C. 172 (Sask. C.A.). Counsel to the appellant accused was John Diefenbaker.

[30] (1838), 7 E.R. 559 (H.L.).

[31] [1914] A.C. 733.

[32] [1972] A.C. 378 (P.C.).

for Saskatchewan in *Wysochan* itself. And, supported only by the briefest and least convincing remarks,[33] so does the Law Reform Commission of Canada as shown in the definition of hearsay set out in section 27(2) of the proposed Evidence Code.[34] In the light of the reasons for the hearsay rule I have offered, I can only say that after *Wright* v. *Tatham* all of them have been wrong.

My original formula describing hearsay evidence must therefore be revised to include implied assertions: evidence offered by a party-litigant—whether a witness's oral testimony or a writing—setting out an assertion or an implied assertion of some relevant matter previously made by a person, which evidence the party-litigant offers to prove the matter.[35] The testimony at the murder trial setting out the wife's implied assertion that her husband did not shoot her should be no less barred than the testimony in the original example setting out the direct and deliberate assertion.

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[33] The Comment on s. 27(2)(b) simply says this about the matter: ". . . Under the definition . . . a person's words or conduct are not hearsay if he did not intend them to be assertive. In assessing the reliability of such evidence account may have to be taken of the dangers of hearsay evidence. However, unlike conscious assertions, a person is seldom likely to be deliberately misleading when he engaged in non-assertive activity, which is the most important danger associated with hearsay. In defining hearsay to exclude non-assertive conduct the Code follows the better view of the present law." These remarks obviously ignore every reason for the hearsay rule except the danger that the declarant may have been insincere.

The definition and Comment draw heavily upon Rule 801(a), (c) of the American Federal Rules of Evidence, P.L. 93-595, 93rd Congress, H.R. 5463, and the accompanying Advisory Committee's Note. The Committee adopted the thinking of critics who argue that, not only the danger of insincerity, but also the dangers of defective perception, memory and communication are inevitably minimal if the declarant did not intend to assert the relevant matter. *E.g.*, Falknor, The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct (1961), 33 Rocky Mt. L. Rev. 133; McCormick, s. 250. Simply in the light of the amended example of the evidence at the murder trial, the argument is fallacious. But, of course, that does not mean that every item of hearsay-by-conduct evidence should be excluded under the hearsay rule. Exclusion should depend upon the court's analysis under the second of my two propositions.

[34] *Supra* footnote 5.

[35] With the amended example as illustration, "implied assertion" may be defined to mean (a) a person's verbal statement about something not the relevant matter and also his non-verbal conduct which he intends as a substitute for the verbal statement, when the party-litigant offers evidence of the words or conduct to prove that the person perceived the relevant matter, and (b) a person's non-verbal conduct which he does not intend as a substitute for any verbal statement when the party-litigant offers evidence of the conduct to prove that the person perceived the relevant matter. Other definitions are set out in Morgan, Hearsay and Non-Hearsay, *op. cit.*, footnote 28, at pp. 1144-1145, 1158; Maguire, *op. cit.*, footnote 28, at p. 769; Finman, *op. cit.*, footnote 28, at p. 702, n. 69. Because the discussion has been less elaborated here, the formulation I offer differs somewhat from that in Schiff, *op. cit.*, footnote 16, p. 282.

I move to my second proposition. Without benefit of statutory backing, judges should admit evidence which is hearsay within both my original and the expanded formula when the purposes of the hearsay rule in our adversary trial system would be served barely or not at all under the particular circumstances.

Clearly, if a person is practicably available to be subjected to all the witness demands, there is no good reason for waiving them. But, at least if the person who might be called as a witness is unavailable through no fault of the proponent, the proposition amounts to this. To prove a relevant matter a judge should admit any particular item of evidence setting out a person's previous direct or implied assertion of the matter if the introduction would not at that time at that trial substantially harm any of the interests our system's demands upon witnesses protect.

What happened in *Myers* v. *Director of Public Prosecutions*[36] is a good example of a situation where judges acting under common law authority should have admitted hearsay evidence of a direct assertion. I will simplify the facts a little for the sake of clarity. The accused was charged with stealing a particular automobile which the Crown alleged he had in his possession when arrested. He insisted that the automobile he had did not belong to the alleged owner and had not been stolen; rather, he said, it had been rebuilt from an abandoned wrecked automobile and parts retrieved from wrecked automobiles. The Crown introduced admissible evidence that, when the automobile stolen from the alleged owner was assembled in the manufacturer's plant, its chassis bore a removable plate with the number 123 inscribed on it and its engine a removable plate with the number 456 on it. The Crown also introduced admissible evidence that the cylinder block of the automobile the accused possessed bore the number 789 irremovably moulded upon its surface. The Crown then offered this evidence from the manufacturer: a microfilm of a card on which, following the routine of manufacturing and recording, each assembly line workman had written the number borne by the specific component he had installed in a particular automobile as it moved down the line. The relevant card had set out that the automobile with the chassis numbered 123 and the engine numbered 456 (that is, the stolen automobile) also had a cylinder block numbered 789. The manufacturer's officials were also available to testify regarding the business purpose of the recording, the specific controls maintained to assure accuracy, and the incidence of error.

In the *Myers* case the assembly line workers who wrote the numbers on the particular card, that is, the hearsay declarants, could not be traced in the huge plant. They were therefore truly unavailable

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[36] [1965] A.C. 1001.

as witnesses. Moreover, on the specific narrow point for which the evidence of the microfilm was offered—that the three components with those particular numbers were installed in the one automobile the alleged owner ultimately purchased—the demands our trial system puts on testimonial evidence might justly have been ignored. The interests they generally protect were not of more than trivial significance. Had the workmen been identified, during pre-trial interviews and preparation counsel could not have got anything out of them other than assurances that, since their working routine was to inscribe on the cards the numbers they saw on the components, the numbers on the card in question represented the actual numbers on the particular components installed. Beyond that, the factors of open court with audience, oath, testimonial qualifications, examination format, even opportunity for cross-examination, were all highly unlikely to change the workmen's assurance. Indeed, if we canvass one by one the various testimonial defects defence counsel might have tried to uncover during cross-examination, we see how futile the exercise would have been. After all, the workmen performed the same job function over and over again to indistinguishable automobiles moving along an assembly line hour after hour, day after day. And the futility is particularly evident in this light: suppose the witnesses were to agree that they might have erred in misperceiving a number, or erred in remembering the number between perceiving and recording, or erred in transcription as they wrote it down. Clearly admissible evidence from the manufacturer about the high degree of overall accuracy would nevertheless have rendered the witnesses' concession insignificant.

You will recognize that I have elaborated upon some of the arguments Lord Pearce offered in *Myers*, dissenting on the point in the company of Lord Donovan.[37] And, like Lord Pearce, I conclude that, on the particular facts of *Myers*, the argument should have been decisive.

My second proposition is not completely heretical in this country today. That is so for several reasons. Judges in Alberta have long relied on Dean Wigmore's thinking in these areas to justify receiving business records under *ad hoc* common law exceptions to the hearsay rule.[38] Then, in 1970, in *Ares* v. *Venner*,[39] an appeal

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[37] *Ibid.*, at pp. 1036, 1041-1042, 1044. For approval of Lord Pearce's purposive analysis in the context of exploring appropriate methods of judicial law-making, see Weiler, Legal Values and Judicial Decision-Making (1970), 48 Can. Bar Rev. 1, at pp. 21-23.

[38] *Omand* v. *Alberta Milling Co.* (1922), 69 D.L.R. 6 (Alta S.C., App. Div.) (Stuart J.A.); *Ashdown Hardware Co.* v. *Singer*, [1952] 1 D.L.R. 33 (Alta S.C., App. Div.), aff'd without reference to the point, [1953] 1 S.C.R. 252. In *Omand* the judge cited and adopted what is now set out in J. Wigmore, vol. 5 (Chadbourn rev.,

from Alberta, a unanimous panel of the Supreme Court of Canada quoted with approval important passages from the reasons of Lord Pearce and Lord Donovan in *Myers*[40] and specifically disapproved the conclusion of the majority of the House of Lords that judges may no longer create new common law exceptions to the hearsay rule.[41] I grant that the court in *Ares* then set out a specific rule of decision limited to hospital records.[42] I also grant that no Canadian judge has analyzed hearsay evidence in the detailed terms I have put here. But I find comfort in several facts. First of all, the Supreme Court created the *ad hoc* hearsay exception for the statements of declarants who were not only available but had been present under the plaintiff's subpoena in the trial courtroom. The trial judge, from whose reasons the Supreme Court quoted,[43] had justified his action in admitting the written records of their words by referring to Wigmore's argument that the necessities of proper health care demand regarding hospital personnel as practicably unavailable to appear as trial witnesses.[44] While the Supreme Court offered no such rationale, my argument here does not go so far. Secondly, a year after *Ares*, the Alberta Appellate Division invoked the case as the key to adopting the reasoning of the dissenters in *Myers* and applying it to more than hospital records—in the case before the Alberta judges, to a railway company's records identifying certain railway cars.[45] You will also note that section 29 of the Law Reform Commission's proposed Evidence Code would admit hearsay evidence whenever the declarant is unavailable as a witness[46]—and this, without any regard to the

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1974), ss 1420, 1521-1522, and in *Ashdown* the court unanimously approved *Omand* and the citations there from Wigmore's treatise.

[39] [1970] S.C.R. 608.

[40] *Ibid.*, at pp. 623-624, quoting from [1965] A.C., at pp. 1040-1042 (Lord Pearce) and at p. 1047 (Lord Donovan).

[41] *Ibid.*, at pp. 625-626: "Although the views of Lords Donovan and Pearce are those of the minority in *Myers*, I am of the opinion that this Court should adopt and follow the minority view rather than resort to saying in effect: 'This judge-made law needs to be restated to meet modern conditions, but we must leave it to Parliament and the ten legislatures to do the job.' "

[42] *Ibid.*, at p. 626: "Hospital records, including nurses' notes, made contemporaneously by someone having a personal knowledge of the matters then being recorded and under a duty to make the entry or record should be received in evidence as *prima facie* proof of the fact stated therein."

[43] *Ibid.*, at p. 617.

[44] J. Wigmore, vol. 6 (3rd ed., 1940), s. 1707. The passage is repeated verbatim in the Chadbourn revision of 1976.

[45] *Canadian Pac. Ry* v. *City of Calgary*, [1971] 4 W.W. R. 241 (Alta S.C., App. Div.).

[46] Section 29 reads: "29 (1) A statement made by a person who is unavailable as a witness is not excluded by section 27 [the provision excluding hearsay evidence] if the statement would be admissible if made by the person while testifying as a witness.

demands of witness examination underlying the hearsay rule at common law. That, I believe, is truly throwing out babies with bath water.

I now apply my propositions to a particular problem the Court of Appeal for British Columbia has dealt with at least twice in the last several years. A certain matter is relevant. A witness on the stand swears that he perceived the matter accurately at the past time and spoke words contemporaneously with his perception setting out the matter accurately, but he cannot now remember either what he perceived or then said. A second witness is called who swears that he was present with the first witness at the past time and that, while he did not perceive the matter, he accurately heard what the first witness then said about it and he contemporaneously and accurately wrote down what he heard. The second witness then offers to read the writing, or the calling party offers the writing itself to prove the matter, or both. At no time has the first witness checked the accuracy of what the second witness wrote.

In *Regina* v. *Kores*[47] the matter was the content of the accused person's oral answers in the Greek language made to an English-speaking interrogating policeman who understood no Greek. The first witness was a skilled translator who rendered all the policeman's questions from English into Greek and all the accused person's answers from Greek into English. The second witness was an English-speaking stenographer who also understood no Greek and who wrote down in English the questions put by the policeman and the answers as translated by the first witness. In *Regina* v. *Penno*[48]

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(2) 'Unavailable as a witness' includes situations where a person who made a statement (a) is dead or unfit by reason of his bodily or mental condition to attend as a witness; (b) is absent from the proceeding and the proponent of his statement has been unable to procure his attendance by process or other reasonable means; (c) persists in refusing to testify concerning the subject matter of his statement despite an order of the judge to do so; (d) testifies to a lack of memory of the subject matter of the statement; or (e) is absent from the proceeding and the importance of the issue or the added reliability of his testimony in court does not justify the expense or inconvenience of procuring his attendance or deposition.

(3) A statement is not admissible under this section if the unavailability of the person who made it was brought about by the proponent of the statement for the purpose of preventing the person from attending or testifying.

(4) A statement is not admissible under this section unless the party seeking to give it in evidence has within a reasonable time given notice to every other party of his intention to do so with particulars of the statement and the reason why the person is unavailable as a witness."

The Ontario Law Reform Commission has recommended enactment of a similar provision. Ontario Law Reform Commission, *op. cit.*, footnote 1, pp. 15-17. The criticism in the text applies equally to that proposal.

[47] (1970), 15 C.R.N.S. 107 (B.C.C.A.).

[48] (1977), 35 C.C.C. (2d) 266 (B.C.C.A.).

the matter was the registration numbers on tickets attached to two coats hanging in the robbery victim's store just before the robbery. The first witness was the assistant manager helping the manager take inventory. The first witness looked at the ticket on each coat and called aloud to the manager the number and other information there endorsed. The second witness was the manager herself who wrote down on inventory sheets what she heard the first witness call out.

In *Kores* the court held that the second witness's testimony was admissible to prove the matter but not the stenographic notes. In *Penno* the court held that the second witness's testimony and the pertinent inventory sheet were admissible to prove the matter. Respecting both pieces of evidence in *Penno* and respecting the witness's testimony in *Kores*, that is right. But in both cases, the court asserted that the evidence was not hearsay. That is wrong.[49]

It is wrong because the evidence in both cases fits within any standard definition of hearsay, including the original formula I have offered here. In both cases the Crown offered the testimony of the second witness and the written record setting out the same assertion to prove the matter by a report of the first witness's previous assertion of it.[50] In *Kores* the matter was the accused's statement that, for example, "I entered this country illegally". To establish it, the Crown called the stenographer to testify and to offer her written notes that "the translator said that the accused had said, 'I entered this country illegally'." For the purpose for which it was offered the evidence is clearly hearsay. In *Penno* the matter was that two coats hanging in the store before the robbery bore tags with registration numbers 123 and 456. Here the Crown called the manager to testify

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[49] In *Kores* the court relied on the analysis of the High Court of Australia in *Gaio* v. *The Queen* (1960), 104 C.L.R. 419, a case with materially identical facts. The majority of the Australian judges held that, since there was really only one conversation in which the interpreter acted merely as a conduit between the interrogating policeman and the accused person, the issue of hearsay did not arise. This reasoning is demolished in short order in Cross, The Periphery of Hearsay (1969), 7 Melbourne L. Rev. 1, at p. 4. In *Penno* the court misapplied a standard definition of hearsay and invoked *Kores*, among other cases, for the testimony as well as the inventory sheet. For the sheet alone the court then added *Ares* v. *Venner* and s. 30 of the Canada Evidence Act. The decision of the English Court of Appeal in *R.* v. *McLean* (1967), 52 Cr. App. R. 80, defining as hearsay testimony in a materially identical situation, the court specifically refused to follow. Professor Cross has no doubt that the definition in *McLean* was correct. Cross, pp. 203, 403.

The Court of Appeal for British Columbia also found no hearsay element in *R.* v. *Degelman* (1977), 2 C.R. (3d) 1, a later case appearing nicely to combine some of the material facts of *Myers* and *Penno*. The court was wrong there too.

[50] The British Columbia court seems to have a penchant for admitting hearsay evidence by failing to apply the standard definitions, or failing to apply them rightly. For a very recent occasion when the Supreme Court of Canada was obliged to make the correction, see *R.* v. *O'Brien*, [1978] 1 S.C.R. 591.

and to offer the inventory sheet that "the assistant manager said to me in the store, '*this* coat bears a tag with number 123 on it and *that* coat bears a tag with number 456 on it'." Again, for the purpose for which they were offered, both pieces of evidence are clearly hearsay.

But, since admitting the evidence in *Kores* and in *Penno* did not substantially violate, if it violated at all, any of the interests the hearsay rule functions to protect, the court's ruling was completely right in *Penno* and partly right in *Kores*.[51] In both cases the perception and memory of each of the two witnesses taken together duplicated precisely what would have been accepted without question if one witness had possessed them. In addition, in both cases, at all stages of the process from initial interview to final cross-examination, both witnesses were subject to all the witness demands I have outlined respecting every part of the matter each could remember at the time of the trial. The only extra dangers not present if a single witness had both perceived the matter and testified about if from memory (or offered his own written record of it) are, first, possible failure of the second witness accurately to perceive what the first witness said and, second, possible failure of the second witness accurately to remember at the trial what he then perceived. I say these are added dangers because, if the first witness had purported to remember the details of his perception of the matter at the time of the trial, we would only be concerned with *his* failure accurately to perceive and accurately to remember. But, in a situation like this, that concern is always reduced from what it ordinarily would be: he does not purport to remember or testify about the details and therefore the possible attendant inaccuracies cannot creep in. Moreover, on the particular facts of *Penno*, the extra dangers are minimal. The sounds the first witness spoke were simple and the significant ones were a reasonably short succession of numbers. At all events, the second witness's testimony swearing to her accurate perception could be tested on cross-examination. As for memory, that is completely covered by the production of the inventory sheet which the second witness created at the very moment she heard the numbers called out. In *Kores* the sounds the first witness spoke were undoubtedly more complex than in *Penno*; they were sentences with significant verbal meaning which the first witness might have heard wrongly. But, if we assume that the second witness was a skilled stenographer, the likelihood of mistranscription would be reduced. In any event, the likelihood is no greater than if the accused himself had been speaking the words in English. And, again, the second witness's sworn testimony that she accurately

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[51] For Professor Morgan's excellent analysis of the hearsay problems, see Morgan, The Relation Between Hearsay and Preserved Memory (1927), 40 Harv. L. Rev. 712.

heard might be tested on cross-examination. Finally, any problem of her defective memory was completely solved by production of the stenographic notes she made of the translator's words as he spoke them.[52]

As I conclude this brief discussion of *Kores* and *Penno*, we should recognize that neither case would have caused the court any trouble if the first witness without present memory of the relevant matter had himself created the writing and had sworn at the trial that he had not only perceived the matter accurately but had also accurately recorded his perception at the very time or shortly thereafter while his memory of the perception was still fresh. Had that happened, well-settled common law doctrine laid down without discussion of the hearsay rule would have avoided all problems. Under the false guise of "refreshing his memory" the witness would have been allowed at least to read into evidence the content of the writing as proof of the matter set out.[53] Since that is clearly good law, why not permit two extra steps? First, admit the writing to prove its assertion of the recorded matter as soon as the witness duly qualifies it, and second, even if the witness did not himself record his perception of the matter, admit the testimony of someone else who, after swearing that he accurately recorded the first witness's description of his perception at the time, reads the writing he made recording what he swears he heard. Dean Wigmore approved both steps,[54] and in *Penno* the Court of Appeal for British Columbia effectively did too.[55]

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[52] My conclusion might be different on particular facts different from those in *Kores* and *Penno* if the second witness had created no written record and was therefore obliged to testify only from possibly defective memory about what the first witness had said. The problem of the second witness's memory could not then so easily be solved.

[53] *E.g.*, *Fleming* v. *Toronto Ry Co.* (1911), 25 O.L.R. 317 (Ont. C.A.); *Crabtree* v. *Milne* (1921), 54 N.S.R. 521 (N.S.S.C. in banco); *Omand* v. *Alberta Milling Co.*, *supra*, footnote 38; *R.* v. *Elder*, [1925] 3 D.L.R. 447 (Man. C.A.); *R.* v. *Brown*, [1927] 4 D.L.R. 779 (Sask. C.A.); Cross, pp. 204-206.

In an elaborate discussion Dean Wigmore distinguished this situation from that where the witness's memory of the event is actually triggered. The latter he labelled "present recollection revived", while what we are considering he labelled "past recollection recorded". Wigmore, vol. 3 (Chadbourn rev., 1970), ss 734-765. Purporting to apply the well-settled doctrine under Wigmore's label, the Court of Appeal for British Columbia recently approved admissibility of a witness's previous statement although she had not sworn specifically that it accurately recorded what she had originally perceived. *R.* v. *Rouse* (1977), 36 C.C.C. (2d) 257. As the dissenting judge rightly pointed out, the reliance of the majority on the doctrine was therefore misconceived.

[54] Wigmore, vol. 3 (Chadbourn rev., 1970), ss 751, 754. Wigmore's conclusion on the first step was adopted by the New Zealand Court of Appeal in *The Queen* v. *Naidanovici*, [1962] N.Z.L.R. 334. For Professor Morgan's agreement about the second step, see Morgan, *op cit.*, footnote 51, at pp. 727-728.

Before closing, I add a few words comparing *Penno* and *Kores* to what might have happened in *Regina* v. *McGuire*,[56] also a recent decision of the Court of Appeal for British Columbia. In *McGuire*, a murder prosecution, policemen called as witnesses by the Crown testified that some months before the trial they had been present when eye-witnesses to the murder identified the accused person as the killer. Later in the trial the Crown called the particular eye-witnesses to testify, but they then denied that the accused person in the prisoner's box was the man. On the appeal from conviction, the court held that the policemen's testimony was inadmissible hearsay on the issue whether the accused person was the killer.[57] As Crown counsel conducted the case, I will not here quarrel with the result.[58] But suppose this had happened: After receiving the negative

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[55] In *R.* v. *Degelman*, *supra*, footnote 49, the court unknowingly probably took a third (and maybe a fourth) step. On the charge against Degelman of possessing stolen automobile parts knowing they had been stolen, the Crown alleged that a Corvette automobile owned by one Wayne Huffman was stolen in December 1974 and that its disassembled parts were found in Degelman's possession in March 1975. At the trial a policeman testified that the parts Degelman had bore a certain serial number. For Huffman's part, while he could not remember the serial number of his automobile, he testified that he had registered it in his own name pursuant to the provincial motor vehicle statute. The impugned evidence the Court of Appeal held admissible was the testimony the Crown then offered from an administrative officer in the provincial motor vehicle records branch. He produced a print of a microfilm record of a particular automobile's first registration. In effect reading from the print, he testified that the record revealed that "Wayne Huffman" was the registered owner of an automobile with a certain serial number—which corresponded substantially with the number on the parts found in Degelman's possession. On the assumption that Huffman, with personal knowledge of the serial number, registered the automobile with the very officer who testified at the trial, the analysis is identical with that I applied to *Penno*. But, as I read the reasons for judgment, it seems clear that the record, a copy of which the officer read, had been created by some clerk in the records branch who was not called at the trial. If so, admissibility of the officer's testimony properly depends on the adequacy of this substitute for that of the clerk. Invoking my argument favoring admissibility in *Myers*, I conclude that adequacy is shown. There is however another problem of like kind. At the time Huffman made the registration he undoubtedly relied on the documents accompanying the automobile for registration purposes and probably had no personal knowledge of the serial number the automobile actually bore. If so, admissibility of Huffman's testimony, upon which the administrative officer's evidence obviously hinges, properly depends on the same argument applied again.

[56] (1975), 23 C.C.C. (2d) 385 (B.C.C.A.).

[57] The Court of Appeal in England, considering a similar situation in *R.* v. *Osbourne*, [1973] Q.B. 678, saw no hearsay problem to challenge admissibility. In the United States a senior appellate court recognized the problem but, after noting that the particular witness was available for cross-examination, admitted the evidence nevertheless. *People* v. *Gould* (1960), 354 P.2d 865 (Cal. S.C. en banc); see also *State* v. *Simmons* (1963), 385 P.2d 389 (Wash. S.C.).

[58] Concluding rightly that the testimony in the circumstances was really evidence of the witnesses' previous inconsistent statements, the court applied common law doctrine well-settled in Canada that such evidence is admissible only to

answer from each witness, Crown counsel had then got his testimony that on the earlier occasion he had indeed accurately identified someone (he knew not who) as the killer.[59] Then, the policemen's testimony albeit hearsay should have been admissible, at least under *Penno* and *Kores*—but also under my analysis. The only extra danger is the policemen's possibly faulty memory about who each eye-witness had actually identified earlier. But, since the act of identifying a particular person on a specific occasion is a simple phenomenon, indeed much less complex than the sound of the numbers in *Penno* or the details of the statement in *Kores*, judges should not worry about it.[60]

You might note that the impugned evidence in all three cases would have been admissible had the proposed Evidence Code been operative. The testimony of the second witness and the written records in *Kores* and *Penno*, and the testimony of the policemen in *McGuire*, would all have qualified under section 28 as "a statement previously made by a witness".[61] The evidence in *Kores* and *Penno*

attack credibility. *E.g.*, *Deacon* v. *The King*, [1947] S.C.R. 531; *R.* v. *Moore*, [1956] O.W.N. 877 (Ont. C.A.). Respected commentators and some American courts have challenged the doctrine. *E.g.*, Morgan, *op cit.*, footnote 9, at pp. 192-196; McCormick, s. 251; *Beavers* v. *State* (1971), 492 P.2d 88 (Alaska S.C.). Another body of scholarly and judicial opinion, responding to the challenge, has defended the doctrine. *E.g.*, Reutlinger, Prior Inconsistent Statements: Presently Inconsistent Doctrine (1975), 26 Hastings L.J. 361; *Ruhala* v. *Roby* (1967), 150 N.W. 2d 146 (Mich. S.C.). Since analysis of the arguments and counter-arguments would take me well beyond the bounds of the examples discussed in the text, that must await some future occasion.

[59] Indeed, something similar happened in *McGuire* when another eye-witness, called by the defense to testify that the accused person was not the killer, admitted during cross-examination by Crown counsel that he had earlier identified as the killer someone in a photograph the police showed him. Other evidence, presumably introduced by the Crown, established that the person in the photograph was the accused. In the court's view, the jury could properly consider the witness's admission only as evidence of a previous inconsistent statement impugning his testimonial credibility. But, had counsel got the witness's confirmation that the earlier identification had been correct, the result should have been different.

[60] A commentator in England, criticizing the reasoning in *R.* v. *Osbourne*, *supra*, footnote 57, has reached the same conclusion. Libling, Evidence of Past Identification, [1977] Crim. L. Rev. 268, at pp. 276-278. He insists, however, that the policeman's testimony is not hearsay. For Professor Morgan's analysis of this and similar situations, see Morgan, *op cit.*, footnote 51, at pp. 724-728. Courts in the United States have reached this result, but sometimes without analysis of hearsay problems. *E.g.*, *State* v. *Wilson* (1951), 231 P.2d 288 (Wash. S.C. en banc), cert. denied, 343 U.S. 950; *Commonwealth* v. *Johnson* (1963), 193 A. 2d 833 (Pa Super. Ct); *United States* v. *Barbata* (1968), 284 F. Supp. 409 (U.S. Dist. Ct, E.D.N.Y); *Martin* v. *Commonwealth* (1970), 173 S.E.2d 794 (Va S.C.A.); *see Bulluck* v. *State* (1959), 148 A.2d 433 (Md C.A.); *Government* v. *Petersen* (1975), 507 F.2d 898 (U.S.C.A., 3rd Cir.).

[61] Section 28 reads: "A statement previously made by a witness is not excluded by section 27 [the provision excluding hearsay evidence] if the statement would be admissible if made by him while testifying as a witness."

would also have qualified under section 29 as a statement "made by a person who is unavailable as a witness", where "unavailable" includes by definition "a person who testifies to a lack of memory of the subject matter of the statement".[62] Since at least section 29 thus contemplates admissibility well within the bounds of the area where the reasons for the hearsay rule operate importantly, we see here again the babies and the bath water.

Recognizing what the hearsay rule is for, judges should apply it evenhandedly, not only to evidence of a declarant's direct assertion of a relevant matter, but also to evidence of his implied assertions to the same effect. But, at the same time, judges should recognize that, without benefit of empowering legislation, the way is open for their creation of *ad hoc* exceptions to the rule, made with care—indeed, tailor-made—for particular items of hearsay evidence at particular trials. That way is open to judges who, in their search for just and accurate determination of litigants' disputes, refuse to apply the hearsay rule when its reasons under the circumstances at bar do not operate in any significant way.

STANLEY SCHIFF**

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TORTS—NEGLIGENCE AND OCCUPIERS' LIABILITY—ROLE OF JURY—CONFUSING WORDS FROM THE ORACLE.—Something has to be done. Either the law of torts must be legislatively simplified, or someone who understands its present complexities must explain it to the Supreme Court of Canada. The Supreme Court's reasons for judgment in *Wade* v. *Canadian National Railway Company*[1] came to the writer's attention while grading torts examinations written by first year law students. Few of the students performed as poorly as the court.

Eight-year-old Peter Wade and a friend were playing in some sand and gravel piled on unfenced railway property close to the C.N.R. mainline. Although employees of the railway company knew that children were accustomed to play there, no steps had been taken to keep them away. When the boys saw a freight train approaching slowly on the mainline they ran toward it, and Peter's friend dared him to steal a ride. Peter, a rather slow-witted child, accepted the challenge, and made two unsuccessful attempts to board the train. On his second try he fell under the wheels of a boxcar, which severed his right leg.

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[62] *Supra*, footnote 46.

* Stanley Schiff, of the Faculty of Law, University of Toronto.

[1] (1978), 80 D.L.R. (3d) 214 (S.C.C.).

Peter Wade's action against the C.N.R. was tried by judge and jury. The jury, in response to a series of questions formulated by agreement of counsel, made several important findings of fact. The plaintiff was found to be a licensee, having been allured to the site of the accident by the sand and gravel piles, as well as by the train itself. The defendant was held to have been negligent, in view of its awareness of the frequent presence of children, in having failed to remove the attractive sand and gravel piles, or to fence the property, or to post warning signs. The jury also found negligence in the manner in which the train had been made up, apparently believing that the crew in the caboose should have had better visibility of the train ahead; but it is difficult to imagine, given the noise and the lengthy stopping distance of even a slow-moving train, how the accident could have been prevented even if someone in the caboose had seen it developing. Finally, Peter Wade was held to have been incapable of contributory negligence, since he did not possess sufficient intelligence or experience to appreciate the risk involved in his actions. This conclusion was poignantly corroborated by evidence that as he lay on the ground immediately after the accident, the boy childishly waved good-bye to the train.

The Nova Scotia Supreme Court, Appeal Division, confirmed the verdict of negligence against the railway company, but held that the plaintiff had been contributorily negligent to the extent of fifty per cent.[2] The Supreme Court of Canada, by a majority of six to three, dismissed the action altogether on the ground that the railway company did not owe Peter Wade a duty of care in the circumstances. In the course of arriving at this conclusion the majority of the court, whose reasons were written by Mr. Justice de Grandpré, had some very perplexing things to say about the respective functions of judges and juries in this type of case, about the nature of the common law duty of care, and about some aspects of the law of occupiers' liability.

Judge and jury

The most surprising aspect of the Supreme Court's decision is that it seems to fly in the face of the jury's findings. As Chief Justice Laskin stated at the outset of his dissenting opinion:[3]

> The overriding consideration in this case is the force, and, indeed the faith that is to be accorded to the verdict of a jury.

Strictly speaking, the conclusion that the C.N.R. was negligent was not a pure finding of fact. It was a mixed question of law and fact, involving the application of a legal standard to a particular fact

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[2] (1976), 14 N.S.R. (2d) 541.

[3] *Supra*, footnote 1, at p. 217.

situation. Nevertheless, this type of question is as fully within the legitimate purview of the jury as purely factual issues. Fleming comments that:[4]

> . . . it falls within their province to translate the metaphysical standard of the reasonable and prudent man into a concrete standard applicable to the particular case before them and, in that light, to decide whether the defendant failed to conform.

Whether this function will remain a part of the jury's exclusive domain in Canada has now been put in doubt by the Supreme Court's rejection of the jury's findings in the *Wade* case.

There are two ways in which a trial judge or an appellate court can properly forestall or override a jury's finding of negligence in a particular situation. First, either a trial judge or an appeal court is entitled to conclude on the facts that there is no evidence upon which a reasonable jury could base a finding of negligence. Alternatively, they may rule that, as a matter of law, the defendant did not owe a duty of care to the plaintiff.

The first approach was not open to the Supreme Court in the *Wade* case. Mr. Justice de Grandpré acknowledged that: "as findings of fact", the jury's answers as to negligence, "are unimpeachable being amply supported by the evidence".[5] Accordingly, the second approach was employed. "The plaintiff cannot succeed", said Mr. Justice de Grandpré, "unless the defendant, as a reasonable person, was under a duty to act differently, due regard being given to the requirements of tort law as to foreseeability".[6]

One cannot quarrel with this position, but when one examines the questions explored by Mr. Justice de Grandpré in his search for a "duty of care", it will be seen that most of them involved matters within the exclusive domain of the jury.

Duty of care

"Did a duty exist?" asked Mr. Justice de Grandpré. One would have thought that the question had been fully answered by the jury finding, which the court accepted, that Peter Wade was a licensee. A licensee is a person whose presence on the property in question is acquiesced in by the occupier. Since it is not possible to acquiesce in something about which you are unaware, a licensee is, by definition, a foreseeable entrant to land. By both the general law of negligence and common law principles of occupiers' liability, a lawful and foreseeable entrant to land is owed an undeniable, if sometimes

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[4] J.G. Fleming, The Law of Torts (5th ed., 1977), p. 292.

[5] *Supra*, footnote 1, at p. 227.

[6] *Ibid.*, at p. 228.

ill-defined, duty of care.[7] Inexplicably, Mr. Justice de Grandpré decided that he would have to go beyond the question of the plaintiff's status to determine whether a duty of care existed.

Even more difficult to understand is the fact that most of the matters he examined in this regard had nothing to do with the *existence* of a duty. The bulk of his attention was directed to the *extent* of the railway company's obligation to fence its right of way, to police its property, and to provide for good visibility in the make-up of its trains.[8] Then, after observing that the license of a child like the plaintiff did not include permission to climb on moving trains, his Lordship concluded:[9]

> I do not see that, by the exercise of reasonable foresight, there were reasonable and practical measures to be taken by the railway. . . .

These are not "duty" questions. They are "negligence" questions, having to do with the extent of care required to be exercised in the circumstances by a person who owes a duty. To repeat Fleming's words, these questions involve the translation of "the metaphysical standard of the reasonable and prudent man into a concrete standard applicable to the particular case . . .". Since these matters are peculiarly within the competence of the jury, it is difficult to understand how the court was entitled to set aside the jury's finding of negligence. A court cannot bestow jurisdiction on itself with respect to matters within the jury's purview by simply labelling them "duty of care".

Mr. Justice de Grandpré did not altogether overlook genuine duty of care questions. He did hold that The Railway Act[10] imposed no statutory duty appropriate to the situation,[11] but of course that finding did not preclude the existence of a common law duty, based on reasonable foreseeability of risk to the plaintiff. His Lordship eventually addressed the latter issue, almost as an afterthought, following his discussion of the negligence issues referred to above:[12]

> I conclude that no reasonable occupier could have reasonably foreseen that a child playing on a pile of sand some 50 ft. from the track when the engine went by, would leave this place of safety, run towards the track and attempt to jump on the ladder of a boxcar.

He seems to be saying here that no duty of care existed because the harm was sustained in an unforeseeable *manner*. This represents

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[7] *Booth et al.* v. *City of St. Catharines et al.*, [1948] S.C.R. 564 (S.C.C.); *Mitchell et al.* v. *Canadian National Railway Company* (1974), 46 D.L.R. (3d) 363 (S.C.C.).

[8] *Supra*, footnote 1, at pp. 228-229.

[9] *Ibid.*, at p. 229.

[10] R.S.C., 970, c. R-2.

[11] *Supra*, footnote 1, at p. 228.

[12] *Ibid.*, at p. 231.

either a serious misunderstanding of or a significant departure from previously accepted principles of negligence law.

According to the decision of the House of Lords in *Hughes* v. *Lord Advocate*,[13] all that needs to be foreseeable is the presence in the danger area of someone likely to suffer the type of harm that occurred; the manner of occurrence is not important. Applying this principle to the facts of the *Wade* case, a duty would exist, since the presence of children who might be run over by trains was undeniably foreseeable.

The *Hughes* principle has been applied by many Canadian courts.[14] It is true that the Supreme Court of Canada appeared to overlook it in *Bradford* v. *Kanellos*.[15] That case involved a small negligently caused fire in a restaurant. A panic-stricken customer, who thought that the noise of an automatic fire extinguisher signified escaping gas, shouted in fright, and precipitated a stampede toward the exits. The plaintiff, another customer, was injured in the stampede. An action against the person responsible for the fire failed on the ground that:[16]

> . . . it should not be held that the person guilty of the original negligence resulting in the flash fire on the grill ought reasonably to have anticipated the subsequent intervening act. . . .

Had the foreseeability question been asked in the manner called for by the *Hughes* case ("Were injuries to a customer by trampling a reasonably foreseeable consequence of failure to take adequate precautions against fire?") the result would undoubtedly have been different. Until now, the *Bradford* decision has been generally regarded as either a mere aberration or a special exception to the *Hughes* principle applicable when new intervening acts of negligence by third parties are involved.

Perhaps the *Wade* decision indicates a third explanation: that the Supreme Court of Canada has rejected the *Hughes* principle. If so, the court is remiss for not having said so openly. If other Canadian courts are mistaken in following the *Hughes* case, they should be told so. And why.

Occupiers' liability

The field of occupiers' liability is one of the least satisfactory areas of tort law. Certain *obiter* dicta in the Supreme Court's reasons

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[13] [1963] A.C. 837 (H.L.).

[14] See, *e.g.*, *School Division of Assiniboine South #3* v. *Hoffer et al.* (1972), 21 D.L.R. (3d) 608 (Man. C.A.), aff'd (1974), 40 D.L.R. (3d) 480 (S.C.C.).

[15] (1974), 40 D.L.R. (3d) 578 (S.C.C.). But see *R.* v. *Côté* (1975), 51 D.L.R. (3d) 244 (S.C.C.).

[16] *Ibid.*, at p. 579, quoting with approval from the reasons of the Ontario Court of Appeal.

for judgment in the *Wade* case constitute a source of further confusion.

Mr. Justice de Grandpré, in commenting on the need to establish a duty of care, stated that this requirement exists:[17]

> . . . whether these facts are observed in light of the classic rules governing the liability of an occupier toward a licensee (the status of the child as found by the jury) or in that of the so-called new occupier law requiring the occupier to act with reasonable humanity. . . .

The first question raised by this comment is why the law of occupiers' liability was relevant at all. There has been wide agreement in recent years that the special regime of liability imposed by that branch of tort law applies only to the passive state of safety of occupiers' premises. Active negligence on the part of the occupiers is usually thought to be governed by the ordinary law of negligence.[18]

The distinction between active and passive hazards is not always an easy one, of course. The facts of *Wade* illustrate this. Here the boy was injured by the active operation of a train on the defendant's premises, yet much of the negligence attributed to the defendant by the jury (failure to fence, to post signs, or to remove the alluring sand piles) related to the passive condition of the premises. In fact, the active and passive elements were inseparable. It is clear that no breach of legal duty could have been plausibly alleged if the train had been operated on property reasonably secure from the presence of small children or, alternatively, if the premises, maintained as they actually were, had not been the site of some dangerous activity. The Judicial Committee of the Privy Council has held that in this type of mixed situation the ordinary law of negligence should prevail.[19] Chief Justice Laskin expressed a similar opinion on behalf of the dissenting judges in the *Wade* case:[20]

> . . . the respondent's duty here arises not simply from its occupancy of the right of way but from its positive activity in carrying on train operations. This is not a case in which the injury arose from the condition of the property but rather from an activity carried on by the respondent on its property. In this

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[17] *Supra*, footnote 1, at p. 228.

[18] J.G. Fleming, *op cit.*, footnote 4, pp. 433-434. E.C. Harris, Some Trends in the Law of Occupiers' Liability (1963), 41 Can. Bar Rev. 401, at p. 402, describes the distinction as a "comparatively recent development". D.C. McDonald, The Law of Occupiers' Liability—A Report to the Alberta Institute of Law Research & Reform (1969), p. 28, asserts without citing authority that although there is some Canadian material supporting the distinction, it is not well established in Canadian law. An interesting discussion of the pros and cons of the dispute will be found in *Videan* v. *British Transport Commission*, [1963] 2 All E.R. 860 (C.A.).

[19] *Commissioner for Railways* v. *McDermott*, [1967] 1 A.C. 169, at p. 189 (P.C.).

[20] *Supra*, footnote 1, at p. 221.

> respect . . . there is every reason to measure the respondent's liability by ordinary principles of negligence.

There are at least four possible explanations for the majority's refusal to agree with the dissenters on this issue. The majority may have invoked the law of occupiers' liability for any of the following reasons:

1. They were rejecting altogether, for Canada, the active—passive distinction, and were holding that the law of occupiers' liability applies to both active and passive dangers.
2. Where the active and passive elements are intertwined, as in this case, the court believes that it is the law of occupiers' liability rather than the law of negligence, which should apply.
3. Occupiers' liability was appropriate to this particular case merely because the court found, on the facts, that the passive components were much more significant than the active ones.
4. It did not matter which regime was applicable because in the court's opinion the "duty of care" principle is common to both.

By failing to indicate which of these considerations motivated them, the majority added materially to the uncertainty that currently surrounds the law of occupiers' liability in Canada.

The dissenting judges also contributed their share to the confusion. Chief Justice Laskin cited *Mitchell* v. *Canadian National Railway Company*,[21] a recent Supreme Court of Canada decision, as an example of a situation where negligence law rather than occupiers' liability law was applicable because of the interaction of active and passive dangers. In that case, a young boy who was held to be a licensee slipped on an icy slope and fell onto a railway track, where he was injured by a passing train. Speaking for a majority of a five-man court, the Chief Justice held for the plaintiff in spite of the fact that the icy slope was an obvious danger. Until then, the law of occupiers' liability had restricted the occupiers' responsibility to licensees to situations of concealed danger. Since the reasons for judgment were couched in terms of occupiers' liability law, most observers have treated the *Mitchell* decision as a rejection of the rule that licensees need only be protected from concealed dangers.[22] To have the case now explained by Chief Justice Laskin in entirely different terms comes as a great surprise. It should be noted,

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[21] *Supra*, footnote 7.

[22] It was so interpreted, for example, in *Bartlett et al.* v. *Weiche Apartments Ltd* (1975), 55 D.L.R. (3d) 44 (Ont. C.A.).

moreover, that the *Mitchell* case contained no suggestion of negligence in the active operation of the train in question, whereas there was some indication of negligent operation in both the *Wade* case and the Privy Council case mentioned above.[23] While the distinction may not be a significant one, the Chief Justice ought to have explained why he believes that it is not.

The most perplexing aspect of the court's comments on occupiers' liability is the suggestion in the earlier quoted passage from the reasons of Mr. Justice de Grandpré that the new standard of "reasonable humanity" might be applicable to the duty of care owed to a licensee like Peter Wade as well as to that owed to a trespasser.

At one time, the law protected trespassers from no more than hidden traps intended to injure, or other dangers recklessly inflicted. In *Addie* v. *Dumbreck*[24], for example, damages were denied to a trespassing child who was injured by the negligent operation of certain machinery on the land in question, because there had been neither "any act done with deliberate intention of doing harm to the trespasser", nor any "act done with reckless disregard" of the trespasser's presence.[25]

Dissatisfaction with this harsh standard, especially where children were involved, led the courts to develop over the years various ways to circumvent the law. The most common of these was the "allurement" doctrine, whereby children knowingly attracted to dangerous premises by some feature seductive to children were treated as licensees rather than as trespassers.[26] More recently, the courts have undertaken more direct reform, by redefining in a more liberal fashion the standard of care owing to trespassers.

Early suggestions for such judicial reform can be found in a 1963 decision of the English Court of Appeal: *Videan* v. *British Transport Commission*.[27] Lord Denning, M.R. expressed the opinion, *obiter* dictum, in that case that the duty of care imposed by ordinary negligence law should apply to all foreseeable trespassers.[28] A somewhat less radical proposition was advanced by Lord Justice Pearson, also *obiter* dictum, in the same case:[29]

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[23] It has to be admitted, however, that the negligence was slight in both cases, and of dubious causal significance in the *Wade* case.

[24] [1929] A.C. 358 (H.L.).

[25] *Ibid.*, at p. 365.

[26] E.g., *Cooke* v. *Midland Great Western Railway of Ireland*, [1909] A.C. 229 (H.L.).

[27] *Supra*, footnote 18.

[28] *Ibid.*, at pp. 865-866.

[29] *Ibid.*, at p. 875. He did not purport to invent a new standard; he cited old authorities in which the prohibition against intentional injuries was described in terms of "humanity". His point was that changing social attitudes and practices now demand a more generous interpretation of the "common humanity" standard.

> If the person concerned knows of, or has good reason to anticipate, the presence of the trespasser, that person owes to the trespasser a duty of care which is substantially less than the duty of care which is owing to a lawful visitor, because the duty to a trespasser is only a duty to treat him with common humanity . . .

In 1972, following his elevation to the House of Lords, Lord Pearson persuaded his colleagues on that court to adopt the "common humanity" standard. The case, *British Railways Board* v. *Herrington*[30], involved a child injured by contact with an electrified rail on an inadequately fenced railway line. Railway employees had been aware of both the dilapidated condition of the fence and the resulting presence of children on the property. They had taken no steps to remedy the situation, however. Expressly rejecting its earlier decision in *Addie* v. *Dumbreck*[31], the House of Lords applied the "common humanity" standard and held for the plaintiff.

The Supreme Court of Canada approved the new test in *Veinot* v. *Kerr-Addison Mines Ltd.*[32] Strictly speaking, the court had no need to consider the new notion, since it upheld by a majority the lower court's finding that the plaintiff was a licensee, and had been injured by a danger known to the occupier. However, the majority expressly approved the *Herrington* decision, and held that even if the plaintiff had been a trespasser there had been a breach of the duty to treat him with ordinary humanity. Even the reasons for judgment of the dissenting judges, who were of the view that the plaintiff was a trespasser, and that there had been no breach of any duty owed to him, can be interpreted as accepting the new approach in principle.

The precise meaning of the "common humanity"[33] principle, and its relationship to ordinary negligence law, is far from clear. When Lord Justice Pearson enunciated it in the *Videan* case, Lord Denning commented rather tartly: "I do not know quite what that means."[34] And even in the *Herrington* case, where Lord Pearson took considerable pains to explain the concept, the varied formulations articulated by his several brethren left many questions unanswered. Some observers believe that *Herrington* will eventually be acknowledged to have accomplished indirectly what Lord Denning attempted to achieve directly in *Videan*: an equation of the principles of negligence and occupiers' liability.[35] It will probably

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[30] [1972] 1 All E.R. 749 (H.L.).

[31] *Supra*, footnote 24.

[32] (1975), 51 D.L.R. (3d) 533 (S.C.C.).

[33] Or "ordinary humanity", or "reasonable humanity"; the exact term used varies from case to case and judge to judge.

[34] *Supra*, footnote 26, at p. 866.

[35] See, *e.g.*, J.G. Flemming, *op. cit.* (3rd ed., 1965), p. 464.

be some time before the accuracy of that prediction can be assessed, however.

At least one thing did seem clear at the time the new standard was promulgated: that it was to apply to trespassers only, not to lawful entrants. After all, lawful entrants are covered by a legislative regime (Occupiers' Liability Act[36]) in England. The leading Canadian case, *Veinot*[37], contains no indication that the new test would also be applicable to licensees. The suggestion of Mr. Justice de Grandpré in the *Wade* case that the common humanity standard might have so broad a scope may simply have been inadvertent. If so, it is unfortunate; Canadians have a right to expect a more careful standard of expression from the members of their highest court. If, on the other hand, it was a deliberate pronouncement, some explanation was called for. The idea is too important to be left as a mere tantalizing possibility. Occupiers and visitors alike deserve to know their legal rights and responsibilities.

It is to be hoped that the legislatures of Canada's common law provinces will all eventually replace the complicated provisions of occupiers' liability law with a more rational statutory regime. Unfortunately, the glacial pace of such reforms up to now[38] indicates that the major responsibility in this field will continue to rest with the courts for many years to come. Without better leadership from the Supreme Court of Canada than the *Wade* case exhibits, it will be difficult for lower courts to meet that responsibility satisfactorily.

Conclusions

Some of the shortcomings of the *Wade* judgment may be traceable to the fact that Mr. Justice de Grandpré, who wrote the majority's reasons, was not trained in the common law. A hazardous journey can be expected when a civilian attempts to travel through the wilds of tort law. It cannot be overlooked, however, that three of the six majority judges are common lawyers. Their concurrence would seem to indicate that something other than mere unfamiliarity with the terrain was involved.

It is difficult to escape the impression that the case was decided as it was simply because the majority of the court felt that it would be unfair to impose liability on the defendant in the circumstances. If this speculation is correct, it is regrettable that the preparation of the reasons for judgment was not assigned to someone who could have

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[36] 1957, 5 & 6 Eliz. 2, c. 31.

[37] *Supra*, footnote 32.

[38] Legislation has finally been enacted in Alberta: Occupiers' Liability Act, S.A., 1973, c. 79, and British Columbia: Occupiers' Liability Act, S.B.C., 1974, c. 60.

arrived at the desired result in a manner that did less violence to the law of tort. One method of doing so would have been to hold that the boy's license to be on the property did not extend to, or was terminated by, climbing on a moving train.[39] Indeed, Mr. Justice de Grandpré did so hold,[40] but he failed to pursue the finding to its legal conclusion. Had he done so, several troublesome passages could have been omitted from his reasons for judgment.

Of even deeper concern is the court's apparent obsession to do what it conceives to be justice between the immediate parties without sufficient regard for the long-range consequences. It is the writer's conviction that the Supreme Court of Canada has in recent years, both in public and private law, concerned itself unduly with the short-range equities of the cases coming before them,[41] with resulting distortion or obfuscation of the legal principles involved. The chief task of an ultimate court of appeal, in the writer's view, is to interpret, clarify, and modify the body of legal *principles* which lower courts are called upon to apply to individual cases. If individual justice can be done in the process so much the better. But the primary responsibility for "individualizing" justice lies with the lower courts. The Supreme Court of Canada should be chiefly concerned with the state of the law. If it permits its interest in the short-term equities to interfere with its responsibility for formulating and articulating rational legal principles, as appears to have occurred in the *Wade* case, the long-range prospects for Canadian law are gloomy. To borrow words uttered by Mr. Justice Cardozo in a somewhat different context:[42]

> The inn that shelters for the night is not the journey's end. The Law, like the traveller, must be ready for the morrow.

DALE GIBSON*

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[39] Such an approach was taken, in different circumstances, in *Danluk* v. *Birkner et al.*, [1947] 3 D.L.R. 337 (S.C.C.).

[40] *Supra*, footnote 1, at p. 229.

[41] How else can one explain, for example, the hopelessly inconsistent performances of several members of the court in cases such as *Robertson & Rosetanni* v. *R.* (1964), 41 D.L.R. (2d) 485; *R.* v. *Drybones* (1970), 9 D.L.R. (3d) 473; and *A.-G. for Canada* v. *Lavell et al.* (1974), 38 D.L.R. (3d) 481 on the legal effect of the Canadian Bill of Rights? See generally: P. Weiler, In the Last Resort (1974).

[42] The Growth of The Law (1924), p. 20.

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RESTITUTION—DISCHARGE OF A DEBT—MOSSE STILL GROWS ON THE RIGHT OF RECOVERY.—It is now over thirty-five years since Lord Wright first spoke of "restitution" as a third category of common law remedies, providing relief against unjust enrichment.[1] While in Canada jurists have received Lord Wright's words with approval[2] and generally displayed a liberal attitude to the law of unjust enrichment,[3] in England matters have proceeded more cautiously. The introduction of a general right to restitution in English law has been criticized[4] and the present position most recently described as follows: "My Lords, there is no general doctrine of unjust enrichment recognized in English law. What it does is to provide specific remedies in particular cases which might be classified as unjust enrichment in a legal system that is based on the civil law".[5] The decision in *Liberian Insurance Agency Inc.* v. *Mosse*[6] concerns one of these specific common law remedies, the right to recover upon the compulsory discharge of another person's debt.

Although "the facts of the case are probably unique"[7] the basic framework falls within the traditional mold. The three principal characters consist of the plaintiff, a Liberian company (L.I.A.) which acted as broker in effecting a policy of cargo insurance, the defendant Mosse, a representative of the underwriters (Lloyds), and the policy holders (A.T.C.), the cargo owners.

A loss occurred to the cargo insured. A.T.C. commenced a suit in Liberia, not against the underwriters (who did not live, carry on business or have any funds in Liberia) but against L.I.A. on the basis that the latter was an agent of the present defendant. A.T.C was successful both at trial and on appeal, (L.I.A. limiting its defence to a denial of agency) and judgment was given against L.I.A.

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[1] *Fibrosa Spolka Akcyjna* v. *Fairbairn Lawson Combe Barbour Ltd*, [1943] A.C. 32, at p. 61.

[2] *Deglman* v. *Guaranty Trust Co. and Constantineau*, [1954] S.C.R. 725, at p. 734; *County of Carleton* v. *City of Ottawa*, [1975] S.C.R. 663, at p. 669.

[3] See generally John D. McCamus, Restitutionary Remedies in Special Lectures Law Society of Upper Canada: Current Problems—Law of Contracts (1975); and for a recent example of recovery based solely on "the doctrine of unjust enrichment", *Small and Small* v. *Stanford and Bailey*, [1977] 6 W.W.R. 185 (Co. Ct).

[4] *Reading* v. *Att.-Gen.*, [1951] A.C., 507, at p. 513, per Lord Porter.

[5] *Orakpo* v. *Mansion Investments*, [1977] 3 All E.R. 1, at p. 7, per Lord Diplock. Contrast, "[W]here a Court, on proper grounds, holds that the doctrine of restitution is applicable, it is not necessary to fit the case into some category": *James More and Sons Ltd* v. *University of Ottawa* (1974), 49 D.L.R. (3d) 666 (Ont. H. Ct), at p. 676, per Morden J.

[6] [1977] 2 Lloyd's Rep. 560.

[7] *Ibid.*, at p. 561.

L.I.A. then brought the present suit against the defendant, claiming a sum proportionate to the risk underwritten by Lloyds (74.42%) seeking not to stand in A.T.C.'s shoes and assert its rights against the defendant but rather to set up a direct claim.

Donaldson J. found the plaintiff unable to establish any contractual rights against the defendant. As far as agency is concerned, the plaintiff, as broker in effecting the policy, was an agent of the cargo owners, not of the defendant.[8] The plaintiff also attempted to set up a "quasi-promissory estoppel" alleging that the underwriters, who themselves had denied liability on the policy from the start, had wanted the plaintiff to limit its defence to disputing agency. Although Donaldson J. suggested he would have had little difficulty implying a promise of indemnity if the defendant had specifically asked the plaintiff to so limit its defence, such was not the case here. To allow a cause of action, in these circumstances, in the absence of a request, would be "ploughing a lonely furrow in almost virgin legal soil".[9]

The plaintiff also asserted a claim in quasi-contract, relying on the cause of action recognized in *Moule* v. *Garrett*[10] and described in that case by Chief Justice Cockburn as follows:[11]

> Where the plaintiff has been compelled by law to pay, or, being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the latter obtains the benefit of the payment by the discharge of his liability, under such circumstances the defendant is held indebted to the plaintiff in the amount.

Donaldson J. made a number of crucial findings concerning the rights arising under the insurance contract. First, there had been material non-disclosure or misrepresentation by the assured, A.T.C. which entitled the underwriters to avoid the contract under section 20 of the Marine Insurance Act, 1906.[12] Second, the right to avoid for certain non-disclosure was not lost before formal notice of avoidance was given.[13] Third, the "held-covered" clause could not be set up against the underwriters. In such circumstances, since no liability of the defendant had been discharged by the plaintiff's payment, the writer suggests Donaldson J. correctly dismissed the plaintiff's claim.[14]

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[8] *E.g.*, *North and South Trust Co.* v. *Berkeley*, [1971] 1 All E.R. 980, also Donaldson J.

[9] *Supra*, footnote 6, at p. 569.

[10] (1872), L.R. 7 Ex. 101.

[11] *Ibid.*, at p. 104.

[12] 1906, 6 Edw. 7, c. 41.

[13] *Supra*, footnote 6, at p. 565.

[14] *Ibid.*, at pp. 566-568.

What is unfortunate however is not the result but the restrictive approach taken to the cause of action. Donaldson J. sets out four necessary conditions formulated by Goff and Jones[15] and then rigidly applies the facts to the conditions:[16]

> [It] follows the plaintiff must show (i) that he has been compelled by law to make the payment, (ii) that he did not officiously expose himself to the liability to make the payment; (iii) that his payment discharged a liability of the defendant; and (iv) that both he and the defendant were subject to a common demand by a third party, for which, as between the plaintiff and the defendant, the latter was primarily responsible.

Clearly, as Donaldson J. suggests, circumstances in which all the conditions are satisfied will be rare.[17]

Within the context of a judicial system which denies a general right to restitution it is submitted that this particular cause of action should be recognized as a well suited vehicle to prevent unjust enrichment and should be applied more liberally. This comment provides a brief opportunity to examine critically each of the four conditions.

Condition (iv) requires that both plaintiff and defendant be under a common demand. In the present case there was little difficulty in finding that this condition had been satisfied, yet such a condition if applied mechanically is prone to harsh results.[18] If liability is imposed by statute and the statutory provision renders A *or* B but not both liable and B is called upon to pay, while A ought to have been, a direct action by B against A has been denied.[19] However, if the statute renders A *and* B liable, and B is called upon to pay while A is primarily liable, B can recover.[20] If the courts can determine who as between A or B is primarily liable surely they can determine as between A and B who ought to have been liable. In a recent Ontario case,[21] the court had no difficulty in allowing this cause of action, as distinct from a general right to restitution, when confronted with a statute creating a debt of the first type described above.

Even more fundamental to the right of recovery is condition (i) requiring legal compulsion. The defendant argued that the condition

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[15] The Law of Restitution (1966), p. 207.

[16] *Supra*, footnote 6, at p. 562.

[17] *Ibid.*

[18] Contrast *Moule* v. *Garrett* (1872), L.R. 5 Ex. 101 and *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society*, [1899] 1 Q.B. 161.

[19] *Re Nott and the Cardiff Corporation*, [1918] 2 K.B. 146, rev'd by House of Lords on another point, [1919] A.C. 337.

[20] *Brook's Wharf and Bull Wharf* v. *Goodman Bros.*, [1937] 1 K.B. 534.

[21] *James More and Sons Ltd* v. *University of Ottawa*, *supra*, footnote 5.

was met only when the plaintiff was compelled by the laws of England and Wales (''Civilization ends not actually at Watford but at the coast and Scottish border''[22]) but Donaldson J. held compulsion by foreign law, as long as not a mere colourable imitation of the process was sufficient.[23]

Although Lord Greene's statement that recovery upon a compulsory discharge is ''merely one example of a number of cases where the law raises an obligation to indemnify irrespective of any actual contractual relationship between the parties'',[24] would suggest varied circumstances of recovery, the right has been confined, in English law, to instances of legal compulsion. Canadian courts have refused to so limit recovery.[25] The requirement of compulsion is an application of the principle that officiousness is a bar to recovery,[26] yet in circumstances where such a principle is of questionable relevance. ''Liabilities are not to be forced upon persons behind their backs'',[27] but in the case of payment of an existing debt there is no forcing of the liability but merely the substitution of creditors, ''instead of owing the money to A she will in future owe it to B''.[28] Also the fear expressed by Lord Kenyon,[29] that by allowing recovery for voluntary payments, an enemy could become one's creditor, seems overly protective since a debt can now be assigned without the debtor's consent.[30]

The second condition, officiously exposing oneself to liability is cast in the same mold. In *Liberian Insurance*, as no question of liability arose until final judgment, it was argued that the plaintiff by limiting its defence to contesting agency had officiously exposed itself to liability. It is suggested the question should not be whether

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[22] *Supra*, footnote 6, at p. 562.

[23] *Ibid.*

[24] *Re A. Debtor*, [1937] 1 All. E.R. 1, at p. 10.

[25] See *County of Carleton* v. *City of Ottawa*, *supra*, footnote 2 (mistake); *Samilo* v. *Phillips* (1968), 69 D.L.R. (2d) 411 (B.C.S.C.), aff'd on other grounds (1971), 20 D.L.R. (3d) 283 (S.C.C.) (necessitous intervention); also *Arnett and Wensley Ltd* v. *Good* (1967), 64 D.L.R. (2d) 181 (B.C.S.C.); Contrast, *Lambert Implements Ltd.* v. *Pardell et al.* (1965), 50 W.W.R. 310 (D. Ct.) where recovery was denied on the basis of voluntariness.

[26] See generally as to ''officiousness'' Goff and Jones, *op. cit.*, footnote 15, p. 17; and as to the narrowly restricted exception of ''necessitous intervention'' see Chapter 14 of the same.

[27] *Falcke* v. *Scottish Imperial Insurance Co.* (1886), 34 Ch. D. 234, at p. 248, per Bowen L.J.

[28] *Butler* v. *Rice*, [1910] 2 Ch. 277, at p. 282, per Warrington J., a case where a stranger paid a morgage debt and was subrogated to the rights of the mortgagee.

[29] *Exall* v. *Partridge and two others* (1799), 8 T.R. 308, at p. 310.

[30] See W.R. Cornish, Interveners and Unjust Enrichment (1975), 38 Mod.L.Rev. 563, at p. 564.

the debt was discharged voluntarily, but rather can a debt in fact be discharged by a voluntary payment[31] and if so, has it been?

Donaldson J. found that on the facts of the *Liberian Insurance* case, the "main issue" was whether the underwriters if sued would have been liable to A.T.C., that is had a debt of the defendants been discharged, as required by condition (iii)? It is suggested whenever one claims a right to reimbursement[32] condition (iii) should not only be the main condition but the only condition a plaintiff need satisfy.

Yet the discharge of the debt should not give rise to an absolute right of recovery. It should be open to the defendant to raise certain matters to show how he has been prejudiced[33] by the substitution of creditors as where the payment was premature[34] or intended as a gift.[35]

The English Court of Appeal has recently displayed at least a willingness to modify the legal requirements of this cause of action. In *Owen* v. *Tate*[36] Scarman L.J. having set out the four conditions reviewed a number of cases and concluded that a court should look at all the circumstances of the case and grant a right of reimbursement when just and reasonable. However, Scarman L.J. severely restricted the right of recovery, suggesting that in the absence of some necessity[37] it would not be just and reasonable. While, on the facts, the result in *Owen* v. *Tate* is consistent with the proposed liberal view[38] it is suggested the Court of Appeal did not modify the

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[31] See Birks and Beatson, Unrequested Payment of Anothers Debt (1976), 92 L.Q.Rev. 188, for a thorough examination of the problem.

[32] At least in all cases where there has been no antecedent request for the payment by the defendant. Where the principal debtor requests the plaintiff to guarantee its debt, then upon payment the plaintiff has a right of reimbursement even if the principal debt was unenforceable against the principal debtor. *Argo Caribbean Group Ltd* v. *Lewis*, [1976] 2 Lloyd's Rep. 289 (C.A.) following in *Re Chetwynd's Estate*, [1938] Ch. 13 (C.A.).

[33] In criticizing the decision of *England* v. *Marsden* (1866), L.R. 1 C.P. 529, where recovery was denied because the plaintiff had voluntarily and for his own advantage exposed himself to potential liability, Lindley L.J. in the later case of *Edmunds* v. *Wallingford* (1885), 14 Q.B.D. 811, at p. 816, said: "[A]lthough it is true the plaintiff has only himself to blame for exposing his goods to seizure, we fail to see how he thereby *prejudiced* the defendant or why having paid the defendant's debt in order to redeem his own goods from lawful seizure, the plaintiff was not entitled to reimbursement by the defendant". Italics mine.

[34] Stoljar, The Law of Quasi-Contract (1964), pp. 141-147.

[35] *Re Fink* (1971), 14 D.L.R. (3d) 31 (Ont. H. C.).

[36] [1975], 2 All E.R. 129.

[37] *Ibid.*, at p. 135; see also the criticism of departure from recognized categories of recovery A.J. Oakley, The Position of the Officious Surety, [1975] C.L.J. 202.

[38] "Speaking for myself on the material which was before the county court judge . . ., I find it quite impossible to sort out the rights and wrongs and certainly quite impossible to say whether or not the defendants in fact received a benefit . . .". *Ibid.*, at p. 137, per Omerod L.J.

requirements far enough. As long as the law of unjust enrichment is confined, as it appears to be in England, to a number of distinct categories of rights, it is suggested the historic requirements of one of these rights should be re-assessed and in cases like *Liberian Insurance* the common law should recognize a right of recovery whenever it can be demonstrated that the defendant has benefited by the discharge of a debt.[39]

WILLIAM J. BRAITHWAITE*

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CORPORATE LAW—FOREIGN CONTROLLED SUBSIDIARIES—NEED FOR EFFECTIVE CANADIAN BOARDS OF DIRECTORS.—For many years there has been a concern by many Canadians that too much of our economy is controlled and managed outside of Canada by foreign corporations.[1]

Because of our tax laws and to limit financial responsibility most foreign corporations operating in Canada do so through subsidiary corporations formed here. In an attempt to "Canadianize" the role of these subsidiaries in our economy Canada, Ontario and British Columbia require that a majority of the directors of most corporations formed under their laws must be resident Canadians.

It would appear that in many instances the boards of directors of Canadian subsidiaries are not in fact exercising their duties of management and control. Frequently, their duty to manage has been fully abdicated to the foreign head office and to foreign executives.

In effect, in many situations calling for board of directors level management decisions, the Canadian subsidiary corporate form is ignored, the Canadian directors have no authority and the whole

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[39] *Cf. Minister of Consumer and Commercial Relations et al.* v. *London Midland General Insurance Co.* (1978), 18 O.R. (2d) 153 (Ont. H. Ct). There the Minister acting under authority provided by the Motor Vehicle Accident Claims Act had defended a civil action brought against the driver of a motor vehicle by a person injured in an accident. Under the insurance policy the insurance company was obligated to defend the driver. In a direct action by the Minister against the insurance company, recovery was denied, not because the minister had *voluntarily* assumed the other's legal obligation but because the defence in the earlier civil suit was ". . . far too vague and ephemeral to be construed as constituting a benefit which can be measured in monetary terms". *Ibid*, p. 155 per Stark J.

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[1] Foreign Direct Investment in Canada (1972) (the Gray Report).

Canadian operation is run from head office as if it were just another region of the parent corporation.[2]

In 1977 in *Dominion Bridge* v. *The Queen,*[3] the Federal Court of Appeal held that a fully controlled off-shore subsidiary of a Canadian company was so closely controlled by the parent that the income of both should be taxable in Canada.

It would appear that there is no reason why the logic of the *Dominion Bridge* case will not be applied against foreign corporations who keep too much control of their Canadian subsidiaries. The result would be to tax in Canada the world income of the parent.

Also the authorities cited in the *Dominion Bridge* case indicate that not only for income tax purposes, but to avoid other legal consequences, a subsidiary should not operate as a mere sham or puppet of its parent.

Accordingly, any foreign corporation with a Canadian subsidiary should move without delay to ensure that as much as possible real and actual management and control of its Canadian subsidiary is held and exercised in Canada, by its Canadian board of directors.

HUGH H. MCLELLAN*

* * *

LAW TEACHERS AND THEIR JURISDICTION.—The Canadian legal establishment—judges, practitioners and teachers—have not hitherto enjoyed a favourable press either at home or abroad. Long ago Professor Maxwell Cohen, in an article in this *Review,* expressed the opinion that the contribution of Canadian legal scholars ranged from the less than modest to the reasonably respectable.[1] And in 1956, F. R. Scott lamented that legal research was "wholly inadequate in quantity and quality to enable the legal profession properly to fulfill its high social obligations".[2] Twenty years later

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[2] For general background information see, Power or Pawns, Boards of Directors in Canadian Corporations, by Terrence H. White (CCH Canadian Limited, 1978), and references therein.

[3] 77 DTC 5367, affirming 75 DTC 5150. Commented upon by A.M. Pilling in The Tax Haven Subsidiary (1975), 23 Can. Tax J. 467.

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[1] The Condition of Legal Education in Canada (1950), 28 Can. Bar Rev. 267. See also his follow up commentary in [1964] Can. Bar Assoc. Papers 116.

[2] Report of the Committee on Legal Research (1956), 34 Can. Bar Rev. 1000, at p. 1001.

the Symons Commission was no more generous.[3] Its *Report* laid serious charges against our system of legal education. The Commission stated that courses were insufficiently Canadian in content, that the law schools did not stress Canadian legal problems,[4] that the study of Canadian legal history was non-existent,[5] that there was an insufficient quantity of legal writing,[6] that there was an overweening respect for the English tradition,[7] that post-graduate education was primarily obtained abroad,[8] that alien law teachers constituted too great a number,[9] and that Canadian post-graduate legal programmes were servicing to a large extent, non Canadians.[10]

The appreciation of responsible critics abroad has been no more complimentary. Professor Atiyah believed that neither Canadian law schools nor law courts enjoyed much of a reputation internationally because of their slavish adherence to English precedents both ancient

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[3] To Know Ourselves, The Report of the Commission on Canadian Studies (T.H.B. Symons: Association of Universities and Colleges of Canada, 1976).

[4] These were identified as being: the law of the sea, the law of oil and gas, the law relating to multi-national corporations, the law relating to civil liberties, and to the native peoples, Canadian constitutional problems and comparative studies of common and civil law.

[5] ". . . the study of Canadian legal history might be expected to be a respectable and flourishing enterprise, but it is not. It has been greatly neglected, and most of the little work that has been done has reflected limited interests. . . . The result is that we know almost nothing about our legal past. We have not even accumulated and organized the major facts, let alone thought about them." quoting Risk, A Prospectus for Canadian Legal History (1973), 1 Dal. L.J. 227.

[6] Indeed, the Commission's investigations revealed that the preparation of integrative treatises is a major weakness in Canadian legal scholarship.

[7] "Because Canada reached political and judicial independence by an evolutionary process, some legal lumber was left lying about and its disposal took time", Curtis, Stare Decisis at Common Law in Canada (1978), 12 U.B.C.L. Rev. 1, at p. 9. In comparison, the revolutionary independence of the United States of America has resulted in a very different development. See Horwitz, The Transformation of American Law 1780-1860 (1977).

[8] "They noted that no law school in Canada has a fully rounded programme of graduate studies. Consequently, most Canadians interested in post-graduate work in law still go to the United States, Britain or France, where such study is further developed and more highly regarded."

[9] "At present nearly 25 percent of full-time law faculty members in Canada are non-Canadians, and in two regions of the country over a third of the full-time faculty have been non-Canadian in recent years."

[10] "In 1972-73, the most recent year for which figures are available, of the students enrolled for a master's degree in law at Canadian Universities, 39.3 per cent were non-Canadians in Ontario, 53.6 per cent in the Prairie provinces, and 100 per cent in the Atlantic region. Only 10 per cent of those studying for a doctorate in Ontario were Canadian."

and modern.[11] Equally, Mr. Glazebrook had little time for Canadian writing on criminal law and deprecated, with sympathy, the poor quality of the judgments offered by the Canadian judiciary.[12] And even an acknowledged friend, Professor J. G. Fleming of the University of California at Los Angeles, has found it impossible to restrain muted criticism.[13]

Of course, the present generation of full-time Canadian law teachers, adjuncts and practitioners are now responding by the

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[11] Review of Linden, Studies in Canadian Tort Law (1968-69), 10 J.S.P.T.L. 232: "It is regrettable but true that Canadian Law Schools and Canadian Courts (with, in each case, one or two exceptions) have not enjoyed a very high reputation in this country. This volume of essays on Tort Law should do something to improve the reputation of Canadian Law Schools, though I doubt if it will do the same thing for Canadian Courts. On the contrary, one is struck repeatedly by the paucity of fruitful and original ideas which have emerged from Canadian Courts in dealing with tort problems.

"Canadian adherence to English case law does make it possible to see the effect of English cases applied in a society closer in many ways to the United States than to England itself. If Canadian judges have not contributed much to the development of this branch of the law, Canadian litigants have supplied the raw material for many interesting situations, and it is helpful, and interesting to have these brought to the attention of English lawyers.

"Perhaps the most revealing remark in the volume, is, however, to be found in this chapter. While recognizing that unsatisfactory conceptual techniques are not an obstacle to the 'great' judge who is able to penetrate the jungle, the author points out that such 'visionary judges and lawyers' are extremely rare. It seems possible that the author has here put his finger on something of great importance, and (I regret to say) on a distinctive feature of the Canadian scene. In England, it may be, the quality of the judiciary has generally (though not always) been such that the worst excesses of mechanical jurisprudence have usually (though not always) been avoided, even though lip-service is still paid to the gospel according to legal concepts. In the United States the realist movement has for many years now succeeded in showing lawyers the dangers of mechanical jurisprudence, and so avoiding its worst features, at least in the better Courts. But in Canada, the quality of the judiciary has hitherto been such that mechanical jurisprudence is often seen at its worst."

[12] Review of Friedland, Cases and Materials on Criminal Law and Procedure (1976), 92 L.Q.Rev. 301: "Canada has disappointingly little to offer the criminal lawyer. Its Criminal Code is no more than a revision and modification of Stephen's Draft Code, and contains very little that is novel or conceptually interesting: its chief merit lies in the ready manner in which it is frequently amended in order to embrace old sins committed in new ways. There is no Canadian textbook on criminal law in English and the legal world would scarcely be the poorer if the serried volumes of Canadian Criminal Cases never saw the light of day. The Canadian juridiciary has, no doubt, many virtues, but its warmest admirers could not claim that the art of delivering memorable judgments is amongst them."

[13] "The present, is of course, not a suitable occasion for musing about the qualitative performance of Canadian courts, save to say that Professor Weiler's recent pessimistic appraisal of the Supreme Court's record (Groping Towards a Canadian Tort Law: The Role of the Supreme Court of Canada (1971), 21 U.T.L.J. 267) could be easily paralleled as well on the provincial level." Review, Linden's Canadian Negligence Law (1973), 2 O.H.L.J. 349.

publication of increasing numbers of books and monographs but[14] as yet the reviewers have been sparing with the accolade of excellence in their assessments.[15] Most have been received as good or useful but some have been comprehensively panned.[15a] The courts too are

[14] *E.g.* Cumming and Michenberry, Native Rights in Canada (2nd ed., 1972), review, Berger, (1972), 22 U.T.L.J. 305; Tarnopolsky, The Canadian Bill of Rights (2nd ed., 1975), review, Marx, (1975), 53 Can. Bar Rev. 832; Castel, International Law (3rd ed., 1976), review, Fitzgerald, (1976), 54 Can. Bar Rev. 476; Castel, Canadian Conflict of Laws (Vol. 1, 1975), review, Lederman, (1976), 54 Can. Bar Rev. 455. And compare H. W. Arthurs, Paradoxes of Canadian Legal Education (1976-77), 3 Dal. L.J. 639, at p. 654: "Let me now make explicit what was implicit in this analysis. Canadian legal scholarship, in all of its manifestations, is often inadequate, sometimes acceptable, but seldom—on an objective scale—first class. In other words, if we were to apply the grading profile of student marks to an assessment of faculty members, the results would be pretty much the same."

[15] Azard, Pierre and Boisson, Droit civil québécois, t.1 (1971), review, Brierley, (1972), 22 U.T.L.J. 215; Brun and Tremblay, Droit public fondamental (1972), review, Bernard, (1973), 6 Can. J. Pol. Sc. 548; R. St. J. MacDonald et al. (eds), Canadian Perspectives on International Law and Organisation (1974), review, LaForest, (1975), 53 Can. Bar Rev. 442; Driedger, The Construction of Statutes (1974), review, Andecent, (1975), 7 Ott. L.Rev. 479; Fridman, The Sale of Goods in Canada (1973), review, Zysblat, (1973), 8 U.B.C. L.Rev. 374; Fridman, The Law of Contract in Canada (1976), review, Hickling, (1978), 12 U.B.C. L.Rev. 140; Gibson, Substantial Justice: Law and Lawyers in Manitoba 1670-1970 (1972), review, Bowker, (1972), 50 Can. Bar Rev. 376; Grossman, Police Command: Decisions and Discretion (1975), review, Dias, (1975), 7 Ott. L.Rev. 703; Harvey, The Law of Habeas Corpus in Canada (1974), review, Izumi Nash, (1975), 32 U.T. Fac. L.Rev. 119; LaForest, Water Law in Canada: the Atlantic Provinces (1973), review, Lucas, (1975), 53 Can. Bar Rev. 440; Neilson (ed.), The Consumer and the Law, review, Waddams, (1971), 21 U.T.L.J. 588; Pharand, The Law of the Sea of the Arctic with Special Reference to Canada (1973), review, Rutter, (1975), 13 Alta, L.Rev. 371; Waters, The Law of Trusts in Canada (1974), review, Bale, (1975), 13 O.H.L.J. 610; Weiler, In the Last Resort; a Critical Study of the Supreme Court of Canada (1974), review, Abel, (1974), 24 U.T.L.J. 318; Cheffins and Tucker, The Constitutional Process in Canada (2nd ed., 1976), review, Jones, (1977), 55 Can. Bar Rev. 197; Glenn, La capacité de la personne en droit international privé français et anglais (1975), review, Smith, (1975), 55 Can. Bar Rev. 209; Goode, Criminal Conspiracy in Canada (1975), review, Gray, (1976), 34 U.T. Fac. L.J. 290; Green, Law and Society (1975), review, McConnell, (1977), 41 Sask, L.Rev. 197; Patenaude, La protection des conversations en droit privé (1976), review, Archambault, (1977), 55 Can. Bar Rev. 216; Tancelin, Théorie du droit des obligations (1975), review, Vallée-Ouellet, (1977), 23 McGill L.J. 153; Smith, Legal Obligation (1976), review, Fridman, (1977), 55 Can. Bar Rev. 397; Jacomy-Millette, Treaty Law in Canada (1975), review, LaForest, (1976), 14 Can. Yb. Int. L. 399; S.A. Williams, The International and National Protection of Movable Cultural Property: A Comparative Study (1977), review, Green, (1978), 56 Can. Bar Rev. 361.

[15a] Fridman (ed.), Studies in Canadian Business Law (1971), review, Crawford, (1972), 22 U.T.L.J. 124; Mendes da Costa (ed.), Studies in Canadian Family Law (1972), review, Barber, (1973), 51 Can. Bar Rev. 709; J. Williams, Limitations of Actions in Canada (1973), McCamus, (1973), 23 U.T.L.J. 472; McWilliams, Canadian Criminal Evidence (1975), review, Brooks, (1976), 54 Can. Bar Rev. 199; Ruby, Sentencing (1976), review, Mandel, (1977), 55 Can. Bar Rev. 385; J. Williams, The Law of Defamation in Canada (1976), review, Pitt, (1978), 41 Mod. L.Rev.

changing. The Supreme Court of Canada and the provincial courts of appeal have been prepared to leave behind English decisions,[16] to reject more recent English developments,[17] and even to lay down policies[18] and reconsider their own decisions,[19] in the light of changed conditions.

But, if it is true that the historically poor reputation of Canadian courts and legal scholarship is justified, then blame must rest principally with the purveyors of our legal tradition—the law teachers. For even a cursory observation of the experiences of other legal systems across the globe reveals the potential contributions and disservices of academics. The Scots, for example, were able to mould their law in the civilian tradition through the training of young lawyers in the universities of France and the Netherlands and have retained that tradition through the dynamism of their faculties of law.[20] In a similar fashion the South Africans were able to withstand

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103. And see Arthurs, *op. cit.*, *ibid.*, at pp. 640-641: "Fourth, what is the quantity, quality and direction of legal scholarship today? There are ten or twenty times as many law teachers now as there were in 1950. But is there ten or twenty times as much scholarly writing? Is it appreciably better? We accept that the social sciences can do much to inform and invigorate our analysis of the legal system—a commonplace today, but a heresy in 1950. But is this perception widely translated into practice by legal scholars?"

[16] *The Queen* v. *Jennings*, [1966] S.C.R. 532. Compare the dissent of Laskin C.J.C. in *Co-operative Fire & Casualty Co.* v. *Saindon et al.* (1975), 56 D.L.R. (3d) 556 (S.C.C.).

[17] *Teledyne Industries Inc. et al.* v. *Lido Industrial Products Ltd* (1978), 17 O.R. (2d) 111 (Div. Ct) preferring established Ontario practice to the new formulations of the House of Lords on interlocutory injunctions in *American Cyanimid Co.* v. *Ethicon Ltd* (1975), 2 W.L.R. 316. This break with tradition was made easier by the fact that the instant decision has been subjected to criticism by the English Court of Appeal and has not been followed either in Australia or South Africa, as was noted by the Ontario Court.

[18] *Andrews* v. *Grand & Toy Ltd, Teno* v. *Arnold* and *Thornton* v. *The Board of School Trustees of School District No. 57*, [1978] 4 W.W.R. 577 (S.C.C.), giving ceilings for awards for intangibles.

[19] *Keizer* v. *Hanna*, Supreme Court of Canada, (1978), 82 D.L.R. (3d) 449 (S.C.C.) departing from the earlier decision in *Gehrmann* v. *Lavoie* (1976), 59 D.L.R. (3d) 634 (S.C.C.) with regard to the question of deduction of income tax payable by the deceased upon his earnings.

[20] In the 14th century the Universities were Orleans, Bourges, Louvain and Poitiers and in the 17th and 18th centuries the Scots attended Utrecht, Groningen and Leiden. See Smith, Studies Critical and Comparative (Edinburgh, 1962), pp. 34 and 51; Phillipson, Lawyers, Landowners and the Civil Leadership of Post-Union Scotland in MacCormick (ed.), Lawyers in their Social Setting (Edinburgh, 1976). And compare the words of Lord Macmillan in *Stewart* v. *L.M.S.*, 1943 S.C. (H.L.) 19, at pp. 38-39: "The law of Scotland was then still in a formative stage. . . . During the seventeenth and eighteenth centuries Scottish students of law, in the absence of opportunities of academic instruction in their own country, resorted in large numbers for their legal education to the great seminaries of Civil law in Holland. . . . From their sojourn in Holland the aspirants to practice in the

the encroachments of the English common law in the early twentieth century and thus maintain an individual and identifiable South African private law chiefly by the development of their law schools.[21] Despite the early erosion and subsequent renaissance of the civilian tradition in Louisiana was largely a product of law teachers.[22] Conversely, the experience of the African common law jurisdictions has been that the training of African lawyers in London, combined with the absence of local law schools until relatively recent times has held back the africanization of the common law by more than seventy years.[23]

Therefore can we in Canada claim, like the African lawyers, that academic law teaching is still young and that it is unfair to compare us with the established jurisdictions? Are we indeed younger than our other neighbours-in-law? Possibly in Ontario it can be argued that university training in law is relatively recent and that despite early sputterings,[24] fully fledged university law schools are products of the forties,[25] fifties,[26] and sixties.[27] But a survey of the dates of commencement of law teaching across the rest of the country reveals a rather different picture[28]—one which does not markedly differ from descriptions of the experiences of England and the United States. When one looks at the English experience it becomes clear that university legal education is no ancient tradition. This did not

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Parliament House brought back with them, not only the principles which they had imbibed from the masters of the Roman-Dutch law, but also the treatises of which the law schools of the Dutch universities were so prolific. No Scots lawyer's library was complete in those days which did not contain the works of Grotius, Vinnius, the Voets, Heineccius and other learned Civilians." For the story of the contribution of Scots law teachers as writers and the catalytic effect of the Scottish Universities Law Institute see (1975), 53 Can. Bar Rev. 428.

[21] Hahlo, . . . And Save Us From Codification (1960), 78 S.A.L.J. 432.

[22] Crabites, Louisiana not a Civil Law State (1928), 9 Loyola L.Rev. 51; Daggett, Dainow, Herbert, McMahon, A Reappraisal Appraised: A Brief For the Civil Law of Louisiana (1937), 12 Tul. L.Rev. 12; Barham, The Renaissance of the Civilian Tradition in Louisiana in Dainow, ed., The Role of Judicial Decisions and Doctrine (1974), p. 38.

[23] Cottrell, an End to Slavishness? A Note on *Ali* v. *Okulaja* (1973), 17 J.A.L. 247.

[24] University of Toronto 1854-1868, 1873-1878, 1881-1888; Queen's 1861-64, 1880-1883; Western 1885-1887.

[25] University of Toronto 1949. The "Department" of Law, however, predates World War II.

[26] Ottawa 1957; Queen's 1957; Western 1957.

[27] Windsor 1968 and York 1968.

[28] Alberta 1912; Saskatchewan 1913; Manitoba 1914; British Columbia 1915 (Reorganised 1945); New Brunswick 1892; Dalhousie 1883. The list is to be completed by the addition of Victoria 1975, Calgary 1976 and Moncton 1978. The teaching of law began at Carleton in 1946.

take hold until the late nineteenth century and by 1908 there were still only eight law schools in operation.[29] And, as Dr. Baker has recently shown, attendance at University College, London, the first modern law school in England, did not really pick up until the 1930's.[30]

Likewise, legal education in the United States did not get off to any great headstart. The law schools may have been greater in number in the nineteenth century but their quality was barely measurable.[31] It is only after the turn of the century that we see the proliferation of law schools in that jurisdiction.[32] Yet one cannot deny the quantity and excellence of the productions of the lawyer-academics.

Who, then, are these individuals who apparently have still to establish Canada's legal reputation? Is there anything about the way they perceive their role as teachers and scholars which might affect their attitudes to the development of a Canadian legal tradition based on excellence. Educational psychologists claim that a teacher's individual approach to his subject is conditioned mainly by the way he himself was taught.[33] Consequently, it may be instructive to examine the educational background of Canadian law teachers in order to elucidate the major influences on their understanding and nurturing of our law. Although it may conceivably be valuable to trace both undergraduate and secondary school studies[34] because of

[29] The Report of the Committee on Legal Education 1971 (Cmnd. 4595), pp. 3 and 8.

[30] Baker, University College and Legal Education 1826-1976 (1977), 30 C.L.P. 1, at p. 8.

[31] "In the years following the reorganization of the Harvard Law School under Story, the number of schools gradually increased. By 1850 there were fifteen; by 1860 the number was twenty-one; and by 1870 it was thirty-one. Even as late as 1870 a substantial number of the schools, twelve of the thirty-one, conducted one-year programs; two had lengthened the course to one and a half years; and seventeen were on a two-year basis. The instruction offered was severely legal. A number of states had by 1870 established a requirement that all applicants for admission to the bar had to be twenty-one years of age. The schools had no entrance qualifications except an occasional recognition of the maturity standard; for example, Harvard after 1849 had a requirement that an applicant for law study must be a person of good moral character and nineteen years of age." Harno, Legal Education in the United States (1953), p. 51.

[32] The figures given in Reed, Present Day Law Schools (1928), p. 29 are: 1900—108; 1910—124; 1920—150. Today the number exceeds 400.

[33] Holt, How Children Fail (1968). Plato also recognized the importance of the myth-makers (teachers) in the propagation of a culture. See The Republic, Bk. II, ch. 9. An early compilation of literature on legal education in Canada may be found in Arthurs and Bucknall, Bibliographies on Legal Profession and Legal Education in Canada (1968).

[34] Such an effort would be especially productive in the case of teachers who never took an LL.B. degree, but as few persons so educated are currently teaching in Canada, little in the way of important influences would be gained.

the professional orientation of law teaching, a general pattern of the most significant factors can be gleaned simply from a computation of the influences on law teachers during their own professional training.

Insofar as Canadian law teachers are concerned, these influences have traditionally occurred in three time frames: during LL.B studies, during graduate legal education, and during the period of articling and bar admission courses. This third factor has never been predominant in most Canadian jurisdictions,[35] and since 1957 even in Ontario one could not avoid taking an academic degree from a recognized law school.[36] As a result, there are today only approximately fifteen professors who received no legal training at the University level.

The predominant educational influences on Canadian legal academics must therefore be the location and manner of their initial and graduate law studies. Although an assessment of the specific manner in which our teachers were taught would require massive historical research, fortunately for those wishing to tabulate statistics on the educational background of Canadian law teachers, the Canadian Association of Law Teachers annually publishes a fairly comprehensive directory. It is from this directory that the statistics presented below have been derived.[37]

Canada wide, of 752 entries in the directory, sufficient biographical material could be obtained for 644 persons actually teaching law in Canada in 1977-78. According to the directory there are 460 full-time law teachers in Canada, and although background material is not given for all of these, only a few do not appear in the sample of 644.

A computation of this information reveals that of these 644 teachers, 470 received their first law degree in a Canadian school; of the 506 persons teaching in Canada's common law schools, 350 took their initial legal training in a Canadian school. The directory also

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[35] The dates of opening for Canadian Law Schools appears in Laskin, The British Tradition in Canadian Law (1969), pp. 80-88: For a detailed treatment of the Ontario position see Bucknall *et al.*, Pedants, Practitioners and Prophets: Legal Education at Osgoode Hall to 1957 (1968), 6 O.H.L.J. 137.

[36] Even prior to 1957 many Ontario law teachers took a university law degree from the University of Toronto.

[37] Directory of Law Teachers 1977-78, edited by R. W. Kerr, complete tables follow as appendices I and II. It should be stressed that the figures reflect the education, *not the nationality* of law teachers. Furthermore they do not distinguish between single and multiple graduate degrees, nor between civilian or common law graduate studies. Finally, the statistics do not reflect the reputation of teachers, the emphasis placed by them in their courses or the materials used in teaching. Only the country of legal education is intended to be revealed by these tables.

reveals that there are approximately 170 full-time teachers in Quebec schools, and approximately 310 full-time teachers in the common law schools.[38] Since it is highly unlikely that many foreign trained teachers would hold a part-time appointment, we have assumed that most persons holding non-Canadian LL.B or J.D. degrees are full-time teachers. Consequently, the tabulation reveals that approximately 150 or almost fifty per cent of the full-time teachers in Canadian law schools received their first law degree outside Canada.

Our computation also reveals that across Canada only 103 of 477 graduate degrees held by law teachers were conferred by Canadian schools. When only the common law schools are considered this ratio becomes 63 of 403, or less than sixteen per cent. Unfortunately, it is not possible to deduce with any accuracy what the gross totals or percentages would be for only full-time teachers.

In order to gain a more accurate picture of educational influences on Canadian law teachers we have divided those teaching in common law schools into five geographic categories—Canadian, United Kingdom, United States, South Pacific (Australia and New Zealand), and other—reflecting the location of their various law degrees. Our tabulation reveals that as far as initial law degrees are concerned, the United Kingdom is the principal non-Canadian source. The approximate figures for full-time teachers are: Canada—160; United Kingdom—78; United States—29; South Pacific—28; other—15. At the graduate level both the United States and the United Kingdom overwhelm Canadian degrees. The statistics for both full-time and part-time teachers are: United States—186; United Kingdom—123; Canada—63; South Pacific—11; other (including France)—24. Combining these two tables, it appears that only 25 or eight per cent of full-time Canadian law teachers have both undergraduate and graduate law training in Canada, and 82 or almost thirty per cent of full-time Canadian law teachers have received no legal education whatever in Canada.

In addition to these statistics revealing a substantial foreign educational influence on Canadian law teachers, our tabulation reveals that the dual nature of Canada's legal tradition seems to have been lost on most of our common law teachers. Only 26, or approximately five per cent of full or part-time teachers appear to have received legal training in both the civil and the common law. Of these, only 3 have initial law degrees in both systems. By way of contrast, over 40, or approximately twenty-five per cent of those

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[38] These figures are approximate because it is impossible to determine how many professors at McGill are cross-appointed to both civil and common law faculties.

teaching in civilian schools have had common law training, and 5 of these have both a license and an LL.B.

If our claim about the effect of a teacher's education on his viewpoint is tenable, then the above statistics would lead one to draw the following conclusions: (1) law teaching in Canada of those perspectives which are formed at the LL.B level still reflects predominantly the English tradition; (2) the view and interests developed by law teachers at the graduate level show a greater United States imprint: (3) the dual perspective to be drawn from the study of both Canadian legal traditions is notably absent.

In order to assess the validity of these observations it is necessary to set out the traditional goals of LL.B. education and determine the major aspects of legal knowledge that one acquires at that time. A survey of the introductory notes to Canadian law school calendars would reveal the following general themes:[39] the inculcation of legal method (thinking like a lawyer); the development of research and writing skills; the imparting of a basic and general body of doctrine; and the appreciation of the social context of the law.

The impact of these basic goals is all the more significant if it is remembered that the freshman law student is at his most impressionable stage. Usually he arrives with little or no intellectual baggage which will permit him to withstand the tide of "new knowledge and truth" which his law teachers impart to him. For example, most law students arrive believing that the law is concerned with justice, only to have that naive view washed away by the legalism of their teachers. Most law students also approach law school believing that the law is certain and clearly written in statute books, but soon they are inculcated with the view that only *cases* count. Most law students enter law school with a generally diffuse and wide ranging view of what is relevant to the determination of any dispute, and quickly see their horizons narrowed to "nitty-gritty" questions such as the *ratio* of a case.

More important than this intellectual lobotomizing, however, are the perspectives conveyed as to the materials proper for legal study. How often have we been polemical about what textbooks are valuable and which are not? How often have we claimed that a case is terrible, a judge incompetent, or a particular court's decisions not worth following? How often have we engaged in arid analytical exercises about the rule in *Foakes* v. *Beer*,[40] forgetting or consciously ignoring that not only does the Mercantile Law Amendment Act[41] over-rule the case, but also that no self-respecting

[39] Calendars examined were from Dalhousie, McGill, York, Alberta and Victoria.

[40] (1884), 9 A.C. 605.

[41] R.S.O., 1970, c. 272, s. 16.

Canadian businessman would ever treat this case as binding upon him?

We leave it to the reader to decide whether or not the above aspects of Canadian legal education show the influence of any particular tradition.[42]

On the other hand, what are the main objectives of graduate legal education and what insights do students acquire at that time? Again, a survey of law school calendars reveals the following themes:[43] the opportunity for independent thought and research about a specific subject area; the chance to work closely in a community of scholars dedicated to the perfection of legal doctrine; and the chance to develop and evaluate new solutions to contemporary legal problems, arguing in a thesis for their adoption.

Not only are these goals less methodologically oriented, but the graduate law student is unlikely to be as intellectually malleable as his under-graduate cognate. Generally, by the time a student undertakes graduate work he has been thoroughly inculcated with conventional ideas (his high marks reflecting this) so he is less likely to be intimidated by new views about the legal process or its principal aspects. Moreover, the graduate student is usually more concerned with doctrine than methodology, so that his reliance on his teachers tends to be restricted to substantive questions. Again, because the graduate student is encouraged to think critically about his work, he is less susceptible to indoctrination by his academic surroundings.

Of greater significance than his resistance to these factors, however, are the limited ways in which a teacher transmits the knowledge acquired during graduate education. Most graduate work is undertaken in technically specialized fields such as labour arbitration, securities regulation, judicial review, civil liberties, tax planning, secured transactions, oil and gas law, and so on. Often, given the generally smaller size of Canadian schools, these areas are not taught as distinct courses, and when they are, usually are presented as seminars to upper year students. Consequently, even if a teacher developed new perspectives at graduate school, these would be imparted in the context of his specialty, after students had completed the basic methodological training of first year. Moreover, since most graduate education today is focused on statutory courses,

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[42] See Fuller, On Teaching Law (1950), 3 Stan. L.Rev. 35; Savoy, Towards a New Politics of Legal Education (1970), 79 Yale L.J. 444; Anderson, Teaching Methods in Common Law Canada (1974), 11 Coll. int. dr. comp. 152; Brenner and Lahey, Development and Shortcomings of First year Legal Skills Courses: Progress at Osgoode Hall (1976), 14 O.H.L.J. 161.

[43] Calendars examined were from Dalhousie, Queens, University of Toronto and the University of British Columbia.

the impact of new doctrine will be felt principally in recommendations for legislative reform, and not in the reorientation of basic views about the judicial process.[44]

Again, we leave it to the reader to decide whether or not the above aspects of a teacher's activities show a deference to any particular viewpoint.[45]

A final conclusion suggested by our tabulation is that regardless of whether teachers in common law schools are predominately English or American in training they show little appreciation or understanding of Canada's other legal tradition, the civil law. Do law teachers look at how Quebec courts and its National Assembly have been handling certain problems which are also vexing her common law neighbours?[46] Do we ignore the jurisprudence of the Quebec courts or the ideas of Quebec writers even on federal subject areas?[47] Do we properly educate our students as to the dual nature of

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[44] Many recent studies by the Ontairo Law Reform Commission have recommended legislative changes to common law doctrines. Statutes such as The Family Law Reform Act 1975, S.O., 1975, c. 41, The Family Law Reform Act 1978, S.O., 1978, c. 2, and The Statutory Powers Procedure Act, 1971, S.O., 1971, c. 49, all have modified common law doctrines which equally could have been developed by the courts.

[45] See Twining, Pericles and the Plumber (1967), 83 L.Q.Rev. 396; Bergin, The Law Teacher: A Man Divided Against Himself (1968), 54 Va L.Rev. 637; Arthurs, Paradoxes of Canadian Legal Education (1977), 3 Dal. L.J. 639.

[46] Occasionally a textbook of national scope will include brief reference to the law of Quebec. For example, in Law of Trusts in Canada (1974) Donovan Waters devotes chapter 28, pages 929-956 to the trust in Quebec. Usually, however, Quebec law is totally ignored. We have almost universally failed to advert to Quebec's introduction of no-fault auto insurance; during debate and discussion on the *Murdoch* case, few commentators took the time to examine how articles 1266c-1267d of the Civil Code deal with the difficulty; despite the occasional hint by the Supreme Court (*cf.* the dissent by Chief Justice Laskin in *Harrison* v. *Carswell* (1975), 62 D.L.R. (3d) 68) we have not looked at civilian ideas such as "abuse of rights" in developing solutions to difficult problems. Although most law schools offer introduction to civil law (or Quebec law) courses, usually adopting Castel, The Civil Law System of the Province of Quebec (1962) as a basic text, beyond such introductory material we tend to systematically deny the dual nature of our legal tradition. See generally Hahlo, Two Legal Systems in Canada (1974), 12 Coll. int. dr. comp. 149, and J. Deschênes, On Legal Separatism in Canada (1978), 12 L.S.U.C. Gaz. 1.

[47] Almost no use is made of Dussault's Traité de droit administratif canadien et québécois (1974) despite laudatory reviews such as: "Canadian, but not comprehensively Canadian, for as the title indicates, it is administrative law 'canadien et québécois,' which is to be read as meaning of Canada and of Quebec but not of other provinces. There is generous illustrative reference to materials from them by way of analogy or contrast and indeed to British, French, and U.S. sources, but Dussault's exhaustive exploration is reserved for the Quebec and federal law. Lawyers elsewhere must look beyond it. Although it limits, this by no means destroys its usefulness for them. As a research tool on federal law, it serves them the same way it does their Quebec brethren. Moreover, all who for clients compare Quebec's usually similar but occasionally special practices with those prevailing in their own

our legal system or do our constitutional law courses still presuppose the centralist, unitary state of the Westminster model?[48] Finally, do we make use of the civilian tradition in Quebec to develop a truly Canadian perspective on such issues as codification, *stare decisis,* the role of the judiciary or the social context within which our legal rules must operate?[49]

This answer we also leave to the reader.

One concluding observation. If all these influences are present, and our legal system suffers for them, why do Canadian trained law teachers not take the initiative, and why do Canadian graduate programmes not attract more Canadian students? As for the latter question, how often do we counsel our best students to go to Harvard and London as opposed to Dalhousie, Toronto, York or the University of British Columbia? As for the former, we quote Jonathan Swift, who remarked about the lawyer's deference to the past:[50]

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provinces have a means to learn about them. Its focus is provincial but its audience should be extra-provincial.

Parts I and II, dealing respectively with 'the organization of the administration' and 'the powers of the administration', confer on the work its distinction of being a true treatise by dealing with those aspects until now omitted which are needed for a full systematic development of the subject. The principal subdivisions are, under part I 'administrative structures', 'the administrative personnel', and 'public property'; under part II, 'general character of administrative powers', 'the regulatory authority', and 'contractual authority'. Their mere listing accuses the truncated view which has dominated Canadian legal thinking. Each of these important topics is treated with the same thoroughness as are the more conventional ones referred to in the preceding paragraph. That is how the continental treatises are constructed and that is how Dussault is constructed. Still refraining from comments on details, I find most instructive the assembly and discussion of materials on these hitherto overlooked aspects of administration.'' Abel, (1975), 25 U.T.L.J. 122. Moreover, rarely do constitutional law courses draw on the insights of Quebec writers such as Brossard, La Cour suprême et la constitution (1968); Brun et Tremblay, Droit public fondamental (1972); Tremblay, Les compétences législatives au Canada et les pouvoirs provinciaux en matière de propriété et de droit civil (1967). Finally, we have been so accustomed to anglicizing our divorce law that works such as Azard et Bisson, Droit civil québécois, t.1 (1971); Pineau, La famille—(marriage, separation, divorce) (1976); or Ouellette-Lauzon, Droit des personnes et de la famille (1976) which offer many insights into how the Divorce Act is being interpreted in Quebec are totally ignored.

[48] See the debate between Abel and Gibson: Abel, The Role of the Supreme Court in Private Law Cases (1965), 4 Alta L.Rev. 39; Gibson, Constitutional Law: Federalizing the Judiciary (1966), 44 Can. Bar Rev. 674.

[49] Little recent work has been done in this area outside Quebec. See Baudouin L'interprétation du code civil québécois par la Cour suprême du Canada (1975), 53 Can. Bar Rev. 715; Johnson, The Codification of the Common Law (1957), 17 R. du B. 165; Mayrand, L'autorité du précédent judiciaire en droit québécois (1959-60), 10 Themis 69.

[50] Swift, Gulliver's Travels.

> It is a maxim among these lawyers, that whatever hath been done before, may legally be done again: and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind.

As we were taught, unfortunately, so most of us shall continue to teach; "it is better that the method be certain than that every teacher should speculate upon improvements to it."[51]

But, as one distinguished editor has reminded us, "criticism is easy but art is difficult".

EDWARD VEITCH*
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APPENDIX I

Number of LL.B. and graduate degrees conferred by various schools upon current teachers in Canadian Law Schools.

School	*LL.B.*	*LL.M*
CANADA		
Dalhousie	45	5
University of Toronto	44	12
York-Osgoode	42	9
Saskatchewan	36	3
Queens	34	5
Univ. of British Columbia	29	9
McGill	25	14
Alberta	23	4
Manitoba	20	2
Ottawa (common law)	16	—
Univ. of Western Ontario	15	—
Univ. of New Brunswick	14	—
Windsor	7	—
University of Montreal	46	22
Laval	44	15
Ottawa (civil law)	15	13
Sherbrooke	15	—
TOTAL	470	63
UNITED STATES		
Harvard	11	86
Yale	1	30
Columbia	1	14
Other U.S.	16	56
TOTAL	29	186
UNITED KINGDOM		
Oxford	20	36
Cambridge	6	12
London	20	64
Other U.K.	32	11
TOTAL	78	123
SOUTH PACIFIC		
All New Zealand	11	6
All Australia	17	5
TOTAL	28	11
OTHER:		
France	18	34
Other	31	20
TOTAL	49	54

APPENDIX II

Analytical breakdown of legal education of full-time teachers in Ontario faculties of law

	Canada LLB No other Degree	Canada LLB Canada LLM	Canada LLB U.S. LLM	Canada LLB U.K. LLM	Canada LLB South Pacific LLM	U.S. LLB Canada LLM	U.K. LLB Canada LLM	South Pacific LLB Canada LLM	Entirely U.K.	Entirely U.S.	Entirely South Pacific	Other
Windsor	2	5	5	2	—	—	—	—	2	2	—	2
Western	3	2	9	8	—	—	—	—	4	2	—	1
Queens	5	—	9	9	—	—	—	—	1	3	—	4
Ottawa	10	2	2	3	—	—	—	—	3	1	—	4
U. of T.	1	—	15	6	—	—	—	—	5	1	—	1
York-Osgoode	8	1	15	5	—	—	—	—	3	5	5	7

[51] Paraphrasing Lord Eldon in *Sheddon* v. *Goodrich* (1803), 8 Ves. 441, at p. 447.

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