BOOK REVIEWS
REVUE DES LIVRES

Report on Sale of Goods. Three Volumes. By the ONTARIO LAW REFORM COMMISSION. Toronto: Ministry of the Attorney General. 1979. Pp. Vol. I, xxi, 282; Vol. II, xx, 283-569; Vol. III, iii, 205. (No Price Given)

It would be unfortunate if this three volume document was destined to be read only by those with an interest in what one writer has termed the "neutral and sexless"[1] problems of the law of sales. The *Report* provides a fascinating window onto the world of certain contemporary Canadian legal thought. It may not reflect either a coherent or a unitary vision of law, but its assumptions concerning the role of contract rules in society, and the structure of legal thought embedded in the document, deserve attention. In addition, it raises important issues concerning the nature of institutionalized law reform and the role of the legal academy in that process.[2]

The *Report on Sale of Goods* originated in a reference to the Ontario Law Reform Commission by the Minister of Justice in February, 1970. The reference began with a recommendation of the Commercial Law subsection of the Ontario Branch of the Canadian

[1] J. Honnold, American Experience Under the Sales Article of the U.C.C. in J. Ziegel and W. Foster (eds), Aspects of Comparative Commercial Law (1969), p. 5.

[2] A significant number of articles have been written on this issue. These include: J. Lyon, Law Reform Needs Reform (1974), 12 Osgoode Hall L.J. 421; L.C.B. Gower, Reflections on Law Reform (1973), 23 Univ. of Tor. L.J. 257; L. Friedman, Law Reform in Historical Perspective (1969), 13 Kentucky L.J. 351; G. Sawer, The Legal Theory of Law Reform (1970), 20 Univ. of Tor. L.J. 183; R. Samek, A Case for Social Law Reform (1977), 55 Can. Bar Rev. 405; A. Castles, The New Principle of Law Reform in Australia (1977), 4 Dal. L.J. 3; E. Ryan, The Path of Law Reform (1977), 23 McGill L.J. 519; J. Barnes, The Law Reform Commission of Canada (1975), 2 Dal. L.J. 62; M. Goode, The Law Reform Commission of Canada — Political Ideology of Criminal Process Reform (1976), 54 Can. Bar Rev. 653; E. Patrick Hartt, The Limitations of Legislative Reform (1974), 6 Man. L.J. 1; O. Kahn-Freund, On Uses and Misuses of Comparative Law (1974), 37 Mod. L. Rev. 1.

Bar Association. They had argued that reform of sales law was needed to "free the law from technicalities"[3] and to "relate sales rules to contemporary commercial reality".[4] They advised the adoption of the principles and approaches of Article 2 of the American Uniform Commercial Code. Nine years later the Commission, noting that "the Reference has been . . . most difficult and taxing — the most difficult experienced during its fifteen years",[5] has recommended adoption of a revised Sale of Goods Act which "borrows heavily from Article 2 of the Uniform Commercial Code but is not simply a copy of this article".[6]

The proposed Act, which the Commission has judiciously refrained from calling a Code,[7] is titled "An Act to Revise the Sale of Goods Act," notwithstanding that it covers fifty-six pages of the *Report* compared to a slim seventeen pages for the existing Act. The major substantive changes proposed in the *Report* are: the abolition of the parole evidence rule and the Statute of Frauds requirements; the adoption of an extended definition of express warranty based on section 12 of the American Uniform Sales Act; the adoption of a unitary concept of "substantial breach" in place of the existing classification of warranties and conditions; the recognition of a non-waivable obligation of good faith in the exercise of contractual and statutory rights and obligations and the adoption of a doctrine of unconscionability.

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[3] Vol. III, p. 157.

[4] *Ibid.*

[5] Vol. II, p. 568.

[6] Vol. I, p. 26.

[7] This is not surprising after the unfortunate consequences of the federal Law Reform Commission's attempts to introduce an Evidence Code. This was a particularly striking example of Kahn-Freund's argument (*op. cit.*, footnote 2) concerning the difficulties facing legal transplantation: that transplantation will fail where it goes against a foreign power structure "whether that be expressed in the distribution of formal constitutional functions or in the influence of those social groups which in each democratic country play a decisive role in the law-making and the decision-making process and which are in fact part and parcel of its constitutional and administrative law" (*ibid.*, p. 13).

He uses as an example of his thesis those institutions and procedures "which express the power of the legal profession and the distribution of power within the legal profession". Thus he notes that: "The reaction in this country to the French system of administrative courts is another [example]. Many people greatly admire the Conseil d'Etat, but if ever a special tribunal was created in this country to protect the citizen against illegal administrative acts or more generally against maladministration, it would be a new Division of the High Court or of the Court of Appeal, and not what a Frenchman would call a different 'ordre de juridiction'. It would (like so many institutions in this country) continue to express the unparalleled power of the legal profession and the national belief in, or national myth of, its "neutral position" (*ibid.*, p. 19).

The Commission proposes the application of the statute's provisions by analogy to near sales and suggests that its recommendations might serve as a basis for a revised Uniform Sale of Goods Act, and that greater harmonisation should be sought with the laws of Quebec. The *Report* also indicates that the Commission will undertake research for the purpose of proposing a Law of Contract Amendment Act so that the law of contract may "keep abreast of changing needs".[8]

Although these reforms may appear to create substantial changes to existing law the reader should be reminded of the comments of Karl Llewellyn on the changes wrought by Article 2 of the Uniform Commercial Code that "it contains much less innovation than anybody would think who did not happen to know the better and more commercial case law".[9]

The *Report* is certainly a systematic and comprehensive overhaul of the legal rules of sales. It also reflects the scholarship of the academic legal community which produced twenty-four of the thirty research papers. However, when one analyses closely the introductory chapters setting out the rationale for reform, a number of questions arise as to the foundations of the whole enterprise.

Thus the Commission appears to have assumed as a fundamental axiom that the legal rules of sales *matter*, that it is therefore important to reform them and in particular to weave these legal rules into a harmonious and coherent system. This approach seems to reflect the central assumptions of classical contract theory which assumes that individuals and entrepreneurs plan their affairs on the basis of carefully drafted rules and that the legal rules act as both an encouragement and a deterrent to contracting parties. "Disputes are avoided by asking a lawyer to predict what a court would do, or settled through adjudication. The more predictable the outcome of this process, the better contract law can facilitate the planning and settlement process that is essential to a market society."[10] The Commission therefore assumes "that the rules of contract law and the process of contract litigation are central, significant and necessary for economic transactions in a modern capitalist economy".[11]

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[8] Vol. I, p. 32.

[9] Why we need the Uniform Commercial Code (1957), 10 Univ. of Fla L. Rev. 367, at p. 374.

[10] See: S. Macaulay, Elegant Models, Empirical Pictures, and the Complexities of Contract (1977), 11 L. and Soc. Rev. 507, at p. 509 and the literature cited in that article.

[11] *Ibid.*

These assumptions would appear to answer the question—to whom do the legal rules matter? Yet the Commission has great difficulty in sustaining this basic assumption when it attempts in the introductory chapters to justify the need for reform.

Although it is noted that Commonwealth legal scholars "have for a substantial time recognized important defects in the Sale of Goods Act",[12] these defects seem to have caused few discernible ripples in the streams of commerce. Indeed, the Commission, after conducting a substantial empirical study to ascertain business practices and attitudes, presumably with a view to bringing the law into line "with contemporary commercial practice" and to "facilitate planning and settlement by business", was faced with the apparently unfortunate conclusion that businessmen are monumentally uninterested in sales law or its reform. If the Commission had looked into the past it would have found that businessmen were also uninterested in Chalmers' codification at the turn of the century.[13] The Commission's attempt to discount the fact that business does not view legal norms as being relevant either to the conduct of everyday business relationships or to planning or dispute settlement is most ingenuous. Thus it is stated that "many of the respondents . . . represent well organized business establishments who are in a position to anticipate contractual conflicts and to resolve them by professionally drafted documents". Yet the Commission's empirical data provide no foundation for substantiating such a conclusion and conflict with the findings of previous studies,[14] which indicate that

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[12] Vol. I, p. 23.

[13] See the useful article by R.B. Ferguson titled, Legal Ideology and Commercial Interests: The Social Origins of the Commercial Law Codes (1977), 4 Brit. J.L. and Soc. 18.

Ferguson notes that overt commercial backing for the sale of goods code was limited to two petitions to the House of Lords from the Leicestershire Trade Protection Society, two from the Aberdeen Chamber of Commerce, and one from the Glasgow Chamber of Commerce, *ibid.*, note 68, p. 32. It was hardly the conflagration which Chalmers had expected. See Chalmers, The Codification of the Law of Sale (1891), 12 J. of the Institute of Bankers 11-45.

[14] Note 6, on p. 26 of Vol. I of the Report is intended to substantiate its conclusions concerning well organized business establishments. It notes that only 25.8% of the respondents had estimated annual sales of less than $1 million. Firstly, this statistic does not substantiate the conclusion in the text. Second, I had always thought that 25% was a highly significant percentage.

A recent empirical study of the impact of Article 2 of the Uniform Commercial Code came to the following conclusions: "In summary the resounding message of these data is that, warranty litigation aside, appellate and presumably lower courts deal only infrequently and sporadically with Article 2 of the Code. If the article is used as infrequently by planners and negotiators of non-litigated disputes, the significance that the law school curriculum assigns to sales contracts, and perhaps to contracts in general, is unwarranted", and later, "Though others will conceive more "planning for the risk of non-performance often is none too careful, and disputes are seldom resolved by litigation or even by applying the norms of contract law outside of litigation".[15]

Although the Commission notes the "gap"[16] between the law and business practice the curious reader is provided with little enlightenment concerning the implications of these findings for understanding the significance and adequacy of the existing rules of sales law.

It is all the more bizarre therefore that having noted the difference between the empirical picture of contract and the legal rules, the Commission continues to argue for the importance of uniformity among the common law provinces[17] so that the adoption of a revised Act will not create "unintended impediments to the free flow of goods between provinces".[18] In addition, it notes that "it is a matter of regret that the laws of Quebec and Ontario differ so materially in such an important branch of commercial law".[19] Greater harmonisation between the legal rules of Ontario and Quebec is therefore called for. Canada may be able to tolerate political pluralism but legal pluralism appears, at least to the Commission, to be an unmitigated evil.

Yet the question remains. To whom is it a matter of regret? Max Weber[20] noted that capitalism appeared to flourish as strongly in the highly irrational English common law system as it did on the continent of Europe. There is no reason to suppose that the legal differences between Quebec and Ontario impair commerce. Whose interests is the reform intended to serve?

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sophisticated and objective tests of justness and correctness, the results of our admittedly crude and rather limited tests should lead one to be skeptical about the possible impact of even an elaborate and widely adopted commercial statute". J.J. White, Evaluating Article 2 of the Uniform Commercial Code: A Preliminary Empirical Expedition (1977), 75 Mich. L. Rev. 1262, at pp. 1272 and 1285 respectively.

The Commission's limited references to other empirical studies suggest that they were unaware of many of the relevant studies. For references to further studies see Macaulay, *op. cit.,* footnote 10.

[15] Macaulay, *op. cit.,* footnote 10, at p. 509.

[16] For an analysis and critique of the "gap" approach to socio-legal research see R.L. Abel, Law Books and Books about Law (1973-74), 26 Stanford L. Rev. 175.

[17] Vol. I, p. 30.

[18] *Ibid.,* p. 30.

[19] *Ibid.,* p. 12.

[20] See generally M. Weber, On Law in Economy and Society (Rheinstein ed., 1966) and see also D. Trubek, Max Weber on Law and the Rise of Capitalism, [1972] Wis. L.Rev. 720.

The structure and substance of the Ontario Act is similar to Article 2 of the Uniform Commercial Code and perhaps some comparison to the rationale for this latter Code may throw some light on this question.[21] Lawrence Friedman, in tracing the sources of the Uniform Commercial Code, commented that:[22]

> Essentially, it was a scheme of law professors, hungry for clarity and order in a tool of their trade. To the business community the code was and is mostly irrelevant.

Although that judgment may be an overstatement are these comments applicable to the Ontario proposals?

That question may be partially answered by looking at the structure of thought implicit in the Commission's work.

The Commission sometimes views the legal rules as an autonomous system and the criteria for reform are therefore drawn from within the system. At other times, there is reference to community standards and values. However, it is not clear in references to developments as "healthy",[23] or in the characterisation of "the better view"[24] or "better reasoned decision,"[25] exactly what value criteria are being used.

There is, in general, a tension between the values of certainty[26] and predictability reflecting the classical model of contract rules, and a concern for flexibility and the substantive rationality of the commercial marketplace and community standards.[27] The Commis-

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[21] No authoritative history of the Uniform Commercial Code exists. J.J. White and R.S. Summers in the introductory chapter to their handbook on the Code refer to a number of useful articles. See: J.J. White and R.S. Summers, Handbook on the Uniform Commercial Code (1972).

[22] Law Reform in Historical Perspective (1969), 13 St. Louis L.J. 351, at p. 355. See also L. Friedman, The Legal System: A Social Science Perspective (Russell Sage Foundation, 1975), p. 219.

[23] Vol. I, p. 37.

[24] *Ibid.*, p. 79.

[25] *Ibid.*, p. 67.

[26] As examples of references to "certainty" and "harmony" see Vol. I, pp. 26, 31, "Should Ontario Adopt a Commercial Code", pp. 46, 66, 68, 167.

[27] In, for example, doctrines of "good faith", "unconscionability", and "substantial breach". Thus, the Commission argues in favour of the flexible test of "substantial breach" by stating at p. 149: "There would be greater emphasis on the facts of individual cases and the actual prejudice suffered by the aggrieved party, and less reliance on a priori assumptions. We would regard such flexibility as a desirable feature of the revised Act . . .", but then the Commission notes later on that page that ". . . it would be wrong to conclude . . . that our recommendation that a system of a priori classification should not be applied, will leave the parties adrift in a sea of uncertainty".

Other examples of the recognition of substance over form include s. 2.2(2) and (3) of the proposed Act.

sion at times appears schizophrenic in its conflicting desires for flexibility and predictability. This dichotomy cannot simply be explained by the tired metaphor that the law must respect both values: it seems to reflect an uncertainty as to the function of sales and contract law and litigation in contemporary society.

A symptom of the Commission's schizophrenia can be found in its discussion of good faith and unconscionability. It is uncomfortable in dealing with those concepts which will clearly require overt ethical and economic value choices by courts. They are "elusive"[28] and "abstract"[29] and "subjective"[30] and "this weakness is inherent in many value concepts".[31] Such doctrines may lead to uncertainty. It therefore fences its proposals within a legislative framework, hoping that flexibility and certainty can be reconciled, and allaying the fears of businessmen who "may not welcome this additional layer of uncertainty".[32] However, it may be questioned whether this model of a "residual" doctrine of unconscionability operating within a framework in which contracts are generally carefully planned documents reflecting the intentions of the parties, fits the reality of the commercial marketplace. In addition, the Commission's model may misrepresent the character of much contract or sales litigation. Thus one writer has recently argued: "In most contract litigation today, the courts see their function much as they do in accident litigation. A situation has misfired, something has more or less unexpectedly gone wrong in the performance of a contract. The court's function is then to adjust this conflict, to pick up the pieces, to achieve a just solution in all the circumstances of the case; the court is not much conerned about the influence of the decision on future behavior; it does not see its primary function as being that of laying down rules of good conduct for the citizenry, of encouraging the public to pay their debts or keep their promises."[33]

Although not all contract litigation is of this nature and one should not, as the author of the previous quotation notes, overstate the case, it is a useful general proposition. Such an approach by the courts may cause a certain consternation among academic commentators concerned with finding the "correct"[34] solution to legal issues but it seems on many occasions to have led to substantive justice.

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[28] Vol. I, p. 157.

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.*, p. 163.

[33] P.S. Atiyah, The Rise and Fall of Freedom of Contract (1979), p. 678.

[34] For a useful critique of this approach, see Atiyah, *op. cit.*, *ibid.*, Ch. 20.

It may, however, be argued that this substantive justice dispensed by the courts in contract and sales cases has been pragmatic and lacking in "principled" foundation. The Commission's proposals may therefore be viewed as an attempt to provide a consistent and principled framework of values for guiding the courts in sales litigation. The proposed statutory framework for unconscionability is a useful example of this attempt. To the extent that it requires judges to openly recognize that they are making value judgments on ethical and economic grounds and that they must adopt a coherent theory of why one situation is unfair but another is not, then it is to be welcomed. However, the unconscionability section does not make its philosophy clear, hiding it within an exceptionally detailed provision.

The problem, of course, is that the factors which I have mentioned above undermine the need for a grand "system" of sales rules, especially if many of the substantive provisions reflect what courts are in fact doing. Indeed, one may argue, and the research director of the Commission has argued,[35] that the courts may do an effective job in developing doctrines of unconscionability and good faith for the few "trouble cases"[36] which are actually litigated.

The Commission's concern with harmony, certainty, and uniformity might remind a reader at times of the "scientific"[37] approach to reform represented by the first American Restatement of the Law movement. Yet that particular movement has been severely criticized for its simple and truncated view of legal science and one must ask what sort of science does the report reflect? A scientific approach may simply become the justification for the statement and restatement of "dominant doctrine" and "the better reasoned decisions". If such is a useful academic pursuit it is less justifiable as the major approach of a law reform commission. Yet, the Commission proposes research into "a law of Contract Amendment Act". On the assumption that it is able to find and capture "the" law of contract lurking in the twilight then what justification will be proffered by the Commission to justify a restatement of the basic principles of contract. The answer "to keep abreast of changing needs"[38] begs the further question—who needs it? Lawyers?

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[35] See J. S. Ziegel, Comment (1979), 52 Can. Bar Rev. 105, at pp. 116-117.

[36] K. Llewellyn, What Price Contract? (1931), 40 Yale L.J. 704, at p. 718.

[37] An insight into what the restaters would understand their task to be is found in Cardozo's call for a Ministry of Justice in (1921), 25 Harv. L. Rev. 113. For a trenchant critique of the Restatement movement written at the time they were in first bloom, see E.S. Robinson, Law — An Unscientific Science (1935), 44 Yale L.J. 235.

[38] Vol. I, p. 32.

Businessmen? or "law professors hungry for clarity in a tool of their trade?"

I am not simply attacking doctrinal research by law professors to clarify the rules of contract law but rather the position that this ought to be the major thrust of institutionalized law reform. For example, the Commission concludes, albeit tentatively, that mistake in contract might be a fertile field for law reform on the basis that mistake had "generated intense discussion among legal scholars"[39] and that "little agreement has been reached concerning important issues", for example, "the present state of the 'law' ". Is a central criterion for reform to be that an issue generates "intense discussion among legal scholars?".[40]

The Commission would like to have justified its *Report* by demonstrating its impact outside the legal system. This required an understanding of the role of sales rules in society as a prelude to policy making. Yet it seems to have stopped short in this process of understanding, perhaps because it was becoming clear that reform would have no impact outside the legal system. Consequently the report is a curious mixture of legal doctrine with occasional references to empirical data and commercial practice. The schizophrenia evidenced in its approach towards the role of contract law points to a deeper ambivalence concerning the role of the Law Reform Commission.

If law reform is concerned solely with legal doctrine, then it would be best to admit that it is avowedly "profession oriented", rather than "public oriented" and is guided by the values of certain segments of the academy. That structure of thought, as evidenced by this report clearly locates the science of law reform within the traditional materials of the lawyer, the case report, the statute and the law review article. The empirical references are, as befits a legal document, particularly positivistic in nature, viewing the "reality" of business practice as a spectator might view a spectacle through two-way glass. One might indeed ask whether the recommendations of the Commission would have been different, if no empirical research had been carried out.

The Commission in its discussions of its social science research appears to have assumed that a fact is a fact is a statistic and that

[39] *Ibid.*, p. 103.

[40] L. Friedman comments: "Law professors study and teach law, primarily case-law. They derive their notions of what is important and current from reading law reviews and advance sheets. A type-situation that gives rise to two or three appellate cases a year, particularly if the decisions seem muddled and inconsistent, becomes an "important problem" to the reader, regardless of what it means to the outside world." Law Reform, *etc.*, *op. cit.*, footnote 22, at p. 356.

social science empirical research is primarily fact gathering. Facts are, however, like sacks. They will not stand up unless you put something in them.[41] Statistics are a useful starting point but they are no substitute for thought and for the generation of ideas about the nature of the social reality under investigation. The Commission in its review of business attitudes notes the "gap" between the facts of business practice and the legal rules of sale but does not make any serious attempt to go further. The explanations given seem inadequate for the wealth of data which was assembled. It is a pity that it should have done so little to generate any hypotheses of interest concerning the possibly complex relationship between the norms of sales and contract law and the empirical picture of contract. While it may be true that the law matters to society, it is highly unlikely that it does so in the manner which the Commission has portrayed.[42]

If law reform implies an understanding of what it is that we are reforming, then we must take a much broader approach to understanding the relationships between the legal and social reality in question. That is not a simple task and is certainly much more than fact gathering empiricism. It may require the development of alternative models of society and a concern for social theory and history.[43] Only the Canada Law Reform Commission has even attempted to articulate its proposals in such terms.[44] Unfortunately, doctrinal research still remains dominant. Institutionalized law reform ought to provide a forum for the development of alternative research. The results so far are, however, disappointing; and much of it may be viewed as little more than an exercise in the legitimation of legal power.

If we widened the horizons of our thought, then we might even discover that legal solutions in traditional terms of courts and rules might not be the answer—that, for example, greater facilitation of informal conciliation and mediation might be more effective. However, we will never get to that stage of thinking if we lock ourselves in the suffocating straightjacket of much of traditional legal thought about law and law reform. We may get a comprehen-

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[41] Attributed to Pirandello.

[42] For the development of some of these hypotheses, see Macaulay, *op. cit.*, footnote 10.

[43] The historical introduction to the Report is weak. For example, it states: "Events moved quickly during the 19th century" and "it was felt that the rules were sufficiently settled to warrant their being reduced to statutory form". Vol. I, p. 7. But what events moved quickly? and who felt that the rules were sufficiently settled?

[44] The Commission's consensus model of the criminal law has been criticized. See Goode, *op. cit.*, footnote 2.

sive, bright, shining and well-oiled machine such as the proposed Sale of Goods Act, but that may not be of any use to a person who only wanted his bicycle repaired.

There are many other issues raised by the *Report* which I have not dealt with but which ought to be mentioned. There is, for example, the appropriateness of a number of the Commission's proposals for consumer transactions where consumers need certainty in their remedies.[45] There is also the issue of how the judiciary will handle and develop the open texture of many of the provisions[46] and the role of the academy and bar in that process.[47]

Yet, in conclusion, there remains the question of whether the proposed Act will have more than a marginal impact either within or outside the legal system. It will certainly provide an interesting topic for discussion in the classroom and will undoubtedly spawn many law review articles. But is that worth nine years of consideration by a Law Reform Commission?

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[45] The Commission dismisses the need for a separate Consumer Sales Act with the statement that "there appears to be no immediate need for legislation of this kind". Vol. 1 p. 40. One wonders how they know this "fact" since no authorities are cited. It must simply be regarded perhaps as a self-evident truth.

Consumers may in fact be much better off by *not* attempting to use the legal system to remedy their grievances but using other means. See: M. Galanter, Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change (1974), 9 L. & Soc. Rev. 95; H. L. Ross and N. L. Littlefield, Complaint as a Problem-Solving Mechanism (1978), 12 L. & Soc. Rev. 199.

[46] Reformers often assume that once a law is passed it will immediately be applied throughout the court system. A recent article on consumer protection suggests that this is far from the truth, partly because lawyers do not have sufficient knowledge of the new law to argue it before a judge and partly because judges take time to assimilate new laws. See: S. Macaulay, Lawyers and Consumer Protection Laws (1979), 14 L. & Soc. Rev. 115, at p. 143.

The following comments are instructive: "judges hate consumer cases because they simply do not understand the new law. The courts are just now getting used to the Uniform Commercial Code [the U.C.C. became effective in Wisconsin in 1965]," and ". . . few lawyers would look forward to arguing that a contract was "unconscionable" under section 2-302 of the Uniform Commercial Code before the trial judge who was so unhappy about the open texture of this provision of the U.C.C. Young lawyers who have mastered the administrative regulations designed to protect consumers will learn to hesitate to display their wisdom before a trial judge who has never heard of such laws." *ibid*.

[47] For a useful comparative perspective on this issue see J. Dawson, Unconscionable Coercion: The German Version (1976), 89 Harv. L. Rev. 1041.

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Debtor and Creditor: Cases, Notes and Materials. By M. J. TREBILCOCK, R. J. REITER and J. B. LASKIN. Toronto: University of Toronto Press. 1979. Pp. xxv, 889. ($50.00)

There has not been a published casebook in the debtor-creditor field for over a decade.[1] Now, suddenly, there are two.[2]

This casebook is intended as an introduction to the legal relationships between debtors and unsecured creditors. The editors have designed the book for use by students, and not for other uses such as promoting their theories or providing citations. They do suggest in the Preface that ". . . the book should be of value to practitioners, both as a basic research tool and as a source of additional lines of legal argument". I expect this is an overly optimistic assessment of the use practitioners might make of the book. Anyone devoting a reasonable amount of his time in practice to this field would find the book of little assistance; it being merely an introductory analysis. Furthermore, the bankruptcy provisions in chapters 18 to 22 include many provisions from Bill S-14[3] in the text. Unfortunately, due to the Federal election of May 22nd, 1979 and subsequently in February, 1980, this Bill has not become law. The references to the proposed bankruptcy law reform make the text confusing in some places for those who might use it as a reference to the present state of the law.[4] Nevertheless, having said that, practitioners who are only infrequently involved in the debtor-creditor field might well find the book a valuable addition to their library particularly for reference to the execution process.

The book is divided into two main parts. The execution process, and some related matters such as mechanics liens, are dealt with in chapters 1 through 17. The balance of the book, chapters 18 through 22, deal with bankruptcy. The sequence of topics in the book is an attractive one, conventional in many respects but interspersed with some new approaches to illustrate the policy choices involved in determining how debts may be enforced.

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[1] MacGuigan, Cases and Materials on Creditors' Rights (2nd ed., 1976).

[2] The book under review and J. Walker and H. Ash, Debtor-Creditor Relations Cases and Materials (1978).

[3] Fourth Session, Thirtieth Parliament, 27 & 28, Eliz. II, 1978-79.

[4] This should not be taken as a criticism of the usefulness of the book as a student teaching vehicle. Significant bankruptcy reform has been anticipated for a number of years in Canada. The authors made a choice to use the Bankruptcy Bill proposed at the time of preparing the manuscript in the expectation that it, or a substantially similar bill, would shortly be enacted. Unfortunately, political events have intervened. However, the new federal Parliament, led by Pierre Trudeau, will likely renew its law reform initiatives in this area. Even if that process is delayed, the bankruptcy section of the book provides the opportunity for the student to examine the present legal rules in a critical fashion and familiarize himself with the proposals for law reform.

The book begins with four chapters dealing with the setting in which debt-collection takes place. Such information is absolutely vital to a good casebook for students. Their lack of personal experience and background knowledge of how the business world operates is universally an impediment to their learning commercial law. The book attempts to fill-in some of the gaps in the student's knowledge of the marketplace. It then proceeds to an examination of the common law and legislation which form the basis of the creditor's remedies and the limitations placed upon those remedies by certain protections extended to the debtor.

This examination of the common law legislation forms the bulk of the first part of the book: the execution process. Every good casebook is a mass of compromises and this one is no exception. In commercial law subjects particularly, there is a compromise to be made between the specialties of practice and the doctrinal structure, as organizing principles. Most of the materials here are arranged in a doctrinal sequence. In contrast, the book by Walker and Ash[5] relies more upon the specialties of practice as its organizing principle. For example, Walker and Ash have separate chapters on (a) The Rights of the Commercial Landlord; (b) Enforcement of Matrimonial Support Orders; (c) Reciprocal Enforcement Orders; and (d) Guarantors. Whereas these topics are all dealt with, albeit in much less detail, as aspects of the general topics of "Execution" in chapters 8 and 9, "Garnishment" in chapter 10 and "Special Creditors" in chapter 14. Yet one specialty of practice, mechanics' liens, is dealt with by Trebilcock *et al.* where it is not found at all in Walker and Ash. Chapter 16 on "Mechanics' Liens" is a very useful chapter dealing with the special provisions of the Mechanics' Lien Act.[6] This chapter should prove of value to student and practitioner alike. It serves to whet the teacher's appetite for more treatment by the editors of other areas of specialty of practice. But alas, compromise is the essential ingredient of every casebook. However, there is one decision of the editors which I find difficult to understand. In the normal course the book has used Ontario legislation as the focus for discussion, though legislation of other provinces is referred to where comparisons are constructive. Yet, only brief mention is made of the Personal Property Security Act[7] proclaimed in force in Ontario on April 1st, 1976. That mention is in connection with the topic of "Purchasers of Goods from the Sheriff" in chapter 9 on "Execution". The Personal Property Security Act completely revised the law governing the taking of security for a debt

[5] *Op. cit.*, footnote 2.

[6] R.S.O., 1970, c. 267 as am.

[7] R.S.O., 1970, c. 344 as am.

in Ontario. In doing so, it reduced the distinction of form among secured transactions[8] and thereby affected the law of debtor-creditor. The Act is not referred to in a number of areas in the book despite the obvious fact that it will affect the area. For example, in chapter 13, "Priorities Among Creditors", I find it astonishing that no reference is made to the Personal Property Security Act and its specific rules on the subject.[9] Any American casebook[10] on the subject of debtor-creditor would not dare to ignore Article 9 of the Uniform Commercial Code, the parent legislation from which Ontario's Personal Property Security Act was copied. In fairness, however, in pointing out this omission it should be noted that Walker and Ash's casebook suffers from a similar deficiency. Although, in their case they try to remedy the defect by appending as an unconnected chapter to the remainder of the book a final chapter on "Personal Property Security Act Enforcement".

The bankruptcy aspects of debtor-creditor law are treated as a separate part of the text. In contrast, Walker and Ash do not deal separately with bankruptcy but intertwine it in the other topics with which they deal. This latter approach is more congruent with the business context in which many debtor-creditor issues arise. However, from a pedagogical point of view the separate treatment of bankruptcy does enable the student to learn one area of law without the overlap of a second area to confuse and worry him. Separate treatment also serves to emphasize the fact that bankruptcy is a special change of status of the debtor where provincial Acts dealing with similar aspects of debtor-creditor law are overriden by the Bankruptcy Act.[11]

Chapter 17, entitled "Impeachable Transactions", serves as the transitional chapter between the part of the book dealing with the execution process and that dealing with bankruptcy. I am satisfied that this conventional approach to introducing the subject of bankruptcy remains the best. Although the topic can be rather more lively and interesting to the student when dealt with in connection with the general ability of the trustee in bankruptcy to avoid transactions and treat secured creditors as unsecured creditors for bankruptcy purposes. The chapter is probably the most coherent and well organized one in the text and serves its purpose well, as a bridge between the execution process and bankruptcy.

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[8] McLaren, Secured Transactions in Personal Property in Canada (1980), pp. 1-4.

[9] Pp. 6-16.

[10] See *e.g.*, Warren and Hogan, Cases and Materials on Debtor-Creditor Law (1974).

[11] R.S.C., 1970, c. B-3.

It is no easy feat to select and arrange materials for the bankruptcy area within a debtor-creditor casebook so that they are both comprehensible and reasonably comprehensive. I admire the editors' attempt and find it workable. The editors showed good judgment, I think, in giving short shrift to bankruptcy procedure. They provide some clue to their rationale in the "Preface" when they say ". . . in this field more than in any other, practice and personal experience are extremely important, the book does not purport to be a guide to those aspects of the debtor-creditor process. The practical skills are occasionally referred to, but they are better learned elsewhere". A view I share totally.

As previously mentioned, the bankruptcy part of the book suffers from the decision to include in it reference to what the authors assume to be the new Bankruptcy Act.[12] Unfortunately, Bill S-14 has not become law. This leaves the bankruptcy chapters not adequately reflecting the current law. The editors recognize that they have taken a risky position in referring to the proposed Bankruptcy Bill. They tried to reduce the risk of that decision by including both the present and the proposed provisions on bankruptcy. The result is a cumbersome and at times, incoherent structure, which can only lead to confusion for the student. A better approach would have been to use the current law and deal with the new law by way of supplement. Such a supplement could then have referred to the text at the appropriate point. Quotation of the current Bankruptcy Act could have been left out of the book for the reader to refer to independently in an office consolidation form. In this way, when a new Bankruptcy Act is proclaimed in force it can be dealt with and referred to in the supplement to the original casebook. However, perhaps this criticism reflects too much the benefits of hindsight.

No further carping about this book could be justified. In conception and in detail it is a superior casebook. Without intending to be gracious I do want to mention some of the many features which excite my admiration. Many chapters are prefaced by notes and articles that provide overviews.[13] These are likely to be helpful to students, for they are clear and concise. Hopefully, any subsequent addition will expand upon this aspect of the book. As aids to teachers and students alike, instructions on the reading of the case and the background to it precede many of the reported judgments.[14] These serve to direct the reader's attention when reading the case thus enabling him to make more efficient use of his time. These and the editors' questions seem well-conceived to me. The questions seem to

[12] See *supra,* footnote 4.

[13] Particularly chs 1, 3, 4, 8, 11 and 18.

[14] Ch. 9 on "Executions" does this well.

test the reader's understanding of what he has learned and in part act as teasers to cause him to think and reflect further. Again, it is hoped that a subsequent edition will not dispose of this aspect of the book. Indeed, it could be further improved by interspersing in the materials, at strategic points, problems. The problems would assist those teachers who like to weave answers to them into their pedagogical technique and also permit the student to develop different analytical skills than those of case reading because he would be trying to apply what he has learned; thereby developing problem solving skills.

The book is relatively free of mechanical blemishes; none of them seem to be important. It is well laid out and attractively presented but could benefit from a table of statutes which locates the reference of every section of a statute dealt with in the materials. Without exception, the excerpts drawn from journals and other sources are well chosen. The case editing is skillful and enhanced by the notes and questions. The book merits your attention and use. I warmly commend this book to the attention of fellow teachers and students of debtor-creditor law.

RICHARD H. MCLAREN*

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Criminal Procedure in Practice: A Manual for the Defence of Cases in Provincial Court. By P. G. BARTON and M. A. PEEL. Toronto: Butterworths. 1979. Pp. xxvii, 324. ($32.50)

There is a great need in this country for manuals such as this one, and we should be grateful to its authors for undertaking the task of writing it. Articled students and beginners at the Bar will no doubt find solace in its pages, and the sole practitioner who occasionally enters the twilight world of provincial court now has a silent partner to advise him on his footwork. Given this need, one might expect a reviewer to approach his task happily and with a considerable fund of goodwill at his disposal. Unfortunately, the book was a disappointment, and I shy away from saying so in print—not only through fear of offending the possibly tender sensibilities of its authors (after all, who *really* likes criticism?), but mainly because of a lingering suspicion that my misgivings are not quite fair. The danger in reviewing a book that is essentially a practice manual lies in judging it by an inappropriately high standard. After all, it is not a treatise or

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a text, nor do its authors suggest that it is. Moreover, they actually concede at one point that the book may not be as well written as it should be.[1] I hope it is not too uncharitable of me to say that I agree.

In fact this concession hints at the true nature of my disappointment: not so much a concern at the small errors that one can find in just about any book, but a nagging and perhaps unjustified suspicion that this one was dictated in the car on the way to work, and that as the publication deadline approached, thoughtful reflection was sacrificed to timely completion. Too many important practical and ethical issues are raised, only to be resolved without reasons (is not that what we tend to criticize in some judges?), or not resolved at all, or even left tantalizingly obscure, as when the authors end a brief discussion about calling the accused on a *voir dire* with, "[t]here are some rather disquieting recent cases in this area"![2] And at times, the book seems to be internally inconsistent, always a danger of joint authorship. At page 14, for example, the authors state that the major decision of "whether to testify" is one which "must be made by your client". Yet at page 239, they assert that the decision about "whether [your client] is to testify is essentially yours to make. . .". To be sure, both these statements are then qualified, but not enough to dispel the initial confusion.

Even if one were to disagree with these rather general critical remarks, more precise examples may be found. At page 240, the authors suggest[3] that the right of the Crown to ask an accused about his criminal record depends on whether he adduces evidence of his good character, and they then refer the reader to section 593 of the Criminal Code.[4] But by virtue of section 12 of the Canada Evidence Act,[5] an accused exposes himself to the risk of such cross-examination the moment he takes the stand, even if evidence of good character has not been led. (Section 593 is really of help to a prosecutor only where the accused does not testify and therefore cannot be asked about his record.) In short, this passage would mislead the novice rather than assist him.

There are other examples: at page 108 the authors suggest that, if a motion to quash an information before plea fails, counsel might then consider moving for prohibition. This advice, however, seems to be incompatible with a number of cases, in particular *Regina* v.

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[1] P. 214, n. 61.

[2] P. 53, n. 27.

[3] N. 99.

[4] R.S.C., 1970, c, C-34, as am.

[5] R.S.C., 1970, c. E-10, as am.

Layton, ex parte Thodas[6] a decision of the British Columbia Court of Appeal.

Yet for all this, Mr. Barton and Mr. Peel have produced a valuable resource. Particularly praiseworthy are their suggestions and recommendations about the running of a law office. There are in addition very helpful sections on office meetings, bookkeeping, and the lawyer's relationship with his Law Society, and there are a number of precedents for forms and trial aids. These aspects of the book will be welcomed by anyone beginning the practice of law in provincial court.

To sum up, I suspect that it is more accurate to say that this book may be more of a disappointment to its authors than it will be to its readers. As I indicated at the outset, the latter no doubt will be comforted by its presence; but each of the former, I think, must know in his heart that this could have been a better book. On the other hand, they both might be more inclined to heed the advice of an American judge who had been asked to advise his brothers on the correct way to write opinions. "Just write 'em," he said, "and pay no attention to the carping of professors and their stooges on the Law Review".

HAMAR FOSTER*

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Law and Legality: Materials on Legal Decision-Making. By JOHN CLAYDON and J. DONALD C. GALLOWAY. Toronto: Butterworths. 1980. Pp. xl, 700. ($27.50)

The main or first part of the title of this book might indicate that it is concerned with fundamental issues in jurisprudence. The second part, or sub-title, "Materials on Legal Decision-Making", hints at its true nature, which is to deal with the doctrinal bases for the way in which the Canadian legal system functions. Admittedly Part III, of which more will be said later, delves more deeply into jurisprudence. However Part I is unquestionably about constitutional and, to some extent, administrative law: while Part II provides materials relating to the connection between what might be termed the state legal system and external and internal entities: namely, other legal systems or the international legal order, and "private" arrange-

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[6] [1970] 5 C.C.C. 260.

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ments. It is intended to provide law students with cases, statutes, and other writings, from which they will extract some understanding of the various issues within the scope of the book, as well as extensive notes and comments, composed by the authors, but relying heavily upon other writers, and containing considerable quotations therefrom, the purpose of which is to elaborate upon the previous material, as well as to raise questions and problems for the student to ponder and pursue at greater length.

It is, therefore, a case-book, along traditional lines, so far as contents and purpose are concerned. But it is not a traditional constitutional law case-book: nor one which follows the normal approaches of a book devoted to "the legal system". The authors make it clear, in their introduction, that they are interested (as the student of law should be interested) not only in formal rules contained in statutes and decisions of the courts, but also in "decisions" by others, such as Ministers of the Crown. They are concerned with "legal values" that is, what are the underlying foundations of the legal system, from which perhaps the formal rules may be deduced (as witness, for example, the consideration, at the outset of the book, of the notion of "public policy" and its effect in relation to issues of property and contract law). Drawing a distinction between law and the state, the authors write: "Decisions which are not made by the state often reveal more about legal values than those made by a court, legislature or minister of the Crown".[1] Their point of view, it would seem, is that it is impossible to differentiate between law and politics: that to distinguish between these two facets of human, and state activity, is unreal and artificial. As they put it: "One of the purposes of these materials is to demonstrate that while it is important to obtain an appreciation of the distinctive working of the judicial process, there is so much interaction between law and politics that any perspective that does not consider the links between them risks distorting the nature of the legal process and the role of the contemporary lawyer."[2]

Thus we find, for example, in the chapter on the establishment, maintenance and amendment of the constitution, not only extracts from relevant cases, and from text-books, but also passages from the government *White Paper on Constitutional Amendment*,[3] as well as from the Canadian Bar Association's Constitutional Committee's document *Towards a New Canada*.[4] And in the section devoted to the relations between the courts and the executive, there is citation of the *Green Paper on Legislation on Public Access to Government Documents*.[5] The object of such inclusions is clearly to draw the

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[1] P. xviii. [2] P. xx.
[3] (1978) [4] (1978) [5] (1977)

student's attention to the very real political, as well as legal issues involved in these questions: and to emphasise the point that law is not merely a formal or logical matter, but involves making rules and decisions that relate to the everyday world of reality. In other words, their aim is to expose with as much clarity as the complex questions will permit the close connection between decisions of some law-making body and the reason why such decisions are made, or the elements from which such decisions are compounded. It is manifestly a useful exercise: and it is carried out in a way which deserves commendation. The authors maintain a high standard of comment: and are always provocative, in the sense of stimulating the reader to substantial consideration of the core problems.

I am less content with Part II: Decision-Making Competence of Non-State Authorities. The introduction to this part identifies what is endeavoured to be dealt with in its pages: namely, the relationship between the state on the one hand and groups of individuals organised in certain ways for their benefit and the promotion of those values or ends which they wish to achieve. The basic point seems clear enough: the extent to which society is multi-faceted and organised on various levels such that it is impossible simply to look at the formal constitutional structure of society and discuss the legal system in such terms. However, I found that the materials included in this part of the book (apart from the cases from which extracts were taken) difficult to assimilate and far from clear as to what they were trying to say or to achieve. I am particularly puzzled by the purpose of the inclusion of the extract from Professor Fried's book *An Anatomy of Values,*[6] which makes up the whole of Chapter 8, entitled "Individual Autonomy". It is far from clear, at least to this reader, and I suggest it will be to students generally, what is the relevance of an abstract discussion of privacy in the context of legal decision-making. Perhaps the extract was inserted to make the point already made at the outset, that law comes from various sources. Another criticism that can be made is that the various chapters in this part, when contrasted with the richness and variety of what was contained in Part I, appeared thin and lacking in meat and substance. Perhaps the authors fell between two, or more stools. They did not want to get entangled with too technical a discussion of, for instance, natural justice, the formal rules for determining the validity of an exercise of power by a subordinate or autonomous group. Nor did they want to talk too broadly and in too abstract terms about the nature of the connection or relation between the state and groups or individuals. I do not think that they solved their problem successfully. Perhaps it is insoluble. Perhaps, to be contradictory, all that

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[6] Problems of Personal and Social Choice (1970).

was necessary in the context was to introduce the student to the nature of the difficulty: to indicate that there are other entities which are concerned with, or may become involved with the issue of decision-making: so that, in examining the total structure of society it is necessary to look beyond the formal or immediate composition of the elements of the state (and their mutual inter-relationship) and to see how far, and with what legal authority, individuals, or the state itself, can connect with other bodies, organisations, or groups.

Which brings me to Part III, entitled "Legal Reasoning and Judicial Decision-Making". This section of the book, as previously indicated, tends to be much more closely and immediately concerned with what is indubitably a jurisprudential issue, namely, the way in which judicial bodies actually arrive at their conclusions as to what is the law. At this stage, as the authors say, they are adding some flesh to the skeleton of the decision-making process described in the earlier sections of the book. This they do "by deflecting the focus away from an analysis of its structure and from the contents of decisions, and by reviewing particular decisions with a view to understanding the logic of decision-making and the rationality of the decision-maker".[7] All of which, I venture to suggest, is a rather sophisticated (high-falutin?) way of saying that they are going to give some discussion and examples of the canons of statutory construction (with a postscript on interpretation of private agreements that is scarcely worth the inclusion, so little does it add to illuminate) and the paradoxes and quirks of the doctrine of *stare decisis*. A little Wittgenstein (always a good card to play in these logico-positivist times): a couple of contradictory cases culled from England and the United States: some excerpts from writers on both sides of the Atlantic, again contradictory in their approach: an English and a Canadian, that is Privy Council, case which give opposite views, in the earlier part of this century, of the right of women to vote or hold political office: the judgments of the court in the famous (or infamous, depending on your point of view) Case of the Speluncean Explorers: *Harrison* v. *Carswell*[8] from the Supreme Court of Canada, followed by a lengthy commentary thereon by Coval and Smith: *Riggs* v. *Palmer*,[9] which appears to be the foundation for Professor Dworkin's philosophy of law: and, naturally, *Donoghue* v. *Stevenson*,[10] with the contrasting attitudes of Lord Atkin for the majority and Lord Buckmaster for the dissentients neatly exposed and considered. And there we have Part III. What the authors appear to be indicating, by their own language and the selection they have chosen to include in the book, is that language is neither certain nor fixed: that everything is immutable. *Panta rei,* as

[7] P. 9-1.

[8] [1976] 2 S.C.R. 200.

[9] (1889), 115 N.Y. 506.

[10] [1932] A.C. 562 (H.L.).

Heraclitus said: especially the meaning of words. Everything seems to depend on the purpose that is to be achieved by what the court is doing. "By classifying a fact-situation under a given rule, and by classifying that rule under a purposeful category, the lawyer and judge can give the facts a legal meaning."[11] Hence, it would appear, as the authors state a little later on, and this conclusion follows from prior reasoning which I have omitted, "for a lawyer, a bear may be a dog". This strikes one as akin to Shaw's famous exposition of how the word *fish* could actually be spelled "ghoti"! But who would want to?

The foregoing would suggest that the present reviewer is not enthused by Part III of this book. If its purpose was to introduce the student to the problems of interpretation, that is the use of words whether by legislatures or courts, then it perhaps suffices. If it was intended to go further and give a satisfactory account, with examples, of the nature of judicial lawmaking, in the form of construction of statutes or the creation of the common law, it merely skims the surface. Moreover, so far as the latter aspect is concerned, it ignores many other features of the judicial system, and of modern jurisprudential approaches to the system, that could give the student a very different understanding or impression of what happens, or what ought to happen in the process of legal decision-making. That may be in accord with the authors' intentions. It is their view of the subject that is being considered, not that of somebody else. All I would say is that it is a pity, given the general nature and purpose of this book, insofar as I have grasped both, that more was not done along those lines.

In short, therefore, what we have in this volume, is an interesting experiment in producing a "different" sort of casebook for the beginning student who wishes to find out something of the workings of, in particular, the Canadian legal system. I am not convinced that the experiment is totally successful all along the line. The first section of the book, judging by what I have heard from colleagues knowledgeable in the area of constitutional law, is extremely useful to students of that subject. But my understanding of the authors' intentions is that they were not purporting to produce a constitutional law casebook. If my understanding is correct, then I think that the authors may well have to reconsider the nature and contents of this book at some future time.

G. H. L. FRIDMAN*

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[11] P. 9-2.

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Cahiers de bioéthique. Collection publiée par le Centre de bioéthique de l'Institut de recherches cliniques de Montréal, Vol. 1: *La bioéthique*. Québec: Les Presses de l'Université Laval. 1979. Pp. 190. (Prix non indiqué)

C'est avec beaucoup de plaisir que l'ensemble du monde juridique a pris connaissance de la nouvelle collection publiée par le Centre de bioéthique que dirige le Dr. David J. Roy. En effet, depuis maintenant près d'une dizaine d'années, l'Amérique du Nord en particulier s'intéresse aux grandes questions reliées à la bioéthique sous l'angle de l'analyse juridique. C'est depuis ce temps que les facultés de droit des universités américaines ont inscrit à leurs programmes des cours portant sur la "biotechnology and the law" ou la "bioethics and the law" et c'est au cours de la dernière décennie que les équipes multidisciplinaires sont apparues surtout afin de conseiller les gouvernements aux prises avec des problèmes de politique législative reliés à la médecine et à la biologie.

Ce courant nord-américain s'est fait sentir au Canada il y a quatre ans déjà lorsque la Commission de réforme du droit du Canada s'intéressait, dans son projet *Protection de la vie,* aux différentes questions d'ordre bioéthique qui nous ont valu depuis lors la parution d'un certain nombre d'études comme le document de travail no 23 de la Commission de réforme du droit du Canada portant sur *Les critères de détermination de la mort* ou le document de travail no 24 portant sur *La stérilisation* ou enfin, le document d'étude sur *Le caractère sacré de la vie ou la qualité de la vie*.

Parallèlement à ces recherches menées par la Commission de réforme du droit du Canada, on ne peut cependant déceler véritablement des mouvements similaires dans les différentes universités et, somme toute, il n'y a encore au Canada que très peu de facultés qui offrent, dans leurs programmes de cours, de manière permanente, un cours traitant des questions reliées à la bioéthique et au droit. Evidemment, nos facultés connaissent déjà des cours *Médecine et droit* ou *Psychiatrie et droit* mais la perspective est alors différente et, bien souvent, ces cours ne sont de toute façon pas offerts régulièrement au programme.

C'est donc en ce sens qu'il faut saluer avec d'autant plus de respect les travaux du Dr. David Roy qui, avec l'équipe qu'il dirige au Centre de bioéthique, a mis sur pied depuis quelques années déjà des cours qui s'adressent principalement aux étudiants de médecine mais qui ont une perspective pluridisciplinaire car ils abordent les grandes questions sur lesquelles la bioéthique se penche.

Aujourd'hui, le Dr. David Roy nous offre une collection nouvelle et nous sommes en mesure de connaître par le premier Cahier la manière dont l'équipe conçoit la bioéthique, grâce à plusieurs textes qui sont présentés et qui sont écrits d'ailleurs tant par des membres de cette équipe que par des spécialistes européens ou canadiens. Ce Cahier international, complémentaire aux écrits spécialisés en bioéthique déjà accessibles en plusieurs langues, est le premier qui soit écrit en langue française.

Comment l'équipe du Dr. Roy définit-elle la bioéthique et quelle ampleur donne-t-elle au concept? C'est tout ce premier Cahier qui, en guise d'introduction aux cahiers futurs, apporte une réponse à cette question. Tout d'abord, indique le comité de rédaction en note liminaire:

> Il importe de souligner tout d'abord l'affinité qui existe entre la médecine et la bioéthique. Depuis toujours les médecins se sont fait un devoir de réfléchir sur les questions de vie et de mort, de santé et de maladie, de bien-être et de souffrance propres à la condition humaine . . . mais l'ensemble des sciences de la vie lance un défi qu'aucune d'elles n'est à même de relever. Sous cette menace de confusion naît donc la nécessité de solidarité et de concertation des disciplines traditionnellement autonomes mais quelquefois réductionnistes. Désormais, il faut qu'elles répondent avant tout au besoin humain individuel et social de réintégration. C'est dire qu'elles doivent revenir vers cette unité qu'est l'homme. Unité qu'elles ont à défendre contre toute fragmentation entre la médecine et les autres sciences humaines, et contre tout morcellement à l'intérieur de la médecine. C'est donc de l'effort commun de plusieurs disciplines que naît la bioéthique.

Ce Cahier nous présente donc des textes tant européens que canadiens, disions-nous précédemment. En effet, on a retenu la participation de spécialistes belges et européens comme d'ailleurs l'étude nous présente aussi une entrevue avec le Dr. André E. Hellegers, directeur du "Kennedy Institute of Ethics Georgetown University". Nous retenons surtout, pour notre part, le texte du Dr. Roy lui-même, directeur du Centre de bioéthique: "La bioéthique et les pouvoirs nouveaux", de même que le texte de Maurice A. M. de Wachter, également du Centre de bioéthique: "La bioéthique science interdisciplinaire?"

En effet, ces deux textes nous apparaissent situer la perspective de l'équipe du Centre et nous indiquer sans doute dans quelle voie les Cahiers futurs s'engageront. Le Dr. David Roy fait une description phénoménologique de la bioéthique en regardant les interrelations entre la bioéthique et l'éthique et en analysant les trois fonctions de l'éthique que remplit la bioéthique; par la suite, il regarde la bioéthique sous l'angle de la morale, de la loi naturelle et de la morale de la situation. Enfin, il regarde la bioéthique en relation avec la biomédecine et le futur et il aborde en dernier lieu un point qui nous intéresse tout particulièrement ici, soit les corrélations entre la bioéthique et la loi. Comme il l'affirme aux pages 98 et suivantes:

> La bioéthique, particulièrement la macro-éthique exige une collaboration étroite avec les législateurs. Les décisions juridiques et les projets de loi sont parfois le point de départ et la cible d'une critique et d'une réflexion

> bioéthique. . . . La possibilité et la nécessité d'une collaboration étroite entre la bioéthique et la loi deviennent plus évidentes lorsque les différentes fonctions de la loi sont clairement définies.

Et le Dr. Roy s'interroge quant à savoir si la loi ne devrait pas, dans notre société contemporaine, remplir une fonction éducative et il affirme alors:[1]

> "Les prétentions de toute science, de tout consortium de technologies scientifiques, doivent être soumises à la haute cour de la communauté humaine. . . . La participation de toute la communauté au dialogue, conçu comme méthode de travail, est le défi principal qui ressort de la révolution biologique. A défaut de cette participation, le bien public sera dicté mais pas atteint.

Quant à M. Maurice de Wachter, il se penche sur la nécessité d'une bioéthique qui soit interdisciplinaire, que nous ne pouvons qu'approuver au plus haut point. En conclusion, il présente une série de positions possibles concernant l'interdisciplinarité, et plus particulièrement la bioéthique en tant qu'interdiscipline. Nous nous permettons de reproduire ici ses conclusions:[2]

— L'interdisciplinarité n'existe que grâce aux disciplines autonomes. En fait, elle renforce et réaffirme le rôle des disciplines distinctes.

— Dans la mesure où la bioéthique est interdisciplinaire, elle crée des problèmes non seulement aux biologistes et aux médecins, mais également aux éthiciens. En particulier, parce qu'elle risque de les inciter sans cesse à dépasser leur compétence et à violer les méthodes propres à leurs disciplines.

— L'interdisciplinarité est indispensable en bioéthique et, pour certaines questions, elle est le préalable nécessaire à toute approche mono-disciplinaire. . . .

— La bioéthique risque de déséquilibrer l'éthique médicale par l'hypertrophie du sentiment de responsabilité. Aussi, faudra-t-il restaurer l'équilibre par d'autres vertus chez le médecin, telles l'acceptation de l'inéluctable, la modération, voire la réserve et l'abstention.

— L' "époché méthodique", et au besoin le retour à elle, fait partie intégrante du point de départ interdisciplinaire de la bioéthique.

Ces études, et d'ailleurs plusieurs autres, doivent être lues et relues pour que toute la substance en soit comprise. Ce sont des textes qui méritent de retenir longuement notre attention.

A la fin de l'ouvrage, les Cahiers nous présentent une documentation fort intéressante en ce qu'elle collige, pour la première fois sans doute, un certain nombre de données sur les sources de bioéthique, tant au niveau des bibliographies que des banques automatisées, que des encyclopédies, collections, revues, ou enfin que des centres, organismes et instituts de bioéthique, en

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[1] Pp. 99-100.

[2] P. 135.

donnant pour chacune de ces sources des renseignements qui sont tout à fait complets.

Dans quelle direction s'orientent maintenant les *Cahiers de bioéthique*? Le numéro suivant traitera du diagnostic prénatal et devra paraître en 1980. Nous ne pouvons que nous réjouir que cette question spécifique soit abordée en toute priorité. A l'heure où, en effet, le diagnostic prénatal suscite les questions les plus diverses, notamment sur le plan moral, il est essentiel que des bioéthiciens nous présentent leur point de vue et, encore une fois ici, la mention du contenu de ces Cahiers nous montre que l'équipe fait appel à des spécialistes de plusieurs disciplines qui sont chacun à la fine pointe de leur spécialisation.

Formulons un voeu: que les *Cahiers de bioéthique* soient reçus comme ils le méritent dans le monde juridique et qu'ils soient générateurs de recherches et de cours dans l'ensemble de nos facultés de droit canadiennes.

MICHÈLE RIVET*

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Traité de droit aérien-aéronautique. By NICOLAS MATEESCO MATTE, O.C., Q.C. Troisième édition. Montréal: ICDAS-McGill University. Paris: Editions A. Pedone. 1980. Pp. 844. ($100.00)

The first two editions of this monumental work appeared in 1954 and 1964 respectively. As sixteen years have passed since the appearance of the second edition, it may be useful to initiate a new generation of readers to the book as a whole rather than to comment only on changes made to that edition.

Dr. Matte styles what others call "air law" as "aeronautical-air law". He considers the appellation "air law" as applied to air space as used by aircraft to be a misnomer because telecommunication, to the extent that it uses air, could also give rise to air law.

The author defines aeronautical-air law as the study of (1) the milieu in which air navigation takes place (drawing a distinction between the legal status of the air in comparison to the infrastructure used in aeronautical operations); (2) the apparatus with which air navigation is carried out (the problem of property in air law); (3) the persons or goods carried by air (persons and goods in air law); (4) journeys by air and the legal effects resulting therefrom (obligations in air law).

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A chapter which stems from a law-review article of the 1950s and which has been cited judicially is entitled, "To Whom Does the Air Milieu Belong?".

After an examination of the debate on the opposing concepts of freedom of the air and state sovereignty over the air during the pre-1919 period, the author discusses briefly the question whether there is a law of war governing the air and arrives at a negative conclusion.

There follows a detailed description of the inter-war conventions, including the Convention on International Aerial Navigation (Paris, 1919). On a more current note, there is a detailed examination of the Convention on International Civil Aviation (Chicago, 1944) as well as the International Air Services Transit Agreement ("Two Freedoms") and the International Air Services Transport Agreement ("Five Freedoms") both also concluded at Chicago in 1944. Dr. Matte concludes that while these documents did not represent the triumph of any of the theses put forward at the Chicago Conference of 1944, they are, nevertheless, the necessary point of departure for reaching an international regime of the freedom of air navigation.

The book then proceeds logically into a discussion of the regulation of international air navigation by bilateral agreements of which there are a few thousand and which, today, are the object of considerable revision and renegotiation as non-scheduled air services make heavy inroads into the previously sacred territory occupied by scheduled services and newly born states seek their slice of the aviation pie. One of the key bilaterals was the Bermuda Agreement of 1946 between the United Kingdom and the United States. This required air carriers to provide capacity adequate to the traffic demands between the country of which the air carrier is a national and the countries of destination of the traffic. The 1946 Agreement formed the basis of many such agreements in succeeding years. Unsatisfied with its share of the North Atlantic traffic, the United Kingdom denounced this Agreement in 1976 and this event was followed by the conclusion of the so-called Bermuda II Agreement in 1977. Unlike the 1946 Agreement, the new one refers to both scheduled and non-scheduled services as essential elements of a healthy system of international air transport. But because the new agreement was concluded between two states with a highly developed civil aviation and having peculiar interests in the North Atlantic area and it has somewhat different objectives than its predecessor, Dr. Matte doubts that it will serve as a model for agreements between the United States and third world countries. It may, however, serve as a model for states in the North Atlantic area.

Other agreements and regulations in the air field, mentioned in the volume, cover such matters as the Universal Postal Union, sanitary regulations, assistance and salvage, facilitation of air navigation (that is, the International Civil Aviation Oganization's joint financing agreements for the provision of air navigation facilities in the North Atlantic) and regional organizations dealing with aviation.

A substantial and very useful part of the book is devoted to the legal status of the aircraft commander. This appears to be a reproduction of the French version of a bilingual English-French book already published by the author on the same subject. Dr. Matte notes that ICAO was to have studied the subject through a Panel of Experts in April 1980. However, it may be recalled that, in fact, the Panel down-played the possibility of developing a comprehensive convention on the legal status of the aircraft commander, although it did leave the door open for ICAO action to strengthen the technical aspects of the role of the aircraft commander in the case of unlawful seizure of an aircraft.

Turning to the subject of penal aeronautical-air law, Dr. Matte discusses in considerable detail the Convention on Offences and Certain Other Acts Committed on Board Aircraft (Tokyo, 1963), the Convention for the Suppression of Unlawful Seizure of Aircraft (The Hague, 1970) and the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Montreal, 1971). In his view, these conventions will be productive of only limited results in curbing the wave of acts of unlawful interference with civil aviation. On the plus side of the ledger, this reviewer notes that each of the three conventions has in excess of 100 parties, a truly remarkable record. Moreover, no one has ever pretended that they alone constitute the solution to the evil to be cured since they are only a part (the legal part) of a total solution of which much of the technical part is in place (for instance, airport security, as well as searches of passengers, baggage and cargo). It is encouraging that the political will to overcome acts of terrorism against civil aviation is still lacking in only a few states.

The study of the private-law aspects of aeronautical-air law occupies 331 pages, somewhat over half of the 609 pages in the narrative portion of the volume. A detailed and very useful study of the Warsaw system, which governs the international carriage of passengers, baggage and cargo by air, traces the history of the Warsaw Convention, (1929) through its various amendments which include The Hague Protocol of 1955, the Guatemala City Protocol of 1971 and the four Montreal Protocols of 1975, together with the Guadalajara Convention of 1961 which supplements the Warsaw Convention. The *de facto* amendment achieved by the Montreal

Agreement, concluded by IATA carriers in 1966, is also considered. All of these instruments are presented in a context of relevant case-law from many countries and a rich mine of doctrinal writings on the Warsaw system. Unfortunately, the Guatemala City Protocol and Montreal Protocols are not yet in force and *ad hoc* arrangements outside the Warsaw system have to be made in order to ensure users of international civil aviation of liability limits in excess of the derisory limits found in the Warsaw system as it now exists. The book discusses the crisis which has arisen because of the attack on the credibility of the Poincaré gold franc as an international unit of account in the Warsaw system because of the two-tier value of gold, that is, official rate and free-market rate. The Montreal Protocols of 1975 pioneered the adoption of the Special Drawing Right (SDR) of the International Monetary Fund as a new unit of account in liability conventions; but since these instruments are not in force, the Warsaw system continues to limp along with the Poincaré gold franc. Dr. Matte is somewhat critical of the SDR as a unit of account and feels that other monetary solutions should be found for the Warsaw Convention.

There is a detailed study of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface (Rome, 1952) and the amending Protocol of 1978. Canada denounced the Convention in 1976 on the ground that its limits of liability were too low. Nor has it shown any enthusiasm for the 1978 amendments.

There is a very good and practical chapter on the somewhat esoteric subject of security rights in aircraft. This chapter is structured around an analysis of the Convention on the International Recognition of Rights in Aircraft (Geneva, 1948). Dr. Matte considers that this Convention requires some improvements if it is to hope for a wider acceptance, although he suggests that, even if amended, the Convention would not be widely accepted. He sees as a possible solution the use of bilateral agreements between states for the introduction of measures permitting the establishment and recognition of security liens on aircraft in order to meet economic and legal requirements of financiers on the one hand and the requirements of carriers on the other hand.

Other items discussed under the heading of private law are the precautionary attachment of aircraft, the draft convention on aerial collisions (1964), insurance against the risk of air transport, and organizations participating in the legislative unification of private international law.

The book contains the texts of many conventions, draft conventions, protocols and agreements. This aspect alone makes it a useful tool, because key documents establishing the legal basis for international civil aviation are gathered together in one place. There is a long list of cases cited, a good alphabetical index, a detailed bibliography and an equally detailed table of contents. In this regard, it is observed that each chapter in the book is preceded by its own handy table of contents. The book has a clear typography and is a pleasure to read. It will be a widely used and indispensable tool for lawyers in private practice, governmental officials and academics. Dr. Matte is to be congratulated for his helpful update of a labour of love begun almost three decades ago.

GERALD F. FITZGERALD*

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The Superbureaucrats: Structure and Behaviour in Central Agencies. By COLIN CAMPBELL and GEORGE J. SZABLOWSKI. Toronto: Macmillan of Canada. 1979. Pp. x, 286. ($9.95)

The passion for empirical studies in the social sciences arose originally from the attempt to match the method and credibility of the "hard" sciences so that three generations of behavioural studies now testify to the growing belief among teachers and scholars in these areas that they have achieved some "scientific" validity in method and results. The difficulty, of course, always has been that the human laboratory does not behave with the predictability of atoms, genes, cells and stars despite the volume of social arithmetic that is now often present to give the appearance of precision and predictability. In a recent issue of *The American Scholar*, Clifford Geertz of Princeton has commented on the ". . . enormous amount of genre mixing in social science, as in intellectual life generally, and such blurring of kinds is continuing apace. . . . [Many] social scientists have turned away from a laws-and-instances ideal of explanation toward a cases-and-interpretations one, looking less for the sort of thing that connects planets and pendulums and more for the sort that connects chrysanthemums and swords".[1]

What Professor Geertz has in mind here is that this *quondam* search for credibility that so dominated social science procedures over the decades recently has been relaxed and the lessons from using discrete instances on the one hand or insight thinking on the other—borrowed from history and the humanities—has always been present in social studies, but has achieved a renewed respectability with the "blurring of the genres".

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[1] Spring 1980, p. 165.

So it is with the turn of many behavioural scientists, along with traditional historians, towards the use of "oral history" as valid materials upon which to build the pyramid of footnotes that insures acceptability. Indeed, without the cassette and the tape recorder, modern investigative "field activities" would not have their range, their fluidity and even their occasional dubiousness. For what can be the value of interviews recorded in cassette detail if references made to conversations with key interviewees are not documented by name, a scholarly habit now bedevilling any critical judgment where authors rely upon anonymous authorities to justify facts, insights, memory or opinion.

Happily, Professors Szablowski and Campbell have chosen to balance interview, arithmetic and insight with classical research into the standard documents. They discuss their methods with candour and sufficient persuasion to suggest that whatever the benefits or defects of their research style, they were not unaware of the price they had to pay for so current and "productive" a procedure.

Indeed the volume as a study of the Central Agencies in the Government of Canada led to ninety-two interviews comprising, as the authors say, "the entire universe of those holding positions at the level of director or above in the five central agencies".[2] Thus this book is an effort to understand "how and by whom decisions are made in the Federal bureaucracy". Wisely the authors open their study by pointing up the complexity of modern government, the inability of many to know that decision-making is outside of the system and indeed even inside it, with the result that ". . . the actual process of government is a mystery to the ordinary citizen". And this leads to Professors Campbell and Szablowski to take on the burden, as they put it, ". . . to get beyond the official rhetoric and to discover what really takes place. What is needed is to get inside the apparently closed circle of politicians and officials who wield power and to examine their activities".[3]

Anyone who has worked in or near the corridors of power will smile wryly at this heroic objective. The five entities that the authors examine in this volume are the Prime Minister's Office (PMO), the Privy Council Office (PCO), the Federal-Provincial Relations Office (FPRO), the Finance Department, and the Treasury Board Secretariat (TBS).

Something of the scope of this relatively small paperback can be sensed by a quick view of the Chapter headings: Why Study Central Agencies?; What Central Agencies May or May Not Do—Structure

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[2] See Appendix I, p. 242.

[3] P. 1.

of Authority?; Looking From the Inside—Central Agencies Through the Eyes of Their Officials; On the Road to the Mountain—Socio-Economic Backgrounds; Ascending to and Remaining on the Peak — Career Path and Orientation; Interactions—One Inner Circle or Many?; Accountability—To Whom and for What?; Evaluation of Central Agencies—Summary and Proposals for Reform.

What the authors have done is an attempt to make one of the first "inside" evaluations of how the inner system works in the Federal government without having been "insiders" themselves. The heavy reliance upon interviews and the extent to which these provide the insider *aperçus* which the authors lack, is one of the favourable and yet vulnerable aspects of this intriguing exercise. Yet it is not possible for the reader to know how significant was the oral testimony quoted unless at the same time it is known who the propounder of the proposition may have been. A good example is the following description by a finance department official in discussing the qualities regarded as important for membership in the inner circle:[4]

> The Finance minister always belongs, but some are stronger than others. John Turner grasped issues with amazing quickness and usually was in command; Donald MacDonald demonstrates intelligence but he's too reluctant to indicate his judgment. Tommy Shoyama [the deputy minister] is tremendously impressive from the standpoint of his ability to chair difficult meetings. Simon Reisman [Shoyama's predecessor] was too intuitive—he used to browbeat people, too. Mickey Cohen [then assistant deputy minister of the Tax Policy branch; now deputy minister of Energy, Mines and Resources] is brilliant, fast, and very pleasant. Bill Hood [the associate deputy minister] has an outstanding mind and has everyone's respect, but he's difficult to work with. I've seen a lot of Gordon Osbaldeston [secretary of the Treasury Board] and he strikes me as very able. He's tough, but very rational. These are the fellows whom I've seen in operation. Their positions might have helped them get into the inner circle. Their personal qualities have determined their success.

Now it is quite impossible to accept so subjective a view of the system by converting it into the personality qualifications on which this quotation relies so heavily for its judgment as to who will exercise power within the system. Unless the careers of the individuals referred to above were in due course carefully evaluated for their impact over time, it would not be feasible to know whether the general view held and quoted above had any validity as an insight into the influence-playing and career-making games within the "inner circle".

If this were the entire approach of the book, serious doubts would have to be cast upon its ultimate usefulness as a scholarly contribution to the field. But happily the volume is more than that. The descriptions of all five of the Central Agencies and what they do

[4] Pp. 172-173.

are acute, detailed, current and informed. The various charts, statistics and tables are more than helpful; they give valuable base-line information on the nature of the work at the Agencies concerned, the types of personnel that comprise the staff, their training and background (religious, geographic and ethnic origins), all of which reflect the new realism in approaching problems of organization and power. The influence of John Porter is a thread that runs throughout. Indeed, Wallace Clement as well as Van Loon, Whittington and others, who have helped build the edifice of scholarship in the public administration sector of Canadian political studies, are the indispensable intellectual substructures providing terminology and general viewpoint without which Campbell and Szablowski could not have proceeded to the useful results at hand.

Alas, time waits for no footnote to justify a volume's immortality. Even though this reviewer is lamentably late with his own homework, events had already overtaken the authors. Change is the enemy of the current and it was inevitable that a book written to describe, analyze and then make recommendations to improve upon a general system of bureaucratic centralism, should face the risks of studies and shifts that are continually in the making as government struggles with the twin demons of complexity and accountability— all exacerbated by the sheer numbers of the bureaucracy involved. The Lambert Commission's *Report on Financial and Management Accountability*[5] had not appeared when the authors were in the midst of their final pages for the printers. Yet it was inevitable that whatever they published would have to take account of the warnings of Commissioner Lambert who listed the following as among the areas of primary concern to be investigated:[6]

> The nature of accountability within government, of deputy ministers to Minister, to the Prime Minister and to the Central Agencies . . . and their reporting relationship to Parliament; and
>
> The functions and responsibilities of the Central Agencies in the Framework of accountability."

It is interesting to compare today the important recommendations of the Lambert Commission with those of Professors Szablowski and Campbell.[7] What is clear is that the latter could not have foreseen the way in which the super ministries, for a co-ordination of economic priorities, for example, would become instruments for the "envelope" system that would allocate to the co-ordinating ministry funds and functions that heretofore had been performed by Treasury Board or the Privy Council Office. Indeed, Campbell and Szablows-

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[5] (1979).

[6] *Ibid.*

[7] Pp. 240-241.

ki's recommendation that the PCO should be restructured ". . . as a strong policy-analysis, integration and co-ordination secretariat catering to the Cabinet system as a whole. . ." seems not to have forecast the likely weakening of that ambition with the establishment of Mr. Andras' portfolio as the Minister in Charge of the Board of Economic Development Ministers in 1978-1979 (succeeded to, but with a different name, by Mr. de Cotret and now by Senator Olsen). The irony of the present Central Agency development remains that the historic co-ordinating roles on fundamental issues of economic policy, either by Finance, the Treasury Board, or the Privy Council Office, may be in the process of replacement by the new Ministry of State for Economic Development (Senator Olsen as Minister and Gordon Osbaldeston as Deputy Minister).

This natural inability to have foreseen the impact of the changes by government made parallel to, and as a result of, the Lambert Commission study, is perhaps the main weakness of an otherwise interesting, readable and imaginative text on the operations of the so-called Central Agencies. Perhaps the wide audience served by the study now should have the benefit of an updated version incorporating these new developments that Lambert and others have influenced and charted.

Significantly the authors leave out External Affairs as one of the five and this omission is thoroughly justified by the canons guiding their analysis. Nevertheless, with the kind of defensive pride classically surrounding foreign offices and now with the presence of very ambitious senior officials, External sees itself, with some justification, as the co-ordinator of all external policy, initiatives and negotiating activities. However, this kind of co-ordination is not quite within the ambit of the book's objectives. Central policy making at home deeply interfaces with policy abroad, but that does not require External to be considered a policy-maker within the meaning attributed to the five Central Agencies even though the Under-Secretary of State for External Affairs sits in on crucial committees of his peers and shares policy discussions wherever these may or do impinge on Canadian interests or obligations abroad.

In a fundamental sense the book is an essay on the political and administrative difficulties of living well and "efficiently" in a blessed land with too much rather than too little by the standards of a hungry and beset world. History and geography are the twin assets and the twin burdens of the Canadian angst. The emergence of federal Canada, and its present frenetic efforts to cope with everything from energy to unity, is partly the story of its race and language divisions, of its regional claims and distances and, ultimately, of the long delay in evolving a deeply felt, coherently understood and shared sense of community. The role of the politician and civil servant has been central at every stage of Confederation. In earlier times, when innocence was abroad, the politician ruled the roost. Under the multiple complexities of this generation, the public servant, custodians of "secrets" and the co-ordinators of data, become the architects of policy perhaps as often as the politicians themselves. And those custodians are the very civil servants who, in the Keynsian and post-Keynsian era, have profited from the success of economic and social policy in Canada (and elsewhere) and so achieved — until recently — new levels of credibility and authority. How to reconcile the many conflicts of modern Canada — from the regional disparities to language rights, from energy pressures and resource inequities to an equilibrium between provincial and central authority — has become a puzzle and a challenge far more difficult than the demands of war-time and the euphoria of post-war economic growth posed for the preceding generation of emerging super-bureaucrats. Ironically, tomorrow's "supers" will have less scope for choices at the very moment when the greatest degree of wisdom and imagination are required to make the Canadian system work. Above all they will have very little control over the world beyond the Canadian frontier and perhaps almost as little over their provincial peers unconsciously converting Provinces into principalities — a process perhaps inevitable if the evolution of "a renewed federalism" with strong provincial civil servants follows its logical way. At least Professors Campbell and Szablowski have given us something fresh to consider: how the system works at the federal level; how a career-oriented meritocracy sees its operations and opportunities; how power and accountability can be reconciled with the "secret rites" of inner councils; and, finally, how the democratic process can or should have the best of both selective talent and public input — through politicians or other interest groups — operating in a time when skill and judgment are required if a relatively prosperous Canada is to be rescued from its own self-destructive and disuniting temptations.

MAXWELL COHEN*

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International Labour Law Reports. Vol. II. Edited by Z. BAR-NIV. Alphen aan den Rijn: Sijthoff & Noordhoff. 1979. Pp. xvi, 356. ($87.50 U.S.)

Ever since the promulgation by President Wilson of his Fourteen Points the movement for recognition of labour rights has grown apace until every declaration, convention or bill on human rights recognizes that the right to work is indeed a fundamental right of man. At the same time, the increasing strength of the trade union movement has ensured that breaches of this right do not go unanswered, even to the point of disruption of the labour scene and the rights of those who may not be directly involved in the controversy in which the trade union concerned is a party. Accompanying these developments has been a realisation that labour law is a division of the law which is highly specialised and of increasing importance, as may be seen from the controversy concerning the Nova Scotia "Michelin Bill" at the end of 1979.

As with so many branches of law nowadays, there is an increasing trend towards consolidation and imitation, to which the developments in Europe with the establishment of the Economic Community and the acceptance by each member country of the supremacy of European law, accompanied by recognition of the right of establishment and the mobility of labour, has provided an added impetus. In the field of labour law as in so many others, comparative study has become of increasing importance. An editorial committee under the chairmanship of Zvi Bar-Niv, President of Israel's National Labour Court, has made itself responsible for compiling and publishing a series of *International Labour Law Reports* (cited as ILLR), which is now in its second volume. The reports are gathered from the European Community whose court held in *Gaetano Dona* v. *Mario Mantero*[1] that professional football was an economic activity covered by the European Economic Treaty, so as to exclude discrimination or non-employment on the basis of nationality, a problem which is at least of media interest in Canada; the Council of Europe, whose decision in the *National Union of Belgian Police Case*,[2] affirmed the duty of the State to make it possible for trade unions to do their job efficiently and to be heard, even though the process might not be by consultation; Austria; Belgium; France; the Federal Republic of Germany; Great Britain—the report of *Camellia Tanker Ltd. S.A.* v. *International Transport Workers Federation*[3] at first instance will have to be supplemented in a later volume; Israel; Italy; Japan; The Netherlands; Sweden; and

[1] P. 12.

[2] P. 162.

[3] P. 257.

the United States, with *Bishop* v. *Wood*[4] suggesting that the Supreme Court has overruled its own judgment in *Arnett* v. *Kennedy*,[5] reported and commented upon in volume 1.

The cases are grouped according to subject and not jurisdiction, enabling them to be compared the more readily. Perhaps, before the series is much older, some representative of the Canadian labour law fraternity will persuade the editorial committee to widen its scope so as to include decisions rendered in this country.

L. C. GREEN*

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Comparative Law Yearbook. Vol. 2, 1978. Edited by D. L. CAMPBELL. Alphen aan den Rijn: Sijthoff & Noordhoff. 1979. Pp. v, 300. ($52.50 U.S.)

For too long lawyers in the west have been hesitant about recognizing the importance of comparative law, although those in countries belonging to the European Community have of necessity become increasingly aware of its significance. International lawyers, too, have had to recognize the importance of this field of study in view of the fact that the Statute of the World Court[1] includes general principles of law recognized by civilized nations as a "source" of international law, and the only way to ascertain what these general principles may be is by way of comparison of differing legal systems. However, all have been too ignorant of the systems of law existing in eastern Europe in particular, and until comparatively recently the eastern European countries have not made the situation easier since they have not been in the habit of providing texts in languages which their western colleagues can understand. The Center for International Studies, with its seat at Salzburg, Austria, has helped to fill some of the lacunae by publishing a *Yearbook of Comparative Law*, of which this is the second volume. The contributors to this volume come from Hungary, Austria, Sweden, Washington, D.C., via Barbados, Norway, the United States and Poland. The subjects discussed show no particular national bias, and many are of concern even to countries which have made no contribution to the volume.

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[4] P. 117.

[5] (1974), 416 U.S. 134, reprinted in 1 I.L.L.R. 190.

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[1] Art. 38(c).

Among such subjects is Dr. Frame's comparative survey of the legal status of illegitimate children, concluding that the trend is decidedly in favour of liberal reform, although he reminds us that "for practical reasons the non-marital child may never achieve full equality with the child born in more traditional circumstances".[2] On the other hand, we cannot ignore the fact that in more and more countries the traditional family unit based on a lasting marriage has been disappearing or become of less social importance. While Canada and, to a lesser extent, the United States have been concerned recently with the problem of mail surveillance in general, Dr. Frison looks at the problem from the much narrower point of view of prisoners' rights. Unfortunately, this paper is not as useful as it might be from the point of view of guidance, for the author has merely provided short statements as to the position under United Nations guidelines and in various countries—of Canada she says that, as compared with the United States, "there are less constitutional safeguards . . . and more official discretion".[3] Her paper may serve as a good starting point for a more detailed and suggestive study. Perhaps of more interest is Professor Bing's comparative outline of privacy legislation, for this has been written from a functional point of view. That is to say, rather than a simple country by country analysis, the author has taken specific problems and then looked at the way different systems approach those problems. Is it true that, in the case of the police for example, "the Canadian law includes the principle that information provided by an individual for one purpose generally cannot be used for another purpose without consent"?[4]

Ever since the *Sabbatino* case[5] there has been an increasing tendency for states to limit the extent of state immunity, and this has become particularly important with the increase in state trading and state socialism. Professor Schreuer has written an interesting paper on recent developments in the law of state immunity, paying particular attention to the position today in the United States, the United Kingdom, the German Federal Republic and under the European Convention on State Immunity.[6] His paper not only provides useful substantive material, it should serve as a hint to graduate students who may wish to work in this field.

Professor Waltoś of Krakow deals with the phenomenon of special proceedings in criminal procedure, defining such proceed-

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[2] P. 66.

[3] P. 83.

[4] P. 174.

[5] (1964), 376 U.S. 398.

[6] No. 74 (1972).

ings as those which "involve a course of process whose objective is to solve the question of the penal responsibility of the accused but which differs vitally, in a way pre-established by the system of valid legal norms, from the course acknowledged as typical within the given procedural system".[7] He considers the most typical example of this process to be the court martial, although many might suggest that the system whereby complaints against the police are examined and frequently dealt with by the police themselves, or disciplinary proceedings by professional bodies might equally qualify. He is worried about the frequency of special proceedings and points out, for example, that in Poland almost half the criminal cases heard annually are by way of special proceedings. He comments that "the phenomenon of special proceedings originates of necessity from the conditions under which contemporary proceedings are evolving. [But] caution must be taken only to prevent its excessive growth".[8] Finally, from the general interest point of view, Dr. Kriscunas looks at some of the legal, administrative and technical aspects of the global environmental problem presented by vessel-source oil pollution. He calls for a properly enforced treaty to deal with this problem, and reminds us that "whether the ocean and its tremendously important resources are to be the 'heritage of mankind' is now in considerable doubt. One thing, however, is clear. If the world community fails in regulating the uses of the marine environment regarding oil pollution from vessels, it may not ever have to decide whether the oceans are the 'heritage of mankind'—it will be too late".[9]

In addition to the papers already mentioned, there are others suggesting the economic system of Latin America may be a mechanism to be followed by other less developed countries;[10] the role of comparative law in looking at countries with different economic systems;[11] a comparison, based on an American perspective, of German and European Economic Community anti-merger legislation;[12] and to set a jurisprudential background to the entire volume, the opening paper by Professor Mádl entitled "A Comparative Law Synthesis Theory v. Private Transnational Law as a New Concept in Private International Law", which suggests that in those fields "where a comparative-law synthesis of theoretical value is possible, the theoretical justification and soundness of such synthe-

[7] P. 285.

[8] P. 300.

[9] P. 274.

[10] By Bruce Zagaris, p. 117.

[11] By Michael Bogdan, p. 89.

[12] By Thos. G. Russell, p. 183.

sis will stand . . . despite the fact that the self-same theoretical thesis may fulfil different functions in countries with diverging social and political systems''.[13]

If future volumes of the *Comparative Law Yearbook* contain the same variety of subjects, dealt with from a similar wide variety of viewpoints, it will not be long before this publication of the Center for International Legal Studies takes its place among the leading legal annuals of the day.

L. C. GREEN*

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[13] P. 42.

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