# Book Reviews

## Chronique bibliographique

*Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada.* By W.R. LEDERMAN. Toronto: Butterworths. 1981. Pp. xx, 464 ($39.95)

Professor Lederman's volume on *Continuing Canadian Constitutional Dilemmas* represents twenty-five years of work in the sense that it brings together in one volume essays that he has written on the constitutional history, the public law, and the federal system of Canada over a twenty-five year period. At a time when Canada is in the midst of another constitutional crisis due to the relentless "patriation" effort of the Trudeau Government, it presents under one cover the thoughts and the writings of one of Canada's leading constitutional authorities. But even without the presence of such a crisis, the volume would still be of tremendous worth because of the academic stature of the author, and of the high value placed on his opinion in constitutional matters by governments, governmental agencies, and leading corporations.[1]

Professor Lederman writes in his Preface that though the essays were written without a master plan over a twenty-five-year period, they "lent themselves, without too much straining, to a systematic rather than a chronological arrangement according to the subjects, processes or institutions dealt with".[2] Accordingly, the twenty-eight chapters of the volume are divided into six parts. Part I which has two chapters is entitled "The Nature of Constitutions and of Legal Reasoning"; Part II with four chapters is devoted to "Constitutional History, Independence and Amendment"; Part III with five chapters relates to "The Canadian Judicial System"; Part IV, the longest of the six with twelve chapters, covers "The Federal Distribution of Legislative Powers and Co-Operative Federalism"; Part V with three chapters touches on the subject of "Guranteed Human Rights and

[1] See Foreword by Dr. J.A. Corry of Queen's University, p. v.

[2] P. xv.

Freedoms in Canada''; Part VI entitled ''Addendum'' has two chapters, one of which discusses the ''Continuing Relevance of Constitutional Jurisprudence'',[3] and the other the ''Proposals of the Government of Canada for Basic Constitutional Change, October 1980''.[4]

A mere glance at the table of contents and at the titles of the chapters included in each of the six parts indicates how justified Professor Lederman is to claim ''that the coverage afforded by the collected essays is wide-ranging, reaching to most of the essential processes and institutions of our constitution which provide us with government under the rule of law''.[5] Just about everything is there, with a bonus in the form of notes, thoughts, and developments added to some of the essays, particularly the older ones, to bring them up-to-date. For instance, ''A Note On the Victoria Charter of 1971'' is added to Chapter 5, ''The Process of Constitutional Amendment for Canada'', which originally appeared as an article in the 1966-67 *McGill Law Journal*.[6] Also, ''Further Developments and References'' are added to Chapter 6, ''Constitutional Amendment and Canadian Unity'', which first saw the light of day as a public lecture delivered in March, 1978. This was just before Prime Minister Trudeau's Government proposed constitutional reform which would have included the abolition of the Senate of Canada and its replacement with a House of the Confederation. The effect of such notes is to reflect on the past in the light of the present, as well as to bring things up-to-date, which gives added value to the material presented.

The broad sweep of the volume can perhaps best be illustrated by comparing the subject-matter of Chapters 1 and 2 in Part I with the subject-matter of Chapters 27 and 28 in Part VI. Chapter 1 is devoted to a discussion of the ''Characteristics of Constitutional Law''. In this chapter there is a discussion of ''Constitutional Law in the Broad Sense'' which has been said to include all law,[7] a concept with which Professor Lederman disagrees, or has been limited to ''public law'' as compared with ''private law'', a concept which Professor Lederman still considers a ''very broad sense of the term''.[8] There is also in this chapter a discussion of ''Constitutional Law in the Limited Sense'' according to which the term ''constitutional law'' is confined to only a part of the public law — often that part which is enshrined in a single document such as the Constitutions of Ireland and the United States.

[3] Ch. 27.

[4] Ch. 28.

[5] P. xv.

[6] (1966-67), 12 McGill L.J. 371.

[7] Sir Ivor Jennings, The Law and the Constitution (5th ed., 1959), Ch II, III, cited at p. 3.

[8] P. 9.

As Professor Lederman delves into the meaning of these various concepts he discusses the merits and demerits of the various theories of sovereignty such as Austin's and Dicey's. Chapter 2 is a discussion of "The Common Law System in Canada" which includes sections on "The Reception of English Law and Institutions," "The Formal Rules of Precedent in Common Law Courts," and the "Nature of the Common Law Judicial Process (The Courts and the Common Law)".

Thus, to a considerable extent, Chapters 1 and 2 of the volume deal with constitutional law in the abstract. By contrast, Chapters 27 and 28 may be said to deal with constitutional law in the concrete — with what should or should not be done to make Canada's Constitution current. Chapter 27, entitled "Continuing Relevance of Constitutional Jurisprudence", relates to the need for constitutional reform, particularly in the aftermath of the August 1980 Quebec Referendum. Chapter 28 is a discussion of "The Proposals of the Government of Canada for Basic Change, October 1980". In this chapter he strikes some telling blows against the procedure used by the Trudeau Government to amend and "patriate" the British North America Act. To start off with, he notes that the changes contemplated "cannot be made by a simple majority statute in a single legislative chamber, whether it is the Parliament of Canada or a Provincial Legislature; rather, they require resort to an extraordinary legislative process for constitutional amendment which cannot be operated either easily or often".[9] He opposes going to London for basic constitution change "against a background of constitutional disarray and dissent in Canada".[10] Indeed, if there can not be agreement in Canada, he favors simple patriation so that disagreement can at least be kept at home. After stating that he considers the proposed Constitutional Act, 1980 to be unconstitutional, Professor Lederman makes the following observation:[11]

> Provided legitimate methods of change are used, I am in favour of patriation, of a good Charter of Human Rights, and of the Victoria Charter for amendment. I have said so many times over the years. But do the ends justify the means? The methods the Trudeau Government is now proposing seem to me to be dangerous. The ongoing success of our Canadian Federal System depends on very extensive co-operative plans and measures at the federal-provincial inter-governmental level. This process is continuous and depends on mutual trust and goodwill. This means the Federal Government should treat the Provinces as partners and not as adversaries and should seek the widest possible consensus. It has not been doing either of these things lately.

Parts II through V of the volume deal with various phases of the Constitution both from an historical and a contemporary point of

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[9] Pp. 434-435.

[10] P. 440.

[11] P. 442.

view. Indeed, the book is laden with Canadian constitutional history which is very gratifying to one who firmly believes that it is easier to understand the present if one has a good knowledge of the past. A good understanding of the origin and development of that which exists today can often explain many things which might otherwise be difficult to understand. That is why Part II, "Constitutional History, Independence and Amendment", was found to be so interesting, particularly Chapter 4, "The Extension of Governmental Institutions and Legal Systems to British North America in the Colonial Period". In essence this chapter is a short short course in Canadian constitutional history, an understanding of which is so important if one is to thoroughly appreciate the problems with which Canada is beset today. Equally interesting are Chapters 5 and 6 of Part II which relate to the amending process and Canadian unity in which Professor Lederman seeks to state Quebec's position as well as that of the rest of Canada. He does this to the point of discussing how terms for the secession of Quebec would be negotiated if, as he puts it, "the unlikely happens".[12]

Chapter 7 of Part III of the volume gives about as good an account of the origin and development of "The Independence of Judiciary" as can be found anywhere. It should be required reading for every law student, and recommended reading for others in the United States as well as in Canada who, on occasion, would tamper with that independence. For, "[i]t has been recognized as axiomatic that if the judiciary were placed under the authority of either the legislative or the executive branches of the Government then the administration of the law might no longer have that impartiality which is essential if justice is to prevail".[13]

The other chapters of Part III of the volume relate to "The Supreme Court of Canada and the Canadian Judicial System",[14] judicial review,[15] and thoughts and proposals for the reform of the Supreme Court of Canada.[16] Among other things, he defends the impartiality and the objectiveness of the judges of the Supreme Court, and refutes the idea that they are under the undue influence of the Parliament and of the Government to which they owe their existence and their appointments. Also, he makes interesting comments on the question of regional quotas for the membership of the Supreme Court. He advocates increasing the number of Justices from nine to eleven,

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[12] Pp. 101, 102.

[13] Pp. 109, 110, quoting from A.L. Goodhart, English Law and the Moral Law, (1955), pp. 55, 56.

[14] Ch. 8.

[15] Ch. 9.

[16] Chs 10, 11.

but disagrees with the Pepin-Robarts Task Force recommendation that five of the eleven should be from Quebec. He does not think that Quebeckers should expect that much, though he would accept it if it were ". . .part of the price to keep Quebec in the Canadian federal union. . .".[17]

Part IV of Professor Lederman's book, the longest of the VI,[18] is directed at the distribution of legislative powers within the Canadian system under the British North America Act—Federal *versus* Provincial. In the foreword, Dr. Corry summarizes very well the problem that this distribution of legislative powers presents in today's world when he writes as follows:[19]

> For some time now, and with increasing frequency, the judges have been finding that sections 91 and 92 are not wholly separate compartments fully insulated from one another. Again and again, a subject-matter expressly reserved to one legislature or the other is found to have important aspects which fall also within the subject-matter conferred on the other level.

Professor Lederman leads off his discussion of the problem with a chapter on the "Classification of Laws and the British North America Act".[20] From his Preface one learns that he first became interested in the classification theory in connection with his study of Private International law at Oxford after World War II, and that he continued this line of inquiry upon his return to legal teaching and research in Canada.[21] This chapter which was first published in 1953 in a volume of legal essays[22] was the outcome of his research. Basically, his conclusion is that the application of sections 91 and 92 of the British North America Act is a question of classification which is complicated by the fact that a given law can be classified in many different ways and thus placed in both camps, Federal and Provincial. In turn, that places the problem in the hands of the judges and the courts who must make the ultimate decision.[23]

The chapter on classification is followed by chapters that touch on such things as the concurrent application of Federal and Provincial laws,[24] the balanced interpretation of the Federal distribution of legislative powers,[25] unity and diversity in Canadian federalism,[26]

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[17] P. 220.

[18] Chs. 12-23.

[19] Foreword, p. x.

[20] Ch. 12.

[21] Pp. xv, xvi.

[22] See Legal Essays in Honour of Arthur Moxon, ed. by J.A. Corry, F.C. Cronkite and E.F. Whitmore (1955), p. 183.

[23] For a summary of his conclusions see pp. 248, 249.

[24] Ch. 13.

[25] Ch. 14.

[26] Ch. 15.

the Supreme Court and the Federal Anti-Inflation Act,[27] and the legislative power to implement treaty obligations.[28]

In part V of his volume, one of the shortest,[29] Professor Lederman gives us three short chapters on "Guaranteed Human Rights and Freedoms in Canada". In the first,[30] "The Constitution and the Protection of Human Rights", he delves into such things as the "Philosophical and Logical Features of a Typical Bill of Rights" in which he draws a distinction between rights and freedoms. He comments on the conflicts between overlapping general principles and the need for compromise, as well as the need for both generalities and particulars, and the relation between equality and discrimination as tests of justice. He also discusses the roles of democratic parliaments and independent courts in the protection of human rights and freedom. The former are the primary law-making bodies where important social policy decisions for change are, and should be, taken; the latter have a complimentary role to play and should not be viewed as rivals of parliamentary bodies. The role of the latter—the courts—is to individualize legal principles found in constitutions and statutes "so as to give authoritative decisions at the particular level of everyday affairs for the persons contemplated by the terms of the laws".[31] In addition, he comments on the powerful position in which courts are placed with respect to laws that are especially entrenched in a constitution. Such laws cannot be readily changed by a legislative body that is dissatisfied with the interpretation courts give to them which, in effect, gives the courts the last word.

Chapter 25 of Part V is a comment on the Supreme Court of Canada's decision in *The Queen* v. *Joseph Drybones*,[32] the case which is generally considered to have put teeth into The Canadian Bill of Rights[33] which was enacted into law by the Parliament of Canada in 1960. By a vote of six to three the Supreme Court held in that decision that it was discriminatory and a violation of The Bill of Rights for section 94 of The Indian Act[34] to make it an offence for an Indian to be intoxicated *off a reserve*. Drybones, who was found guilty of having been intoxicated *off a reserve* in violation of the Indian Act and fined $10.00, was deemed to have been denied equality before the law since, solely because of his race, he was punished for having done

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[27] Ch. 16.

[28] Ch. 19.

[29] Twenty-seven pages.

[30] Ch. 24.

[31] P. 412.

[32] [1970] S.C.R. 282.

[33] R.S.C., 1970, Appendix III.

[34] R.S.C., 1952, c. 149, s. 94(b).

something which any other Canadian was free to do without having committed any offence, or having been made subject to any penalty. Commenting on the case, Professor Lederman writes: "Quite clearly then, our final court has confirmed the view that the Canadian Bill of Rights is of overriding effect in the whole sphere of federal law in Canada."[35]

Unfortunately, Professor Lederman does not also comment on *A. G. for Canada* v. *Lovell—Isaac* v. *Bedard*,[36] decided after *Drybones*, in which the Canadian Bill of Rights appears to have lost some of its newly acquired teeth. In that case it was found not to be a violation of the Canadian Bill of Rights for an Indian woman to be deprived of her rights as an Indian by section 12 of the Indian Act, and not to be able to continue to live on the Reserve, if she married a non-Indian, disabilities that did not apply to a male Indian who married a non-Indian woman. Indeed, not only did a male Indian retain his Indian rights even though he married a non-Indian, but his wife could also live on the Reserve. This, as Chief Justice Laskin pointed out in his dissenting opinion, hardly seems consistent with what the Supreme Court of Canada decided in *Drybones*.

Chapter 26, the last chapter of Part V, touches on language rights in the Province of Quebec. As Professor Lederman discusses this tender spot of the relationship between English-Canadians and French-Canadians not only in the Province of Quebec, but throughout Canada, he links language rights with human rights and continues:[37]

> In the first place I feel full sympathy for the concept of the French language as the priority language in Quebec; that Quebec must be the homeland of French language and culture in North America. Nevertheless, the large anglophone minority in Quebec has historic rights to the use of the English language that should be allowed greater freedom and accorded greater recognition than we find in the proposed Charter of the French Language in Quebec [Bill 101 which was in the process of being enacted into law by the National Assembly of Quebec when this was written].

He thinks it "obnoxious", and going too far, for Quebec to indirectly, but effectively, bar anglophone immigration into the Province by restricting access to the existing historic anglophone school system to children with at least one parent who was educated in that system. On the other hand, he recognizes that English-speaking persons are a linguistic minority group in Quebec. For that reason, as a compromise he thinks it reasonable to require that children in the anglophone school system become proficient in French as a second language. He acknowledges, and neither defends nor condones, the wrongs done

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[35] P. 416.

[36] [1974] S.C.R. 1349.

[37] P. 425.

French-Canadians in the past in Manitoba and Ontario when they were deprived of rights to education in French, but he dismisses that as having occurred generations ago and adds: "We should not now dwell unduly on past injustices, because things have changed."[38] But the question still remains for French-Canadians of the Province of Quebec: how much have things changed, and for how long would the change last if there were not the effective safeguard of a Bill 101 or the presence of a René Lévesque, in or out of power?

Professor Lederman's book of essays on Canada's continuing constitutional dilemmas is an extremely interesting and thought-provoking book, particularly for one brought up under a different constitutional system such as the author of this review. Perhaps the most striking feature of the book is the seemingly overriding presence of the so-called "Quebec Question", particularly in the later essays, as it crops up here and there, sometimes where one least expects it. Now and then, one even gets the feeling that some of the essays and several of the "Further Developments and References" were written by one who feared that Quebec was looking over his shoulder to see what he was doing. Far from detracting from the value of what Professor Lederman has written, this serves instead to highlight the problems that Canada faces today, and will increasingly face in the future now that the Western Provinces have started to make noises of their own. In many ways, some of these noises that come from the West are similar to those that Quebec has made in the past, and continues to make with increasing intensity today.

*Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law and Federal System of Canada* is an excellent book. It should be on the reading list of every student of the Canadian constitutional system.

EDWARD G. HUDON*

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[38] P. 426.

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*Essais sur la Constitution*. By GÉRALD A. BEAUDOIN. Ottawa: Éditions de l'Université d'Ottawa. 1979. Pp. x, 422. (No price given.)

Gérald Beaudoin is one of Canada's senior constitutional scholars. He has been a professor of Constitutional Law (and until recently Dean of the Civil Law Section) at the University of Ottawa for many years. Before that he was Assistant Parliamentary Counsel to the House of Commons. He has been a constitutional advisor to the Government of Canada, and he was a member of the Pepin-Robarts Task Force on Canadian Unity.

As both a convinced federalist and a strong supporter of cultural autonomy for French Quebec, Professor Beaudoin brings a balanced perspective to the constitutional questions that have preoccupied Canadians in recent years. He argues for major constitutional reforms, but opposes changes which would weaken Canadian federalism. As one who shares his general outlook, I picked up this collection of Professor Beaudoin's essays with some eagerness. Many of my expectations were met, although I regret to report that some were disappointed.

Most of the essays have been previously published. The fact that they were originally prepared for a variety of audiences results in a quite uneven level of sophistication throughout the book. No single category of readers is likely to be fully satisfied. For example, the excellent blow-by-blow description of the February, 1968, Parliamentary crisis, which occurred when Beaudoin was Assistant Parliamentary Counsel, may well be too detailed to sustain the interest of the general reader. On the other hand, several of the essays prepared for lay (sometimes non-Canadian) audiences, though they serve their purpose well, are of little or no value to the specialist. By the same token, of course, the book contains *something* for everyone, constitutionalist and lay reader alike.

A certain amount of repetition is to be expected in a collection of this sort. When addressing different groups on related subjects one understandably covers some of the same ground with each group. This collection contains rather more repetition than is justifiable. When preparing the essays for conjoint publication, Professor Beaudoin or his editor should have been a little more ruthless in deleting unnecessary duplication.

Timeliness also presents some problems. Many of the essays, which were written over a span of almost ten years, deal with topical and fast-paced events. The relevance of some of them has been reduced by the passage of time. Much of the speculation about the then-forthcoming Quebec referendum on sovereignty-association falls into that category, for example, as do the discussions of language

rights under section 133 of the British North America Act, which were written before the Supreme Court of Canada ruled on the matter. Professor Beaudoin cannot be faulted in those cases; the book was published well before both the referendum and the Supreme Court language decisions. There are some problems of timeliness that he could have avoided, however.

An illustration of avoidable obsolescence is the essay outlining the Canadian judicial system. Written before the Exchequer Court of Canada was replaced by the Federal Court of Canada, before appeals to the Supreme Court of Canada required leave, and before the creation of the Canadian Judicial Council, it is seriously deficient as a description of the current situation. While it is true that there are brief footnotes referring to the establishment of the Federal Court and the requirement of leave to appeal, the text remains unaltered and potentially misleading. No mention is made of the Canadian Judicial Council, and the uninformed reader would be excused for inferring that no such organization exists after reading the following statement, among several proposals for *future* change:

> On a prôné aussi l'établissement d'un Conseil de la Magistrature. . . .[1]

It would have added considerably to the value of the book if Professor Beaudoin had been a little more assiduous in revising the text to reflect the state of affairs at the time of publication.

The major source of my personal disappointment is the author's frequent reticence to express his own views about proposals he describes. This is not to say the he never offers personal opinions; he expresses forthright, even eloquent, support for certain measures. This is especially true of the reform proposals advanced by the Pepin-Robarts task force. But on too many other subjects he contents himself with merely describing a suggestion, or perhaps stating its pros and cons, and then assuming a non-committal stance. On the thorny question of resource ownership and management for example, he tells us only that:[2]

> Il faut réconcilier l'article 109 de la Constitution qui attribue en exclusivité aux provinces la propriété des ressources naturelles sur leur territoire et les articles 91.2, 91.3 et 121 de l'Acte de 1867, qui traitent du commerce général dans le pays, de la taxation fédérale, des importations et des exportations.

On the subject of treaty-making by the provinces, he describes the unsatisfactory present state of affairs, and then concludes that:[3]

> Il reste cependant à mettre au point une solution à long terme qui donnerait satisfaction.

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[1] P. 153.

[2] P. 36-37.

[3] P. 37.

He is similarly unhelpful concerning reform of the division of powers over immigration,[4] abolition of the monarchy,[5] modification of the Senate,[6] future allocation of the residual power,[7] and many other matters. I would like to have had the benefit of Professor Beaudoin's thinking on these difficult questions.

Perhaps I am asking too much. There are limits to what one person can accomplish in one book. The best way to leave the matter may be simply to express the hope that this prolific scholar will soon find occasion to share his views on those constitutional issues about which he was silent or non-committal in these essays.

Turning to what he has produced in this collection, there is much to applaud. The major constitutional options open to Quebeckers dissatisfied with the status quo are explained clearly and dispassionately from both legal and political standpoints. There are good overviews of the present state of constitutional law in several areas, such as civil liberties, environmental management, and children's rights. Useful suggestions are made for improvement of the constitutional position of the judiciary, and a number of other reform proposals are noted.

Above all, these essays should be celebrated for the optimism they express concerning our ability to fashion satisfactory solutions to the constitutional problems of Quebec and Canada, provided that we are prepared to be innovative:

> Dans cette mosaïque nouvelle il ne faudrait pas craindre d'innover.[8]

And patient:

> La minute de vérité qui est venue durera des jours, des mois et quelques années peut-être.[9]

If our federal and provincial politicians shared Professor Beaudoin's attitude, Canadians would have little to fear from the constitutional crisis.

DALE GIBSON*

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[4] P. 58.
[5] P. 58.
[6] P. 60.
[7] P. 77.
[8] P. 47.
[9] P. 47.

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*Canadian Sentencing Digest*. Edited by R. PAUL NADIN-DAVIS and CLAREY B. SPROULE, Q.C. Toronto: Carswell Co. Ltd. 1981. Pp. Loose-leaf. ($65.00)

The vast majority of criminal cases that come before the courts result in conviction and sentence. One can therefore not overstate how important it is that lawyers and judges be extremely knowledgeable about sentencing principles and quantum of sentence. Principles of sentencing have been dealt with reasonably well in the English text by D.A. Thomas[1] and, more recently, in the Canadian text by Clayton Ruby.[2] Both textbooks also discuss quantum briefly.[3] However, they have shortcomings; being texts, they cannot be kept current; and, with their emphasis on sentencing principles, it is not reasonable to expect them to be comprehensive as regards quantum cases. There also exists regular reporting of quantum of sentence in the *Criminal Law Quarterly* and in the *Weekly Criminal Bulletin*. Both of these are extremely helpful. They are also current. However, again, they are insufficient because they are not comprehensive. By providing brief information about a few cases at a time, they leave to the reader the difficulty of indexing and cataloguing and, by making no claim to be comprehensive, they leave that nagging fear that one's worthy adversary will come up with that recent case and annihilate one's well prepared sentencing submissions.

*Canadian Sentencing Digest* is a "Quantum Service". Accordingly, it is a welcome addition to the literature in this field. In its present form, it claims to have compiled all reported sentencing decisions since 1970. The volume is tabulated in categories, first coinciding with the categories of offences set out in the Criminal Code; then, it contains separate tabs for various federal statutes including the Food and Drugs Act,[4] the Narcotic Control Act,[5] the Income Tax Act,[6] the Juvenile Delinquents Act,[7] and numerous other federal statutes including ones as obscure as the Territorial Lands Act[8] and the National Library Act.[9] In these respects it is both comprehensive and extremely easy to use.

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[1] Principles of Sentencing: The Sentencing Policy of the Court of Appeal Criminal (2nd ed., 1979).

[2] Sentencing (2nd ed., 1980).

[3] Clayton Ruby, *op. cit., ibid.*, pp. 423-500, and D.A. Thomas, *op. cit.*, footnote 1, pp. 74-193.

[4] R.S.C., 1970, c. F-27, as am.

[5] R.S.C., 1970, c. N-1, as am.

[6] R.S.C., 1970-71-72, c. 63, as am.

[7] R.S.C., 1970, c. J-3, as am.

[8] R.S.C., 1970, c. T-6, as am.

[9] R.S.C., 1970, c. N-11, as am.

Within each tabulated category there are listed the specific offences in order corresponding with the numbers of the sections which create the offences. For each offence, all reported cases are summarized in chronological order. This organization is excellent. It makes for quick reference; it allows one to refer to the most recently reported cases under a given section; it enables one to compare all recently reported decisions in summary form side by side.

Editorial comment is generally absent. However, where necessary to explain a remarkable feature of the legislation itself, it is included. For example, the curious history of section 236(2) of the Criminal Code and a summary of the controversy surrounding it is included.[10]

The volume is unbound looseleaf. Accordingly, updating can be done with relative ease.

It has been said that perfection is not of this world and this volume is not without its shortcomings. The preface contains a promise that quarterly releases will keep it up to date.[11] However, as we enter the last quarter of 1981, the original 1980 version remains in its original form. Thus, one year of sentencing decisions is missed. Also, the effect of an important decision of the Supreme Court of declaring section 238(3) unconstitutional is not included.[12]

Furthermore, although comprehensive as to reported cases, the digest in its present form does not solve the problem created by the fact that most sentencing decisions are not reported. In this regard, the editors emphasize that they would appreciate receiving information about unreported decisions.[13] It is hoped that we practitioners will respond to this request and that the editors will thereby keep abreast of unreported decisions as they arise and include them promptly in the digest. If this is done, this digest has the potential of being an essential library item on the subject of sentencing.

A further defect is that the summaries are extremely brief. In some cases, so little information is given in the summary of a case that the case is quite useless as a precedent. Undoubtedly, the editors have included all information given in the report. It would be very useful, though also demanding, if the editors could do additional research beyond the report to add essential information. As a minimum, they might determine, when a sentence is reduced to time served and how much time was served as such information can normally be ascertained easily.

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[10] Pp. 70-1 and 70-2.

[11] P. iv.

[12] *R.* v. *Boggs* (Feb. 1981), unreported.

[13] P. iv.

As stated earlier, one of the main advantages of such a service is that it provides, in one place, summaries of all reported recent decisions on a specific offence. This is of use to the practitioner in attempting to find a precedent for a given case. It is also of use to the practitioner or academic as a tool to study disparity of sentencing, evolution of sentencing, quantum and even sentencing principles. Though the summaries are succinct, the principles and the application of principles emerge, sometimes with startling clarity, when numerous cases are summarized close together. Unfortunately, the usefulness diminishes sharply when only a few cases are reported for a given offence.

For example, one finds seven reported cases in the decade in question for escape custody[14] and three reported cases in the same period for being unlawfully at large.[15] The three unlawfully at large cases resulted in sentences of fifteen months, one year, and six months.[16] Any practitioner from an area such as Kingston where there is a large number of prisons can confirm that, to the extent that such a summary might be taken as to be reflective of the sentence one might expect to receive for unlawfully at large, it is misleading. Without reference to statistics, yet without fear of contradiction, I can assert that the most common sentence received for being unlawfully at large or for escape is three months consecutive. Furthermore, the frequency of such charges far exceeds what the reports reflect. Furthermore, in a recent unreported decision of the Ontario Court of Appeal, when a six month consecutive sentence for unlawfully at large had the effect of transferring a relatively young offender to the penitentiary, the Ontario Court of Appeal reduced the sentence from six months to three months.[17] This illustration indicates how important it is for practitioners and others to keep in touch with the editors of this digest to keep them aware of unreported decisions. Without a relatively comprehensive summary of unreported decisions, the digest will be of extremely limited use.

A similar shortcoming exists in the section of trafficking in controlled drugs. Only one case is referred to on the subject of trafficking in speed.[18]

For some offences, on the other hand, this digest is, even in its present form, of great use. These include the extremely serious cases,

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[14] Pp. 27-1 to 27-3.

[15] Pp. 29-1 to 29-2.

[16] *R.* v. *Ritchie* (1974), 9 N.B.R. (2d) 22 (C.A.); *R.* v. *Blazek* (1976), 14 N.B.R. (2d) 260 (C.A.); and *R.* v. *Wardelle* (1976), 15 N.B.R. (2d) 488 (C.A.), respectively.

[17] *R.* v. *Viger* (Sept. 29th, 1981), unreported.

[18] Pp. 137-1. Of great assistance re drug offences is Drug Users and Conviction Statistics, published annually by the Department of National Health and Welfare.

which are more likely to be appealed and hence more likely to be reported, such as rape. There are thirty reported cases of sentencings for rape.[19] With this number, one has sufficient different situations to compare so as to gain some assistance in preparing for sentencing.

Of practical and academic interest, by way of comparison, it is interesting to compare some of the decisions on indecent assault. Twenty-one cases of indecent assault on a female are captioned.[20] Four cases of indecent assault on a male are captioned.[21] In the cases of indecent assault on a female, three involved "respectable" persons in authority, two being school teachers with the victims being students[22] and one being a respected businessman with the victim being a female employee.[23] Their sentences varied from time served (not stated) to a suspended sentence. In the case of the businessman attacking his employee, she sustained bruises and damaged clothing. He received a suspended sentence plus an order to pay $1,000.00 to the victim. In contrast, an uneducated nineteen-year-old with some psychiatric history, who, like the respected gentlemen, had no previous criminal record, for grabbing two women's breasts simultaneously and walking away laughing when they protested, was sent to jail for three months and in addition put on probation for two years.[24]

In the cases reported of indecent assault on a male, one sees a case where four accused chased a nineteen-year-old male and dragged him to their car, drove him to a secluded spot, undressed him against his will, and while three held him, another "attacked his private parts". He was not hurt in any way. They each received one day imprisonment plus a fine of $500.00.[25] This very light sentence for an offence involving both violence and kidnapping is a marked contrast to anything similar involving a female or involving a younger male.

Principles of sentencing can be gleaned from the cases. In some they are implicit; in others, they are actually stated. For example, in *R.* v. *Campbell*,[26] we find an iteration by the Nova Scotia Court of Appeal that the possibility of harm to a sexual offender in a federal penitentiary is not a matter to be considered in sentencing.[27] The

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[19] Pp. 31-1 to 31-11.

[20] Pp. 34-1 to 34-7.

[21] Pp. 37-1 to 37-2.

[22] *R.* v. *Doran*, 16 C.R.N.S. 9, (Ont. C.A.), and *R.* v. *Wells* (1977), 7 A.R. 311 (C.A.).

[23] *R.* v. F12A. (1974), 26 C.C.C. (2d) 474 (Ont. H.C.).

[24] *R.* v. *DeCoste* (1974), 10 N.S.R. (2d) 94 (C.A.).

[25] *R.* v. *Marple* (1975), 6 N.S.R. (2d) 389 (C.A.).

[26] (1978), 26 N.S.R. (2d) 460 (C.A.).

[27] P. 33-2.

digest being no more than it claims to be, namely a "Quantum Service", one must be careful when finding such statements of principle and should check other sources for further assistance.[28]

One might well debate the relative utility of reporting quantum as opposed to reporting principles and *vice versa*. Neither can of course exist in a vacuum. One can conjure examples where one judge iterates the principles of general deterrence and protection of the public and another judge in a similar case, in his stated reasons emphasizes rehabilitation by referring to the youth of the offender and the prospects he has for future education; when the cases are compared, the relative quantum of the sentences may or may not bear a direct relationship to the principles stated. In many such instances, sentences though somewhat disparate, are not subject to appeal. Justice has been seen to be done and the appropriate principles of sentencing have been considered. However, the bottom line is the sentence itself in terms of quantum and, to those two young men sitting side by side in the paddy wagon on the way to jail, one might have difficulty explaining society's conception of justice. The same difficulty would certainly arise in explaining the result to the two victims, though they are less likely to come into contact or otherwise become aware of the disparity. The very fact that leeway is given to judges and must necessarily be given to judges in sentencing and that some disparity is bound to result may have contributed to the paucity of literature on the subject. Society and we as its individual members would rather not hear that our rules and their application lead to situations in which all persons are not treated equally (in terms of quantum). To say that it is a human process and subject to variation depending on the individual judge and his individual mood on that occasion is true, is inevitable, but is still slightly unnerving. Nevertheless, all efforts should be made to educate the bench, the bar, and the public on the sentencing process and on quantum, despite the discomfort it may from time to time cause, and toward this end the editors of this digest have taken a step in the right direction.

The authors are preparing a companion volume on sentencing to be published soon. The *Canadian Sentencing Digest,* coupled with the use of texts for enlarging on sentencing principles, and subject to the cautions stated herein, is a useful service in its present form. With

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[28] The court will consider evidence tending to show that, in the circumstances, the rehabilitation of the accused is more likely to occur in a reformatory than in a penitentiary: *R.* v. *Viger, supra,* footnote 17. On the other hand, once a person is imprisoned in one system or another, one factor the court will consider is the possible disruption that would be caused by a transfer. Clayton Ruby, *op. cit.,* footnote 2, pp. 296-298, and 417-418.

active input from the bar and bench, it has potential for being the most important tool yet available for researching the quantum of sentence.

FERGUS J. O'CONNOR*

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*Matrimonial Property Law in Canada.* Edited by ALASTAIR BISSETT-JOHNSON and WINIFRED H. HOLLAND. Toronto: Burroughs & Co. 1980. Pp. 820. ($88.00)

This is a loose-leaf[1] guide to the various provincial statutes dealing with matrimonial property. The section on each province, clearly indicated with ducks'-beak yellow tabs, contains textual material on the history of matrimonial property law, discussion of the more-or-less new statutory provisions, and a reproduction, on a delicately-pale green paper, of the relevant Act. The expandable covers, in contrast, are a dignified bottle green, with gold print, so that this book looks at once handsome and practical. The print is very readable and tables of cases and statutes[2] are provided, although not an index.[3] The editors have provided an introduction, and Professor McNair, of Western Ontario, a final useful chapter entitled Tax Implications of Family Property Law.

The contributors are a mixture of academic and practising lawyers from across Canada and the Preface reveals that they had two objectives in mind: the provision in general of a ready means of ascertaining the position in other provinces, (a difficult task, without the help of this book, given the recent tidal wave of legislative activity), and the provision of a "useful starting point" for practitioners.

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[1] The loose-leaf format seems to be dictated by necessity now that there is such an abundance of case and statute law in the field of family law. The promise of the format has been fulfilled by the publication of a supplement which Professor Bisset-Johnson informs me has been available since January, 1982.

[2] This writer certainly sympathises with the decision to omit the definite articles, in the Table of Statutes, even where it forms part of the short title of an Act. The attempt to conform to the varying practice across Canada can be somewhat unrewarding in a work of this nature.

[3] This has been rectified as of September, 1981, with the publication of an index and table of concordance. The price quoted above includes these additions. They were not available to the reviewer but should obviously add tremendously to the book's value as a reference work.

In an attempt to indicate the extent to which the book meets these objectives, I utilized it to research two test issues, one very general and one more specific.

*1. The matrimonial property regimes in Canada.*

It is reasonable to assume that, as a minimum, in a work of this nature, it should be easy to discover the basic regime in any chosen province. That is the most useful "starting point" of all. On the whole the book yields up that information fairly easily, though differences of organization and terminology inevitable in a co-operative effort of this kind make the search a little more strenuous than it might otherwise have been.

The following information was acquired with slightly varying degrees of ease. All provinces, with the exception of Quebec and British Columbia, now have, with some embellishments, a system of separation of property with deferred sharing and a considerable amount of judicial discretion. New Brunswick is unusual in that there is provision of a right to share in the proceeds of the sale of the marital home during marriage[4] and Saskatchewan in that an application for distribution of matrimonial property may be made at any time,[5] apparently even during an on-going marriage.

Newfoundland was perhaps the most difficult section to utilize because of the format consisting of comments on each sub-section in order. The writer indicates initially[6] that The Matrimonial Property Act[7] "incorporates immediate and deferred community of property". It is true that the Act makes provision for community of property in the matrimonial home,[8] but it seems more accurate to describe the system with respect to other matrimonial assets as one of deferred sharing with discretion.[9]

British Columbia has what looks more like a deferred community of property regime, as indicated in the very useful chapter contributed

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[4] The Marital Property Act, S.N.B., 1980, c. M-1.1, s. 20(1).

[5] The Matrimonial Property Act, S.S., 1979, c. M-6.1, ss 2(k) (i) and 21(1).

[6] P. N-5.

[7] S.N., 1979, c. 32.

[8] S. 6(1) states that "[n]otwithstanding the manner in which the matrimonial home is held by either or both of the spouses, each spouse has a one-half interest in the matrimonial home owned by either or both spouses, and has the same right of use, possession and management of the matrimonial home as the other spouse has".

[9] S. 19(1) states that where "(a) a petition for divorce is filed, (b) a marriage is declared a nullity, (c) the spouses have been separated and there is no reasonable prospect of the resumption of cohabitation, or (d) one of the spouses has died, either spouse is entitled to apply to a court to have the matrimonial assets divided in equal shares, notwithstanding the ownership of those assets, and the court may order such a division".

by Professors Robinson and Wuester. An entitlement to a one-half interest in family assets arises automatically on the happening of certain "s 43 events".[10]

Quebec, of course, is a law unto itself, and one of the many positive aspects of this book is the very clear discussion of the basic "partnership of acquests", regime as well as the alternatives. The section, contributed by Professor Groffier of McGill is certainly an excellent starting point for the common lawyer.

*2. The "triggering" events for division of property.*

A more specific issue relates to the statutory situations in which separation of property ceases and sharing may be ordered. How helpful is this book in making a comparative survey of the law on such a topic? Since a contentious issue has been whether death should be included as such an event, I paid particular attention to that. Again the book yielded the information with comparative ease, although the ease of course should be vastly increased by the index. The chapters range from very clear indeed through to reasonable. For example, the triggering events for British Columbia can be found in a matter of seconds, under the heading "When Does the Interest of a Spouse Arise?"[11] It is at once apparent that death is not included. The Manitoba chapter lists the events under "The Sharing of Assets: How the Scheme Works"[12] and again death is not included.[13]

Nova Scotia is an example of a province in which death is a triggering event, a point highlighted by Professor Bisset-Johnson, who draws attention to the difficulties which are ignored in the Matrimonial Property Act.[14] This brings me to a small feeling of frustration that I experienced with the text as a whole. It would be unfair with a work of this nature to look for extensive academic comment or an analysis of the values implicit in the legislation. I believe the book is a research tool and to be evaluated as such. However the writers do not completely refrain from such comment and occasionally views are asserted or made apparent in a vacuum, as it were, without argument or justification. Sometimes this is helpful, as, for example, where a summary is given of the weaknesses of

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[10] The Family Relations Act, R.S.B.C., 1979, c. 121. S. 43. s. 51 makes provision for an application for reapportionment.

[11] P. BC-9.

[12] P. M-18.

[13] However, Manitoba does have one very interesting event. S. 12(3) states that division may be made where "the other spouse has committed an act amounting to dissipation." The Marital Property Act, S.M., 1978, c. 24 (also S.M., c. M 45). This is a significant inroad on the basic separation of property regime.

[14] S.N.S., 1980, c. 9.

previous law, but sometimes one is left with the feeling of having been led up the garden path just a few steps and then abandoned.

With respect to the issue of death as a triggering event, nowhere in the book is there a comprehensive discussion of the pros and cons of including death, nor is this a deficiency in a work of this nature. However, Professor Bissett-Johnson does leave the reader dangling over the edge of this complex issue. He states as follows:[15]

> One of the major innovations of this Act is to include death as one of the events which "triggers" the operation of the statutory regime. Clearly the government of Nova Scotia was impressed by the irony, apparent in some of the other provincial regimes, that it was advantageous for a wife to divorce her husband rather than to take him "till death doth them part".

This is simply tantalising where there is no discussion nor even mention of the much greater irony that under most provincial regimes it may be advantageous for a spouse to divorce rather than stay happily married period. There is no hint of a reason why, if separation of property was acceptable to the government of Nova Scotia as a general regime, the occasion of death was treated as exceptional. At the present time in this province, a spouse can dispose of property *inter vivos* as (s)he wishes[16] but cannot do so to the same extent by testamentary disposition. There is no obviously conclusive reason why death should be treated like any other marriage breakdown,[17] although concentration on the sharing mechanisms to the neglect of the basic regime may lead to the superficial impression that death and divorce should be treated alike. Some discussion of the position of people whose marriage has *not* broken down, which this book does not provide, might easily lead one to the opposite conclusion. However, the point is that comments of this nature only make the reader conscious of what the book is *not*, rather than concentrating her or his attention on its many virtues.

One of these virtues, this reader was very happy to note, was that the contributors refrained from perpetuating stereotypical images by their use of pronouns. It is certainly appropriate in a book devoted to discussion of the way Canadian legislatures have begun to deal with the "failure of the equitable rules relating to family property to reflect the social changes within modern marriages",[18] that the writers' style

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[15] P. NS-7.

[16] Although if that disposition amounts to "unreasonable impoverishment" under s. 13(a) this can be taken into account by the court in exercising its residual discretion.

[17] There may well be special countervailing claims on death, which are normally taken into account by the full range of succession law, and unless that law, in this context, is going to be swallowed up by matrimonial property law, it may seem safer from a practical standpoint to leave death out of the list of triggering events. That is not to say that there should not be sharing on death—an attempt must be made to seek a just method of sharing property not just on death but during the marriage also.

[18] P. I-3.

reflects significant development in the use of language allied to those changes.[19] But this is by no means the only virtue. This is a well-produced and extremely informative book, which deals with some very complex matters in a useful way. I believe that it will reward frequent reference.

Perhaps it is as well that it is a book to be dipped into rather than read from cover to cover, otherwise the rather elderly joke about a man and woman becoming one on marriage, that one being the man, might wear a trifle thin the third time round.[20] On the other hand, it is very nice to see two editors so much in tune with each other that they share their sense of humour. Perhaps the "graphic" (Holland) or "wry" (Bissett-Johnson) remark of Lord Simon's does bear repeating. "[T]he cockbird can feather his nest precisely because he is not required to spend most of his time sitting on it."[21]

CHRISTINE BOYLE*

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*Similar Fact Evidence*. By DONALD K. PIRAGOFF. Toronto: The Carswell Co. Ltd. 1981. Pp. xxiii, 309. ($39.50)

To a member of the legal profession who has never been initiated to the finer points of the law of evidence, but who is occasionally thrown into the arena of litigation to face difficult evidentiary issues,[1] the admissibility of similar fact evidence is one of the most confusing issues that may be confronted. The treatment of similar fact evidence

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[19] This reviewer was surprised to note that in the introduction, however, practitioners and *bona fide* purchasers for value are male, while housekeepers and persons who may claim a share in family assets are female, as in the following classic sentence on p. I-4. "Here it may repay a practitioner to consult his local Land Titles Act or Registry Act to see whether a wife's alleged or admitted equitable interest in property is capable of being registered as a caveat,. . .". In contrast, the spouse who fears that a joint account may be cleared out can be either sex, as may a house owner, sometimes.

[20] Pp. 1-8, BC-5 and N-3.

[21] Pp. NS-25 and 0-7.

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[1] As a law teacher whose academic interests have never leaned towards evidence, but who has had the opportunity to serve on a number of human rights tribunals, this reviewer is one of those in this position.

in standard texts[2] does little to dispel this confusion. A text whose primary objective is to elucidate this one aspect of the law of evidence is, therefore, a potentially valuable addition to legal literature.

The main theme of Piragoff's *Similar Fact Evidence* is that the lawyer's understanding of how to deal with similar fact evidence has been unnecessarily confounded by a rule-bound approach to the admission or exclusion of such evidence. Piragoff argues in favour of approaching each dispute over the admissibility of similar fact evidence on the basis of fundamental principles, rather than rules. As with all evidence, the fundamental principle on which admissibility depends is relevance—that is, whether the evidence has probative weight in relation to an issue in dispute. Also as a matter of principle, however, there is a danger that similar fact evidence will unfairly prejudice the party against whom it is tendered. The potential for unfair prejudice arises from a human tendency to give similar fact evidence greater probative weight than it deserves. Because of this, the probative weight of similar fact evidence must be carefully balanced against the risk of unfair prejudice in the light of the specific circumstances of a particular case. Ultimately, a judgment must be exercised as to whether to admit or exclude the evidence on the basis of this balancing.

This theme is not new. Since the decision in *D.P.P.* v. *Boardman*,[3] the literature on similar fact evidence is dominated by the view that normal standards of relevance should be applied, although opinions appear to vary somewhat as to the best way to deal with the problem of unfair prejudice.[4] However, this approach appears to have been slow in taking root in the world of litigation. What Piragoff has done is to elaborate this rationalized approach to similar fact evidence in a format which, hopefully, lawyers and judges will find harder to overlook.

After introducing the central theme, the book deals in turn, over several chapters, with how relevance is established (including the measure of probative weight), and how the issues in dispute are identified. Between these two main parts is a chapter extensively analysing the *Boardman* case and outlining statutory attempts to deal with the problems of similar fact evidence.

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[2] For example, Sopinka and Lederman, The Law of Evidence in Civil Cases (1974), pp. 19-26, simply provides a listing of types of cases in which similar fact evidence has been admitted after making the telling statement that: "It is difficult to find a common thread tying together the various classes of cases in which the necessary nexus [for admissibility] has been found to exist."

[3] [1975] A.C. 421 (H.L.).

[4] See, for example, Hoffman, Similar Facts After *Boardman* (1975), 91 L.Q. Rev. 193; Sklar, Similar Fact Evidence—Catchword and Cartwheels (1977), 23 McGill L.J. 60; Williams, The Problem of Similar Fact Evidence (1979), 5 Dalhousie L.J. 281.

The depth and thoroughness of the analysis in this book is both its greatest strength and its greatest weakness. The author has examined a substantial volume of case-law to show how, on the one hand, a rule-oriented approach to similar fact evidence creates an intellectually unsatisfactory situation while, on the other hand, the proposed reorientation to fundamental principles would still satisfy the concerns underlying the existing rule structure. The central theme is so pervasive that it is impossible to use the book as a reference work without being thoroughly reminded of the main argument. Unless and until a competing text appears on the market, the extensive analysis of this book will demand attention and help to persuade its readers of the central theme. If the central theme fails to win general acceptance, however, this same pervasiveness will tend to discourage those who might otherwise be attracted to the book as a reference work and who might be acclimatized more gradually to the central theme.

The book is overly long and somewhat repetitive, not only as a whole considering the limited scope of its subject matter, but also in many of its analyses of particular aspects. While his explication of particular points by examples is generally helpful, the author sometimes distracts attention by an unnecessarily detailed discussion of an illustrative case.

This tendency is exhibited in an extreme form by the inclusion of an entire chapter[5] on the case of *LeBlanc* v. *R.*[6] Apart from the issue of similar fact evidence, the *LeBlanc* case involved a difficult substantive issue with respect to the mental element involved in criminal negligence. In order to deal with the *LeBlanc* decision as a case study on similar fact evidence, the author also extensively reviews the substantive issue. The author's analysis indicates that the law of the case on both the substantive issue and the evidence issue is unclear. Although the case could not have been completely ignored, it could have been discussed briefly with, at most, a brief footnote pointing out the wider analytical problems presented by the case. However meritorious the *LeBlanc* chapter would be as an independent case comment, it unnecessarily extends the length of the book.

Notwithstanding its flaws, *Similar Fact Evidence* is welcome, not only as a text to aid in the understanding of its subject matter, but also hopefully as a keystone in the movement towards more rational handling of similar fact evidence in litigation.

ROBERT W. KERR*

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[5] Ch. 10: *LeBlanc* v. *R.*: Similar Fact Evidence and Criminal Negligence.

[6] (1975), 29 C.C.C. (2d) 97 (S.C.C.).

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*Droit de la consommation*. Par NICOLE L'HEUREUX. Montréal: Éditions Sorej. 1981. Pp. 290. ($17.50)

Nous devons au Professeur Nicole L'Heureux, de la Faculté de Droit de l'Université Laval, la parution récente d'un ouvrage relatif au droit de la consommation, la collectivité juridique québécoise ayant déjà bénéficié d'un précédent titre du même auteur, le *Précis de droit commercial*, publié en 1971 aux Presses de l'Université Laval.[1]

*Le droit de la consommation* vient en ce domaine relativement nouveau et important du droit combler une lacune au Québec, du moins au niveau de la monographie, abstraction faite de quelques titres portant sur des secteurs spécialisés de la consommation.[2]

Ce précis qui se veut une synthèse de l'ensemble du droit de la consommation et qui, de l'aveu de l'auteur, s'adresse d'abord aux étudiants, ordonne la matière en trois parties respectivement consacrées au *contrat de consommation*, à la *protection du consommateur dans la phase préalable au contrat* et, finalement, à l'*exécution et à la surveillance*. Ce plan nous semble assez fonctionnel, quoiqu'un esprit pointilleux pourrait trouver étrange de voir la phase préalable au contrat être traitée après les notions relatives au contrat lui-même et non avant.

C'est la première partie, traitant de l'aspect contractuel du droit de la consommation, qui a particulièrement retenu notre attention: le contrat de consommation ne peut en effet manquer d'intéresser un civiliste puisque, en dépit d'une large part d'autonomie, ce secteur du droit ne peut complètement s'affranchir du droit civil dont la présence se fait toujours sentir, d'une part sur un plan négatif, dans la mesure où le droit des contrats de consommation est en réaction aux règles du droit commun jugées insuffisamment protectrices de certaines catégories de contractants, et, d'autre part, sur un plan positif, étant donné le rôle supplétif du droit commun des contrats.

Cette première partie se subdivise en quatre titres, exposant successivement: le domaine du droit de la consommation, les mesures générales de protection, les contrats réglementés spécialement et les pratiques de commerce reliées à ces derniers. Une particularité à signaler, à ce niveau: l'on ne retrouve les développements relatifs aux sanctions civiles qu'à la troisième partie de l'ouvrage où les recours de nature contractuelle voisinent avec les sanctions administratives et pénales. La volonté d'offrir du droit de la consommation un tableau intégré explique sans doute ce qui pourrait, à première vue, apparaître comme une incongruité.

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[1] Réédité en 1975.

[2] V. Françoise Lebeau, Étiquetage et emballage des produits de consommation (1977); La publicité (1981).

D'une manière générale, l'auteur élabore dans cette partie une bonne théorie du contrat de consommation: la problématique de l'équilibre contractuel est posée en termes justes et le lecteur dispose d'un exposé à la fois clair et systématique de la réglementation applicable à tous les contrats de consommation d'abord et de celle spécifique à certains types de ces contrats (contrat de vente itinérante, contrats assortis d'un crédit, *etc.*) ensuite.

Quelques remarques doivent, toutefois, être formulées.

Il faut regretter, en premier lieu, le traitement un peu trop rapide de certains sujets: ainsi la question des clauses exonératoires de responsabilité[3] méritait sans doute plus qu'un paragraphe d'à peine quatre lignes et demi;[4] cela est regrettable car il convenait, selon nous, d'expliquer l'avantage pour le consommateur de la solution de l'article 10 de la nouvelle Loi sur la protection du consommateur[5] par rapport aux simples balises jurisprudentielles[6] apportées en droit commun au principe de la licéité de ces clauses;[7] de même certaines précisions relatives à la notion du fait personnel du commerçant et du fait de ses employés auraient été bienvenues.[8]

En second lieu, quelques passages auraient mérité un effort accru au niveau de l'art de convaincre: mentionnons les paragraphes où l'auteur assujettit le régime des nouvelles garanties légales créées par les articles 37 (garantie d'usage normal) et 38 (garantie de durée raisonnable) de la Loi sur la protection du consommateur aux principales conditions de la garantie des vices cachés:[9] cette fusion des régimes de garantie est loin d'être évidente; l'on est même en droit de se demander pourquoi le législateur aurait pris la peine d'édicter ces deux nouvelles garanties, si au bout du compte, le consommateur reste astreint aux conditions contraignantes du régime de la garantie du vice caché (preuve de l'existence du vice lors de la conclusion du contrat et preuve du caractère occulte de ce vice, notamment): où serait alors le progrès pour le consommateur? Nous ne nions pas *a priori* la justesse de la thèse ici défendue, mais force est de constater qu'il faudrait pour en être convaincu des arguments un peu plus élaborés que celui qui consiste à avancer que "[l]a notion d'usage

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[3] Loi sur la protection du consommateur (citée L.P.C.), L.Q., 1978, c. 9, art. 10.

[4] P. 37.

[5] *Supra*, note 3.

[6] Jean-Louis Baudouin, Les obligations (1970), aux pp. 309-313.

[7] *Glengoil Steamship Line Co.* c. *Pilkington* (1898), 28 R.C.S. 148; *Manning Marine Ltd* c. *Chateau Motors Ltd*, [1978] C.A. 290.

[8] V. Claude Masse, Les clauses d'exonération des commerçants (1980), 2 Justice 25, à la p. 27.

[9] Pp. 42-44.

normal est très voisine de celle des défauts cachés'';[10] dans cette même perspective, mentionnons, en outre, les passages[11] où l'on semble trouver que le recours direct qu'offrent aux sous-acquéreurs le droit commun[12] et le droit de la consommation[13] repose sur le même fondement; la question méritait d'être plus poussée en raison des dangers que recèle la théorie du transfert implicite, à titre d'accessoire, de la garantie initiale des défauts cachés: le revendeur ne peut, en effet, transmettre au sous-acquéreur plus de droits qu'il n'a;[14] admettre purement et simplement et comme allant de soi l'identité de fondement des deux recours directs est regrettable, car cela pourrait priver le consommateur de bonne foi de son recours contractuel contre le fabricant si, par exemple, le commerçant revendeur avait connu lors de l'achat initial les vices de la chose.[15]

En troisième lieu, il convient de signaler une importante lacune au niveau de la présomption de connaissance du vendeur en matière de vices cachés: l'auteur a certes souligné[16] que le législateur a, pour les contrats de consommation, mis fin[17] à la relative incertitude[18] au sujet du caractère absolu ou relatif de la présomption; nous aurions toutefois apprécié que l'on traitât aussi de la délicate question du fardeau de cette présomption: faudrait-il, comme en droit commun, continuer à n'imposer cette présomption qu'au vendeur spécialisé[19] ou, au contraire, faudra-t-il, comme semblerait le suggérer l'absence de

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[10] P. 43. Pour une tentative de justification de cette thèse il convient de consulter, quoique les arguments avancés soient loin d'entraîner notre adhésion, l'article de Louis Perret, Les garanties légales relatives à la qualité d'un produit selon la nouvelle loi de la protection du consommateur (1979), 10 R.G.D. 343, aux pp. 348 à 355.

[11] P. 47.

[12] *General Motors Products of Canada Ltd* c. *Kravitz*, [1979] 1 R.C.S. 790.

[13] L.P.C., art. 53, al. 1 et 4.

[14] V. Bernard Boubli, Soliloque sur la transmission de l'action en garantie (à propos de l'arrêt de la troisième Chambre civile du 9 juillet 1973), J.C.P. 1974. I. 2646. Sur la différence qui existe entre le recours direct dû à un transfert implicite de créance et le recours direct fondé sur la volonté du législateur, V. Maurice Cozian, L'action directe (1969), n. 96, p. 62.

[15] Ainsi dans l'arrêt *Kravitz, supra*, note 12, le juge Pratte (aux pp. 796 à 799) recherche en tout premier lieu, avant de reconnaître le bien fondé de l'action du sous-acquéreur contre le fabricant, si ce dernier était bien débiteur de la garantie légale des vices cachés à l'égard de son propre acheteur, le revendeur concessionnaire (existence du vice lors de la vente initiale, caractère caché et inconnu de l'acheteur initial, importance aux yeux de la loi).

[16] P. 44.

[17] L.P.C., art. 53, al. 3.

[18] V. Pierre W. Morin, Annulation de vente d'automobiles pour cause de vices cachés (1975), 35 R. du B. 209, aux pp. 213 à 215; P.P.C. Haanapel, La responsabilité du manufacturier en droit québécois (1980), 25 McGill L.J. 300, aux pp. 306 et 307.

[19] V. Th. Rousseau-Houle, Précis du droit de la vente et du louage (1978), aux pp. 122 à 127.

distinction de l'article 53, alinéa 3 L.P.C., l'imposer à tout vendeur commerçant, qu'il soit spécialisé ou non?[20] Sans nécessairement prendre parti, l'auteur, à notre avis, aurait pu au moins mentionner la difficulté.

Enfin, plusieurs développements offrent du droit commun des contrats une vision un peu trop simplifiée: citons, entre autres, ce passage[21] où il est dit que la garantie des défauts cachés "se fonde sur une présomption de connaissance par le vendeur professionnel des qualités et des défauts des biens qu'il fait profession de distribuer": cela est sûrement exact pour ce qui concerne l'octroi des dommages-intérêts;[22] mais la sanction de l'inexécution de l'obligation de garantie se limite-t-elle à cet octroi?[23] En d'autres termes, l'article 1527 du Code civil n'est-il pas un simple satellite de l'article 1522? Citons également ce paragraphe[24] où l'auteur affirme que le droit civil *nie* le recours direct[25] du sous-acquéreur contre le fabricant en raison de l'effet relatif du contrat, tandis que "[l]e droit de la consommation s'affranchit des concepts contractuels trop étroits du droit civil pour traduire la réalité économique et sociale contemporaine";[26] cette affirmation aurait mérité un peu plus de nuance étant donné qu'avant l'arrêt *Kravitz*[27] lui-même, notre jurisprudence civile avait admis la théorie du transfert implicite, à titre d'accessoire, de certains droits personnels.[28]

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[20] V. Louis Perret, *op. cit.*, note 10, à la p. 348.

[21] P. 19.

[22] Code civ., art. 1527 et 1528.

[23] V. Code civ., art. 1526. La connaissance, réelle ou présumée, des défauts cachés de la part du vendeur n'ayant d'importance qu'au niveau de l'octroi des dommages-intérêts, abstraction faite du problème des clauses de non garantie.

[24] P. 47.

[25] Il est fait référence par l'auteur à l'article 1023 Code civ. Cette réduction du droit civil au Code—et qui fait abstraction de la création jurisprudentielle (voir la note 27)—est loin d'être décisive sur le problème du recours direct: en effet, à l'obstacle que représente en apparence l'article 1023 ne pourrait-on pas opposer un autre texte du Code civil, l'article 1030 qui dispose: "On est censé avoir stipulé pour soi et pour ses héritiers et représentants légaux, à moins que le contraire ne soit exprimé ou ne résulte de la nature du contrat"? V. Lepargneur, De l'effet à l'égard de l' "ayant-cause" particulier des contrats générateurs d'obligations (1924), 23 Rev. Trim. Dr. Civ. 480, n. 10, à la p. 512: *Compagnie d'Aqueduc du Lac St-Jean* c. *Fortin*, [1925] R.C.S. 192, où le juge Mignault fait application de cette stipulation présumée, en plus, il vrai, de faire appel à la théorie de l'accessoire.

[26] L.P.C., art. 53, al. 1 et 4.

[27] *Supra*, note 12.

[28] V. *McGuire* c. *Fraser* (1908), 17 B.R. 449, aux pp. 457 et 462, confirmé par (1908), 40 R.C.S. 577; *Dumas* c. *Les Immeubles Roussin Inc.*, [1975] C.A. 192, à la p. 195; *Gauthier* c. *Gaston Fournier Inc.*, [1976] R.L. 21 (C.P.) 31, à propos du recours du sous-acquéreur d'un immeuble contre l'entrepreneur ou l'architecte sur la base de l'article 1688 Code civ. (*contra*, cependant: *Williams* c. *Gilbert*, [1967] C.S. 458, à la

Précisons immédiatement que les quelques remarques que nous venons de formuler à propos de cette partie de l'ouvrage ne lui enlèvent ni sa valeur ni son utilité: elles témoignent, simplement, de la difficulté inhérente à ce genre particulier qu'est le précis, de fixer avec sûreté les limites de la nécessaire concision.

En ce qui concerne l'aspect formel de l'ouvrage, il convient de saluer la présence d'une bibliographie sélective à la suite de la plupart des chapitres; par ailleurs la présence d'un index, d'une table des matières détaillée, d'une table des arrêts et des articles de la L.P.C. avec renvoi aux paragraphes[29] facilite la consultation du précis.

Par la clarté de son discours, son caractère synthétique et la richesse de la documentation, le *Droit de la consommation* du Professeur L'Heureux s'avère un instrument pédagogique intéressant et constitue un guide appréciable pour celui qui désire avoir une certaine idée du droit de la consommation.

DIDIER LLUELLES*

* * *

*Law and Psychiatry in the Canadian Context*. Edited by DAVID N. WEISSTUB. Toronto: Pergamon Press. 1980. Pp. xlvi, 911. ($65.00)

When mental illness is a factor in a client's case, practising lawyers often find they lack a sufficient understanding of what psychiatrists do so as to be able to make full use of their expertise. Professor Weisstub's casebook is an excellent source book for assisting lawyers in using psychiatrists as expert witnesses and for gaining an understanding of how psychiatrists go about their business of formulating opinions which explain human conduct. It provides a very extensive collection of materials concerning the major themes of the interaction of law and psychiatry: the various stages of adjudication and disposition of the mentally ill criminal offender; civil tests of incompetency; civil commitment; privilege and expert testimony; the historical evolution of concepts of illness and normalcy, and current

p. 460); voir aussi, à propos d'un contrat d'approvisionnement en eau d'un terrain: *Compagnie d'Aqueduc du Lac St-Jean* c. *Fortin, supra,* note 25, aux pp. 198 et 199; Pierre-Gabriel Jobin, Que restera-t-il de l'arrêt *Kravitz*? (1980), 40 R. du B. 493, à la p. 501.

[29] Peut-être aurait-il été intéressant d'insérer dans la table de législation, outre les articles de la L.P.C., les dispositions du Code civil et des lois statutaires, notamment fédérales.

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methodologies being used for diagnosis, assessment and treatment; patients' rights and the remedies available; and legal control of psychiatric practice through statutory regulation, codes of ethics and liability arising from wrongful commitment, malpractice, informed consent, failure to restrain, and for disclosure of diagnostic information.

The greatest strengths of the book for lawyers are its comprehensiveness and the ease of accessibility it gives to materials that legal practitioners would not gather for themselves without a number of years of specialized practice concerning law and psychiatry. There are extensive selections of excerpts from articles and cases from Canada, Britain and the United States. Particularly useful are the lengthy bibliographies provided with each chapter, and the reproductions of legislation from the provinces and other countries, both enacted legislation and proposed.

The book, quite appropriately, begins with those topics wherein lawyers are weakest in their understanding of the interaction of law and psychiatry—diagnosis and treatment. Part 1, "Psychiatry and Law in Society", starts with an historical overview of mental illness, and then proceeds to selections of materials dealing with the concept of normality, and comparisons of law and psychiatry as two systems of social control. Part 2, "The Mental Health Process: Professionals and Their Practices", contains chapters which deal with psychiatric ideologies, institutions and treatment models, and psychiatric classification and diagnosis. The chapter entitled, "Psychiatric Treatment", contains a particularly interesting selection of materials on the debates concerning, psychosurgery, electric shock treatment, behaviour modification, and experimental procedures. These first two parts are made up of selections from published articles and reports, and notes by Professor Weisstub.

Part 3 deals with civil competency and therefore it is with Part 3 that the case-law material begins. There are short chapters in the part on each of the types of legal capacity—contractual, testamentary, marital and divorce—followed by chapters on the tort liability of the mentally ill and on guardianship. The selection of cases is limited, but Professor Weisstub has obtained more use of each page by relying upon excerpts from articles which discuss relevant cases. Also the bibliographies at the ends of these chapters maintain the book as a good source book on these topics so far as the law relates to psychiatry. This treatment of topics typifies the remainder of the more than 900 pages in the book.

There is greater depth in the treatment given the topics of, privileged and confidential communications, psychiatry and expert testimony, and civil commitment in Parts 4 and 5. The controversy

over the need to create a psychotherapist-patient privilege is represented by a good selection of articles and law reform reports, and the position of the psychotherapist as an expert witness is represented by a good selection of cases. These collections of materials are quite timely because governments in Canada will shortly be moving to amend their Evidence Acts now that they have reviewed the work of the Federal-Provincial Task Force on Uniform Rules of Evidence, and now that the Uniform Law Conference of Canada has adopted a new Uniform Evidence Act this past summer.

There are almost 200 pages of materials on the nature and purpose of involuntary civil commitment, its practices and procedures and the rights of mental patients in Part 5. The main topics dealt with in the first two are, dangerousness as a criterion for confinement and its predictability, the legislation of civil commitment (Ontario, British Columbia, Alberta, Quebec, the United States and Britain), the writ of habeas corpus, and the role of counsel. The articles and cases in the chapter entitled, "The 'Rights' of Mental Patients", deal with the right to treatment, enforced treatment, the legal rights of the mentally handicapped, patients' access to medical records, and alternatives to institutionalization. The excerpted commentaries and extracts from the legislation present a good elucidation of the issues and of the leading arguments in each of these areas.

Parts 6, 7 and 8 deal with the mentally disabled in the criminal process. Part 6 concerns the fitness to stand trial issue and psychiatric remands; here Professor Weisstub uses the work of the Law Reform Commission of Canada well to develop the rules and procedures of fitness. Part 7 deals with the insanity defence. Its first chapter presents a selection of recent Canadian cases and Royal Commission reports, which aid the case-law presentation. The materials of the next chapter concern the insanity defence in the District of Columbia and thereby provide an interesting contrast. The concluding chapter of this Part deals with the important topic of the defence of diminished responsibility—the statutory defence in Britain and its case-law counterparts in Canada.

Part 8 is entitled, "Disposition of the Mentally Ill Offender". Here the materials deal with, the use of the Lieutenant Governor's Warrant, diversion, dangerous offender legislation, and Advisory Review Board practices. These are topics about which little is known by most criminal lawyers, mainly because there have been very few reported cases regulating the procedures used in these areas. The first of the two parts of this chapter deals with the protections offered and the possible abuses in relation to these intake procedures from the criminal process. The recommendations of the Law Reform Commission of Canada and of others for improving the procedures used are presented, along with the various police and judicial diversionary

practices used as alternatives to conviction and sentence. The materials are made up of excerpts from the work of the Law Reform Commission and from published articles analyzing the procedures used. The second half of the chapter deals with the primary release mechanism used across Canada—the Advisory Review Board. The debate among the proponents of the various adversarial and inquisitorial models for operating Advisory Review Boards is well presented, such that these materials provide a good source for learning about the procedures used in evaluating and releasing patients held under Lieutenant Governors' Warrants and the complimentary provincial legislation.

Part 9, entitled, "Legal Control of Psychiatric Practice", concerns psychiatric malpractice and the liability of psychiatrists to and for their patients. The material presented is impressive, given the small number of reported cases on psychiatric malpractice that exist to choose from. But Professor Weisstub more than makes up for this shortage by a very wide selection of analytical materials in the form of, articles (which analyse the available cases), legislation, and his own analytical notes. Therefore, this Part would be important reading for any lawyer engaged in psychotherapist malpractice litigation. The divisions of this Part deal with: negligence versus breach of ethics; wrongful commitment; informed consent; innovative treatment versus experimentation; negligence versus error in judgment; failure to restrain the patient; confidentiality and disclosure of diagnostic information.

The materials used throughout this casebook have been well selected and edited so that the presentation of legal principle and psychiatric concept flow according to a clearly discernible order. Some practitioners might have wanted to see more case-law in these materials, but I think Professor Weisstub's emphasizing of articles, notes and commentaries, both legal and medical, presents a more highly concentrated mixture of analytical materials—materials which are more difficult for the lawyer to get his hands on than are case-law materials. The totality of our knowledge and the totality of recognized principle in this area are housed much more in published articles than in case-law, case-law commentary, or legislation. In summation, this casebook goes well beyond the purpose stated in its introduction: "This casebook is intended as an introduction to the broad areas of interaction between law and psychiatry". It is an impressive casebook and an important one, because Canadian materials on the interaction of law and psychiatry are not great in quantity, are spread out through a large number of sources, and have not previously been collected together in published form.

In addition, this book makes interesting reading in many of its parts even for one with only a casual interest in law and psychiatry.

Such topics include: the debate as to the dividing line between mental illness and deviancy, and between treatment and social control; the concepts of normality; conceptual models in clinical psychiatry; the historical overview of the development of the concepts and treatment of mental illness; the organic, psychological and social origins of mental illness; the shift from mental illness to mental health and the blurring of the lines between them, and with it, the transference to psychiatry of problems that used to belong to ethics and religion; the lack of consensus on what is mental illness and whether mental illness is a legal fiction; the controversy over the use of electroconvulsive therapy and psychosurgery; the Louis Riel "Lunacy Commission" and the political manipulation and alteration of the medical reports.

KENNETH L. CHASSE*

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*The Litigious Society*. By JETHRO K. LIEBERMAN. New York: Basic Books, Inc. 1981. Pp. x, 212. ($18.75 U.S.)

*The Litigious Society,* in spite of its wholly American context (with the attendant legal peculiarities in regard to widespread contingent fee billing, constitutional arguments, and liberal class action rules), is a valuable book for both the professional and the general reader in Canada. It is a preliminary inquiry into the subject of litigiousness in the United States, and thereby serves to highlight many of the issues and factors surrounding the growing use of litigation to solve disputes in society.

Lieberman is dealing with the twin questions of why more and more Americans are litigating, and why they are litigating claims which even twenty years ago seemed beyond the purview and jurisdiction of the courts. He answers these questions by examining four areas of burgeoning litigation: (i) product liability; (ii) medical malpractice; (iii) environmental protection; and (iv) intervention in the decision-making processes of public and administrative institutions. In each of these areas the difficulties in delineating the extent of the right of redress are discussed. While the legal process attempts to redress the injury done to individuals through the actions of other parties, it also seeks to ensure that those other parties have the maximum freedom of action; that is, the courts are searching for a balanced solution between the pillars of a rigid "Big Brotherism" and unbridled individualism.

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In attempting to achieve this balance the courts precipitated ". . .a movement from *contract to fiduciary*. . .".[1] Parties in society were seen to be acting in a fiduciary capacity for the benefit of others according to often unspecified societal standards, rather than acting under a notion of contractualism based on a developed mythology of bargaining equality between parties. Societal standards were required because the bargaining was too often a fiction. Furthermore, these standards had to be imposed by the courts because the trust between individuals which had existed in earlier, simpler times, a trust based on bonds of status, class, community, and kinship, was no longer present. The self-help route existing under concepts of contract had hastened the demise of trust in society for "[i]n self-protection one must act more sharply toward others, further reducing trust".[2] As these nonlegal bonds became undone, the courts became more and more both the arbitrators of an increasing number of disputes and the bestowers of the duties of care which individuals owed each other.

Lieberman is informative and insightful in his discussion of the various areas of litigation. For example, in addressing the issue of medical malpractice he points out that the problem is really one of "insurance malpractice". The dramatic rise in premiums in the early 1970's can be understood largely in the context of the equally dramatic losses suffered by the insurance companies in their investment holdings during the same period. Also, while the headlines often proclaim what seem to many to be wasteful, spurious, or exaggerated claims, these are *only* claims and are not usually successful. In areas where there has been a good degree of success in expanding the limits of litigation and recovery, for example in the areas of product liability and environmental protection, the consequence has been better protection for the consumer and the citizen, not a breakdown of the market system. Industries, government agencies, and the medical profession have been put on their guard, and although the reaction of some has been an immediate cry for legislation limiting the right of redress, on the whole the increase in litigation has not been unhealthy, either for the particular groups affected or for the community as a whole.

A principal theme throughout the book is that while excesses may occur and mistakes do happen, it is better to tolerate these than to abolish or severely restrict the right of redress. The right of redress and the resulting standards have arisen because of the perceived need for fair and orderly adjustments in the allocation of resources in society:

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[1] P. 20.

[2] *Ibid.*

> Until the day when our institutions can be trusted to serve us as fiduciaries and when we can be educated to understand the limitations of the world we have constructed, litigation will remain the hallmark of a free and just society.[3]

While the book alerts the reader to several controversies, there are a number of criticisms which ought to be raised. The American orientation of the book is much too narrow; it would have been analytically useful to compare the American experience with that of other countries. The increase in litigiousness is characteristic of most Western industrialized nations, and the lessons (if any) learned in other jurisdictions might have been instructive and valuable.

The book also lacks a consistent theoretical framework. The reader is left with the assertion that litigation is necessary, and that it serves an important function within liberal democracy by establishing and enforcing standards of conduct and care. Such a conclusion, however, seems more a self-evident act of faith in light of the evidence tendered.

The four individual studies are too discrete and disconnected to provide an integrated analytic perspective. The fundamental issues raised in the debates over the role and function of litigation are neither specific nor discussed in a systematic manner; this is especially obvious in the very short discussion on the alternatives to litigation. If reasons are being sought for the trend to litigation, then surely a comprehensive examination of other dispute-resolving mechanisms, and of why individuals use them, is required. Moreover, the pressures which keep many potential litigants out of the legal process should have been discussed.

A more serious complaint (and one common to legal research) is the absence of a discussion of the ideological basis of the inquiry. The author fails to be critically self-conscious of the political perspectives which are the basis of his analysis. There is no attempt to address the issue of whether certain classes or groups in society now benefit more than others from the litigation process: the author's focus ought to have included the question of litigiousness by and for whom? Is it a process established or adapted essentially for the corporate and upper income elites? Do class actions hold the potential of altering the courts' availability in favour of an organized middle class? Are the standards imposed clearly those of an upper class judicial technocracy which has consistently failed to recognize the legitimate rights of those denied access to the courts? These are the types of questions which must be addressed if the fact, content, and growth of litigiousness are to be fully explained. As Lieberman notes, however, there is often the problem that the data necessary to provide a comprehensive

[3] P. 190.

analysis of the questions of who sues whom, where, why, and for what are not always available.

However, the practical insights and the theoretical omissions do provide important signposts as to the direction and subject of legal research. Legal writers must attempt to better understand the make-up and motivations of the potential litigant and of the actual litigant (both in an individual and in a class context) within a consistent, explicit theoretical approach. Until then, litigiousness in society will be comprehensible only in a narrow legal sense, and the reader will have to make do with nothing more than "lawyers' talk" rather than the kind of in-depth social analysis which benefits both the science and the practice of law and litigation.

R.P. SAUNDERS*

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*La Cour supérieure du Québec et ses juges 1849 — 1er janvier 1980.* By IGNACE-J. DESLAURIERS, J.C.S. Quebec: Imprimerie Provinciale Inc. 1980. Pp. vii, 250. ($15.00)

An interest in the personalities and careers of those who have participated in the construction of the law is surely a sign of a growing maturity of the literature of a given legal system. This book by the Honourable Ignace-J. Deslauriers, a judge of the Quebec Superior Court from 1956 to 1976, provides "biographical notes" of all the judges of that court from the time of its erection in 1849 (when the Quebec judicial organization was completely overhauled) down to January 1st, 1980. The 426 entries constitute an important contribution to the history of that court and to the Quebec judiciary and serves as a companion volume to the work of Pierre-Georges Roy, *Les juges de la Province de Québec* published in 1933, which contains a similar range of information in respect of all Quebec judges, whatever their court, from 1764 down to 1933 (a total of just under 300 biographies).

In Roy's book the biographies are arranged in alphabetical order. In the work under review the biographies are organized into five large sections: present and supernumerary judges, retired judges, former judges of the court now sitting on the Quebec Court of Appeal or now in retirement, judges who resigned from the Superior Court and, lastly, former judges of the court now deceased. The entry devoted to the late Right Honourable G. Fauteux, Chief Justice, Supreme Court

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of Canada, is presented *hors séries* in a rubric listing judges of the Superior Court later appointed to the Supreme Court of Canada. The inconvenience of this organizational system (which does have a certain interest) is remedied however by a single alphabetical index to all the judges in all these categories. The first fifty-six pages provide a short history of the court and a synoptical list of all the judges according to rank and judicial districts, with the dates of their service.

The main portion of the book is devoted to the biographical notes, each of which is accompanied by a photograph or reproduction of a portrait. A typical entry will contain date and place of birth, information on ascendancy, education, admission to the profession and early career, date of appointment to the bench and certain family and personal information. Not surprisingly, there are fuller details on the more recent and contemporary judges than on those who served in the last century or the early years of this century and much of the information in these cases is drawn from Roy's work of 1933 and other published sources. Given the rarity of the former and the scattered nature of the latter, it is regrettable that Judge Deslauriers did not see fit to reproduce more fully Roy's information and to round it out in other cases with more details. For example, many of our judges were also authors but the titles and publication dates of their works are not uniformly provided;[1] nor are some of the more colourful aspects of the careers of others mentioned.[2]

It is unfortunate that a number of typographical errors, particularly in the dates provided, have escaped the notice of the proofreader[3] and a curious muddle results from what appears to be a transposition of generations in others.[4] George-Etienne Cartier, moreover, is yet again referred to as Georges.[5]

These are of course no more than minor blemishes in an attractively published and useful work which, it may be hoped, as the author himself declares, will stimulate further and more in-depth researches unto the court and its judges. A further volume on the Court of Appeal from the same author would be a most welcome addition.

J.E.C. BRIERLEY*

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[1] *Cf.* Challies J., p. 171; Langelier J., p. 201; Loranger J., p. 204; McCord J., p. 209.

[2] *Cf.* Bowen C.J., p. 162; A.-N. Morin, p. 214.

[3] *Cf.* the reference to the "Quebec Act" p. 5 and the entries on Guy J., p. 193; Johnson J., p. 196; Laurendeau J., p. 201; Martineau J., p. 208; Short J., p. 229

[4] For ex. Gairdner J., p. 189.

[5] Pp. 227, 231.

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*Report of the Joint Committee of the American Bar Association and the Canadian Bar Association on the Settlement of International Disputes between Canada and the United States of America.* By the AMERICAN BAR ASSOCIATION and the CANADIAN BAR ASSOCIATION. Ottawa: Canadian Bar Association. 1979. Pp. lxi, 113. ($25.00)

A Joint Working Group of the American and Canadian Bar Associations undertook a study of the problems and the options in dealing with the settlement of Canada-United States disputes. As a result of a series of meetings among the members of the Joint Group, and after interviewing a variety of experts from both countries, the Committee presented a *Report* that included Resolutions from the two Bar Associations for the consideration of the Canadian and United States governments; a draft treaty on a Regime of Equal Access and Remedy in Cases of Transfrontier Pollution between Canada and the United States; and a Draft Treaty on Third Party Settlement of Disputes relating primarily to the interpretation, application or operation of any treaty in force between Canada and the United States.

In addition to these resolutions and the two draft treaties, in English and French, as well as a special report presented to the House of Delegates of the American Bar Association by that Association's section of international law there was, of course, the extensive *Report* of the Joint Working Group on the settlement of international disputes. The Group under the co-chairmanship of Henry T. King Jr. of the United States and T. Bradbrook Smith, Q.C. of Canada comprised able members from the Bar, the universities as well as from the public services of both countries.

What is valuable about this document is that it is the result of a very professional exercise in trying to understand the general nature of Canadian-American disputes as these have arisen over the years in various areas—economic, political, defense, environmental and otherwise—and to determine what can be done to provide a dispute settlement mechanism which did not yet exist in the variety of instruments now dealing with the multi-faceted relations of both countries.

The draft treaty on a Regime of Equal Access and Remedy in case of Transfrontier Pollution owes much to the rise in the frequency of these problems increasingly apparent within the past generation and more particularly the last fifteen years. These touch on the whole complex of boundary and transboundary water and air pollution threats—old and new—dangers and experiences on both sides of the frontier. It is true that certain *ad hoc* experiences have already prepared Canadians and Americans for dealing with the question of transfrontier pollution, yet it cannot be said that there was any established theory or procedures for access to common remedies in the private sector. The relations of all governments involved, in the

public sector, had still to be defined with precision over and above Art. IV of the Boundary Waters Treaty of 1909 and the various References thereunder; the Great Lakes Water Agreements of 1972 and 1978; the special Memorandum of Understanding dealing with Michigan and Ontario of 1976; and the Memorandum of Intent of 1979 which laid the basis for the present joint efforts of both countries to study the long distance transport of pollutants, particularly acid rain, and to develop a legal framework for managing such wide dispersals and diffuse sources of pollutants throughout the mid-continent and where acid rain represents the most urgent aspect of a complex situation.

The second draft treaty proposed in this *Report* deals with the general problem of third party settlement of disputes. It is, in fact, an agreement which looks to a standing arbitral body or to the International Court of Justice but more particularly the former, in dealing with problems of disputes of a legal character that lend themselves to this type of tribunal. The kinds of disputes to which the proposed draft treaty refers are set out in Articles 1 and 2, the first dealing with compulsory jurisdiction. This would cover "any question of interpretation, application or operation of a treaty in force between them which has not been settled within a reasonable time by direct negotiations or referred by agreement of the parties to the International Court of Justice or to some other third party procedure". This would be then submitted to third party settlement at the request of either party and would be addressed to the other's cabinet officer in charge of foreign affairs or by an exchange of notes between the two.

Article 2 covers "optional jurisdiction" and deals with other disputes involving questions of principles of international law, and includes problems of losses or damage sustained by the United States or Canada or one of its nationals due to acts or omissions of the other party; immunities of states and their agencies; privileges and immunities of heads of states, foreign ministers and other high officials; consular privileges and immunities; treatment of the other party's nationals; environmental issues; management of natural resources of common interest; and transnational application of civil and criminal laws. The draft treaty is very brief. It provides for the mechanism to organize a tribunal, a timetable for the filing of proceedings and for setting it up, and takes into account, of course, the availability of the International Court of Justice and the new procedures which provide for Chambers. Indeed, a very large part of the thrust of the draft agreement is procedural in that it is primarily concerned with creating mechanisms both within the system of the International Court of Justice and outside of it through arbitral tribunals to which both countries can have recourse. The proposal deals also with questions of applicable law; finality and the binding force and interpretation of

decisions; and advisory opinions which are, apparently, to be part of the jurisdiction of the tribunal should the parties agree.

The *Report* then describes the study procedures of this Joint Work Group that began in 1975/76 and more particularly in the latter year.

As to the first draft treaty, the Working Group was influenced substantially by the 1977 Organization of Economic Co-operation and Development (O.E.C.D.) recommendation for the "implementation in relation to transfrontier pollution". The *Report* frankly admits the important role which these O.E.C.D. proposals played in the development of the Group's own thinking in this area. The first fifty pages of the *Report* therefore are a mixture of the text of the two proposed draft treaties as well as some elaboration of the scope of these treaties and the primary influences that led to the form and content of the suggested treaties.

The main body of the *Report*, however, is a much more completely evolved document. Here part 1 represents a survey of disputes past and present and more immediately those of concern between the United States and Canada. These involve boundaries, economic and trade investment disputes; energy resources and energy policy; extern-ritorial jurisdiction; environmental questions, defence and others.

Part 2 deals with Canada-United States practice in dispute settlements. Here may be found an analytical survey of the variety of approaches to these matters finally addressing the question of distinguishing legal and non-legal issues. This part also examines dispute avoidance; dispute management and finally dispute settlement and follow-up arrangements.

In Part 3 there are the recommended procedures for the settling of legal disputes and a more detailed examination of the meaning of the two proposed agreements or treaties on the settlement of transfrontier pollution disputes and third party settlement in general.

In its survey of the disputes between Canada and the United States in Part 1, and the approach to dispute settlement in Parts 2 and 3, everyone familiar with the concern that Canada-United States dispute and dispute settlement questions have raised over the last seventy-five or eighty years in one way or another, will be familiar with a fairly substantial literature on the subject. This begins in a serious analytical way, with Percy Corbett's classic study in the Carnegie Endowment series entitled *The Settlement of Canadian and American Disputes* and published in 1937.

In that Canadian gem, for which there are a few present-day rivals for clarity, simplicity and accuracy, Professor Corbett took the then list of problems, cast them in functional terms, and looked at

each for the selected method of settlement and the consequent results. He dealt with settlement of the Boundary in Chapter 2; with Fisheries in Chapter 3; with Inland Waterways in Chapter 4; with Miscellaneous Claims in Chapter 5. At the end, he took a look at the overall effects of these dispute settlement exercises and the various documents that flowed from them and thus was able to include in Chapter 6, under the title "Contributions to International Law and Procedure", what may be said to be, perhaps, the first "Canadian" effort to state the character of the Canadian contribution to the international law of the time.

Corbett went one step further in his final chapter, entitled "The Existing Machinery of Settlement and Its Defects", where he deals with the general arbitration provisions of treaties such as the Hague Convention of 1899, the Root-Bryce Treaty of 1908, the Bryan Treaty of 1914, and so on, and draws some conclusions about the status of the machinery available to both countries. In assessing the available procedures dealing with Canada-United States problems he finds one basic flaw in the generality of most arrangements for the adjudication of disputes by permanent or *ad hoc* tribunals namely, "the limitation to disputes of a legal or justiciable nature". He goes on to say:[1]

> [T]he purpose of this restriction is to reserve freedom of action in the vague category of so-called "political" disputes. But as there never has been anything approaching an agreed limitative definition of "political disputes" it remains possible for the parties to withhold from arbitration any given difference simply by insisting that it falls within an entirely arbitrary classification.

Having flagged this deficiency he nevertheless concludes:[2]

> The remarkable success of arbitration between Canada and the United States is due to the fact that these two countries have sufficient respect for judicial methods and their common legal tradition to endow their joint tribunals with the power of deciding according to "law and equity" and then to accept it, in the main with no more discontent than the losing litigant may be expected to manifest, a liberal interpretation by the arbiters of what constitutes equity in the matter at issue. They have even, in the two important cases of the Bering Sea and Atlantic fisheries, given something like a power of legislation to their chosen arbiters. Such indeed is their faith in the possibility of settlement by judicial means, that they have neglected to maintain general provision in advance, allowing their arbitral machinery to fall into disrepair, and counting upon *ad hoc* arrangements as each dispute presents itself.

What is surprising in Corbett's conclusions is his belief that, overall, given the variety of treaties that historically have bound the British Empire, and then Canada, to arbitral dispute settlement procedures or given the willingness to set up *ad hoc* mechanisms, both countries therefore have not been at a serious loss for dealing with a continuing variety of disputes of many kinds. There were in Corbett's

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[1] P. 127.

[2] Pp. 128-129.

day however a sufficient number of uncertainties to make him say that:[3]

> The view has been expressed in these pages that a firm agreement, without reservations, to submit all differences to arbitration by a standing tribunal of the best judicial talent in both countries, would go far to remove that fear of injustice which causes recurrent and sometimes prolonged spasms of popular agitation over real or imaginery injuries. These agitations keep alive the prejudice over which all new plans of collaborative activity have to fight their way.

The final two sentences of this important contribution state:[4]

> Our dissatisfactions have been occasioned by improper modes of constituting *ad hoc* tribunals and the choice of arbiters already committed to a particular view of the case, or by the fact that a dispute falls through some loophole in arrangements apparently designed to dispose of it. Both of these vices would be cured by the establishment of a permanent court of general jurisdiction manned with competent and independent judges.

It is remarkable to consider that many of the issues there were raised in a volume now forty-five years old should still be very much with us—although in fairness Corbett could not have anticipated the great variety of environmental questions that have made it necessary for the Joint Working Group to devote so much attention to them and to propose a special treaty for the settlement of disputes both in the public and private sectors arising from the new transfrontier pollution realities. Nevertheless, Percy Corbett must be given credit for recognizing the uniqueness of the Canada-United States neighbourhood, both politically and legally, and that this ambience offers a special opportunity to devise procedures for the settlement of disputes that perhaps would be less accessible, or acceptable, to other neighbours without the essentially common "political culture" that is shared by both Canada and the United States. This *Report*, prepared for the Canadian and American Bar Associations, therefore should be seen in the context of this long record of Canada-United States dispute settlements experiences.

The recommendations for third party settlement therefore are not new—although Corbett, unlike the Working Group, could not have foreseen the extent to which the International Court of Justice would encourage the development of the Chamber process to the point where it has now become a possible avenue for the settlement of a major Canada-United States seaward boundary dispute involving the Gulf of Maine and Georges Bank. Similarly no pre-World War II scholar perhaps could have justified the vigour with which the present *Report* underlines the urgent need to reinforce the role of International Court Justice by having member states give as many opportunities to it as possible to exercise its jurisdiction and its skills. Of course, Professor

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[3] Pp. 129-130.

[4] P. 130.

Corbett's book was written on the eve of World War II and the shadow of those warning clouds ahead doubtless influenced much of his thinking and his long term views. Nevertheless, a generation of Canadians have grown up since 1946 disappointed at the modest growth of the International Court of Justice and not a little concerned about the contribution that Canada has yet to make to the reinforcing of that role if the court is ever to become the Principal Judicial Organ of the United Nations, in "fact" as well as in "law". Since this was written, Canada and the United States have submitted the Gulf of Maine dispute to a Chamber of the International Court of Justice. (Ed.'s note.)

The surveys made by the Joint Working Group of the scope of Canadian-American disputes also goes beyond the kind of matters that Corbett and his generation envisaged. He was very careful to recognize the distinction that is often made between "political" and "legal" disputes and he decried the artificiality of those distinctions for the purposes of preventing formal adjudication. But nevertheless the fact remains that the scope and character of disputes outlined in the Working Group's very useful assessment of the present status of disputes between the United States and Canada demonstrates the difficulty of single model solutions.

Wisely the report attempts to deal with the "transfrontier pollution" question through recognizing, as the O.E.C.D. itself has done, that there is not only a problem here of intergovernmental relations but also a matter of access to tribunals of both countries by the citizens of either. This is required when there is a private sector dispute which cannot await, or should not await, an intergovernmental claim and for which claim there may be an inadequate remedy under any existing institutional structure. The *Report* therefore recommends a treaty where such access both to government and the private individual would be possible and where the legal regimes of both countries in the area would be sufficiently harmonized to make it likely that suits in either country would lead to relatively similar legal and equitable results.

One of the interesting difficulties in appraising the *Report*, however, is its surprising misunderstanding of important aspects of the work of the International Joint Commission. It misunderstood the "regulatory" jurisdiction of the Commission as distinct from its investigative and advisory role. The *Report* speaks as if the greater part of the work of the Commission has dealt only with the Article IX matters, namely, References, the investigative-advisory function. In fact, the first forty-five years of the Commission's work was heavily on the regulatory side under Articles III, IV and VIII and dealing with "levels and flows" of "boundary waters" and the "raising of levels at the boundary" in the case of "transboundary" river systems.

Indeed, one of the most important aspects of the Commission's work is to provide a mechanism for determining the conditions under which various water uses could take place in boundary or transboundary waters. For under the treaty such uses have to be determined by the Commission when an application before it would compel that determination since one form of use or another might be detrimental to one of the parties at interest and conditions had to be laid down to prevent such an adverse result. Hence while the advisory-investigative side under Article IX increasingly has been in the ascendency the regulatory role, in licensing uses through control over "levels and flows", remains a very powerful aspect of the Commission's activities.

The *Report* also notes the failure of the Commission to ever have been given an arbitral matter under Article X but it misjudges the reasons for this reluctance by suggesting that there may be some limitations on the character of the membership of the Commission that renders it unsuitable for it to handle matters of a strictly legal nature. It is quite true that membership of the Commission is very diverse—retired politicians, lawyers, engineers, ex-diplomats, and so on—but that does not mean that special legal panels could not have been struck under the rules of the Commission for purposes of any legal question that would come to the Commission for arbitration under Article X. Nevertheless the Commission now has become the central institution for overseeing the shared environment in common boundary areas; and has been given quasi-management duties in the Great Lakes "clean-up" under the 1972 and 1978 Agreements.

Finally, despite the difficulties with an effort to deal with so many matters in a compressed *Report* of this kind, it must be said that the Working Group and the two Bar Associations deserve the congratulations of students of Canada-United States Relations in bringing to the attention of both countries the new situations which they face and which, since Corbett's time, require a reexamination perhaps in a more profound way than before of the mechanisms for dispute settlement between both countries.

It is surprising that the *Report* pays so much attention to the Arbitral process for the general settlement of disputes—apart from the special legal procedures for a common trans-frontier pollution regime—and so little to alternatives. The great lesson for example of the International Joint Commission's success—until its regrettably diminished role of the past three years—was the successful use of common fact-finding techniques in its joint Control and Study Boards. For, here, once "binationally" found facts were agreed upon "binationally", and were interpreted by the "binational" board concerned, the decision-making process of the Commission was reinforced in moving inexorably to unanimous findings, recommenda-

tions or Orders of Approval. This *Report* does not examine that central IJC experience for its possible application to other areas of Canada-United States relations. Common secretariats, shared facts, joint study boards, clearly have some relevance to the wide range of intertwined relationships giving rise to irritation and dispute. The omission to explore these International Joint Commission lessons is a major omission in an otherwise valuable study.

MAXWELL COHEN*

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*Comparative Law Yearbook.* Vol. 3, 1979. Edited by D.L. CAMPBELL. Alphen aan den Rijn: Sijthoff & Noordhoff. 1980. Pp. v, 287. ($47.50)

Increasingly in recent years lawyers, however restricted nationally they may have regarded their practice as being, have been compelled by the increasing interdependence of commercial activities, the scope of national extraterritorial legislation and the increase in private overseas travel to be prepared to deal with issues of foreign law not necessarily falling within what is normally regarded as the conflict of laws. As a result, comparative law has grown in importance and respectability. The Centre for International Legal Studies at Salzburg, Austria, under its Director Professor D.L. Campbell has, through the medium of its *Comparative Law Yearbook,* helped to make some of the relevant material available.

There are two papers of general interest which the ordinary lawyer might not otherwise be aware of. Professor Hungdah Chiu examines problems connected with recent law reform in the People's Republic of China, of which perhaps the most interesting section is the documentary annex. Secondly, Professor Garlicki of Warsaw has contributed an interesting paper on "Polish Constitutional Development in the 1970s" which to some extent helps to explain the developments of the 80s, sustaining his comment that the "courts in Poland have the right to hold any such regulations [of the organs of administration and the People's Councils] incompatible with the Constitutions or to declare the regulation unenforceable".[1] Of perhaps more

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[1] P. 264.

lasting interest is the paper by Dr. Lovassy of Budapest on "Collective Western Legal Efforts Concerning the Suppression of Terrorism", which is primarily an analysis of the Council of Europe's Convention on the Suppression of Terrorism, 1976. It has often been said that the Convention removes terrorism from the class of political offences; in fact, however, it merely permits the parties to decide not to regard certain terrorist acts as political, while those specified in Article 1 can never be so regarded. However, much of this exception is removed by the provision that extradition may be denied if the "requested state has substantial grounds for believing that the request . . . has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality *or political opinion*. . .".[2] In view of current comments in the United States that the Soviet Union and its friends are behind every terrorist movement, it is useful to note Dr. Lovassy's comment that the "declaration of acts dangerous to society as 'political crimes' depends on the attitude of internal legislative bodies. Hungarian criminal law and the criminal jurisdiction of the socialist countries, in general, do not recognize the qualification of terrorist acts as political crimes. . . [T]he isolation and the final liquidation of terrorism can be achieved only by 'depolitization', such as by complete and united efforts against terrorism, applying the most severe legal means available. Therefore, internal and international regulations in the field of terrorism must endeavour to achieve optimum harmony corresponding to a given level of social-historical development".[3]

In view of current concern in Canada relating to cartels, practitioners may well find material of interest in Dr. Hines' paper on "German Merger Controls and the Oil Industry", which might be read together with Dr. Trebec's analysis of "The Transnational Reach of United States Antitrust Laws". Other contributions of interest to the commercial lawyer are those by Mr. Patel of the University of Zambia who provides a comparative study of "Employee Creditors Rights in Collective Proceedings" in Zambian, French and English law; Dr. Magnus on "European Experience with the Hague Sales Law", pointing out, among other things, that "telephone calls do not constitute a valid notice if the seller was not able to understand sufficiently the language of the buyer",[4] a matter which might become significant in the relations between Quebec and the rest of the country; and Professor Nicklish's lecture on "International Commercial Arbitration and Long-term Contracts". Problems in the law of partnership, particularly as they affect the "sleeping partner"

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[2] Art. 5, p. 153, italics added.

[3] Pp. 151-152, 160.

[4] P. 115.

and the recognition of judgments are discussed by Mr. Caffrey in a careful analysis of *Blohn* v. *Desser*.[5] Equally interesting, especially from a jurisprudential point of view, is Mr. Nunes' consideration of meaningful criteria of actionability in the law of delict, while the legal historian might find Dr. Balekjian's examination of consideration in the English law of contract and its absence in Scots law similarly fascinating. Finally, at a time when in some countries the problem of contempt of court is under active consideration, as it is in the United Kingdom, the editor's paper on the *Sunday Times* case[6] and Mr. Anklesaria's comments on the Indian law from the point of view of the "unprotected lawyer" are useful contributions to consideration of a problem which affects every lawyer.

This statement of the contents of the latest volume of the *Yearbook* indicates the width of material covered, but one might express the hope that future volumes might be wider in their scope with contributions by Canadian lawyers interested in these types of problem.

L.C. GREEN*

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*Droit International Public*. Vol. 4. By CHARLES ROUSSEAU. Paris: Sirey. 1980. Pp. xiv and 671. (No price given).

Charles Rousseau is the *doyen* of French international lawyers and one of the most highly respected writers on this subject in any language. The first volume of his *Droit International Public* appeared in 1970,[1] and this was followed by volumes two and three in 1974 and 1977.[2] The fourth volume has now been published and its appearance leads one to express the hope that Professor Rousseau will not keep us waiting as long as he has done in the past for the fifth volume which is to complete his account of public international law.

The earlier volumes deal with sources, subjects and competences, while this new volume is devoted to *Les relations inter-*

[5] [1962] 2 Q.B. 116.

[6] [1974] A.C. 273 (see also, European Court of Human Rights, Ser. A, no. 3, 1979.)

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[1] (1972), 50 Can. Bar Rev. 553.

[2] (1979), 57 Can. Bar Rev. 183.

*nationales*. The learned author uses this term in a sense different from that normally applied to it in English. Since his work is on public international law he employs the term to deal with the relations between states as regulated by law. Part I is concerned with some of the basic principles underlying international law as we now know it—independence, state immunity, equality, and non-intervention. As to the substance of independence, Professor Rousseau points out that this was dealt with in volume 2 as part of the discussion on the subjects of international law, so that all that is necessary in this volume is to reiterate its importance since it is the basis of state immunity, equality and non-intervention. As to the latter, the learned author provides a lengthy account of the Monroe Doctrine which he regards as possessing "une nature mixte", with both a political and juridical aspect.[3] While he accepts that it does not constitute a rule of international law in the usual sense he provides a number of instances to suggest that it has in fact received formal recognition in treaties and elsewhere so as to give it some status in positive law. Canadian readers will find the author's discussion of the relevance of the Monroe Doctrine for Canada of particular interest, but they may not agree with his assessment of current issues between Canada and the United States as merely minor destabilisers.[4] Professor Rousseau's comments on the Drago Doctrine and the Porter Convention relative to the collection of state debts are probably now solely of historical interest.[5]

Part II of volume 4 deals with the organs of state representation, the head of state, the foreign minister, diplomatic agents and consuls. It is perhaps a little surprising that in this section, although he points out that the foreign minister is the agent of his government in external affairs,[6] Professor Rousseau makes no mention of the Ihlen Declaration which is normally cited as evidence of the legal rule that statements by this minister within his field of competence bind his state. In view of the seizure of the United States embassy in Iran and the treatment accorded to its personnel and archives the account on diplomatic immunities begins to sound unreal.[7] However, if, as one hopes, the Iranian situation was unique, Professor Rousseau's account may serve as a useful introduction to the larger works by Satow and Sen.

The last Part of the volume comprising some 730 pages is concerned with le cadre spatial des relations internationales. In his

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[3] P. 103.

[4] Pp. 106-107.

[5] Pp. 109-111.

[6] P. 138.

[7] Pp. 171-204.

analysis of the law of the sea the learned author divides his account between the traditional conceptions and the new orientations, by which he means the continental shelf, the exclusive economic zone, the seabed and the protection of the marine environment. Canadian readers will find the discussion of "hot pursuit" of interest,[8] for the reference not only to *The I'm Alone*,[9] but also to such national decisions as *The North*.[10] There is an historical account of the Anglo-French discussions regarding a Channel Tunnel, and if this should eventually materialize, the author's suggestion regarding submarine tunnels—"de placer le tunnel sous deux souverainetés différentes, chacun des Etats riverains étendant la souveraineté territoriale à la portion sous-marine du tunnel"—may well be the basis of legal settlement.[11] Perhaps of more general interest and more practical importance is the discussion of the law relating to abnormal uses of the seas—naval manoeuvres, the launching of missiles and nuclear experiments. In relation to the latter, he cites the 1963 Test-ban Treaty, to which France and China among others are not parties, and says "en raison du grand nombre des Etats qui y sont parties—les ⅔ des Etats membres de l'O.N.U.—ce traité constitue l'expression d'un consensus quasi universel et représente un élément non négligeable d'une coutume internationale en voie de formation".[12] One cannot but feel that Professor Rousseau is being unduly sanguine on this, for it is doubtful to say the least that the non-signatories, especially when they include France and China, would ever accept this view.

This section of the volume is also concerned with the law relating to rivers, including the St. Lawrence;[13] international canals, with reference to the fact that the wars of 1956 and 1967 "devaient apporter des modifications considérables au statut du canal" de Suez;[14] international lakes—the question of condominium or co-existing sovereigns is commented upon[15] and the Great Lakes.[16] Finally, there is a short account of air law during which the anti-hijack treaties are touched upon and a number of national decisions favourably mentioned, in contrast to the author's criticism of Arab countries which provide asylum, but there is no indication of whether he

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[8] Pp. 328-330.

[9] (1933; 1935), 3 Rep. Int'l Arb. Awards 1609.

[10] (1906), 37 S.C.R. 385.

[11] Pp. 309-312.

[12] Pp. 317-318.

[13] Pp. 557-558. The International Commission is referred to at p. 557.

[14] P. 573. The reopening of the Canal to Israeli shipping by reason of the 1979 Peace Treaty is cited at p. 575.

[15] P. 591.

[16] P. 600-601.

considers the rescues at Entebbe or Mogadishu legal.[17] The last twelve pages are concerned with outer space.

This volume of *Droit International Public* is as interesting as the earlier three. When the final volume is published we will have an up-to-date French exposition that stands on equal terms with anything written in any other language.

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[17] Pp. 624-630.

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