Book Reviews

Chronique bibliographique

Canadian Criminal Law. International and Transnational Aspects. By SHARON WILLIAMS, LL.M. D. Jur. and J.-G. CASTEL, Q.C., S.J.D. (Harvard), F.R.S.C. Toronto: Butterworths. 1981. Pp. xxx, 513. ($80.00)

Multiple-jurisdiction crime (that is, hijacking of aircraft) is by now all too familiar. Moreover, easy means of escape of an alleged offender from the scene of a crime committed in one jurisdiction to a hoped-for haven in another is a frequent occurrence. Hence, it is not surprising that law enforcement authorities face serious problems in apprehending fugitive delinquents and courts are faced with jurisdictional problems after apprehension takes place. The authors of the book under review discuss such problems as the foregoing in a methodical manner and put order into a scattered mass of law and facts that, faced by those unfamiliar with this new legal terrain, would soon cause them to lose their way.

What then is the basis and status of international criminal law? There is, first of all, international criminal law *stricto sensu* as exemplified by piracy *jus gentium* and genocide. There is also domestic criminal law in its application to international matters; here, while the offence may be international in the sense that several foreign elements are involved, basically it is domestic law that is being applied. The authors suggest that "transnational" may be a better term to use when the offences involve several states without necessarily involving public international law.[1]

The book is divided into three parts which cover jurisdiction and the criminal law; specific offences of an international and transnational nature, and mutual assistance in criminal matters. Due to the lengthy and detailed nature of the volume, it is impossible to cover all the subjects in it here. Therefore, a selective approach is adopted for purposes of this review.

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[1] P. ix.

The book begins with a statement of the five basic principles upon which jurisdiction is based: the territorial principle; the nationality, active nationality or personality principle; the passive nationality or personality principle; the protective principle, and the universal principle. The authors suggest that the principle of convenience could be added to the list.[2]

The discussion of the territorial principle of jurisdiction devotes considerable attention to the changing law concerning jurisdiction in the maritime field including matters of particular interest to Canada such as the continental shelf, the 200-mile fishing zone, the 100-mile pollution-free zone in the Arctic Ocean and the Exclusive Economic Zone (EEZ) which extends 200 nautical miles from the baseline of the territorial sea. The EEZ is neither high seas, nor territorial sea and, therefore, poses special jurisdictional problems.

In the discussion on vessels in distress, the authors state that the contemporary Canadian point of view is not by any means crystal clear and that only a qualified immunity is granted to vessels which enter a Canadian port or harbour in distress.[3] In their view, an inference that can be drawn from the case of *Cashin* v. *The King*,[4] is that the immunity that is granted to a vessel in distress is restricted to immigration, quarantine and other harbour laws but cannot be utilized for revenue legislation, although it is pointed out that several questions can be raised concerning the decision in this case.[5]

After a detailed examination of the subject of hot pursuit (during which reference is made to the *I'm Alone* case[6] which involved the question of continuity of the chase) and some of the hovering cases of rum-running days, it is indicated that, although the right of hot pursuit has definite limits, in Canada, such limits are of great importance in relation to the protection of fishing rights and to the possible damage caused by oil pollution to the Canadian coastline and natural resources.[7]

Continuing the discussion of the territorial principle of jurisdiction, the authors point out that there is a subtle difference between the case where a constituent element of the offence takes place within the territory of the forum state and the case where no such element has occurred but an effect is felt there. In this regard, they say that states are resorting more and more to extra-territorial legislation in defence

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[2] P. 9.

[3] P. 59.

[4] [1935] 4 D.L.R. 547 (Ex. Ct).

[5] P. 60.

[6] (1933-34), 7 A.D. 203.

[7] Pp. 70-71.

of their domestic systems.[8] After a forty-two-page analysis of the problem of the "effects" approach, they question whether the use of that approach is beneficial and note that, to take the approach, is to embark on a slippery slope which leads away from the territorial principle towards universal jurisdiction.[9]

In the discussion on the active nationality principle of jurisdiction, it is stated that nationality has been generally accepted as a basis of jurisdiction and is utilized extensively by civil law countries. Common law countries, on the other hand, have been reticent in their use of the nationality principle. For example, states such as Canada and the United Kingdom only claim jurisdiction on this ground for a few serious crimes such as treason, and crimes against internationally protected persons to name only two.[10]

Canada, the United Kingdom and the United States, it appears, do not favour the universal principle of jurisdiction except in limited cases.[11] In Canada, provisions supporting the universal principle can be found in amendments to the Criminal Code that implement Canada's international obligations under several multilateral conventions that deal with hijacking, attacks on civil aviation and attacks on internationally protected persons or their property.[12]

There is also a discussion of the difficult question of whether the accused can successfully resist any attempt to prosecute him on the ground that his presence within the territorial jurisdiction of the court has been illegally obtained. Concerning the matter of ordering a person to break the law of a foreign state, it is concluded that Canadian courts will not sanction the breach of the laws of other independent states and that it is a fundamental principle of international comity that courts which are dedicated to law enforcement should not take action which violates the laws of a friendly state or even circumvent its procedures.[13]

The subject of immunities from criminal jurisdiction is covered by an examination of diplomatic and consular immunities, the immunities of special missions, the privileges and immunities of the United Nations, and the immunity of visiting forces.

Part II of the book is concerned with specific offences of an international and transnational nature. The initial topics covered are war crimes and crimes against humanity, including genocide, the prosecution of war criminals in Canada, and foreign enlistment. In the

[8] P. 83.
[9] P. 125.
[10] P. 126.
[11] P. 140.
[12] P. 138.
[13] P. 148.

view of the authors, it seems difficult, if not impossible, to prosecute persons who committed war crimes during the second world war against non-Canadians outside Canada.[14] As to the question of foreign enlistment, a topic of warm interest in Canada during the Spanish civil war, the United Nations is currently considering the development of a convention on mercenaries.

International terrorism comes in for detailed attention and is considered in terms of the 1937 Convention on Terrorism, various United Nations resolutions, the three conventions of the International Civil Aviation Organization (ICAO) on offences and certain other acts committed on board aircraft (Tokyo, 1963), hijacking (The Hague, 1970) and unlawful interference with civil aviation (Montreal, 1971), and the United Nations conventions on internationally protected persons (1973) and hostage-taking (1979). Canada has been prompt to implement the more recent conventions through amendments to the Criminal Code. Sadly enough, the book has to note the failure of ICAO to achieve a convention for the elimination of safe havens for hijackers. However, it is comforting to note that the principle of *aut dedere, aut judicare* found in the Hague and Montreal Conventions and the principle of universal jurisdiction found in those conventions constitute at least a partial deterrent to hijackings and unlawful interference with civil aviation. But, as pointed out by the authors, the most effective method that states can undertake to combat terrorism on a multilateral basis is to utilize improved security techniques on the ground and in the air.[15]

After a coverage of treason and other offences against the sovereign and Canada, piracy, slavery, forced labour and insurgency, there is a brief examination of the new crime of international child abduction where it is concluded that the efficacy of criminal penalties to deal with the problem of abduction of a child by one of his parents across national borders is at best questionable.[16]

Further topics considered at this stage of the book are submarine cables, violations of export restrictions (for instance, United Nations Rhodesia Regulations), counterfeiting and forging of domestic or foreign currency in Canada or abroad, foreign and domestic bribery in international business (a subject on which it is concluded that "Canada has moved relatively slowly"),[17] traffic in persons and prostitution, and illicit traffic in narcotic drugs-international control measures (where it is indicated how the Narcotic Control Act[18] and the Food and

[14] P. 178.

[15] P. 222.

[16] P. 260.

[17] P. 272.

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

Drugs Act[19] implement the conventions to which Canada is party, especially the 1961 Single Convention as amended).

As Professor Williams is the author of a lengthy volume on the subject of traffic in cultural property,[20] the chapter on this subject is short, and the reader will have to refer to the main work for further details. There is, however, a useful explanation of the Cultural Property Export and Import Act[21] under the items of export control, import control, offences and penalties. The conclusion reached is that the most positive and beneficial aspect of this Act is that it attempts to keep Canadian national treasures within the public domain in Canada, by giving Canadian institutions, as well as individual Canadian buyers, the first opportunity to acquire objects that are deemed to be of outstanding significance.[22]

After an examination of the question of obscene publications, it is suggested that the 1923 Convention might well be the subject of an international meeting "to assess whether it is working quietly or is dormant and ignored".[23]

Part III of the book focuses on mutual assistance in criminal matters in terms of such topics as cooperation in the preparation of trial, service of documents, notification of acts and evidence, extradition and rendition (to which ninety-five pages are devoted), *non bis in idem*, double jeopardy: the pleas of autrefois acquit and autrefois convict, recognition and enforcement of foreign penal laws and judgments, and international criminal police cooperation (where there is an extensive description of Interpol).

Within the brief space of a review, it is difficult to do justice to the long chapter on extradition and rendition. But let it be said that the chapter has an eminently practical orientation and, besides giving doctrinal background material, states in detail the procedure followed with respect to extradition to and from Canada. The book includes a list of extradition treaties in force for Canada as of June 1980, a list of multilateral treaties containing provisions on extradition, and the text of the extradition treaty between Canada and the United States which entered into force in 1976. There is also a helpful examination of the subject of "removal" pursuant to the Immigration Act.[24] In the discussion on asylum, it is stated that it is doubtful that an alien who is

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

[20] S.A. Williams, The International and National Protection of Cultural Property: A Comparative Study (1978).

[21] S.C., 1975, c. 50.

[22] P. 306.

[23] P. 311.

[24] S.C., 1976-77, c. 52, as am.

a *bona fide* fugitive from justice accused of having committed political offences abroad would be ordered extradited or removed from Canada.[25]

Under the heading of recognition and enforcement of foreign penal laws and judgments in Canada, there is a comprehensive consideration of the subject of the transfer of Canadian offenders undergoing imprisonment in foreign institutions and the transfer of foreign offenders undergoing imprisonment in Canadian institutions.

The volume contains a number of very informative tables and charts on such matters as jurisdiction over the person and over the offence, the geographical extent of application by Canadian authorities of Canadian domestic law and international law, the major seats of terrorism in the world, the organization of headquarters criminal operations (R.C.M.P. Ottawa), and various aspects of Interpol.

The volume contains a list of abbreviations, a table of cases and a good index.

Professors Williams and Castel are to be congratulated on having produced a most useful and practical textbook on a subject of increasing importance for those engaged in the enforcement, practice and teaching of criminal law. But the book is not just one for the specialist. It is engagingly written and would be of interest to the general reader who would find in it a detailed and fascinating exposition of the law behind the headlines. Accordingly, it is safe to say that the book will be much used by a wide range of readers and will be an invaluable reference tool, whether in the law office or classroom.

GERALD F. FITZGERALD*

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The Prosecution Function. By DAVID M. NISSMAN and ED HAGEN. Lexington, Mass.: Lexington Books. 1982. Pp. xi, 203. ($26.50 U.S.)

This book is dedicated to *the* real *public defenders*, the prosecutors, and is designed to act as a manual for the novice prosecutor, to accelerate the development from "confused law student" to "courtroom torpedo". In this objective, it admirably succeeds. Various elements of the criminal justice system are canvassed, including an

[25] P. 431.

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historical analysis of the prosecution function, ethical considerations, charging functions, plea bargaining, extradition, pretrial motions, confessions, trial preparation, jury selection, case presentation, expert witnesses, and prosecution of that most common crime, drinking and driving offences.

The historical and ethical analysis of the public prosecutor is of use for all those acting on behalf of the Crown. It places the current practices, such as informations, indictments, and preliminary hearings, into historical context so that one can critically appraise their role in the criminal justice system. One may not be so willing to brush aside our legal traditions for expediency, when one comprehends their significance.

Plea bargaining is the subject of considerable comment, much of which relates to the United States, as the authors are American. However, there has been an increased tendency in Canadian courts to recognize the process and even the hint of legislation. The rules by which this game is played are clearly defined and could form the basis for any such procedures in Canada.

In the area of trial preparation, expert witnesses, confessions and case presentation, this book is truly a blessing to the articled student or newly admitted lawyer. All practitioners can recall the trauma of those first few cases after leaving the academic world of law school and having to apply those principles learned in the classroom to the real world. The harried student did not know how to ask a question without being leading, let alone know how to marshall the evidence in a logical and effective manner. Nissman and Hagen have provided a step-by-step approach to help the novice prosecutor (and defence) bridge the gap between theory and practice. Nothing is omitted. Examples of a proper line of questioning, poor cross-examination, and examination-in-chief of an expert witness, are all provided. The authors freely use humour to explain the fundamentals of the practice of criminal law.

As the book is American, its analysis of extradition between states in the Union and the jury *voir dire* are of little practical value. Thus, one might conclude its utility to the Canadian practitioner is limited. However, the recent enactment of the Canadian Charter of Rights and Freedoms[1] has focussed attention on American Constitutional jurisprudence. In this area, all Canadian practitioners are novices and can benefit by the clear and concise explanation of the law and procedures in use in America. Often, for example, Canadians assume *Miranda* v. *Arizona*[2] represents the law today, but it has been

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[1] See Part I of the Constitution Act 1982 in force April 17th, 1982, (1982), 116 Can. Gaz. Part II, 1808, which is Schedule B of the Canada Act 1982, c. 11 (U.K.).

[2] (1966), 384 U.S. 436.

considerably undermined. Procedures for pretrial motions, consistent with section 24 of the Charter are set forth and are highly beneficial.

Despite the two or three chapters on purely American institutions, *The Prosecution Function* is a valuable tool to the articled student, novice lawyer, prosecutor, and anyone currently engaged in the practice of law. Its good-humoured insights into the fabric of the criminal trial makes for pleasant and informative reading.

A. S. BRENT*

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Law and the Media. By CLARE F. BECKTON. Toronto: The Carswell Company Ltd. 1982. Pp. xvi, 161. (No Price Given)

The stated intent of *Law and the Media* is to enlighten members of the media, whose duties involve collecting, designing and disseminating information, of the legal issues which might confront them in their every day activities. It explains to non-lawyers working in the media about the mechanics of the law which directly affects them and the ramifications of it.

The initial chapter provides a narrative outline of the important aspects of our legal system by discussing the concepts of common law and civil law; *stare decisis*; the Canadian constitution; the operation of a federal system of government and a description of the Canadian court system and how it functions for both criminal and civil matters. The chapter provides a good comprehensive introduction to the law and supplies a sufficient footing for later discussion. It might be noted that some comments concerning the constitution have been superseded by the proclamation of the Constitution Act, 1982.[1]

The ensuing chapters cover the topics of defamation; journalist privilege; contempt; copyright; privacy; freedom of information; and obscenity.

The defamation and contempt chapters would be particularly useful for media practitioners. They are well written, clear and logically set out the material aspects of defamation and contempt and warn

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[1] (1982), 116 Can. Gaz. Part II, 1808, which is Schedule B of the Canada Act 1982, c. 11 (U.K.). For example, the comments are made on p. 9 that the British North America Act, 30-31 Vict., c. 3, as am. (U.K.), contains no internal amending formula and that the country has not been able to gain complete control over its own constitution.

the journalist of pitfalls to avoid libel actions or contempt of court charges by liberal reference to examples and cases illustrating reliable or perilous practices.

The chapter on copyright offers a brief statement of the general concepts involved, but without making reference to case law. It is essentially a discussion following the outline of the current Copyright Act.

Obscenity is dealt with by examining such questions as whether pornographic material contributes to the likelihood of sexual or other violent crimes in society and whether pornography leads to a breakdown in a community's moral standards. The author also offers an analysis of the tests used by the courts to determine what is obscene. The relevant Criminal Code provisions are set out and considered in light of various authors' writings in the field.

The discussion on the proposed Access to Information Act acquaints one with an outline of the legislation and the criticisms levelled against it; however, it is not particularly helpful in providing advice to the media. As well, some of the comments are already outdated as a result of changes made to the legislation prior to its enactment in June, 1982. Proclamation of the Act is expected early in 1983.

In many instances the law as it exists in the United States and the United Kingdon is reviewed alongside the Canadian. Such comparisons are relevant and assist the reader in developing a broader scope of understanding for our own system.

The author has omitted footnotes and citations in the text and it is suggested that a closer relationship between the sources and the text is likely to be appreciated by some, especially those who wish to pursue a specific reference or for those who are searching for a concise synopsis of the law on a particular point. For the lawyer or law student wanting to research areas discussed in Ms. Beckton's book, it may provide one with a summary of the law in an informal manner, but better and more comprehensive texts are available on the individual topics. This is not a criticism, as Ms. Beckton clearly enunciated that the material was written to examine subjects of constant concern for media personnel and with that purpose in mind she has been effective in providing a concise and very informative work. She has broken down the complexities of the law and has been neither pretentious nor sententious in making the book readily understandable to the lay person. The text may not only interest media personnel but may extend considerably into other avenues. Concern and awareness of mass media has widely spread throughout our society in recent years. As well colleges and universities are now offering expanding pro-

grammes in communications studies and this book may provide a very effective teaching tool in the post secondary context.

As a result students, teachers and practitioners of mass media have been furnished with a favourable text to increase their awareness of pertinent legal issues and a specific need in society for such a work has been fulfilled.

MARTIN ROMANOW*

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Le contrôle judiciaire de l'action gouvernementale. Par DENIS LEMIEUX. Québec: Centre d'Édition Juridique. 1981. Pp. xii, 449, xxi. ($30.00)

Le contrôle judiciaire de l'action gouvernementale, dont l'auteur est Denis Lemieux, professeur à la faculté de droit de l'Université Laval, est un ouvrage qui ne resemble guère à d'autres ouvrages du même genre. Premièrement, comme le professeur Lemieux nous le dit dans son introduction, ce n'est pas un "livre de recettes juridiques".[1] Deuxièmement, il n'y a pas de notes en bas de page. Plutôt, les références à la législation et à la jurisprudence suivent immédiatement chaque alinéa d'un bout à l'autre du volume. De plus, chacune des sections du volume comporte sa propre liste bibliographique. Cependant, le lecteur qui veut pousser plus loin ses recherches n'a pas à fouiller parmi des notes en bas de page ou ailleurs pour trouver ce qu'il lui faut. Il n'a qu'à consulter la bibliographie qui s'applique à la section qui l'intéresse, ou à consulter les références qui suivent les alinéas qui expliquent les principes pertinents à sa recherche. Il y a une bibliographie générale qui se trouve dans l'introduction, mais celle-ci ne comprend que les ouvrages généraux qui s'appliquent à toute la matière du volume.

L'ouvrage est divisé en dix-neuf sections qui sont elles-mêmes divisées en paragraphes numérotés. Comme l'auteur nous l'explique, le but est de "faciliter les renvois" et de "limiter au minimum les répétitions inutiles".[2] Suivant cette approche, le professeur Lemieux réussit très bien non seulement l'exposé du droit existant, mais aussi

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[1] P. 3.

[2] *Ibid.*

l'introduction d'idées de réformes législatives ou jurisprudentielles qu'il croit prévisibles ou souhaitables.

Les dix-neuf sections du livre comprennent l'Introduction (Section 1); Partie I—l'Existence du contrôle judiciaire (Sections 2-7); Partie II—l'Exercice du contrôle judiciaire (Sections 8-18); et la Conclusion—l'Avenir du contrôle judiciaire (Section 19).

En plus de la bibliographie générale qui a déja été mentionnée, l'Introduction comprend une "Introduction générale" à la notion du contrôle judiciaire sur l'activité gouvernementale, des "Notions fondamentales" de ce contrôle judiciaire, et les "Caractéristiques du droit du contrôle judiciaire". Dans ce court chapitre de neuf pages et demie, l'auteur fait beaucoup plus que présenter seulement le plan de son volume et expliquer ce qu'il a voulu faire en écrivant le livre. Il explique que le contrôle judiciaire n'existe que dans une minorité de régimes juridiques—que beaucoup d'États tels que ceux qui sont soumis à des dictatures militaires ignorent cette forme de contrôle.[3] En effet, ce sont dans les systèmes de droit qui se fondent sur la *rule of law* que ce contrôle existe—l'Angleterre, les États-Unis, l'Australie, le Nouvelle-Zélande, ainsi que le Canada et le Québec, c'est-à-dire partout ou l'on retrouve l'influence anglo-saxonne.

Comme notions fondamentales, le professeur Lemieux explique:[4]

> Le "contrôle judiciaire" est ce droit de regard que possèdent les Tribunaux sur l'action des personnes et autorités soumises à leur pouvoir.

Ce contrôle vise à réparer ou prévenir un préjudice ou une illégalité, ou à faire reconnaître l'existence d'un droit. L'action gouvernementale à laquelle ce pouvoir se rapporte englobe d'abord la Couronne ainsi que ses représentants et mandataires, les autorités ministérielles et les fonctionnaires "auquels la loi a pu conférer un pouvoir de recommendation ou de décision."[5] Mais, l'action gouvernementale ne comprend pas l'activité du Parlement et des cours de justice, ni celle des corps privés.

A propos des caractéristiques du droit du contrôle judiciaire, l'auteur constate que ce droit est d'abord d'origine jurisprudentielle, qu'il est d'origine britannique, et qu'il est un droit morcelé en constant développement.

Le titre de la Partie I de l'ouvrage, intitulé "l'Existence du contrôle judiciaire", indique son contenu. On trouve dans cette partie le fondement juridique du pouvoir d'intervention des cours à l'égard

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[3] P. 7.

[4] *Ibid.*

[5] *Ibid.*

de l'action gouvernementale (Titre 1), la compétence des titulaires du contrôle judiciaire (Titre 2), les différents recours judiciaires contre l'Administration (Titre 3), et les limites du contrôle judiciaire (Titre 4). Partant des origines historiques du contrôle judiciaire, le professeur Lemieux délimite les rôles de la Curia Regis, de la Court of King's Bench, et de la Court of Star Chamber dans le développement de ce contrôle. Ensuite, il traite du fondement du contrôle judiciaire en common law, et passe à une discussion des rapports entre le contrôle judiciaire et la constitution.

Après avoir expliqué le fondement du contrôle judiciaire, le professeur Lemieux passe, dans le deuxième Titre de la première partie du volume, aux "Organismes détenteurs du pouvoir de contrôle". C'est ici qu'il fait remarquer que ce n'est que depuis la création de la Cour fédérale en 1970 qu'on doit distinguer entre l'Administration québécoise et l'Administration fédérale en ce qui a trait au choix du tribunal compétent. Avant 1970, les cours supérieures provinciales contrôlaient la légalité des décisions émanant des autorités administratives fédérales. Mais depuis 1970 l'unité de juridiction n'existe plus quand il s'agit du régime de contrôle judiciaire, et à l'heure actuelle ce regime présente certaines caractéristiques de la dualité du système judiciaire américain.

Le professeur Lemieux a raison d'écrire qu'on doit "se demander si l'existence d'un double système de contrôle judiciaire peut se justifier",[6] car, depuis la création de la Cour fédérale il existe non seulement certaines difficultés quant au choix du tribunal compétent pour présenter une requête ou une action contre l'Administration fédérale, mais aussi une difficulté quant au choix de la division compétente de la Cour fédérale. Compte tenu de la compétence résiduaire des autres cours, il y a encore, malgré l'existence de la Cour fédérale, un risque de jugements contradictoires relativement à l'interprétation des lois fédérales.

Sous le titre, "Les recours judiciaires face à l'action gouvernementale" (Titre 3), le professeur Lemieux traite des sujets suivants: "L'accessibilité au contrôle judiciaire" (Chapitre 1), "Les recours judiciaires face à l'Administration québécoise" (Chapitre 2), et "Les recours judiciaires face à l'Administration fédérale" (Chapitre 3). Il termine la première partie de son ouvrage en nous expliquant "Les limites du contrôle judiciaire" (Titre 4).

La deuxième partie de l'ouvrage consiste en un exposé de "L'exercice du contrôle judiciaire". Au tout début de cette partie l'auteur annonce que "Nous verrons succesivement . . . les cas d'illégalité reliés à (1) l'incompétence *ab initio* de l'autorité décision-

[6] P. 33.

nelle; (2) à la violation des garanties procédurales; et (3) aux erreurs de droit et abus de pouvoir."[7] Il ajoute que "Dans un quatrième titre, nous examinerons la responsabilité extra-contractuelle des autorités publiques du fait de l'action gouvernementale."[8]

Dans l'exposé de "L'exercice du contrôle judiciaire", l'auteur commence par poser le principe fondemental que la "légalité d'un acte administratif dépend en premier lieu de la compétence de son auteur".[9] Ceci est suivi d'explications sur la notion de compétence, les conditions d'existence de la compétence, et ainsi de suite. Mais plus intéresssante est la partie de l'ouvrage où sont discutées la procédure administrative et la notion des principes de justice naturelle qui s'y appliquent (Sous-titre 1, Chapitres 1, 2). L'auteur fait remonter ces principes non seulement à l'article 29 de la Magna Carta, mais aussi à des principes qui existaient déjà en droit romain et en droit ecclésiastique. Compris dans les principes de justice naturelle qui s'appliquent à l'action gouvernementale, l'auteur cite (1) le droit d'être entendu, (2) la règle d'impartialité, (3) l'existence d'une preuve, et (4) l'obligation de motiver. Il y a un sous-titre sur les vices de forme qui "se distinguent des principes de justice naturelle en ce que [ces formes] doivent leur existence à la loi seule, qu'elles n'ont pas toujours pour but de protéger les citoyens et qu'enfin, leur violation n'entraîne pas toujours l'illégalité de la decision".[10]

Les deux derniers "titres" du volume traitent de "La légalité interne de l'acte administratif" (Partie II, Titre 3), et de "La responsabilité extra-contractuelle découlant de l'action gouvernementale" (Partie II, Titre 4). Dans le premier de ces deux derniers titres se trouve une analyse de "L'erreur de droit" (Titre 3, Chapitre 1), du "Détournement de pouvoir" (Titre 3, Chapitre 2), et de "L'erreur dans l'application des faits" (Titre 3, Chapitre 3).

Dans la conclusion du volume l'auteur présente ses vues sur l'avenir du contrôle judiciaire. Premièrement, il discute "La vulnérabilité du contrôle judiciaire". Sous forme de réaction contre ce contrôle, il est d'avis que:

1. Afin de protéger ses actions contre un contrôle trop poussé de la part des tribunaux, "le gouvernement a d'abord fait adopter des clauses privatives destinées à restreindre la portée du contrôle judiciaire".[11]

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[7] P. 171.
[8] P. 173.
[9] P. 307.
[10] P. 377.
[11] *Ibid.*

2. On tend à critiquer le travail des tribunaux, un fait qui témoigne d'un sérieux malaise "quant au rôle constitutionnel des tribunaux".[12]

3. Des tribunaux administratifs spécialisés ont été créés qui, selon l'intention du législateur, ne sont pas soumis au contrôle des tribunaux judiciaires.

L'auteur discute "Les raisons du maintien du contrôle judiciaire", "La portée souhaitable du contrôle judiciaire", et "La consolidation du contrôle judiciaire". L'ouvrage se termine par l'observation suivante:[13]

> On peut finalement souhaiter l'adoption du projet de loi sur la liberté de l'information qui prévoit l'abrogation du fameux article 41 de la Loi sur la Cour fédérale qui a renforcé le privilège de l'Exécutif de faire échapper certains documents et témoignages à tout droit de regard des tribunaux.

Le contrôle judiciaire de l'action gouvernementale est bien écrit, clairement imprimé, et bien relié. Il devrait être indispensable non seulement à l'étudiant en droit, mais aussi à l'avocat dans sa pratique.

EDWARD G. HUDON*

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Principles of Local Government Law. Sixth Edition. By CHARLES A. CROSS. London: Sweet & Maxwell. 1981. Pp. xc, 719. ($52.25 bound, $35.75 paperback)

During the short span of seven years, since publication of the fifth edition, there have been major changes in municipal legislation and a number of important court decisions have been rendered. The author has incorporated these changes and decisions into the latest text to present an up-to-date ready reference for those concerned with the practical work of municipal legislation.

The book is composed of twenty-eight chapters. In each chapter paragraphs or sections dealing with particular topics are numbered consecutively for easy reference. An extensive Table of Cases is referenced to the chapter and the paragraph in which a case appears.

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[12] P. 382.

[13] *Ibid.*

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Similarly a Table of Statutes, which starts with the Poor Relief Act of 1601, and ends with the Highways Act of 1980, is referenced to the chapter and the paragraph in which the statute appears.

Unfortunately, a substantial portion of the text relates to English local government and is not applicable to Canadian municipal government or Canadian social services.

The chapters on highways, public health, burial and cremation, education, food and drugs, shops and consumer protection, have little municipal relevance in Canada. In some provinces such as New Brunswick, rates and taxes have been removed from the municipal scene entirely and the sections of the text which deals with those subjects are of academic interest only. However, such chapters still contain useful background information for the reader.

Of particular interest to the Canadian reader are those chapters which are not based on statutory law, but on the common law development. General principles of tortious liability, failure to perform statutory duties, natural justice, and pollution liability should be of more than passing interest to the Canadian reader.

The concept of the liability of a municipality for negligent performance of his duties by a municipal official as established by *Anns* v. *Merton London Borough Council*[1] is a subject which is of growing concern to all Canadian municipalities. The text provides a useful dissertation on this problem.

The chapter on planning is based on English statutes, but these are sufficiently similar to Canadian provincial planning legislation to make the contents of the chapter of both interest and value to readers.

While the subject matter of several other chapters may not be relevant to Canadian municipalities as many municipalities are no longer charged with the responsibility for the subjects concerned, such chapters do contain material which is of relevance to other public authorities.

For example, the subjects of health and social services, education, public health, and burials, in various provinces are controlled by provincial or non-municipal authorities. However, for those who are dealing with such subjects these chapters will have value.

In all, the text is presented in such a manner that after giving appropriate recognition to the fact that it deals extensively with non-Canadian statutes, it will be found to provide a good foundation for those dealing with the subject of municipal government in Canada.

·ERIC L. TEED*

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[1] [1977] 2 W.L.R. 1025.

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The Supreme Court of Canada Handbook on Assessment of Damages in Personal Injury Cases. By W.H.R. CHARLES. Toronto: The Carswell Company Ltd. 1982. Pp. 129. ($15.00)

Dean Charles' handbook on the assessment of damages in personal injury cases brings together his earlier published article[1] and transcripts of the landmark personal injury assessment trilogy of Supreme Court of Canada decisions, namely *Andrews* v. *Grand & Toy (Alberta) Ltd*,[2] *Thornton* v. *Board of School Trustees of School District 57 (Prince George)*[3] and *Arnold* v. *Teno*.[4]

This material is not new and no doubt those who share an interest in this field are already familiar with the Supreme Court's decisions, Dean Charles' article, as well as a number of other authors' writings.[5] The substantive part of the handbook, being a reprint of the author's earlier article, has already received the imprimatur of the legal profession. The penmanship is clear, concise and informative. The handbook sets out to explain the impact these cases have had on existing law and introduces a number of ideas in areas which still require further resolution. However, while all that Dean Charles writes remains relevant today, even this handbook begins to show some strains of being superseded by rapidly changing events. For instance the discussion on the parameters of non-pecuniary losses must now be read in light of the Supreme Court's recent decision in *Lindal* v. *Lindal*.[6] That case emphatically endorsed the "functional" approach to assessment and reiterated the $100,000.00 upper limit, subject only to "exceptional circumstances" or to take account of the "debasement of purchasing power as a result of inflation", as the maximum permissible award under this head of damages.

The book is well presented by the publishers. The typography is of a high standard and only a couple of minor mistakes have escaped the eyes of the proofreader.

It is difficult to assess whether the legal profession will find this handbook of great assistance. The price of the handbook at fifteen dollars may deter some. However, it does fill a need for a quick reference work on the important trilogy of Supreme Court personal

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[1] Assessment of Damages in Personal Injury Cases (1981), 18 C.C.L.T. 6.

[2] [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452.

[3] [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480.

[4] [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609.

[5] Bissett-Johnson, Damages for Personal Injuries—The Supreme Court Speaks (1978), 28 McGill L.J. 317; Feldthusen, McNair, General Damages in Personal Injury Suits: The Supreme Court's Trilogy (1978), 28 U. of T. L. J. 381; Chernick, Sanderson, Tort Compensation—Personal Injury and Death Damages, Law Society of Upper Canada Special Lecture Series (1981).

[6] (1981), 129 D.L.R. (3d) 263.

injury cases. In that capacity this reviewer is pleased to have Dean Charles' work added to his library.

JEFF BERRYMAN*

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Personal Injury Damages in Canada. By K.D. COOPER-STEPHENSON and T.B. SAUNDERS. Toronto: The Carswell Company Ltd. 1981. Pp. lii, 762. (No Price Given)

The appearance of yet another treatise on damages for personal injury, this one dealing specifically with Canadian law, reflects the increasing concern since the Second World War with damage assessment in tort litigation. We now have *Kemp & Kemp*[1] in England (besides *McGregor*[2]), *Luntz*[3] in Australia and *Cooper-Stephenson and Saunders*[4] in Canada (*Goldsmith*[5] is a mere digest). I hazard the guess that more House of Lords appeals of the last twenty-five years have dealt with this topic than with substantive questions of the law of torts. What accounts for this preoccupation? At the procedural level, it is of course linked to the total disappearance of juries in England and most other Commonwealth jurisdictions, which has provided easier opportunities for appellate review and control. In the United States, by contrast, where the civil jury still reigns supreme, the overall pro-plaintiff trend has encouraged a progressive lessening of judicial control over jury action in relation to damages even more than substantive liability. The resulting "forensic lottery" (*pace* T. Ison[6]), encouragement of litigation and clogging of courts so nonchalantly condoned by the American system are viewed by British and most Commonwealth courts as precisely the kinds of unmitigated evil best combatted by prescribing a list of tariffs and carefully articulated rules for application by professional trial judges and for promotion of settlements.

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[1] The Quantum of Damages in Personal Injury and Fatal Accidents Claims (4th ed., 1975).

[2] On Damages (14th ed., 1980).

[3] Assessment of Damages for Personal Injury on Death (1974).

[4] The instant work.

[5] Damages for Personal Injury and Death in Canada (1959-).

[6] The Forensic Lottery: A Critique on Tort Liability as a System of Personal Injury (1967).

A dominant judicial concern has been with the apparently exponential increase in the size of claims. Although largely reflecting the growing earning capacity of an affluent population, the steep rise in the quality and cost of medical care, and the general falling value of money, the item most vulnerable to retrenchment has been the strands of non-pecuniary loss. The measure of success in keeping down these awards is well illustrated by comparison with their American counterparts, even after making allowance for the difference in the award of attorneys' fees under the two systems. Yet the overall effort seems to be poorly coordinated and often lacking in a sense of direction.

In the early sixties it looked as if some savings could be attained by deducting most collateral benefits which, by definition, would overcompensate the plaintiff, but this course was later reversed, perhaps to compensate for the pusillanimous assessment of non-pecuniary losses and the refusal to make allowance for future inflation. But now that a more realistic approach to inflation has at last prevailed, assessments have been grotesquely complicated by calculating discounts both for inflation and income tax (the latter not in Canada) to the point where it is an exercise more suitable for computers than the courtroom (and entirely unthinkable for juries). The exercise of appellate review has become rather reminiscent of the vain exertions of the sorcerer's apprentice. The miniscule paring of individual items in the light of standards pretending to mathematical accuracy is scoffed by constant and unpredictable shifts in the value of money. That judges have not given up is perhaps a tribute to their constancy rather than to lack of imagination.

The gains in judicial efficiency are hard to gauge. Whatever they are, their price has been high. One index is the complexity of the existing body of law and the enormous judicial effort spent on assembling this awesome edifice. The book under review covers 700 pages, an indication both of the complexity and the loose ends that still abound. In face of this incriminating evidence, one may well sympathize with the authors' opening comment that "[i]deally, there would be no market for a book on personal injury damages in Canada",[7] consigned to the dustbin of history by a first-party social insurance plan like New Zealand's.

While this work has a Canadian focus, it inevitably covers the English authorities and makes many references to other Commonwealth, particularly Australian, material. Has there been any significant Canadian contribution, legislative or judicial? Certainly there are several examples of growing independence from London models: the tax component is ignored, exemplary damages are widely retained,

[7] Preface, p. iii.

loss of companionship in fatal accident cases and loss of expectation of life are handled more liberally. The Supreme Court of Canada has given a lead in several instances but not always meriting unqualified praise. The famous "trilogy" in 1978[8] addressed the problem of runaway verdicts for non-pecuniary loss with some aplomb but floundered rather badly over future inflation.[9] Legislation has fallen thick and fast in the field of fatal injury but without approaching uniformity (the draft Uniform Survival of Actions Act (1962) has evidently died on the vine); only the Ontario Family Law Act 1978[10] has been innovative.

But even identity of black letter rules often only masks substantial differences in application. Two illustrations may suffice. In the famous "trilogy", previously referred to, the Supreme Court of Canada suggested a maximum of $100,000.00 for all non-pecuniary losses of a quadriplegic, while the High Court of Australia only a year earlier had reduced a verdict in a similar case to $50,000.00.[11] The hard-nosed attitude of the Australian court contrasts even more sharply with the Canadian in their respective treatment of the choice between home and institutional care for these plaintiffs. While Dickson J. in *Andrews*[12] considered the psychological and emotional benefit to the patient to be paramount over the social burden of the extra expense, the leading opinion in *Sharman* summarily dismissed home care as an unjustifiably expensive benefit of "amenity" in no way involving physical or mental well-being". The standard of appropriate medical care poses not only a balance between compassion for the plaintiff and the cost burden to the defendant (and the risk pool to which that cost can be passed on), but may also implicate the question of horizontal equity between tort victims and those who must be content with the more Spartan standards available under a national health scheme. It is on this ground that Atiyah has questioned the statutory right of tort victims in Britain to *private* hospital treatment, as noted by our authors.[12]

The great value of the present book lies not merely in the careful and comprehensive collection of the authorities. It has a distinctly academic perspective in providing structure, seeking rationales, and applying criticism. Each important issue is first discussed in point of

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[8] *Andrews* v. *Grand and Toy (Alberta) Ltd*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; *Thornton* v. *Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480; *Arnold* v. *Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609.

[9] Rea, Inflation, Taxation and Damage Assessment (1980), 58 Can. Bar Rev. 280.

[10] R.S.O., 1980, c. 152.

[11] *Sharman* v. *Evans* (1977-78), 138 C.L.R. 563.

[12] *Supra*, footnote 8.

principle before exhausting the case law. Generous attention is paid to textbooks and law review articles. The style is relaxed like that in a disciplined law review article, with opportunity for extended argument and detail. One of the best examples is Chapter 12 (''Factual Causation'') and its treatment of ''necessary'' and ''multiple sufficient causes''. The authors' clear exposition lightens the demands on the reader; their judgment is sound. They labored hard in the vineyard and we are grateful for their harvest of sweet grapes.

JOHN G. FLEMING*

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Contracts: Cases and Commentaries, Second Edition. Edited by CHRISTINE BOYLE and DAVID R. PERCY. Toronto: The Carswell Company Ltd. 1981. Pp. lviii, 843. ($37.50)

This is the second edition of a first year contracts casebook. If the number of people who participated in its preparation is any indication, it is probably used extensively throughout Canadian law faculties. The basic structure of the book has not been altered since the first edition. It takes as its starting point the rules of offer and acceptance and moves through contract formation (uncertainty, intention, consideration), the technical requirements of privity and a document in writing, the classification of contractual terms, the rules of interpretation, and problems of error, frustration and unconscionability to finish with a discussion of remedies. The material in the individual chapters has been reorganized and updated. The choice of cases is good. I was familiar with most of the cases, but some were new and useful. Neither the choice of cases nor their juxtaposition seemed startingly original. It is not always clear why the authors have felt it necessary to change the order of particular cases. Presumably the experience of teaching from the materials dictated the change. It is possible to quibble with some of the editorial decisions. The inclusion of *Photo Production Ltd* v. *Securicor Transport Ltd*[1] is absolutely necessary but then the decision of the Supreme Court of Canada in *Beaufort Realties (1964) Inc.* v. *Belcourt Const. (Ottawa) Ltd*[2] is vital to

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[1] [1980] 2 W.L.R. 283, [1980] 1 All E.R. 556 (H.L.).

[2] [1980] 2 S.C.R. 718; to be fair the case was unreported at the time of the preparation of the casebook but the decision was definitely available.

understanding the status of the House of Lords decision in Canada. I am sure that everyone could multiply the examples of cases that he or she feels are important but that kind of critique is not particularly constructive and any cases which the individual instructor feels are vital to his or her course can be included in supplemental materials. The case book is comprehensive and gathers together cases on all the doctrines traditionally covered in the first year contracts course.

The chapter on remedies has been radically rewritten to take into consideration criticism of the first edition.[3] Originally the chapter on remedies was short (thirty-nine pages) and made up of a discussion of remedies through text and problems. There were only four cases mentioned in the table of contents. The chapter now runs to ninety-six pages and includes all of the classic cases with which we are so familiar. Certainly the first edition must have been one of the few North American casebooks which did not include the full text of *Hadley* v. *Baxendale*.[4] It is not clear to me that the return to the classic case-by-case discussion of remedies is an improvement. To be effective, case analysis has to be thorough and detailed. By the end of the year (assuming one teaches the chapters in order) the need for coverage may outweigh the need to develop analytic skills which should have already been finely honed. As a professor I feel more secure with the case method but I do not feel this justifies the flogging of that pedagogic exercise to death at the expense of other potential learning experiences.

I have other picayune criticisms. Cross-references are not always complete.[5] In the discussion of statutes, reference is sometimes made solely to the statute in the jurisdiction of the author of the particular chapter, although there is no consistent pattern. In a casebook designed for national use, I think that it is logical to include all the appropriate references. The book contains no index at the end. This oversight reduces the usefulness of the book as a reference.

A number of problems are presented throughout the book for the student to solve. These are worthwhile exercises included to help the student develop the necessary legal skills. But again the form is not consistent throughout the book. Sometimes the case upon which the problem is based, is given; other times it is not. This may be because the hypothetical has been created by the author. However, that does not meet my objection. If these exercises are to be useful to the student he or she has to be able to get feedback on his or her answer. The instructor will obviously discuss some of these problems in class but

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[3] A. McLellan (1979), 28 U.N.B. L.J. 257 and D. Vaver (1979), 17 Alta L. Rev. 567.

[4] (1854), 9 Ex. 341, 156 E.R. 145.

[5] See *i.e.*, pp. lvii and 192.

certainly not all. If the casebook is to be useful to the student some indication of a possible analysis of the case should be given. A reference to a case is an economic solution. If no case is available, the author has some obligation to provide guidance. Perhaps suggested solutions could be provided at the end of the book. Without them, the ordinary student will pass over these problems with, at best, cursory reflection on the issue raised because no effective means of measuring his or her progress is provided. Indeed, the problems in the casebook do not progress from simple to more complex and they have been included *pro forma* rather than for any particular pedagogic purpose.

Up until now I have been analysing this casebook on its own terms and, from that viewpoint, I think it largely succeeds. It is a good up-to-date example of the traditional casebook. In fact it reminds me of those severely traditional black shoes with sensible heels and strong laces that my grandmother used to wear—solid, well-made, very comfortable and unlikely to irritate. It would make an excellent casebook for classroom use. I am sure that this group of authors did not intend to produce an innovative pedagogic tool so, perhaps, my reflections on the usefulness of the casebook are more about the book I would have liked to read rather than the one the authors intended to write. From that point of view the traditional design of this casebook is both an advantage and a disadvantage.

The strength of the casebook is the return to the formal logic of the law of contracts as the organizing principle of the material presented. The two other major casebooks available to Canadian teachers—*Milner's Cases and Materials on Contract* edited by Professor S. M. Waddams[6] and *Contracts: Cases, Notes and Materials* by Professors B. Reiter and J. Swan[7]—begin the study of the law of contracts with the issue of the remedies available in the case of breach. This decision can perhaps be justified by arguing that the cases concerning remedies are simple and easy to identify with but I do not think these arguments are very convincing. The first months in law school are difficult no matter where one begins the course because the language and logic of the law are so foreign. There is a much more serious argument in favour of the decision to begin with remedies, one which I think is wrong.

Professors Waddams and Reiter and Swan justify their decision to start with remedies by arguing that the only way to know which promises the law will enforce is to discover ". . . what the law will do if it does decide to enforce a promise".[8] It is argued that ". . . the

[6] (3rd ed., 1977)

[7] (3rd ed., 1982)

[8] Reiter & Swan, pp. 1-2.

study of remedies gets at a most fundamental aspect of the 'law' of contracts: the extent of the legal protection given to private arrangements''.[9] Both of these statements are obscure. I am convinced that no first year student would have a clearer idea of why he or she was starting with remedies after reading them. However, I believe that these statements reveal indirectly the neo-realist position that underlies the decision to start a casebook with a discussion of remedies. After all, it was Fuller who first took this innovative step.[10] The focus on remedies reveals a conception of the law as primarily functional or instrumental. Social purposes rather than the internal logic of the law are the focus of study. This approach permits a detailed discussion of the notion of reliance and the manner in which the desire to protect reasonable reliance has eroded or, indeed, destroyed the traditional doctrinal categories of contract law.

The discussion of the protection of reasonable reliance is absolutely vital to any course on contracts. However, I do not believe that a casebook should be structured so as to give the student the impression that the neo-realist analysis of contract law is the dominant form of legal consciousness[11] in Canada today. It is not. Judges do not reason from remedies backwards. The student needs to understand the formal logic of the law as well as the contradictions within the present legal consciousness. In order to do so they must understand how judges themselves perceive what they are doing. Those who argue in favour of reasonable reliance as the organizing principle of modern contract law confuse what they think ought to be with what is. I happen to agree with the argument that reasonable reliance ought to be determinative of the availability of remedies. However, the course should not be taught as if that goal has been achieved. To structure a casebook as if it had is to mislead the students by obscuring the contradictions within the dominant legal consciousness as it is manifested in the law of contracts. The student needs to understand the debate about fundamental values and purposes of the law; he or she needs to understand formalism, the realist critique of formalism and the subsequent attempts to reconstitute a theory of law.

Therefore, I believe that the structure of the casebook under review is superior. It allows the student to investigate the formal logic

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[9] Waddams, *op. cit.*, footnote 6, p. xliii.

[10] L. Fuller, Basic Contract Law (1947).

[11] By legal consciousness, I mean the vision of the law and its role in the world held by judges or the legal profession, or both at any particular historical moment. This includes explicit views about the law, unconscious assumptions about the law and values shared by the professor. It also includes views on appropriate modes of legal reasoning. For a more detailed discussion see: K. Klare, Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941 (1978), 62 Minn. L. Rev. 265, and K. Klare, Contracts, Jurisprudence and the First-Year Casebook (1979), 54 Harvard L. Rev. 876.

of the law of contracts and the evolution of Canadian legal consciousness while building into the discussion examples of principle and counter-principle which show that the final categories are extremely problematic in light of actual exchange practices. This structure, however, contains a great danger which I do not think the authors have avoided. The risk is that the law of contracts will be presented as a system of scientific rules to be deduced from certain basic principles or premises. The authors were well aware of this danger and their introduction raises a number of the questions which must be discussed in order to avoid this return to formalism. But the weakness of the book is precisely that the issues are raised in the introduction and not adequately integrated into the discussion of doctrine. I doubt that very many first year students read the introduction more than once. After the introduction, these issues are either never mentioned again, or mentioned in a perfunctory note.[12] The student will quickly get the message: the study of law involves the study of cases. The rest is just gloss. It is not really law but merely policy. I have a sneaking suspicion that the committee of authors was not consistently conscious of the jurisprudential, social and moral issues which underly the debates over the death of contract.[13] Certainly the level of discussion of these issues varies from chapter to chapter.

Thus, the decision to structure the book according to the categories of the formal logic of contract law gives the impression that formalism is still tenable after all these years. The students may appreciate the security afforded by apparent doctrinal certainty but we do them a major disservice, one that is as bad as, if not worse than, teaching them that the reliance principle has triumphed. In fact what would have been an important step forward in Canadian casebook design if done with the requisite sophistication becomes a step backwards into history. Surely we do not want to train legal practitioners ill-equipped to deal with exchange problems in an extremely complex advanced capitalist society.

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[12] For example, on p. 141 we are told that the origins of the doctrine of consideration are controversial without any elaboration on the controversy. The discussion of the contemporary debate surrounding the doctrine of consideration is limited to the final note in the chapter. The student will understand very little from that short note and will almost certainly never have time to read the nine articles listed. It could be argued that it is the responsibility of each instructor to raise these issues. That response is true but inadequate. These issues are *the* important questions in contract law and their discussion cannot be left to the personal interest of the instructor.

[13] The committee approach to casebook preparation makes it impossible to eliminate differing styles and, obviously, attitudes towards the importance of these jurisprudential, social and moral issues vary greatly. However, what makes me suspect that the authors had no clear conception of the jurisprudential underpinnings of their decision to structure the book as they did, is the glaring lapse in consistency in chapter 8. That chapter discusses the classification of terms via an analysis of remedies. In itself the chapter is good but its structure is at odds with that of the whole book.

Which brings me to my last criticism. Many commentators have observed that the thing we call a contract in the first year contracts course does not exist out there in the real world.[14] Simple contractual exchange is limited to ". . . the private sale of used typewriters and bicycles".[15] Contracts, as they have been known classically, have been legislated out of recognition. There are insurance contracts, labour contracts, contracts for the sale of goods and the list could go on and on. This legislative dissolving of the category has to be analyzed in the first year course. Furthermore, certain empirical studies show that exchange relations amongst business people do not conform to the model which is taught in the first year course.[16] These criticisms must be taken into account in the planning of any new casebook. The teaching of classical contract theory can be defended.[17] It is a necessary element for the comprehension of upper-year courses. It is absolutely vital for understanding the values of our society and the ideological role of the law. But, nonetheless, the realities of exchange relation must be taken into account. I do not think this is done effectively in this casebook. I do not recall seeing one contract reproduced in the book and there were no exercises in the drafting of contracts. There was little discussion of how business people actually plan their long term relations or of how economic and political power affects the functioning of the market.

It is not clear why the authors of this text made the choices they did but I fear that they decided that, since there was a demand for a casebook, they would fill that need. Little serious thought was given to rethinking the content of the first year contracts course or to establishing clear and precise pedagogic objectives that reflect both the current state of exchange in Canadian society and the latest doctrinal debates in contract jurisprudence. Like my grandmother choosing her shoes, the authors opted for what was comfortable and familiar. But here the analogy breaks down. My grandmother could always walk in her shoes. I am not sure that student will be able to

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[14] MacNeil, The Many Futures of Contract (1974), 49 So. Cal. L. Rev. 691; I. MacNeil, Whither Contracts? (1969), 21 J. Leg. Ed. 403, and I. MacNeil, The New Social Contract (1980).

[15] R. MacDonald, Legal Education on the Threshold of the 1980s (1979), 44 Sask. L. Rev. 39, at p. 43.

[16] L. Friedman, Contract Law in America (1965); S. Macauley, Contractual Relations in Business: A Preliminary Study (1963), 28 Am. Soc. Rev. 55; Friedman & Macauley, Contract Law and Contract Teaching Past Present and Future, [1967] Wis. L. Rev. 822.

[17] See *e.g.*, K. Strasser, Teaching Contracts—Present Criticism and a Modest Proposal for Reform (1981), 31 J. Leg. Ed. 63.

practice law unless they are better equipped theoretically and practically to deal with the complexities of modern society.

J. A. MANWARING*

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Les contrats en droit international privé comparé. By HENRI BATIFFOL. Montreal: McGill University, Institut de droit comparé. 1981. Pp. vii, 166. ($15.00)

Few scholars of the conflict of laws have had careers as distinguished, or as long, as Henri Batiffol, *Professeur honoraire* at the University of Paris II. His *Les conflits de lois en matière de contrats*, a pioneering comparative study, appeared in 1938. His treatise, *Droit international privé*, the latest edition of which he wrote with Professor Paul Lagarde, has attained in French law the kind of magisterial authority that English and Canadian common lawyers associate with *Dicey*.[1] The present book is the revised transcript of a series of lectures that Professor Batiffol gave as Visiting Professor at the Institute of Comparative Law, McGill University, in 1978-79. His treatment is not meant to be comprehensive. Rather, Professor Batiffol offers a kind of full-length portrait of the conflict of laws relating to contracts, drawing its structure, highlighting its fundamental issues, and using comparative material to point up problems and illustrate possible solutions.

He begins, in an introductory section, by placing the private international law of contracts in its setting. He addresses questions that have been raised about the way in which this area of private international law operates in relation to national legal systems and the international legal order. For example, he rejects the argument that some contracts, such as those providing for international arbitration, or those between a state and a private person, must fall outside the scope of any national legal order, and thus outside the conflict of laws. Such a conclusion is seen as unjustified by our experience thus far. International arbitrators cannot solve all problems by notions of good faith and equity, and the vast majority of the legal issues that arise even in these highly internationalized agreements are the same as those dealt with in domestic laws of contract. Solutions unique to international contracts may be appropriate, but they should be framed

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[1] J. Morris, ed., Dicey and Morris on the Conflict of Laws (10th ed., 1980).

as defined exceptions to the general principles of the conflict of laws. It is incorrect, he suggests, to point to the need for such solutions as showing any basic weakness of the system as a whole. In a similar way Professor Batiffol seeks to defend the principles of the conflict of laws from erosion through the use of concepts like mandatory legal rules, or laws of immediate application, or *lois de police*, which supposedly override the normal rules for choice of law. The assertion of the primacy of certain forms of national law over others is to be resisted; the conflict of laws should not surrender its role of balancing, in a principled way, the interests of individuals and of states.

This emphasis on the integrity of the private international law of contract as a conceptual system is also evident in the two main parts of the book, the first of which deals with determining the law governing the contract, and the second, with the scope of application of that law. The comparative survey of methods of finding the governing law is particularly valuable, canvassing the traditional starting-point of the freedom of the parties to choose a governing law; the provisions of the European Communities Convention on the law applicable to contracts, with its presumption in favour of the law of the country where the "characteristic performance" of the contract takes place;[2] the continuing importance in some quarters (German, Italian and Soviet law) of the law of the place of performance; and the present and proposed rules in the Civil Code of Quebec.[3] The author's own preference, which he has stated many times over the years, is for a single rule capable of encompassing both a contract with an express choice of law, and a contract where there is no express indication of the parties' intention as to the governing law. This single rule, which Professor Cheshire also used to favour, is to be found in the concept of "localization" of the contract.[4] The parties' intention "localizes" each of the elements of the contract, but does not operate directly in the decision on choice of law. That decision is made by the judge deducing the governing law, taking the localization of all these elements into account, without any one element necessarily being decisive. Above all, the parties' expressed intention as to the governing law cannot be decisive because that would lead inexorably to the conclusion that a choice of law operates by incorporating the chosen law into the contract, rather than submitting the contract to the chosen law.[5] I confess to doubts on the last point, and also on the more general

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[2] The text of the Convention, with explanatory notes, is reproduced in (1981), 4 Comm. Laws Eur. 1.

[3] Art. 8 C.C. is the present provision; the proposed article is Art. 21 of the Projet de Code civil published by the Civil Code Revision Office in 1978.

[4] P. 57.

[5] Pp. 84-86.

question whether the process of "localizing" the contract really explains how a judge can weigh the subjective and objective elements in a contract against each other in order to find the governing law. The central problem in this matter is how to accommodate rationally both the parties' intentions and interests on the one hand, and the legislative interests of affected jurisdictions on the other. The "localization" theory expresses neatly the idea that the judge should do this, without, I would suggest, going further and analyzing just how he should do it.

Professor Batiffol's conception of the choice of law problem in contracts is, as he admits, opposed to the tendency in the United States to treat each choice of law issue as a separate choice between conflicting policies, which may lead to different laws being applied to different aspects of the same contract.[6] Some incursion of laws other than the proper, or governing law must be conceded, but the contract should still be treated so far as possible as a unity. In the part of the book dealing with the scope of application of the governing law he examines difficult areas such as formation of the contract, capacity of the parties, authority to act on behalf of a third party (*pouvoirs*), consent of the parties, and a range of issues grouped under the heading, *l'objet du contrat*, including legality of the contract and scission by the parties of the law that governs the contract. Throughout these topics French, German, English, Canadian, American, and other systems of the conflict of laws are referred to, and the competing claims of the personal law, the *lex situs*, the *lex loci solutionis*, the *lex delicti*, and others to take precedence over the law of the contract are examined. Professor Batiffol makes no apology for discussing these issues in the classical terms of a choice between systems of law, rather than in the modern, mainly American terms of a choice between results. On the contrary, at the end of the book he puts the case for the traditional methods most eloquently: the subtlety of the analysis, he says, should not be pushed beyond the point where it produces reasonably clear and certain perceptions from which practical rules may be drawn.

Those who want a detailed exposition of the private international law of contracts in different jurisdictions will have recourse to Professor Lando's excellent chapter in the *International Encyclopedia of Comparative Law*.[7] But a better or more attractive introduction to the subject than this one by Professor Batiffol would be hard to imagine.

JOOST BLOM*

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[6] P. 139.

[7] Vol. III, Private International Law, ch. 24, Contracts (1976).

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Sales and Sales Financing in Canada. Cases and Materials. By M.G. BRIDGE and F.H. BUCKLEY, Toronto: The Carswell Company Ltd. 1981. Pp. xlix, 694. ($32.50)

Sales and Sales Financing in Canada is a thorough, scholarly coursebook which will be a useful teaching material for the basic course in commercial transactions in law faculties across common law Canada.

The book is designed for a sixty-hour survey course, Approximately two-thirds of the book deal with sales law; the remaining one-third is on personal property security law. Among the topics covered in sales law are the definition of the sales contract, the writing requirement, unfair trade practices and unconscionability, contractual terms and the right of rejection, implied terms of description and quality, the obligations of delivery and payment, documents of title and letters of credit, seller's title and the passing of property, risk and frustration, remedies and transfer of title (*Nemo Dat* principle, bulk sales). Topics covered in personal property security law include the historical background, the scope of the legislation, priorities, business financing (including Bank Act security and floating charges), other claims to the collateral (subsequent purchasers, fixtures, nonconsensual liens, conflicts of laws) and enforcement proceedings. The book concentrates on Ontario legislation and makes frequent references to the Uniform Commercial Code and the Ontario Law Reform Commission's Report on Sale of Goods (1979). There is no statutory supplement provided. For teaching purposes, the instructor could either prepare a supplement with legislation to be examined during the course or use the statutory supplement from McGill University, where Professors Bridge and Buckley are on the teaching staff.

Throughout, the materials chosen are clear and well-organized. Most of the chapters contain significant amounts of textual commentary which is obviously the result of long hours of patient research. The introductions to Chapter 5 (conditions and warranties) and Chapter 12 (*Nemo Dat* principle) are particularly good. The cases chosen are well-edited and are generally kept to a suitable length—with the possible exception of *Hall* v. *Owen County State Bank*, which may not be entirely worthy of the full ten pages from page 617 to page 627. At frequent intervals, there are also helpful short notes and questions to be used at the discretion of the instructor and the class for subsidiary issues not requiring lengthy extracts from case law.

In a work of this scope, it may be expected that there will be minor disagreements over details. My own particular points of quibble concern page 25 and pages 250-251. At page 25 in the second paragraph from the bottom, I suggest that the Ontario Law Reform Commission meant section 5.16 when it said section 5.16 and did not

intend to refer to section 5.15 instead, as is stated in the text. Section 1.1(1)8(c) of the Draft Sales Bill would therefore serve to confirm that a contract can be a contract of sale even if the seller does not give a full warranty of title.[1] Some sales principles would indeed be applied to leases under section 5.15 and this provision certainly should be discussed in conjunction with section 2.2(4), but the Commission does not propose taking sales imperialism so far as to deem leases to be contracts of sale. My remark concerning the Canadian customs invoice reprinted on pages 250-251 is not a point of disagreement but simply a note that the invoice seems a bit out of place amid documentation which otherwise represents an export from Canada.

The major criticism of this book relates not to what it does but rather to what it does not do, which probably was determined more by the course description at McGill than by the choice of the authors. As they state in the preface, the book does not cover negotiable instruments law beyond a section on the Federal Discount doctrine and Part V of the Bills of Exchange Act. This omission is unfortunate for two reasons. Firstly, Canadian law schools do not all have a separate course on Banking and Bills of Exchange as McGill does. If negotiable instruments are studied only in the basic commercial transactions course, additional materials on this topic would need to be prepared by each instructor. Secondly, a discussion of electronic funds transfer (EFT) in negotiable instruments law would be a good base for a discussion of a similar replacement of paper by electronics in the area of bills of lading and other documents of title.

In negotiable instruments law, EFT raises a number of questions, including that of the functions of both transferability (the concept that title can be transferred) and negotiability (the concept that a transferee for value without notice can receive a better title than the transferor had). In an electronic world, these concepts might have continuing relevance for a pre-authorized right to debit a certain account, but the means of attaching them to the transfer mechanism itself would be problematic.[2] If the electronic transfer is done instantaneously, it is difficult to see how one could be a transferee or holder in due course of the information which flashes across the screen on a computer terminal. If it is necessary to examine *how* to preserve transferability and negotiability of the right to receive payment, it may be worthwhile to examine as well *whether* transferability and negotiability should both be preserved. If the majority of negotiable instruments are cheques and if the majority of cheques are negotiated directly to the payee's

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[1] See Ontario Law Reform Commission, Report on Sale of Goods, vol. I (1979), pp. 42-43.

[2] See P. Brace, Electronic Funds Transfer System: Legal Perspectives (1976), 14 O.H.L.J. 787, especially pp. 794-795.

bank, one might discuss, for example, whether banking institutions really need to be holders in due course.

Similar questions arise concerning potential electronic transfers of the information in a bill of lading. Besides the usual computer-related issues of security and computer error, such a development would also call into question the continuing significance of transferability (and negotiability, in certain circumstances) of the right to receive the goods. As Professors Bridge and Buckley mention at pages 239-240 of the text, air and land freight is commonly transported under non-transferable documents to avoid delays caused by goods arriving at their destinations before the documents, which are usually sent by mail. If documents are non-transferable, goods can be delivered to the consignee immediately; if documents are transferable, however, goods must be retained by the carrier until the documents arrive and are presented in exchange. In ocean transport as well there seems to be an increase in the use of non-transferable documents, due in part to the development of speedy container ships which can reach their destinations ahead of the air mail service.

It may be that transferable documents are used mainly to give financing institutions convenient control of the goods as security for letters of credit. If this is so, then some means will have to be found to provide similar security if paper transactions give way to electronics.[3] Eventually, if both funds and goods can be transferred in an instant by electronics, one might raise the further question of whether letter of credit financing continues to be required for the exchange between buyer and seller.

Canadian courses in commercial law tend to spend only a minimum amount of time on the paper used in commercial transactions. Generally, commercial law seems to mean sale of goods and chattel security. Professors Bridge and Buckley have provided an admirably clear chapter on documentary transactions but their coursebook is still firmly within the "sales and security" tradition. If the computer is about to change the means by which business is conducted,[4] perhaps

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[3] For suggestions, see K. Grönfors, Simplification of Documentation and Document Replacement, [1976] 3 LMCLQ 250.

[4] The era of document replacement may not be far away. For a discussion of document replacement possibilities in Canadian domestic and export trade, see D. Porteous, Trade Documentation in Canadian Organization for the Simplification of Trade Procedures (COSTPRO), Vendors' Conference, Addresses Presented at the Harbour Castle Hilton Hotel, Toronto, Canada on January 24th, 1980, at p. 57.

The federal government has recently decided to work towards adoption of the Customs Co-operation Council Nomenclature for tariff and statistical purposes. Preparatory work is to be done pending a final decision on the matter. Eventual adoption of this international nomenclature and its standardized code numbers would facilitate the use of electronic data processing for goods moving across national boundaries. See Department of Finance, Release 81-79, July 17th, 1981 and Department of Finance,

that tradition should be re-examined. Our law of commercial paper is undoubtedly more suited to quill pens than to computer terminals, but the guiding principles will have to come from somewhere. An expanded coursebook with more material on commercial paper would permit instructors to vary the approach and to give more emphasis to the mechanisms of a transaction should they choose to do so.

Sales and Sales Financing in Canada does an absolutely first-rate job of the task the authors undertook and they should both be congratulated for the high quality of their scholarship. The book is not, however, designed for a course in which commercial paper is studied in detail. If a subsequent edition were to contain a short chapter on the basic principles of negotiable instruments law and possibly an expansion of the chapter on documentary transactions, the work would be even more useful.

MAUREEN IRISH*

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The Law of Sales under the Uniform Commercial Code. By GEORGE I. WALLACH. Boston: Warren, Gorham & Lamont, Inc. 1982. Pp. xviii, 505 (text), 50 (Appendix: Uniform Commercial Code, Article 2, without Comments), 95 (Tables), 15 (Index). ($48.50)

Sales law in Canada faces a state of possible change quite unique in this century. Previously what major changes there had been were concentrated in the consumer area, with legislation stipulating formation formalities, sanctioning bargaining misbehaviour, and controlling some—typically quality—terms.[1] Significant as these were they could be regarded as glosses on *Chalmers'* imperial inheritance, the Sale of Goods Act, enacted across common law Canada in the early decades of this century.[2] Hence English case-law and commentary were the stuff of the classroom and the court handlings of the run of general sales law discussion.

Adoption by Canada of Tariff Nomenclature and Statistical Classification System Developed by Customs Co-operation Council, Discussion Paper, July 1981.

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[1] See *e.g.*, in Ontario the Business Practices Act, R.S.O., 1980, c. 55 and the Consumer Protection Act, R.S.O., 1980, c. 87.

[2] See G. Fridman, Sale of Goods in Canada (2nd ed., 1979), p. ix.

Now the basic legislative structure may soon be replaced across common law Canada by one which draws for its model on the sales article (Article 2) of the American Uniform Commercial Code (UCC). Draft bills for new sales legislation have been put forward by the Ontario Law Reform Commission in its 1979 *Report on Sales of Goods*[3] and by the Uniform Law Conference of Canada in 1982, the more recent one being based on the earlier.[4] It must be admitted that the present economic climate is probably hostile to the introduction of such new law at present. However, the effort and the interest represented by the two sets of proposals auger well for change, if things improve.

If the economic climate does improve, Canadian commercial lawyers face a considerable intellectual challenge rather similar to the one posed by our new Constitution. This challenge is to come to terms far better than before with an important area of American law. In that coming to terms process comprehensive, accurate, up-to-date and clear treatises which also give good access to the rich supporting matter in the American legal culture will be of great value. Two Canadian casebooks on commercial law, both published in 1981, Professors Bridge and Buckley's *Sales and Sales Financing in Canada*,[5] and Professors Ziegel and Geva's *Commercial and Consumer Law*,[6] offer admirable introductions to much of American sales law. However, Canadian commercial lawyers will need to supplement these, and the excellent literature[7] produced in support of the Canadian legislative proposals, with fuller treatments of that law. It is against this background that Professor Wallach's book is reviewed for a *Canadian* audience.

It should immediately be said that neither Professor Wallach's work nor any other on the UCC Article 2 is a candidate for textbook status for future Canadian sales law. This is so unless the shape of the law changes a great deal towards identity with Article 2 in the move to enactment. One need not be a Canadian nationalist or respecter of continuity with the past to believe this to be unlikely. The Ontario Law

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[3] See Review (1980), 58 Can. Bar Rev. 421, with which contrast Review (1980), 58 Can. Bar Rev. 780. The O.L.R.C.'s Draft [Ontario Sales] Bill is Appendix 1 in Report on Sale of Goods, Vol. III (1979).

[4] Approved at the 1981 Annual Meeting of the Conference: see Proceedings of the 61st Annual Meeting of the Uniform Law Conference (1981); and see Committee on Sale of Goods of the Uniform Law Section, Report on Sale of Goods (1981). The Uniform Sales Bill is set out in both these sources, but is subject to stylistic changes entrusted to the Saskatchewan legislative draftsman.

[5] M. Bridge and F. Buckley, Sales and Sales Financing in Canada (1981).

[6] J. Ziegel and B. Geva, Commercial and Consumer Law (1981).

[7] Regrettably not all of it is readily accessible. This is particularly true of the background papers to the Ontario Report.

Reform Commission and the Uniform Law Conference have made good cases for the disutility of many of the Code provisions which are unlikely to appear, or of Code language which is unlikely to be preserved, in any future Canadian sales legislation. Examples of provisions omitted in the Canadian proposals, thereby rendering largely irrelevant here whole departments of American sales literature, are the Code's statute of frauds ones[8] and—more controversially—its rules on sale contract formation, where performance has not begun, from variant offer and acceptance forms.[9] Examples of language change from Code models which render resort to the corresponding departments of American sales literature occasions for the exercise of particularly great care are in the Canadian provisions on anticipatory breach[10] and casualty to the goods.[11] What the American literature can do for the Canadian practitioner is flesh out the terse, sometimes elliptical commentary of the reformers with recognizable fact patterns and less recognizable modes of analysis of them. That literature can also offer practical suggestions for implementing the new law.

Nowhere is all of this better illustrated, along with the place in it of Wallach's book, than in relation to one of the most juridically distinctive parts of the proposed Canadian law, its instruction to apply its provisions by analogy where appropriate.[12] This is intended to catch the intent of the UCC and the approach of many courts under it.[13] Wallach is unfortunately not of much direct use on the analogy drawing exercise generally: his only significant discussion of the problem is in relation to the application of Article 2's implied warranties of quality to lease transactions and contracts for goods and services. Lease transactions and the implied warranties of quality are

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[8] See UCC § 2-201, and compare O.L.R.C., Report on Sale of Goods, *op. cit.*, footnote 3, Vol. I, pp. 107-110.

[9] See UCC § 2-207(1) and (2), and the exchange Shanker, "Battle of the Forms": A Comparison and Critique of Canadian, American and Historical Common Law Perspectives (1980), 4 Can. Bus. L.J. 263 and Vaver, "Battle of the Forms": A Comment on Professor Shanker's Views (1980), 4 Can. Bus. L.J. 277.

[10] Compare UCC § 2-610 with Draft Ontario Sales Bill, *supra*, footnote 3, s. 8.10 and Uniform Sales Bill, *supra*, footnote 4, s. 8.8.

[11] Compare UCC § 2-613 with Draft Ontario Sales Bill, *supra*, footnote 3, s. 8.13 and Uniform Sales Bill, *supra*, footnote 4, s. 8.12.

[12] See Draft Ontario Sales Bill, *supra*, footnote 3, s. 2.2(4) and O.L.R.C., Report on Sale of Goods, *op. cit.*, footnote 3, Vol. I, pp. 65-68; and Uniform Sales Bill, *supra*, footnote 4, s. 2.2(4) and Committee on Sale of Goods Report, *supra*, footnote 4, p. 18 (provision in Uniform Bill is optional).

[13] UCC § 1-102(1) and comments which is not precisely equivalent to the Canadian provisions but points in their direction: O.L.R.C., Report on Sale of Goods, *op. cit.*, *ibid.*, Vol. I, p. 67. See also R. Speidel, R. Summers and J. White, Commercial and Consumer Law (3rd ed., 1981), pp. 34-38 ("Lack of proficiency with statutory law generally— . . . of 'common law' fallacies of method").

dealt with explicitly in the text of the proposed Canadian law.[14] The same is partly true of goods and services contracts: the goods component will attract the implied warranties, while the services part will be left to its own law, and possible analogy drawing.[15] American law has no equivalent provisions. Wallach draws our attention to a string of recent American cases which have drawn the relevant analogy; and he highlights the policy arguments some of them have used. This helps to illustrate the policy matching analysis that drawing analogies calls for. Unfortunately, it does not direct us either to cases including other types of transactions or to the literature which has grappled with the task of providing assistance on the analogy drawing issue generally.[16]

This example serves to illustrate both the major strength and the major weakness of Wallach's work for a Canadian user. It is strong on case collection. Here and elsewhere in the book Wallach appears (to some one who is not an American sales lawyer) to do a good job of gathering all the relevant major lines of authority, particularly the more recent authority.[17] Given the volume involved, particularly in the decade best represented in the book, the 1970's, this is very helpful. Of course there is other authority than the "major" authority.[18] But a Canadian lawyer is given a good start on the topics Wallach covers.

The major weakness of Wallach's book is uneven coverage of the secondary literature. As elsewhere in American law, this is immense, of very variable quality, but often enormously stimulating. Sometimes Wallach provides a fairly good cross-section of it.[19] More often, however, he does not provide any, or very many, references.

The strength of Wallach's work as an acquisition for a Canadian commercial lawyer's library is not limited to its account of recent Code case law. The book also appears to do a good job for the topics Wallach covers of describing non-Code sales law. The Code, like the proposed Canadian law, is not exhaustive of sales law.[20] The non-Code law may not be as useful to a Canadian lawyer as the Code law,

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[14] See Draft Ontario Sales Bill, *supra*, footnote 3, s. 5.15(3) and Uniform Sales Bill, *supra*, footnote 4, s. 5.15(2).

[15] See Draft Ontario Sales Bill, *supra*, footnote 3, s. 5.15(2) and Uniform Sales Bill, *supra*, footnote 4, s. 5.15(1).

[16] See pp. 11-23 to 11-32.

[17] See *e.g.*, Note, The Uniform Commercial Code as a Premise for Judicial Reasoning (1965), 65 Colum. L. Rev. 880, and Murray, Under the Spreading Analogy of Article 2 of the Uniform Commercial Code (1971), 39 Fordham L. Rev. 447.

[18] For example, omitted from Wallach's discussion of application of the quality obligations to leases is the interesting case (pertinent, but not a quality obligation one) of *In re Vaillancourt* (1970), 7 U.C.C. Rep. Serv. 748 (Ref. Dec. D. Maine).

[19] See *e.g.*, his treatment of unconscionability, pp. 5-3 to 5-23.

[20] Compare UCC § 1-103 with Draft Ontario Sales Bill, *supra*, footnote 3, s. 3.4(1) and Uniform Sales Bill, *supra*, footnote 4, s. 3.4(1).

but it can be very suggestive. For example, as equitable estoppel doctrines show some signs of evolution towards inclusion of a principle something like section 90 of the American *Restatement of Contracts*,[21] it is helpful indeed to see Wallach deal with the way the idea of that section has been applied to make offers irrevocable in the absence of part performance, both in the recent *Restatement Second* and sales-related case law.[22]

An overall assessment of Wallach's work for a prospective Canadian buyer must, then, take account of what topics he does cover that are of likely use to such a buyer in light of the degree of similarity of the Code provisions to proposed Canadian law, and of the possibilities for convergence of other Canadian and non-Code American law. As well, Wallach's book should be rated against the major alternative treatises.

The most useful sections of Wallach are then those on contract modification; contract interpretation; contract defences, of unconscionability and excuse by supervening events; anticipatory repudiation; seller's rights in the goods; seller's monetary damage claims; and buyer's monetary damages. Of rather less use are the remaining sections. The one on contract formation has matter on offer and acceptance which is valuable; but that on the statute of frauds is likely to be much less so. The section on contract terms is helpful on the exercise of supplying terms by course of dealing and performance and usage of trade, and supplying missing or omitted terms from other sources. But its discussion of the battle of the forms and the parol evidence rule is likely to be much less so. The section on the buyer's rights in regard to the goods has useful matter on the buyer's rights to specific performance and on prepayment, on the seller's right to cure a defective tender, on acquirements for an effective rejection and on reducing buyer's recovery where the goods have been used. Depending on whether the Uniform Sales Bill's perfect tender model for the right to reject is preferred to the substantial breach device of the Ontario Law Reform Commission's Draft Sales Bill,[23] the matter on the Code's perfect tender rule will be helpful, while that on revocation of acceptance will much less so. But in any event the matter on acceptance will likely have to be approached very cautiously indeed.[24] The section on product dissatisfaction claims has some

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[21] See *Amalgamated Investment & Property Co. Ltd (in liq.)* v. *Texas Commerce International Bank*, [1982] 1 Q.B. 84 (Q.B.) and 109 (C.A.).

[22] See pp. 1-07 to 1-12.

[23] See Draft Ontario Sales Bill, *supra*, footnote 3, ss. 8.1 and 8.8, read with s. 1.1(1) 24; compare Uniform Sales Bill, *supra*, footnote 4, s. 8.1.

[24] Compare UCC § 2-606 with Draft Ontario Sales Bill, *supra*, footnote 3, s. 8.6 and Uniform Sales Bill, *supra*, footnote 4, s. 8.2.

valuable matter on contractual causes of action, but rather less valuable matter on privity, where Canadian law may take a different direction.[25] The same section has a most interesting and extensive discussion of strict liability in tort where, however, the differences between Canadian and American law appear likely to remain considerable. The differences stand to be very much reduced if the Ontario Law Reform Commission's Draft Products Liability Bill[26] or something like it becomes law. The last part of the book, on other statutes affecting the sale of goods, pre-eminently the Magnuson-Moss Warranty Act, is rather more likely to remain of interest only to the comparativist and the transnational lawyer. Missing altogether from Wallach is something a person approaching the Code for the first time would find most useful: an introduction to it, its history and policy premises, and a guide to the use of its text and comments, of the sort in Professors White and Summers' *The Uniform Commercial Code*.[27]

Professor Wallach covers his chosen topics in a clear if not lively fashion. Here he falls to be judged against some powerful company, particularly for clarity Professor Nordstrom's *Law of Sales*[28] and for liveliness Professors White and Summers' work.[29] However, Wallach's work is more up-to-date than Nordstrom's, while more comprehensive in its discussion of judicial authority in the sales area than White and Summers. Evidently Professor Wallach's aim is in a relative compact format to bring the reader abreast of judicial exposition of American sales law, and to make some sense of it all. In this, for which he has no competitor,[30] he has succeeded well. And his publisher has produced an attractive, easy to read book commendably short of typographical or other proofreading errors.

Wallach then represents a worthwhile acquisition for any one in Canada interested in current American sales law as an aid to working with future Canadian law. A sales law specialist will find troublesome the main weakness of the book, its shallow coverage of secondary literature. For him, the acquisition of Mr. Duesenberg's and Professor King's two volume text and updating service, *Sales and Bulk transfers*

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[25] Compare UCC § 2-318 with Draft Ontario Sales Bill, *supra*, footnote 3, s. 5.18 (included for discussion only) and Uniform Sales Bill, *supra*, footnote 4, s. 5.18.

[26] Appendix 1 in O.L.R.C., Report on Products Liability (1979).

[27] J. White and R. Summers, Handbook of the Law under the Uniform Commercial Code (2nd ed., 1980), pp. 1-21.

[28] R. Nordstrom, Law of Sales (1970).

[29] *Op. cit.*, footnote 27.

[30] The closest is J. Stockton, Sales in a Nutshell (2nd ed., 1980), which is a much sparer work, for a student rather than a practitioner audience.

under the Uniform Commercial Code,[31] will be justified, if only because such a person will have substantial contact with export and import transactions. What this person will also have in Duesenberg and King, which the person with Wallach will not, is an introduction to the Code, its genesis, purposes and application, as well as another important element in American sales law literature which is largely missing from Wallach. This is the liveliness and imagination exemplified in the work of the inspiration of Article 2, Karl Llewellyn. His most accessible successors are undoubtedly Professors White and Summers: their *Uniform Commercial Code*[32] deserves a place in the library of all Canadian commercial lawyers, whether sales specialists or not.

All of this American literature represents a formidable challenge to the next round of Canadian treatise writing on sales law. An improvement in this country's economic condition will hopefully be added stimulus, in more ways than one, to having that challenge met.

R.L. SIMMONDS*

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Corporate Structure, Finance and Operations. Edited by LAZAR SARNA. Toronto: The Carswell Company Ltd. 1980. Pp. viii, 496. ($67.00)

Mr. Sarna has collected in his book *Corporate Structure, Finance and Operations*, a series of articles discussing current topics of general commercial interest written by both practitioners and legal scholars specializing in corporate law. The essays contained in this publication may be delineated into two broad categories; firstly, the methods and consequences of both minority shareholder squeeze-outs and going-private transactions; and secondly, an assortment of essays of general corporate interest.

Under the first category, Mr. Sarna has inserted the following articles: "Statutory Elimination of Minority Shareholders in Cana-

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[31] R. Duesenberg and L. King, Sales and Bulk Transfers under the Uniform Commercial Code, 2 vols. (1966), being volumes 3 and 3A of Bender's Uniform Commercial Code Service.

[32] *Op. cit.*, footnote 27.

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da'', by Stephen H. Halperin; ''Statutory Protection Against Oppression'', by Carl M. Ravinsky; ''Le droit de dissidence en vertu de l'article 184 de la Loi sur les sociétés commerciales canadiennes: soupape ou pis-aller?'', by Richard Théberge; and ''The 'Going Private' Transaction—Some Income Tax and Corporate Aspects of a Public Company Becoming Private'', by Edwin Grant Kroft.

In the article entitled ''Statutory Elimination of Minority Shareholders in Canada'', Mr. Halperin analyzes the statutory provisions in Canada relating to the compulsory acquisition of shares owned by minority shareholders of corporations incorporated under those statutes providing a procedure for such elimination. Currently, corporations incorporated under the Canada Corporations Act (the ''CCA''),[1] the Canada Business Corporations Act (the ''CBCA''),[2] the British Columbia Company Act,[3] the Saskatchewan Business Corporations Act,[4] the Alberta Companies Act,[5] the Nova Scotia Companies Act[6] and the Loi sur les compagnies[7] of Quebec provide a mechanism for such elimination. Mr. Halperin makes an excellent point by stating that the compulsory acquisition provisions contained in each of the foregoing statutes are procedural and contain subtle differences in their application and therefore any use of a statutory squeeze-out provision will require a detailed analysis to determine the availability of the remedy and the procedure for its application. Mr. Halperin's article deals with three broad categories: firstly, the basis for compulsory acquisition; secondly, the formalities and the procedures; and thirdly, the necessity for strict compliance.

Mr. Halperin discusses such relevant issues as: (a) the period of time for which an offer for the minority shares must remain open; (b) multiple offers; and (c) acquisition in stages.

Mr. Sarna, after including this article immediately jumps the fence with the publication of an article by Carl M. Ravinsky analyzing the statutory protection available to minority shareholders against oppression by the majority. In this article, Mr. Ravinsky expands upon the traditional shareholder remedies of derivative actions and orders for winding-up and analyzes the more modern approach contained in section 234 of the CBCA. The author points out that the traditional derivative action simply remedies a wrong to a corporation and any benefit derived from such action accrues to the corporation

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[1] R.S.C., 1970, c. C-32 as am.

[2] S.C., 1974-75, c. C-33 as am.

[3] R.S.B.C., 1979, c. 59.

[4] R.S.S., 1978, c. B-10.

[5] R.S.N.S., 1967, c. 42.

[6] R.S.A., 1980, c. C-20.

[7] R.S.Q., 1977, c. C-38.

and an order for winding-up is extremely difficult to obtain due to the amount of misconduct required for the granting of the order. In response to the limited applicability of the derivative action and an order for winding-up, section 234 of the CBCA was created to provide a flexible remedy which allows a court to correct any alleged wrong to a particular shareholder while allowing the corporation to continue as an entity.

Mr. Sarna continues his theme of the elimination of minority shareholders from a corporation and their rights of dissent by the inclusion of the article by Richard Théberge devoted to an analysis of the right of dissent contained in section 184 of the CBCA and certain concepts contained in section 184 such as just value, the identity of a holder of a right to dissent, voting rights of a dissenting shareholder and the loss of dissent. Mr. Sarna in his forward to the article, summarizes this article as follows:[8]

> In the author's view, certain ambiguities in the text of Section 184 and the apparent imbalance between the responsibilities imposed on the corporation and those upon the shareholder lead him to question the ultimate object of the legislator in drafting the dissent mechanism as it now appears. In conclusion, the right of dissent promotes the expedient functioning of the corporate system.

Mr. Sarna concludes his first theme with the article by Edwin Grant Kroft who investigates the income tax, corporate and securities considerations involved in the different methods of making a public corporation private.

Mr. Kroft has provided us with a large number of footnotes which contain an impressive list of secondary articles and cases on the topics enumerated above. The footnotes also provide a cross-reference to the various income tax, corporate and securities laws affecting the above-noted topics.

Mr. Sarna, after Mr. Kroft's article, dramatically changes the theme of the material included in his book—which is then devoted to a discussion of matters of general interest to a corporate practitioner.

The first article under this general theme is an article by François Pépin entitled "Le transfert des valeurs mobilières des corporations commerciales". In this article, the author discusses the nature of corporate securities, registers and transfers under Quebec and Federal statute law and any case law appertaining thereto. In particular, emphasis is given to questions of negotiability of stock certificates, assignment of title and the effects of registration. Mr. Pépin discusses the legal relation between the assignor and the assignee of stock certificates, the problems relating to a delay in execution of a transfer as well as the loss of a certificate through theft or the destruction of title documents.

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[8] P. 86.

The next article is by R. L. Simmonds and entitled "Directors' Negligent Misstatement Liability in the New Scheme of Securities Regulation in Ontario". Mr. Simmonds discusses directors' liability with respect to disclosure documents required by the Ontario Securities Act which contain errors or omissions.

This article is very instructive to any practitioner when advising a director of a corporation subject to the continuous disclosure provisions of the Ontario Securities Act. In fact, all practitioners with public corporations as clients should become familiar with this article and make the directors of such corporations fully aware of the consequences of misstatements in continuous disclosure documents.

The next article titled "Directors' Dissent" is written by the Editor. Mr. Sarna states that while legal writing for some time has been devoted to the rights of dissenting shareholders, little concern has been expressed for the rights and duties of the dissenting director. The author has made a valuable contribution to this area of the law. Respecting the theme and direction of his article, Mr. Sarna states:[9]

> Although the minority director may often find himself oppressed, squeezed-out and out-voted in a manner analogous to the position of a shareholder, a close review of the problem of dissent has not been given similar attention. The purpose of the present essay is to analyse the dissent mechanisms available and to discuss problems under the current statutory framework governing the minority director.

This essay should be read in conjunction with the essay by Mr. Simmonds and the contents of each article should be used as a reference for advising directors of a corporation on their rights and obligations.

A lawyer practicing commercial law will use shareholder buy-sell arrangements quite routinely in the organization of a private closely-held corporation. Mr. Sarna has addressed this rather routine type of agreement by the inclusion of two articles discussing various share purchase plans. The first article by Howard J. Kellough entitled "Corporate Share Repurchase Plans: An Alternative to Shareholders Buy-Sell Arrangements" and the second by Harry S. Campbell entitled "Non Tax Aspects of Buy-Sell Agreements" deal with both the corporate and tax considerations relating to shareholder and corporate share purchase agreements. These articles must be reviewed by any practitioner dealing with a share purchase agreement of any type to prevent his client from mistakenly wandering into hidden tax or corporate law problems. The breadth of these two articles is extensive and an analysis of their content will not be considered in this book review.

Mr. Sarna, has also included an article by Michael C. J. Flavell entitled "The Law on Anti-Dumping in Canada". This article is

[9] P. 348.

rather specialized and investigates a rather narrow aspect of Canadian corporate law: the effect of Canadian anti-dumping legislation. The article is instructive to the general corporate practitioner since it will familiarize the practitioner with the general concepts of the anti-dumping law in Canada.

The last article of significance contained in this book is an article entitled "Dissolution Under the Canada Business Corporations Act" by N. William C. Ross. This article outlines the several grounds contained in the CBCA upon which a corporation may be dissolved and the procedure by which such dissolution may occur. In particular, Mr. Ross focuses on the "just and equitable" ground for dissolution of a corporation. This article contains a useful compilation of the cases dealing with the "just and equitable" doctrine for dissolution and will provide the corporate practitioner with a valuable starting point for the dissolution of a CBCA corporation.

After reading Mr. Sarna's book, I was favourably impressed both with the themes and the general quality of the articles contained therein. They will direct any corporate practitioner to consideration of certain problems in the areas discussed and is therefore a welcome addition to his or her library.

SCOTT L. EWART*

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The Law of Canadian Co-operatives. By DANIEL ISH. Toronto: The Carswell Company Ltd. 1981. Pp. xii, 294. ($36.50)

The original substantive content of *The Law of Canadian Co-operatives* would have made a weighty article but does not justify a book of almost three hundred pages. Comparison of the table of contents and of the internal organization of most of the chapters reveals that the book is, as the author states, closely modelled on *Canadian Business Corporations* by Professors Iacobucci, Pilkington and Prichard,[1] and indicates that the aim of the book is to analyse co-operative law, in particular, statute law from the perspective of Canadian corporation law generally with which it is being assimilated. Although virtually a look-alike junior version of *Canadian Business Corporations* there are, of course, differences between the

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[1] (1977)

two books to reflect the different legal responses to the essential distinguishing features of ordinary corporations and co-operative corporations. Thus chapter four deals with co-operative financing which is based on the co-operative principles of limited return on capital and one person, one vote, and the perspective of chapter six on membership emphasizes the necessity for closed membership rules in co-operative corporations. In addition chapter seven deals with the important topic of the taxation of co-operative profits and is an updated version of a paper originally published by the Canadian Tax Foundation.[2]

The text focuses on four co-operative associations acts, the Saskatchewan Co-operative Associations Act[3] which represents a memorandum type corporations approach, the Manitoba Co-operatives Act[4] and the Ontario Co-operative Corporations Act[5] which are clearly modelled on those provinces respective corporations Acts[6] and the Canada Co-operative Associations Act[7] which is, of course, similar to the federal Business Corporations Act.[8] A mere list of the chapter headings reflects the assimilation of this book with the Iacobucci and others book and of the law of co-operatives with corporation law generally: chapter two deals with incorporation, its advantages and so on; chapter three deals with *ultra vires*, constructive notice and the indoor management rule; chapter five with management including the amount of control vested in the board and the duties of directors and officers; chapter six deals with members including their rights and remedies and chapter eight deals with liquidation and dissolution.

Although *The Law of Canadian Co-operatives* is well-written in a simple, disciplined and descriptive prose style and well-organized (if assisted by its exemplar), the question remains of whether its very existence as a book is justified. Surely another paper or article by Professor Ish in addition to the taxation paper would have been enough to set out the distinctive corporate features of co-operative corporations. The corporations law background is competently set out in *Canadian Business Corporations* and footnoted references to it would have sufficed in a paper on co-operative corporations. The substantive content of the book which could have founded an article would have

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[2] The Taxation of Canadian Co-operatives, Can. Tax Paper No. 57 (1975).

[3] R.S.S., 1978, c. C-34.

[4] S.M., 1976, c. 47.

[5] S.O., 1973, c. 101.

[6] Corporations Act, S.M., 1976, c. 40 and Business Corporations Act, R.S.O., 1980, c. 54.

[7] S.C., 1970-71-72, c. 6.

[8] S.C., 1974-75-76, c. 33.

been those portions analysing how co-operative associations law differs from ordinary business associations law and why. Jurisprudential issues related to the changing philosophical underpinnings of the co-operative ideal could also be discussed. Indeed, Professor Ish's book is somewhat weak on this aspect; granted he adverts fairly frequently to the fact that co-ops are today "big business" in contrast to their forerunners, the Rochdale pioneers, yet the analytical relationship of that transformation to modern co-operatives structure is superficially discussed. Indeed, notably absent from the bibliography are references to recent studies of the issue, such as the excellent articles by Professor C. S. Axworthy.[9]

The Law of Canadian Co-operatives is a competent book in every way and would have provided the makings of an excellent article.

M.H. OGILVIE*

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Foreign Money Liabilities, Working Paper No. 33. By LAW REFORM COMMISSION OF BRITISH COLUMBIA. Vancouver: Law Reform Commission of British Columbia. 1982. Pp. 121. (No Price Given)

The Law Reform Commission of British Columbia has recently published a *Working Paper* on *Foreign Money Liabilities*[1] setting out some tentative proposals designed "to achieve through legislation a legal position that in England has been achieved through judicial decision development".[2] The *Working Paper* thus follows the lead of the United Kingdom Law Commission which in a recent *Working Paper*[3] provisionally welcomes the judicial developments in England. The object of this review is to suggest that neither Commission has given full expression to the arguments in favour of the position which still exists in British Columbia and elsewhere and that they have both exaggerated the "injustices" entailed by such a position.

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[9] Consumer Co-operatives and the Rochdale Principles Today (1977), 15 O.H. L.J. 137 and Credit Unions in Canada: The Dilemma of Success (1981), 31 U. of T. L.J. 72.

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[1] (1981).

[2] P. 99.

[3] Private International Law: Foreign Money Liabilities, Working Paper No. 80 (1981).

The central question at issue is whether a person may press a claim in a currency which is different from that of the forum in which the action is being pursued. At present in British Columbia a plaintiff is constrained to express a claim in Canadian dollars, any conversion from a foreign currency being calculated as at the date of the cause of the action. The present position in England, following the landmark case of *Miliangos* v. *George Frank (Textiles) Ltd* in 1975,[4] is quite different and permits the plaintiff to express his claim in the currency which best expresses the loss he has suffered. This has the effect primarily of enabling the plaintiff to recover a sum which, as at the date of judgment, is tailored to the currency in which he operates, the so-called plaintiff's currency rule.[5]

The principal provisional recommendation of the British Columbia Commission is that legislation be enacted which reflects, *inter alia*, the principle that judgment can, where appropriate, be given in a foreign currency provided that such a currency "will most truly express a person's loss or claim and will most fully and exactly compensate him".[6] Such legislation would indeed bring about a position similar to that which prevails in England, although as we demonstrate below, it is possible to cast doubt upon the degree to which this so-called *Miliangos* principle is a superior method of achieving the objective of exact compensation. In the next two sections we look first at the advantages claimed by proponents of the current English position and then at the advantages of the breach-date rule, proclaimed in earlier cases but largely ignored in contemporary debate.

Eclipse of the Breach-date Rule.

The pressure for changes in the law in both England and Canada accumulated in the 1970s as it became evident that the rapid decline in the international value of sterling and dollars following their floating in the early 1970s militated against the interests of creditors whose own currency was not sterling or dollars. Table 1 gives some indication of the increased volatility of exchange rates in that decade following the decisions to discontinue the convertibility of the United States dollar into gold and to float a number of major currencies.

Some idea of the consequences of this increased volatility may be glimpsed from the main facts of the *Miliangos* case in which the first of the revolutionary changes in English law in this area was brought

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[4] [1976] A.C. 443.

[5] Note, however, that the courts in England have left it open for plaintiffs to argue that the currency of expenditure, the currency of the contract, or indeed, the currency of the forum more accurately reflects their loss.

[6] P. 98.

Table 1.

Exchange rate movements in some of the major currencies, 1961-1980.

	Exchange Rates			
Year	£/C$	US$/C$	SF/C$	DM/C$
1961	.341	.958	4.133	3.827
1962	.331	.928	4.006	3.709
1963	.331	.926	2.994	2.680
1964	.334	.932	4.021	3.706
1965	.332	.930	4.018	3.727
1966	.331	.923	3.996	3.673
1967	.384	.925	3.996	3.695
1968	.391	.932	4.022	3.729
1969	.388	.932	4.022	3.437
1970	.413	.989	4.267	3.606
1971	.360	.919	3.597	3.003
1972	.394	.925	3.492	2.962
1973	.358	.833	2.698	2.248
1974	.351	.824	2.094	1.986
1975	.425	.841	2.200	2.202
1976	.501	.853	2.091	2.015
1977	.395	.752	1.506	1.585
1978	.318	.647	1.048	1.183
1979	.292	.650	1.026	1.124
1980	.275	.656	1.155	1.285

Note: Exchange rates are expressed in terms of the Canadian dollar.
Source: International Financial Statistics, IMF.

about. The English buyer, Frank, had taken delivery of polyester yarn from Miliangos, a Swiss supplier, but had failed to pay the agreed price of SF415,000 approximately. Under the old sterling breach-date rule, the debt would have been regarded as £42,000, the sterling equivalent of the contract price as at the time when payment fell due. By the time that the court came to give its judgment, the sterling equivalent of the debt had risen to about £60,000 as a consequence of the weakening of sterling against the Swiss franc on the foreign exchanges. The implication quite clearly was that only an award expressed in Swiss francs would protect the Swiss plaintiff from the currency depreciation that occurred between the date of breach and the date of judgment.

Many commentators indeed seem to have regarded such changes in the value of a claim resulting from a movement of exchange rates as being *self-evidently* unjust. The Law Reform Commisison of British Columbia for example relies upon a simple assertion: "By 1976 most currencies were 'floating' and relative values often change from day to day and the number of cases in which injustice can arise are greatly increased".[7] It is but a short step from such a position to argue that the

[7] P. 133.

injustice suffered by plaintiffs under the breach-date rule can be eliminated by its replacement with a judgment-date or payment-date rule under which the plaintiff can recover the sum of his own currency for which he had originally bargained.

The Breach-date Rule Reconsidered.

Having suggested that the breach-date rule on the face of it is inappropriate in an era of highly volatile exchange rates, it is worthwhile asking whether this traditional rule is really as outmoded as it seems. In what follows we suggest that there are (at least) three important reasons why the case against the traditional rule may be a lot weaker than generally seems to be supposed.

a) *The Role of Interest Rates.*

The demonstration of the possibly spectacular losses that plaintiffs may suffer through a reduction in the international value of sterling between the occasion of the cause of action and the date of judgment ignores the impact of interest rates. Although both Law Commissions discuss the choice of interest rate, they do not illustrate the way in which this choice may be relevant to the degree of justice entailed by the competing rules.

When the *Miliangos* case was remitted to the trial judge[8] for determination of interest, it was decided that it would be appropriate to calculate interest at rates prevailing in Switzerland since the award of principal was expressed in Swiss francs. The judge applied the general principle that "if you opt for a judgment in foreign currency, for better or for worse you commit yourself to whatever rate of interest obtains in the context of that currency".[9] The United Kingdom Law Commission supports this general principle and indeed in doing so accepts as "persuasive"[10] some of the arguments used elsewhere by the current authors.[11] The British Columbia Commission however devotes considerably less discussion to the question and confines itself to recommending that the courts exercise their discretion in the matter.

It can be seen that the strength of the principle lies in its congruence with the effort to restore the plaintiff to the position that he would have occupied had a cause for action not arisen. The plaintiff, had he not been kept out of his money, would have received a sum of Swiss

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[8] *Miliangos* v. *George Frank (Textiles) Ltd (No. 2)*, [1977] Q.B. 489.

[9] *Ibid.*, at p. 495.

[10] *Op. cit.*, footnote 2, at p. 133.

[11] See for example Bowles and Whelan, The Currency of Suit in Actions for Damages (1979-80), 25 McGill L.J. 236 and Bowles and Whelan, Judgments in Foreign Currencies: Extension of the Miliangos Rule (1979), 42 Mod. L. Rev. 452.

francs. He would have faced the choice of either investing the sum at home at Swiss rates or of converting it into a foreign currency and investing abroad at foreign rates. Having decided to make an award in Swiss francs, the court has to presume that the first option would be followed. Whilst we welcome the United Kingdom Law Commission's endorsement of the principle of using interest rates that pertain on the currency in which judgment is given, there are some important corollaries of the central argument that have gone unremarked.

The first point to be made is that whilst the principle set out in *Miliangos (No. 2)* comes closer to restoring to the plaintiff the amount for which he had bargained, it is not completely successful. The English statute giving the judiciary discretion to make awards of interest on damages explicity prevents the use of compound interest rates. As we have argued elsewhere,[12] confining awards of interest to amounts based on simple rates makes it impossible for the courts to compensate plaintiffs fully for being kept out of their money. The opportunities foregone by a plaintiff deprived of his money are captured properly by, at least notionally, allowing him to reinvest any interest earned in the interim.

The other major corollary, and the one of greatest significance here, of the use of (simple) interest rates relevant to the currency in which judgment is given derives from the existence of a relationship between exchange rate movements and relative interest rates. The operation of international financial markets ensures that countries with weakening currencies will generally offer higher rates of interest. The reason is straightforward: the holders of internationally-mobile funds will take account both of expected exchange rate movements and of the interest rates on offer when they scan world markets for the most attractive location for their funds. Central banks in most countries will be concerned to try and maintain their capacity to attract such funds via manipulation of the interest rates they offer with the consequence that the pressures of demand and supply will tend to make interest rate differentials between countries reflect market views about likely exchange rate changes in the future. Investors will channel funds to London if English interest rates more than compensate for the probable devaluation of sterling. In any other event they will divert their funds away from London to some other country where the prospective rate of return is more attractive.

The inverse relationship between exchange rate movements and interest rate differentials can readily be demonstrated by reference to empirical data. Table 2 indicates the existence of large differences

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[12] Bowles and Whelan, Judgment Awards and Simple Interest Rates (1981), 1 Int. Rev. of L. and Eco. 111.

Table 2.

Interest Rates in Canada, England, Germany, Switzerland and USA, 1961-80.

Interest Rates

	Canada	U.K.	U.S.A.	Switz.	Germany
1961	3.24	6.0	3.0	2.0	3.0
1962	4.00	4.5	3.0	2.0	3.0
1963	4.00	4.0	3.5	2.0	3.0
1964	4.25	7.0	4.0	2.5	3.0
1965	4.75	6.0	4.5	2.5	4.0
1966	5.25	7.0	4.5	3.5	5.0
1967	6.00	8.0	4.5	3.0	3.0
1968	6.50	7.0	5.5	3.0	3.0
1969	8.00	8.0	6.0	3.75	6.0
1970	6.00	7.0	5.5	3.75	6.0
1971	4.75	5.0	4.5	3.75	4.0
1972	4.75	9.0	4 5	3.75	4.5
1973	7.25	13.0	7.5	4.5	7.0
1974	8.75	11.5	7.75	5.5	6.0
1975	9.00	11.25	6.0	3.0	3.5
1976	8.50	14.25	5.25	2.0	3.5
1977	7.50	7.0	6.0	1.5	3.0
1978	10.75	12.50	9.5	1.0	3.0
1979	14.00	17.0	12.0	2.0	6.0
1980	17.26	14.0	13.0	3.0	7.5

Notes: (1) Market exchange rates as at the end of each year.
(2) Discount rate (or bank rate) as at the end of year.
Source: International Financial Statistics, IMF.

between the interest rates offered on strong and weak currencies. By comparing these figures with those in Table 1 it is possible to see that strong currencies such as the Swiss franc and the German mark offer more modest interest rates than weaker currencies such as sterling and Canadian dollars.

We have used this economic argument in the past to demonstrate that in the *Helmsing Schiffahrts* case[13] the English courts applied a procedure for calculating an award that is conceptually unsatisfactory. By awarding German interest rates on a principal sum expressed in Maltese pounds the court failed to treat the plaintiffs consistently. In the present context, this economic argument can be applied in a rather different way.

Returning to the *Miliangos* case, it can be seen that the decision to apply Swiss rather than English interest rates resulted in an award of interest that was much lower than it would have been under the sterling breach-date rule. This lower award of interest at least partially offsets

[13] *Helmsing Schiffahrts G.m.b.H. & Co. K.G.* v. *Malta Drydocks Corporation*, [1977] 2 Lloyd's Rep. 444. This case was not discussed by the Law Reform Commission even though it is in direct conflict with *Miliangos (No. 2)*, *supra*, footnote 8.

the higher principal sum awarded under the plaintiff's currency rule. Had the sterling breach-date rule been applied, Miliangos would have been awarded principal of £42,000 plus approximately £16,000 interest where interest is calculated at English rates. In the event Miliangos was awarded a sum in Swiss francs which corresponded to approximately £60,000 as principial sum plus £8,500 in interest. Comparison of the total award in each case and not the sum of principal is the appropriate standard by which to establish any injustice.

Whilst it must be conceded that, at least as far as the *Miliangos* case is concerned, the plaintiff's currency rule is the one which comes closest to putting the plaintiff in the position that he would have occupied had the breach of contract not occurred, it is nevertheless clear that some account must be taken of differences in interest payments. This argument is of greatest significance on those occasions where, although a currency is declining in value the interest rates offered in it exceed those elsewhere by more than the amount required to offset the currency movement. Taking a simple example, if sterling slips, during the course of a year, from Swiss francs 4 to Swiss francs 3.50 whilst Swiss interest rates are two percent per annum then, provided that English interest rates stand at fifteen percent or higher, an award to a Swiss plaintiff under the sterling rule will be greater than one under the plaintiff's currency rule. There is therefore no reason at all to suppose that a declining currency is sufficient grounds for preferring a breach-date rule. The *Miliangos* rule was evolved at a time when markets were underestimating the rate of depreciation of sterling. At other times the reverse may be true with the result that domestic defendants will gain rather than lose if a plaintiff's currency rule is applied.

As far as contemporary debate is concerned, it is instructive to observe that the Law Reform Commission of British Columbia devotes a chapter in their *Working Paper* to "Dealing with the hard cases". These "hard cases" are those in which "the 'plaintiff's currency' declines in value relative to the currency of the forum after the date the plaintiff's claim arose".[14] On our analysis such a definition excludes those cases in which interest differentials more than compensate for any appreciation in the plaintiff's currency. Such cases will be "hard" because the plaintiff will contemplate a total award (principal plus interest) which is higher under the breach date rule than under the plaintiff's currency rule. Equally, there will be some cases treated as "hard" which are actually more straightforward. If the plaintiff's currency is depreciating but offers interest rates that are sufficiently high as to offset the depreciation, then the plain-

[14] P. 62.

tiff will still do better under the plaintiff's currency rule and no conflict emerges.

b) *Uncertainty*.

A concern which follows rather naturally from the observation that plaintiffs will sometimes do better under a plaintiff's currency rule and sometimes worse is that they will have incentives to frame their actions in such a way as to take advantage of the opportunity to select the currency in which to press a claim. The principal difficulty, alluded to in the previous section and continuing to trouble commentators on the English position after *Miliangos*, is whether the plaintiff is obliged to make a claim in his own currency or whether he has an option to choose between his own currency and sterling.

In favour of the view that the plaintiff is required to make a claim in his own currency are the words of Lord Wilberforce in *Miliangos*. His argument that "a Swiss franc for good or ill should remain a Swiss franc"[15] has considerable appeal: it results in a clear rule under which exchange gains or losses are assigned unambiguously to the defendant.

The prospect of allowing the defendant to enjoy any gain resulting from exchange rate changes was viewed unhappily by Lord Simon in his dissenting speech in *Miliangos*. Professor Waddams indeed takes the view that the plaintiff should be given a choice. In his text on *The Law of Contracts* he argues that ". . . in the final analysis it seems preferable to favour the innocent creditor rather than the debtor who is, by hypothesis, in breach of contract".[16] As support for this interpretation Professor Waddams has, in a commentary on the British Columbia *Working Paper*,[17] quoted the remarks of Donaldson J. in the *Ozalid Group (Export) Ltd* v. *African Continental Bank Ltd*.[18] In the latter Donaldson J. finds himself unable to trace any intention in the speeches in *Miliangos* to make it obligatory to make a claim in a foreign currency.

Whilst it is difficult to be sure exactly what the current state of the argument in England is, there can be no doubt of the anxiety of the courts to retain some degree of flexibility in the matter. In his speech in *The Despina R*[19] in 1978, Lord Wilberforce remarked: "I wish to make it clear that I would not approve of a hard and fast rule that in all cases where a plaintiff suffers a loss or damage in a foreign currency

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[15] *Supra*, footnote 4, at p. 446.

[16] (1977), p. 440.

[17] S.M. Waddams, Foreign Money Liabilities: Law Reform Commission of British Columbia, Working Paper No. 33 (1982), 6 Can. Bus. L.J. 352.

[18] [1979] 2 Lloyd's Rep. 231.

[19] [1979] A.C. 685.

the right currency to take for the purpose of his claim is 'the plaintiff's currency'."[20] The motivation for these remarks was the desire to leave open the possibility for a plaintiff who experienced or felt a loss in a currency other than his own of recovery in the appropriate currency.

This concern to preserve flexibility must inevitably conflict, at least in some measure, with the pursuit of certainty. The reluctance of the court to institute a hard and fast rule makes it more difficult for both potential plaintiffs and defendants to formulate reliable predictions about the outcome of a court hearing. Such uncertainty is likely to generate additional litigation and to bias downwards the level of out-of-court settlements in the great bulk of cases which never get as far as a court hearing. The English courts have been conscious of the importance of certainty, and there is weighty authority for the principle that "certainty is of primary importance in all commercial transactions".[21] In his dissenting speech in *Miliangos*, Lord Simon had commented on one of the aspects of this uncertainty:[22]

> . . . the foreign creditor will have the benefit of movement of the exchange rates either way: if sterling is appreciating he will sue in sterling; if it is depreciating, he will sue for the foreign money. This strikes me as highly unjust to the English debtor as well as importing an undesirable element of monetary speculation into English litigation.

The pattern of interest rates may on occasion invalidate the first of the assertions on which Lord Simon's argument is based, but the main point stands. The Law Reform Commission of British Columbia takes the view,[23] along with many commentators, that this matter is best left for the courts to deal with as and when it arises. Such a position seems likely, if anything, to reinforce the uncertainty in this area.[24]

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[20] *Ibid.*, at p. 689.

[21] *Mardorf Peach & Co. Ltd* v. *Attica Sea Carriers Corporation of Liberia (the Laconia)*, [1977] A.C. 850, at p. 878, per Lord Salmon.

[22] *Supra*, footnote 4, at p. 482.

[23] P. 97.

[24] The Law Reform Commission did consider a wide judicial discretion regarding the issue of currency conversion to be of "doubtful value" as it introduced an undesirable measure of uncertainty in a commercial context where a high premium is placed on certainty and fixed principles (p. 68). This emphasis was not extended to the questions of interest and of the adoption of the jurisprudence developed in England where the Commission believed Canadian courts and counsel would be "sufficiently alive" (p. 97). A review of the English cases casts doubt on the latter proposition both in relation to interest (see cases, *supra*, footnotes 8 and 13) and in relation to the general jurisprudence developed since *Miliangos* (see case, *supra*, footnote 18); see generally, Bowles and Whelan, Judicial Responses to Exchange Rate Instability, in Burrows and Veljanovski, eds, The Economic Approach to Law (1981).

c) *On the Measurement of Loss.*

A third problem which may give rise to doubts about the wisdom of the adoption of a judgment-date or payment-date rule in preference to a breach-date rule arises from a closer examination of the notion of loss. Almost all of the recent discussion in this area takes as axiomatic the price stipulated in a contract. It is possible however to suggest that the price and the terms of a contract are negotiated by parties in the light of their knowledge about the prevailing legal rules. It does not matter that some of this "knowledge" may be inexact or simply wrong: what is important is that the contract is not agreed *in vacuo*. The consequences of making such an assumption is that any losses will be measured by reference to a price which itself reflects, albeit imperfectly, the view the parties take about various contingencies.

A simple example in a purely domestic context will illustrate the basic contention. P contemplates selling goods to D, but has lingering doubts about D's creditworthiness. Whether P agrees to sell to D at all, and whether he will charge a risk premium in any price at which he agrees to trade with D are both decisions that will reflect P's views of the legal rules. If D fails to pay, and P knows that in such an event the court will make an order against D based on the full contract price, then P will presumably be happy to proceed on terms that are similar to those on which he would trade with other, more reliable, customers. Should P be less confident of the prospect of full recovery in the event of breach, then he will probably adjust his price accordingly.

If traders are argued to have charged what amounts to an insurance premium in the contract price to cover themselves against any shortfall they can expect to recover by going to law in the event of breach, then arguments about the "injustice" of a rule may be misleading. Indeed it is perfectly plausible to claim that one of the principal reasons for insisting upon certainty in commercial law is precisely that it enables parties to maintain a clear view of the consequences of contractual failure and thus allows them to make arrangements in advance to guard against relevant risks.

The strength of this argument may be established by asking the deceptively simple question: "at what price would Miliangos have agreed to sell polyester yarn to a German seller at the time when he agreed to sell to the English buyer Frank?" If we assume that the contract was to be governed by English law, and that Miliangos would have been aware that German currency was at that time much more stable in value than sterling, then it would surely be reasonable to infer that Miliangos would have offered to trade at a lower Swiss franc price. This would be sufficient to suggest that measures of the loss suffered by Miliangos based upon the Swiss franc price charged to an English buyer will significantly overstate the degree of injustice.

Lest it be thought that this argument contains a sleight of hand, it is well to recall the words of Lord Denning in the *United Railways* case[25] in 1961 in which the House of Lords had previously reaffirmed the traditional sterling breach-date rule:[26]

> There are always risks incident to foreign investment. One of the risks is that the lender may have to go to another country to recover his money; and when he does so he must recover in the currency of that country, and not in that of his own. It is for risks such as these that he stipulates for a high rate of interest; and his disappointment at the rate of exchange will, I hope, be mitigated by the substantial interest which he will receive.

This argument, which fits the Miliangos position very closely, is notably and inexplicably absent from both the judgment in *Miliangos* and subsequent commentaries on it. Replacing the terms "investment" with "trade", "lender" with "seller" and "interest" with "price" one has a very clear expression of the implicit risk premium argument. The only remaining adjustment required to complete the analogue is to translate the risk of having to pursue the claim in a foreign country into the risk of pursuing a claim in England knowing that the exchange rate to be applied will be the one ruling at the date of breach rather than that at the date of judgment or payment. Such risks have their price just as do the additional inconveniences of pursuing a case in a foreign court.

Expressing the point in a slightly different way, we are suggesting that sellers will have an idea of the *receipts* that they will on average require. The *price* which they stipulate in the contract will be chosen in such a way that given the legal rules in force and given the unreliability of some traders, the required receipts will be generated on an average transaction. It may, at least, initially, be argued that the substantive content of the rules is of no relevance, provided that it is reasonably well understood by traders. Contract price and the terms of the contract will be set in such a way as to accommodate the legal rules. There may of course be grounds for arguing that although traders can in principle come to terms with any set of rules there may be good reasons for preferring some sets of rules to others. Traders for example are likely to prefer rules under which their receipts are relatively similar whether the contract fails or succeeds. The attractions of rules which offer the prospect of *restitutio in integrum* to injured parties include the reduced uncertainty of income flows and the absence of any significant incentive for breach. Such attractions should be taken seriously by those responsible for law reform since traders will incur greater costs in making transactions if they feel constrained to insist upon high prices or the incorporation of special

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[25] *In re United Railways of Havana and Regla Warehouses Ltd*, [1961] A.C. 1007.

[26] *Ibid.*, at p. 1071.

clauses designed to assign risks in ways that differ from the assignment that would be imputed by the courts.

The failure of discussion of foreign money obligations to take any account of the possibility that contract price will reflect the degree to which losses can be recovered under the law is significant. It ignores one of the important grounds upon which breach-date rules rest and contributes to the overstatement of the superiority of the rules which have been evolved in England following the decision in *Miliangos*.

It has been the object of this review to explore, albeit briefly, some of the reasons for supposing that the widespread enthusiasm for the move away from breach-date rules in the context of foreign money liabilities may be at least partly misplaced. The role of interest rates has been largely ignored, with the result that measures of losses under the breach-date rule have been magnified. The difficulties precipitated by moving away from a simple and certain breach-date rule have been played down by emphasizing the importance of flexibility and the search for justice in the individual case. Finally, the degree of "injustice" represented by a breach-date rule is exaggerated if no account is taken of the implicit risk premium that will be charged to parties who trade in weak currencies.

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Le démariage en droit comparé. Étude comparative des causes d'inexistence de nullité du mariage, de divorce et de séparation de corps dans les systèmes européens. Par JACQUELINE POUSSON-PETIT. Préfaces de F. RIGAUX et R. NAISIN. Bruxelles: Éditions Larcier. 1981. Pp. 680. (3.556 F.B.)

L'auteur, Madame Pousson-Petit nous livre ici une thèse soutenue à Lyon en 1979, thèse fort érudite et extrêmement bien documentée de droit comparé européen. Le titre peut étonner à première vue par l'emploi de mot "démariage" emprunté, signale l'auteur, au doyen Carbonnier. Deux grandes parties composent l'ouvrage. Dans la première, l'auteur étudie les concepts d'inexistence, de nullité de ma-

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riage, de séparation de corps et de divorce et porte sur chacun d'eux un jugement critique important. Elle montre aussi comment la législation, la jurisprudence et la doctrine des différents pays européens comprennent ces notions et explique l'interdépendance juridique existant entre celles-ci. La seconde partie est plus philosophique. L'auteur constate tout d'abord que les causes de démariage sont soit subjectives (par exemple les vices de consentement, l'incapacité), soit objectives (l'empêchement au mariage, l'absence de consentement). Ces composantes se rattachent à trois idées communes: les facteurs d'insertion sociale (nationalité, qualité de divorcé, qualité de religieux et d'enfant naturel); les facteurs relatifs au comportement (comportements déshonorants, condamnation judiciaire, comportements sexuels) et enfin les facteurs imputables aux troubles, maladies et infirmités de la personne (eugénisme, troubles sexuels, maladie et arriération mentales, toxicomanie et éthylisme, épilepsie, lèpre et tuberculose). L'examen et l'étude comparative de ces trois facteurs forment autant de chapitres de cette seconde partie, venant après un chapitre préliminaire dans lequel l'auteur s'applique à mieux définir son cadre d'analyse sur les notions de caractère objectif et subjectif des causes de démariage.

Il est intéressant aussi de constater la référence constante que fait l'auteur au droit canonique qui est la souche commune de la plupart sinon la totalité des systèmes juridiques examinés et la façon dont ceux-ci se sont peu à peu séparés de ce tronc commun qui les unissait tous à l'origine. Le lecteur trouvera aussi intéressante l'introduction générale de l'ouvrage, dans laquelle l'auteur exprime l'opinion qu'en fin de compte, la famille se porte bien, même si sa structure, son image et sa forme changent et la rectification qu'elle fait de certains clichés, notamment sur le rôle des femmes. Cette analyse est d'ailleurs à rapprocher d'une intéressante étude de Marie-Thérèse Meulders-Klein récemment parue en Belgique au *Journal des Tribunaux*[1] sur la famille au sortir du XXe siècle. On peut peut-être reprocher à l'auteur à ce sujet certaines affirmations faites un peu à l'emporte pièce comme par exemple celle à l'effet que "l'influence anglo-saxonne a atrophié et émoussé les capacités émotives et expressives de l'homme",[2] mais dans l'ensemble l'ouvrage reste sérieusement documenté, l'analyse intéressante, le style vif et incisif. Le seul autre reproche que peut encourir l'ouvrage, et qui est bien peu de choses au fond, est la longueur et un certain hermétisme des titres notamment de ceux donnés aux deux parties de l'oeuvre.

Le lecteur trouvera ce livre de lecture facile. Le comparatiste y découvrira avec joie une mine quasi inépuisable de renseignements et

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[1] (1982), pp. 1370 et s.

[2] P. 38.

une bonne bibliographie sur les différents droits,[3] le spécialiste en droit de la famille une analyse juridique intéressante et lucide. L'auteur doit être félicitée pour cette véritable somme comparatiste.

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[3] Pp. 575 à 632.

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