Report of the Federal/Provincial Task Force on the Uniform Rules of Evidence. Prepared for the UNIFORM LAW CONFERENCE OF CANADA. Toronto: Carswell Co. Ltd. 1982. Pp. xxxiv, 615. (No Price Given)

In 1898, Professor Thayer wrote:

> A system of evidence, like ours, thus worked out at the forge of daily experience in the trial of causes, not created or greatly changed, until lately, by legislation, not the fruit of any man's systematic reflection or forecast, is sure to exhibit at every step the marks of its origin.[1]

Any attempt to rationalize and codify an area of the law which has developed as Thayer described, will be accompanied by more than the usual difficulties facing law reformers. The *Report* of the Federal-Provincial Task Force on the Uniform Rules of Evidence, with its appended Uniform Evidence Act, is an important, if not altogether successful effort to do precisely those things.

In August of 1977, the Uniform Law Conference passed a resolution favouring the appointment of a Task Force to deal with uniform evidence legislation. With participants from Canada, British Columbia, Alberta, Ontario, Quebec and Nova Scotia, the Task Force formulated its terms of reference as follows:

> To attempt to bring about uniformity among the provincial and federal rules of evidence, by,
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> (1) stating the present law, and
>
> (2) surveying the Report on Evidence of the Law Reform Commission of Canada, the Report on the Law of Evidence of the Ontario Law Reform Commission, the reports of the other provincial law reform commissions on various subjects in the law of evidence, the major codifications of the law of evidence in the United States and the major reports on the law of evidence from England and the other Commonwealth countries, for the purpose of,
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> (a) setting out the alternative solutions for the various problems in the law of evidence, and
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> (b) recommending the preferred solutions amongst those alternatives.[2]

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[1] James Bradley Thayer, A Preliminary Treatise on Evidence at the Common Law (1898), p. 3.

[2] P. 1.

The *Report* of the Task Force occupies 500 pages to which are appended the decisions of the Uniform Law Conference with respect to the Task Force's recommendations, remnants requiring further attention by the Task Force, the proceedings of the special plenary session of the Uniform Law Conference of Canada at which the Uniform Evidence Act was approved and, finally, the provisions of the Uniform Evidence Act itself.

In some respects, another draft codification of the law of evidence ought to be greeted with little enthusiasm. The major codifications prepared in the United States together with the proposals of the Law Reform Commission of Canada in 1975 might be considered to have provided sufficient choice to render further attempts superfluous.[3] However, this *Report* and the proposed legislation are as much concerned with consensus as with reform. The project is entirely justified by the failure of the Canada Law Reform Commission proposals to find acceptance and by the marked differences between them and those put forward by the Law Reform Commission of Ontario.[4] To this justification, may be added the desirability of a current and concise statement of the present law of evidence in Canada, another of the *Report's* objectives.

As among "catalogue", "creed" or "code", the Task Force has chosen something between the code and the creed.[5] The Uniform Evidence Act is intended "to be a comprehensive legislative statement regarding rules of evidence" but not a "codification".[6] Common law rules will continue to operate, except insofar as they are inconsistent with the Act.

The terms of reference themselves exposed the Task Force to a danger. They required the Task Force to survey the numerous existing proposals for reform and select the preferred solution from among them.[7] In doing so, proposals which had been offered as part of a coherent whole and proceeding from a variety of conceptual and analytical bases would be chosen and combined in a way likely to create a reformed law of evidence betraying its origin as surely as the unreformed law of evidence described by Thayer.[8]

This danger has not been avoided entirely. One way of exposing this is to compare the areas in which the Task Force has recommended legislative intervention with the areas to be left to common law development.

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[3] Law Reform Commission of Canada, Report on Evidence (1975).

[4] Ontario Law Reform Commission, Report on the Law of Evidence (1976).

[5] Edmund M. Morgan, Introduction in Model Code of Evidence (American Law Institute, 1942), p. 13.

[6] P. 16.

[7] P. 1.

[8] Thayer, *op. cit.*, footnote 1.

No legislation is recommended with respect to similar fact evidence generally,[9] hearsay upon hearsay,[10] the purpose for which foundation facts may be admitted through those giving expert opinion evidence,[11] the admissibility of offers of compromise and existence of liability insurance,[12] or professional privileges generally.[13] Legislative intervention is recommended with respect to judicial notice,[14] non-expert opinion evidence,[15] confirmation of confessions by subsequently discovered evidence,[16] the manner of questioning witnesses,[17] and the hearsay rule.[18] Some of these choices are difficult to reconcile. For example, with respect to the admissibility of evidence about subsequent remedial measures, the Task Force recommends that the common law position be maintained, saying legislation is unnecessary as it would appear to be preferable to let the law develop on a case by case basis.[19] As for non-expert opinion evidence, legislation is recommended, even though it will not alter the Canadian practice.[20] Here, and in several other places, there appears to be no consistent basis for the decision to legislate or not.

It is possible in the scope of a review to summarize a few of the main provisions of the draft Act. As would be expected, the hearsay rule receives detailed attention. Hearsay evidence will continue to be inadmissible, subject to the provisions of the Act.[21] The hearsay rule will apply to "statements" which means oral or recorded assertions "and includes conduct that could reasonably be taken to be intended as an assertion".[22] Note that the definition does not *exclude* conduct *not* intended to be assertive. It would seem, then, that the Uniform Act will not deprive future generations of evidence students of the pleasures of debating whether or not the inspection of the ship and subsequent departure on it by Baron Parke's celebrated sea captain is admissible as evidence of seaworthiness.[23] In civil

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[9] Pp. 86-89.

[10] *Ibid.*, p. 142.

[11] P. 145.

[12] P. 169.

[13] Pp. 421-22.

[14] P. 42.

[15] P. 117.

[16] P. 195.

[17] P. 264.

[18] P. 146.

[19] P. 169.

[20] P. 117.

[21] Uniform Evidence Act, Report, s. 46, p. 556 (hereinafter referred to as "the Act").

[22] Act, *ibid.*, s. 1, p. 544.

[23] The example is taken from the opinion of Parke B. in *Wright* v. *Doe dem Thatham* (1837), 7 Ad. & El. 313, 112 E.R. 488 (Ex. Ch.).

cases, hearsay evidence will be admissible whenever the declarant is unavailable.[24] "Unavailable" is quite widely defined to include, for example, the situation in which the declarant cannot be identified.[25] If facts similar to *Teper* v. *The Queen*[26] were to occur in a civil case, the exclamation of the unidentified declarant identifying the accused would be admissible.

In criminal cases, the declarant will be considered unavailable only if deceased or unfit to testify by reason of physical or mental condition.[27] Most of the common law exceptions are preserved in statutory form. The provision with respect to statements against the declarant's pecuniary, proprietary or penal interest is unfortunate in that it would admit such statements,[28] contrary to what was decided by the Supreme Court of Canada in *R.* v. *Lucier*,[29] even when they have the effect of implicating the accused in a crime.

The Act contains no provisions relating to character evidence in civil cases. As for criminal cases, character evidence receives detailed treatment in some thirteen sections.[30] Any attempt to clarify the existing rules about character evidence in criminal cases is to be welcomed, but this set of provisions contains serious flaws. There are few gains in terms of clarity and several losses from the point of view of the protection of the accused. Section 23 proscribes evidence of the general character of an accused. Section 25 prohibits the prosecution from producing evidence of a trait of an accused's character for the sole purpose of proving that the accused acted in conformity with that trait unless the accused has opened the door by leading evidence concerning a trait of his character or of his general reputation in the community. It would appear, then, that the sort of evidence led by the accused in *R.* v. *McMillan*[31] would now be admissible as part of Crown's case in chief. The accused is to be more restricted in presenting evidence concerning the character of the complainant. He will be able to do so only where the trait was known to him at the time of the offence or when admissible as similar fact evidence.[32] Under the common law, evidence of the victim's propensity for violence has been admitted as being relevant to a defence of self defence even where that trait of the

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[24] Act, s. 53, p. 557.

[25] *Ibid.*, s. 52(1)(b), p. 557.

[26] [1952] A.C. 480 (J.C.P.C.).

[27] Act, ss 52-53, p. 557.

[28] *Ibid.*, s. 58, p. 559.

[29] (1982), 40 N.R. 153 (S.C.C.).

[30] Act, ss 23-36, pp. 550-553.

[31] (1975), 7 O.R. (2d) 750, 23 C.C.C. (2d) 160 (Ont. C.A.). For the argument that it is not admissible at present see Kenneth L. Chasse, Exclusion of Certain Circumstantial Evidence: Character and Other Exclusionary Rules (1978), 16 Osgoode Hall L.J. 445.

[32] Act, s. 31, p. 551.

victim was not known to the accused at the time of the offence,[33] and, there would appear to be no justification for the limitation imposed by the draft statute. Furthermore, it will be difficult, if not impossible, for the accused to satisfy the court that he knew of a certain character trait of the complainant without giving evidence so that, as a practical matter, evidence under section 28 will not be available unless the accused gives evidence. Furthermore, any evidence offered on behalf of the accused supporting a defence of self defence will permit the prosecution to adduce evidence of character traits of the victim in rebuttal.[34]

The provisions also contain an attempt to reform the law concerning evidence of the sexual conduct of the complainant.[35] While it might be thought that such provisions ought to be confined to sexual offences, the Act is not limited in this way. Section 31 provides that in a criminal proceeding, evidence relating to the sexual conduct of the complainant with a person other than the accused shall not be adduced by or on behalf of the accused. In the first place, these provisions, insofar as they relate to sexual offences, are not compatible with provisions with the same object which are part of the amendments of the Criminal Code relating to sexual offences recently passed by Parliament.[36] In the second place, it is conceivable that the sexual conduct of the complainant in a non-sexual offence might be relevant to the defence of the accused and ought to be admitted. For example, in a prosecution for murder, the accused might testify by way of defence that he reacted violently to a homosexual advance. Evidence of the sexual conduct of the complainant (victim) with a person other than the accused would be clearly relevant and, it is submitted, ought to be admissible but would not be under section 31.

With respect to opinion evidence, the Act follows the Task Force's recommendation that there be legislation with respect to non-expert opinion evidence as well as expert opinion evidence. One may be inclined to agree with the dissenting members of the Task Force that legislation with respect to non-expert opinion evidence is absolutely unnecessary. The majority of the Task Force justifies the conclusion that legislation is necessary on the basis that the judicial statements of the opinion rule vary.[37] The majority favour the formulation proposed by the Law Reform Commission of Canada which provided that a non-expert witness may give opinion evidence provided that the evidence is based on facts perceived by him and is helpful to the witness in giving a clear statement of his evidence

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[33] *R.* v. *Scopelliti* (1981), 63 C.C.C. (2d) 481 (Ont. C.A.) per Martin, J.A., at pp. 492-494.

[34] Act, s. 29(2), p. 551.

[35] *Ibid.*, ss 32-33, p. 552.

[36] An Act to Amend the Criminal Code in Relation to Sexual Offences, S.C. 1980-81-82, c. 125, in force January 4th, 1983.

[37] P. 121; see now *R.* v. *Gratt* (1983), 45 N.R. 451 (S.C.C.).

or to the trier of fact in determining an issue. This provision was chosen because it corresponds to present Canadian practice, a justification that seems to undercut the reason for legislating in the area at all. And, although part of the object of the enactment is to do away with the difficulties of trying to make a clear distinction between fact on the one hand and opinion on the other, this objective is not achieved because the rule itself turns on the meaning of the words "opinion evidence". With respect, I concur entirely with the dissenting comment of Mr. Justice Murray that the attempt to legislate in this area is an "undesirable attempt . . . to codify the common law which at present is causing absolutely no difficulty".[38]

In the area of expert opinion evidence, the Task Force deals with the compulsory exchange of expert reports, expert evidence concerning "an ultimate issue", court appointed experts in civil and criminal cases and limitation on the number of expert witnesses. The compulsory exchange of experts reports, while valuable, will not be new to many jurisdictions,[39] and the decision not to extend this compulsory exchange to criminal cases, at least where practical, is disappointing.[40] The provisions with respect to court appointed experts will be welcomed by many, although, once again, these will not be new in some jurisdictions.[41] The clarification which is provided with respect to opinion evidence concerning "an ultimate issue" is useful.

Some of the proposals will be of particular concern to the defence bar. A provision similar to the present section 730 of the Criminal Code, placing on the accused the legal burden of proof of an exemption, exception, proviso or excuse will apply to all criminal proceedings and not just those proceedings by way of summary conviction as at the present.[42] The standard of proof of the voluntariness of a confession will be on the balance of probability rather than beyond a reasonable doubt as at present.[43] The Task Force recommends that the prosecution be permitted to cross-examine an accused on his voir dire evidence even when the accused's statement to a person in authority has been ruled inadmissible on the voir dire.[44] An accused's exculpatory statement, made when apprehended in possession of stolen property would no longer be admissible.[45] Cross-examining counsel will not be permitted to allege or assume a state of facts

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[38] P. 122.

[39] See *e.g.*, Nova Scotia Civil Procedure Rule 38.

[40] P. 101.

[41] See *e.g.*, Nova Scotia Civil Procedure Rule 23.

[42] Act, s. 12(1), p. 546.

[43] *Ibid.*, s. 67, p. 562.

[44] P. 192, although the extent to which this recommendation is implemented in the Act is not completely clear: see s. 116, p. 574.

[45] P. 209; Act, s. 65(2).

unless he is in a position to prove those facts.[46] This provision, along with the related provision barring opinion evidence with respect to an "ultimate issue" unless the factual basis for the opinion has been established, will, it is submitted, severely handicap defence counsel conducting a cross-examination of an expert witness. While the Crown will no longer be able to cross-examine an accused on his prior criminal record except in a very limited number of circumstances,[47] the court and the prosecution will be permitted to comment on the failure of the accused to testify on his own behalf.[48]

The *Report* is also intended to be a statement of the present law of evidence in Canada. Certainly, it is a valuable source book and, as a general rule, provides concise summaries of the main areas of the law of evidence. The sections of the report dealing with "refreshing memory" and "use of previous statements" are particularly well done in my opinion. However, some chapters, such as chapter 7 dealing with character evidence, are so much occupied with reform that they are of limited usefulness as a statement of the present law. Overall, however, and quite apart from the merits of the proposed reforms, the *Report* is a valuable contribution to scholarship in this area of the law.

The *Report* is attractively presented, thoroughly documented and well indexed. One unfortunate feature of the manner of presentation is that the decisions of the Uniform Law Conference adopting, rejecting or amending the recommendations of the Task Force are included as a group in an appendix rather than being placed after the recommendation to which the decision relates. The effect is that the reader must constantly cross reference the recommendations that are listed at the end of each chapter of the *Report* with the list of decisions of the Uniform Law Conference in the appendix in order to determine which recommendations will be present in the legislation. As noted in the Introduction, time constraints made it impossible to cross reference the report with the legislation, but this causes few difficulties as both follow the same basic outline.

Taken as a whole, the *Report* is disappointing as a piece of law reform but valuable as a piece of scholarship. Whether it will elicit consensus remains to be seen.

THOMAS A. CROMWELL*

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[46] Act, s. 103(2).

[47] *Ibid.*, s. 124.

[48] *Ibid.*, s. 94.

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Unemployment Insurance. By CLAIRE E. CHOATE. Toronto: The Carswell Company Limited. 1982. Pp xii, 386. ($21.50)

Unemployment insurance, to most lawyers, is not a subject worthy of consideration, and as yet, relatively few are involved in providing service in this field.

However, with the broadening of the Unemployment Insurance Act[1] coverage and larger benefits, as well as changing social philosophies, it is apparent that there will be a greater use of lawyers' services in unemployment insurance matters.

This text is a useful compilation for ready reference for those who will come into contact with persons involved with unemployment insurance problems.

The paucity of legal precedents in unemployment insurance matters is indicated by the Table of Cases, which lists a total of only fifty-two court decisions, many of which are unreported. This is an indication of how the Unemployment Insurance Act itself as yet has not attracted the attention of lawyers, nor generated any extensive litigation.

The book gives a very brief history of the development of unemployment insurance. It then breaks down the subject into general concepts, including coverage and entitlement to claims. It also contains an excellent index and cross references, as well as appendices containing the Unemployment Insurance Act; Delegation of Powers Regulations; National Employment Services Regulations; Umpire's Rules of Procedures; Unemployment Insurance (Collection of Premiums) Regulations; and, the Unemployment Insurance Regulations.

Most practitioners would prefer to read an explanatory text or an elaboration of an Act, rather than the bare basics of an Act itself. This text meets that preference.

The format of the book is such as will facilitate any practitioner in determining and advising on unemployment insurance matters. It is intended to be a ready reference and it meets this objective.

ERIC L. TEED*

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[1] S.C. 1970-71-72, c. 48, as am.

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Condominium: the Law and Administration in Ontario. By AUDREY LOEB BURNS and BRADLEY N. MCLELLAN. Toronto: The Carswell Company Limited. 1981. Pp. xviii, 588. ($68.00)

Les auteurs annoncent dans l'avant-propos que les chapitres de ce volume sont aménagés de façon à traiter des trois principaux sujets du Condominium Act:[1] (1) l'enregistrement; (2) la protection du consommateur; et (3) les droits, obligations et responsabilité après l'enregistrement.

Dans un chapitre introductif, les auteurs traitent des différents aspects du condominium, des autres modalités de détenir une maison dans un ensemble immobilier, de la loi ontarienne et de la loi dans les autres provinces canadiennes. Il est intéressant d'observer à ce propos que les auteurs font allusion à la loi de la Colombie Britannique, de Terre-Neuve et de l'Ile du Prince-Edouard. Aucune référence à la loi du Québec! Alvin Rosenberg dans son ouvrage *Condominium in Canada*[2] fait preuve d'un peu plus d'ouverture sur le monde puisqu'il traite de la loi québécoise et qu'il propose en annexe une déclaration de copropriété faite selon la loi du Québec.

Les trois chapitres suivants portent sur la création du condominium: l'enregistrement, la déclaration de condominium et la description des parties composantes, puis les règlements.

Les auteurs abordent ensuite les formules d'acquisition d'un condominium: achat d'une unité du promoteur, offre d'achat et vente, la revente de l'immeuble, les garanties offertes aux acheteurs par l'Ontario New Home Warranties Plan Act.[3]

Il est ensuite question du fonctionnement de la copropriété: assemblées, procès-verbaux, statuts de la corporation de la copropriété, droits des créanciers hypothécaires (mortgagees), l'administration de la propriété, les finances, la comptabilité, les impôts, la vérification annuelle, les assurances, le bail de la copropriété, l'expropriation et la fin de la copropriété.

En appendice, on reproduit tous les formulaires utiles à la copropriété, de même que les textes de loi pertinents.

Cet ouvrage atteint sans doute les objectifs que les auteurs se sont donnés: fournir aux praticiens du droit un guide sûr et moderne de la pratique de la copropriété. Comment ce volume se compare-t-il au classique de la copropriété *Condominium in Canada* de Alvin Rosenberg? Ce nouveau volume constitue un manuel beaucoup plus à jour que celui de Rosenberg. Les nouveaux textes des lois et la jurisprudence récente sont

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[1] R.S.O. 1980, c. 84.

[2] (1969)

[3] R.S.O. 1980, c. 350.

vraiment intégrés à l'oeuvre. Le plan de l'ouvrage est également remarquable par sa clarté et sa logique. A cet égard, nous préférons l'oeuvre de Burns à celle de Rosenberg. Celle-ci nous paraît cependant moins superficielle sur une multitude de points de droit qui dépassent la routine quotidienne. Les véritables problèmes de droit sont trop souvent laissés pour compte. Par exemple, alors que nous aurions souhaité trouver des observations intéressantes sur la multipropriété (Time-Sharing), les auteurs consacrent seulement une vingtaine de lignes à cette question. Nous aurions souhaité que les auteurs s'intéressent davantage aux vrais problèmes de la copropriété en droit ontarien, comme l'avait fait le professeur Risk dans une étude remarquable "Condominiums and Canada".[4]

Pour le praticien québécois, *Condominium, the Law and Administration*, présente une utilité certaine, pour tous les points où le législateur québécois a emprunté au droit ontarien. Pour le surplus, le chapitre troisième "De la copropriété des immeubles établie par déclaration, article 441b et suivants du Code civil", s'est inspiré de la loi française. La doctrine et la jurisprudence françaises sont extrêmement riches: le juriste québécois y trouvera beaucoup mieux son profit.

ROGER COMTOIS*

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Drafting Laws in French. Study Paper. By MARIE LAJOIE, WALLACE SCHWAB and MICHEL SPARER. Ottawa: Law Reform Commission of Canada. 1982. Pp. 296. (Free)

In the Foreword the purpose of this study paper is described as follows:

> It appeared useful to undertake a project with a dual objective in mind. The first would be to demonstrate in concrete fashion the possibility of obtaining in federal legislation a French version that would reflect the spirit of the language, without at the same time modifying the substance of the law. The second would be to verify an hypothesis according to which, in many respects, the English version would also be rendered more intelligible and more accessible to the public without betraying the spirit of that language.

After a short Introduction the authors present redrafts of two federal statutes: the Canadian Dairy Commission Act[1] and the Narcotic Control Act.[2] Chapter IV is entitled "A New Look" and concludes with the following paragraph:[3]

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[4] (1968), 18 U. of T. L.J. 1.

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

[2] R.S.C., c. N-7, as am.

[3] P. 280.

> Although our first goal was not to revise in parallel the two statutory texts, an English version of these two drafts has been prepared and it appears side by side with the French, but only to enable the English reader to understand the French text. The reader, whether francophone or anglophone will thus be able to judge the degree of acceptability of an English text that derives its structure and organization from a French model. Surely, it is at the level of the structure of the statute and its organization into sections that a compromise should be arrived at between the two cultural communities, their jurists and their drafters. The time has come to cast a new look at the form Canadian statutes will assume in the decades to come.

My reaction as a bilingual reader, and as a specialist with some ten years of experience in the drafting of statutes plus a few in the teaching of the subject at the post-graduate level, is that the authors' English text is definitely not acceptable. Let me quote just a few sections from the Narcotic Control Act:

> 28. Where the accused is convicted of an offence of possession of a narcotic, trafficking in narcotics, possession of a narcotic for the purposes of trafficking, or importing or exporting a narcotic, an order for forfeiture is made in respect of the seized object related to the offence.
>
> Any money seized may also be forfeited if it is related to the offence.
>
> 30. An object is forfeited to Her Majesty.

In some cases grievous errors occur such as in the first paragraph of section 4 of the same Act:

> 4. No person shall traffic in a narcotic except as authorized by this Act or the regulations. The offender is liable to imprisonment for life.

The French text, like section 4(3) of the present Act, describes the offence as an indictable offence "un acte criminel", but, in the English version, it is just an offence and, by virtue of section 27(3)(b) of the Interpretation Act,[4] "a reference to any other offence [than an indictable offence] shall be construed as a reference to an offence for which the offender is punishable on summary conviction".

In order to indicate how completely the authors of the *Study Paper* have allowed their concept of the French text to dominate the wording of the English version, I would turn to section 2 of their National Dairy Products Commission Act:

> 2. A National Dairy Products Commission is established.

Section 3(1) of the present Act reads:[5]

> 3.(1) There shall be a corporation to be known as the Canadian Dairy Commission. . . .

Why have the authors thus changed the status of the Commission from an incorporated to an unincorporated body? Is there any difficulty with the word "corporation" in English? Of course there is none and the legal effects of its use in a statute are fully specified in section 20 of the

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[4] R.S.C. 1970, c. I-23, as am.

[5] *Supra*, footnote 2.

Interpretation Act. However there is a controversy among the jurilinguistic fraternity as to the proper French expression for the common law concept of a "corporation". The authors dare not suggest any French term for that particular concept which, by their own admission, "is essential to the life of Canadian institutions".[6] So they strike out the term in both languages; "it is not essential to the Act under study" they say in their explanatory note. But were they not instructed to prepare "a French version that would reflect the spirit of that language, without at the same time modifying the substance of the law"?

Before turning to a consideration of the French text by itself in order to see how well, or rather how poorly, the authors have succeeded in pursuing this objective, I find it necessary to say that my criticism of their English versions prepared by translation from the French redrafts of the two Acts is not to be taken as a condemnation of the method. On the contrary, I feel that, in Canada at the federal level, real equality between the two official languages requires that a fair proportion of the legislation be prepared in French and translated into English. My own experience enables me to say that this can give acceptable results. It is of course necessary that the translation be revised by a person with adequate legal training, plus linguistic knowledge, who must be allowed to make suggestions to the draftsman so that the two texts may be properly coordinated.

This is not what the authors of the *Study Paper* have been doing; they have allowed their conception of a proper French draft to dominate their writing so completely that their English version is a literal translation of the French which takes no account of rules of statute law construction followed by the courts under the British common law system. As Elmer A. Driedger says in *Language du droit et traduction*:[7] "The Supreme Court of Canada interprets legislation by common law methods, and statutes must therefore be written to fit those methods."

On the contrary the authors of the *Study Paper* are contemptuous of common law methods of construction and feel entitled to disregard the case law on the subject. For instance in their redraft of the Canadian Dairy Commission Act they strike out the definition of "place":

> "place" includes any vehicle, vessel, railway car or aircraft;

In their Explanatory Notes they say:

> This definition appears to have a rather unfortunate case-law origin. In any event, it constitutes an abuse of the definition technique used in statutes and cannot be disguised by the term "interpretation".

As no reference to the case or cases is given, it is impossible to judge the validity of the criticism. However, this much can be said, the defined word is used in reference to an exorbitant power to search without a warrant

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[6] P. 72.

[7] (1982), p. 72.

(section 19 of the present Act, sections 34 and 36 of the redraft). Because this is a departure from the ordinary principles of law, it is a firmly established rule that such a statute must be interpreted strictly, which means that each word is to be given the narrowest meaning possible in the context. In *Colet* v. *The Queen*,[8] this rule was recently applied very rigorously to searches by the Supreme Court of Canada. It was held that a warrant to seize a firearm for which the owner did not have a permit did not authorize the police officers to search the owner's house in order to seize it. They needed a search warrant. Since they did not have one, they were trespassers against whom Colet was entitled to use his weapon to prevent them from breaking into his property.

In my view, a draftsman is under a strict obligation to take all case law into account since it is his function, as is recognized in the Foreword, to produce legislation the content, that is the legal effect, of which will carry out the intention of Parliament. To draft legislation which will not be interpreted by the courts in the manner intended, is to betray this intention. One may not like the rules according to which our courts interpret statutes, but in our democratic society where respect for judicial decisions is fundamental, it is impossible to circumvent them except by express provisions.

Federal legislation is to be drafted bearing in mind that, as a rule, the basic law is the common law, which is at the root of our Constitution.[9] Only when civil law is affected is it necessary to consider how it should be taken into account with respect to the operation of the statute in Quebec, which does not seem to be a problem here. The French version of federal statutes cannot therefore be written as a law for the same purpose would be written in France. The basic principles and the rules of interpretation are not the same.

In *R.* v. *Proudlock*,[10] six judges of the Supreme Court of Canada agreed that:

> . . . there are in our criminal law only three standards of evidence:
>
> 1. Proof beyond a reasonable doubt which is the standard to be met by the Crown against the accused;
>
> 2. Proof on a preponderance of the evidence or a balance of probabilities which is the burden of proof on the accused when he has to meet a presumption requiring him to establish or to prove a fact or an excuse;
>
> 3. Evidence raising a reasonable doubt which is what is required to overcome any other presumption of fact or of law.

There is no doubt that in French criminal law there is no equivalent of those three (or four) expressions. Article 353 of the French Code de

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[8] [1981] 1 S.C.R. 2.

[9] *R.* v. *National Trust Co.*, [1933] S.C.R. 670.

[10] [1979] 1 S.C.R. 525, at p. 550.

procédure pénale provides that there is but one question which embodies the whole extent of the judges' duties:

> Avez-vous une intime conviction?

In view of this state of the law in France, we cannot expect to find any expression in use for such concepts as "a reasonable doubt" or "a balance of probabilities". If the available French words are restricted to those in current use in France, "raisonnable" is obviously going to be eliminated, but it is necessary to ponder the implications. No expression in current use in France will be found meaning "a reasonable doubt" or "a balance of probabilities". All those that can be dug up will perforce mean something else and will be confusing in the extreme because words derive their meaning from usage.

Serious consequences may result from any attempt to eliminate from Canadian statutes the word "raisonnable" on the basis that it is not used in France as a legal term. I am not satisfied that, in section 10 of the Narcotic Control Act (section 17 of the redraft), the phrase "has reason to believe" ("a raison de croire") would carry the same meaning as "reasonably believes" ("croit en se fondant sur des motifs raisonnables"). I am afraid the new wording involves the substitution of an objective test for a subjective test and, in this connection, I would refer to Arnup J.A.'s observations on the present wording in *Levitz* v. *Ryan*.[11]

I must now draw attention to a number of serious defects in the two redrafts whereby the authors unwittingly fail to carry out the basic requirement not to modify the substance of the law. I have already made reference to the changes resulting from the deletion of the word "corporation", and of the definition of "place" in the Canadian Dairy Commission Act. I now have to draw attention to the erroneous way in which they have dealt with the definition of "market". This is extremely important since its purpose is to restrict the scope of the Act to matters within federal jurisdiction according to the case law. It reads as follows:

> "market" means to market in interprovincial or export trade;

The authors of the study make the following comment:

> This is a substantive provision, disguised as a definition. We have rejected this improper practice; the jurisdiction of the Commission with respect to marketing is now dealt with in section 5 of the new version.

This section 5 reads as follows:

> 5. The Commission has jurisdiction over marketing of dairy products in interprovincial and export trade.

It is quite true that the present definition is a substantive provision and would be better put as such. However, it has the effect of restricting, not the Commission's jurisdiction, but the scope of the regulations. These are within the competence of the Governor in Council, not of the Commission,

[11] [1972] 3 O.R. 783.

the words "market", "marketing" and "marketed" being found in each of paragraphs (a) to (g) of section 12(1) of the present Act authorizing the making of regulations by the Governor in Council.

The effect of a provision such as the suggested section 45 purporting to authorize the making of federal regulations respecting the marketing of dairy products without restricting them to interprovincial or international trade is clear: it would be totally invalid. The courts will not undertake to redraft an Act of Parliament in order to restrict it to the area of its proper constitutional jurisdiction; if it is found to be in excess of its jurisdiction they will strike down the entire Act unless the provision in question can be severed from the rest of the statute.[12]

Concerning the redraft of the Narcotic Control Act, I have already mentioned the omission, in the English version of section 4, to specify that this is an indictable offence. I must also note that, in section 12, "ministère public" does not have the same meaning as "prosecutor". The latter expression, as defined in section 2 of the Criminal Code,[13] includes a private prosecutor. This is important because, in summary conviction proceedings, prosecuting police officers act as private prosecutors since, not being admitted to the Bar they cannot act as counsel for the Attorney General; "poursuivant" must therefore be used in the French as in the Criminal Code. In section 14 of the redraft, the reference to sections 421, 422 and 423 of the Criminal Code requires the same qualification as in section 12. In view of what I have already said, I will leave it to the readers to pass upon the validity of the authors' statement in their notes following section 16: "We consider that the power to search bears with it the power to enter the place to be searched."

Finally I have to point out that the authors' drafts unfortunately exhibit some linguistic or syntactic defects. I was surprised to read in sections 28 and 29 of the French version of the authors' National Dairy Products Commission Act "Sont crédités au compte" ("There shall be credited to the account") and "Sont . . . débités au compte" ("There shall be . . . charged to the account"). This is English syntax. In French, the correct constructions are "Le compte est crédité (débité)" or "Sont portés au crédit (au débit) du compte".

I must also criticize the suggested wording of the French version of paragraph (*b*) of section 45 concerning matters that may be the subject of regulations:

> *b)* la saisie et la disposition d'un produit laitier commercialisé en violation d'un règlement établi en vertu du présent article, ...

The French word "disposition" does not have the meaning of "disposal"

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[12] See, *Attorney General of British Columbia* v. *Attorney General of Canada*, [1937] A.C. 377; *Labatt* v. *Attorney General of Canada*, [1980] 1 S.C.R. 914.

[13] R.S.C. 1970, c. C-38, as am.

in this context. The expression "la façon d'en disposer" in the present legislation is perhaps not the best possible equivalent but at least it is not incorrect.

Similarly, in paragraphs (*g*) and (*h*) "imposition" should be "établissement". It is often the case in French that the proper meaning of a noun does not correspond exactly to the meaning of the verb derived from the same root.

In the redraft of the Narcotic Control Act, para. (*c*) of s. 8 reads:

> *c*) autoriser des personnes à posséder et à faire le commerce d'un stupéfiant et en prescrire les conditions, . . .

French syntax does not allow of such a construction.[14]

In conclusion I have to say that the redrafts submitted by the authors of the Study Paper do not, when closely examined, argue in favour of their method. While it is highly desirable to escape from the concept of a French version of federal statutes as a slavish translation from the English, it is no solution just to put the shoe on the other foot.

LOUIS-PHILIPPE PIGEON*

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The Law Lords. By ALAN PATERSON. Toronto and Buffalo: University of Toronto Press. 1982. Pp. 288. ($25.00)

The Law Lords by Dr. Alan Paterson of Edinburgh University is a most important book. Numerous reasons might be given to support such an audacious assertion. At least four are obvious. First, Dr. Paterson's tome is based on personal interviews with virtually all of the Lords of Appeal in Ordinary in the past three decades, as well as leading counsel who have argued frequently before them (and many have been appointed subsequently to an appellate court), and contains the first public account of judicial law-making beyond the committee rooms at the Palace of Westminster. Secondly, the book provides a fascinating exposé of the judicial law-making process itself, focusing particularly on the period between the oral hearing of an appeal and the rendering of a judgment. Thirdly, Dr. Paterson also reveals for the first time and in definitive detail the behind-the-scenes events which led to the 1966 Practice Statement that the House of Lords would no longer be bound by its own decisions. Fourthly, the study also

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[14] See M. Grévisse, Le bon usage, Grammaire française (8th ed.), para. 196.

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confirms the widely held view that one law lord in particular, Lord Reid of Drem, has not only been instrumental in promoting judicial innovation in the post-war period but has also been held in the highest esteem by his fellow peers as perhaps one of the best legal minds of this century. Undoubtedly, these are significant findings.

Although the book began as an Oxford D. Phil. thesis it bears few of the proverbial birth scars associated with such an inauspicious entry into the world of print. A relatively slender volume, it is closely written, tightly argued and well documented. Especially welcome are the numerous excerpts from the interviews on which the book is based.

Dr. Paterson's research focused primarily on the "hard cases" decided by the House of Lords between 1957 and 1973, and he attempted to discover by means primarily of interviews with law lords of that period how they reached their decisions on the facts of the difficult socio-economic and political issues before them. His thesis is that judicial law-making in the House of Lords is essentially a social process in which the prime players are counsel and the law lords mutually interacting in accordance with shared perceptions of the parameters of legitimate behaviour for each. He records that he had little difficulty in persuading the law lords to discuss the judicial process and that of fifteen active law lords only four declined to participate (Lords Dilhorne, Diplock, Hodson and Morris) while all four of the inactive law lords agreed to taped interviews (Lords Denning, Devlin, Pearce and Radcliffe). In addition he enjoyed co-operation from about thirty of the leading advocates at the English Bar, and also made use of the law reports, judicial biographies, extra-judicial writings, and a number of printed cases, and attended hearings. The interviews lasted for up to two and a half hours and were structured around a check-list of open-ended questions. The author found a high consistency between the respondents' answers and their performance in decided cases, internal consistency and consistency as between one another and over time. The respondents were also given the opportunity to revise their responses prior to publication, and few amendments were made, indeed the law lords agreed in most instances to the ascription of extracts to them by name.

Essentially, *The Law Lords* examines a number of possible answers to one fundamental question: who influences the law lords? The findings are not unexpected. Although the law lords are virtually immune from political sanction because of their elevated status and the immunity implicit in the doctrine of the separation of powers, it is apparent from Dr. Paterson's findings that they do not look beyond their own professional cadre for ideas, indeed are influenced primarily by other law lords and by the few leading counsel whom they hold in high esteem. Would-be reference groups such as academic lawyers have no influence at all with the exception of one or two highly respected academics, such as the late Professors Goodhart and Cross, both honorary Benchers of their respective Inns, who are perceived as members of the law lords' personal reference group. This

low esteem in which law dons are held undoubtedly reflects their low professional status in England, and Dr. Paterson's findings make it evident that until academic lawyers are an accepted part of a respected reference group they cannot hope to be influential, no matter how often judges may jokingly assert that authors in the *Law Quarterly Review* or *Modern Law Review* now constitute *the* final court of appeal in England. Ironically, at least one law lord believes that academic commentators are of little use because they are rarely critical enough! Lord Reid sums up thus:

> If Professor Goodhart or someone like him is criticizing you in the *Law Quarterly Review* then you sit up and take note, if it is somebody you've never heard of, perhaps you don't take so much notice.[1]

Equally uninfluential from the law lord's perspective are lower court judges, the legal profession generally and most of the senior branch of the profession with the exception of a small handful of leading counsel who appear regularly before the law lords and who have won their approval. Paradoxically, interview findings with these barristers suggest that while they regard their role in the appeal hearing dialectic as that of advocates for their client's cause and that their first duty is to win, leading counsel do not think that they have a role in shaping the law and limit their submissions to what they perceive will succeed. Thus, counsel regard the law lords as a reference group not *vice versa*.

But some counsel can be influential, as shown in considerable detail in chapters three and four of *The Law Lords* which focus on the oral hearings from counsels' and lords' perspectives respectively. In contrast to the American Supreme Court practice, oral debate is important in determining the final outcome, particularly when counsel are highly respected by the panel, and although the law lords keep a tight rein on the argument, they tend to rely on counsel to clarify and explore the difficult legal points under discussion.

While counsel are a reference group, the most important reference group are the other law lords. Judicial interaction "behind the appellate curtain" is in the final analysis a secret deliberation; however Dr. Paterson was able to persuade the law lords to reveal some information about it and one is struck by how informal the process is from the selection of Appeal Committees to the writing of the final speeches. There would appear to be few rigidly enforced routines and as a corporate group, the House of Lords appears to enjoy a delicate balance between collegiality and individualism. In contrast to the American Supreme Court, and apparently also our own in recent years, and despite a clear understanding amongst the law lords of the usefulness to the profession of a group decision, all members of the House of Lords respected the right of individual members to write their own judgments and to dissent. One would suspect that respect for individual decision-making is not just a product of a *laissez-faire* ethos as Dr. Paterson

[1] Pp. 19-20.

argues but is also founded on a profound belief in the value of the individual and his freedom of expression—an attitude of mind encouraged by the highly individualistic nature of practice at the English Bar. Lord Reid expressed the reality best:

> Remember most of the cases that come up to us are cases of difficulty, and it is not sensible to suppose that five people are always going to agree, you know perfectly well they are not.[2]

In addition to questioning the law lords about their reference groups, Dr. Paterson also questioned them about their perceptions of the "role" of a law lord in respect to the issue of the alleged conflict in decision making between doing justice on the facts of the case before them and the need for stability and certainty in the common law. He discovered that between 1957 and 1973 there were three distinct periods (1957-1962, 1962-1966 and 1966-1973) in which the trend increasingly favoured doing justice rather than strict reliance on precedent and distinguishing the indistinguishable. Important steps in the process were the retirement of Lord Simonds in 1962 and the increasing influence of Lord Reid and to a lesser extent Lord Denning, both of whom favoured greater candour in addressing policy issues and the great question of defining the limits of judicial law-making in a democracy. The Practice Statement of 1966 was, of course, the important turning-point and subsequently the law lords, especially Lord Reid developed guidelines for judicial law-making which prevail to this day.[3]

The Law Lords is a sympathetic portrait of a small group of clever and distinguished men who perform a difficult job with great conscientiousness. Few readers could put the book down without some sense of admiration for the sincerity, honesty and high concept of duty with which these judges approach their task, no matter how much one might disagree with their decisions or personal philosophies. Inasmuch as the human dimension in law-making should be public, the author has presented an appealing glimpse. Ironically, Dr. Paterson fails, however, to draw what seem to be the most obvious conclusions from his empirical findings as to the nature of the judicial law-making process. He finds, not unpredictably, that the law lords' perceptions of their role are formed by the reference groups to which they have themselves belonged and which have shaped them throughout their lives: the small professional cadre at the English Bar, the leaders of the Bar and the appellate court judges. But he fails to note the essential characteristics of these socialization vehicles which are reflected in the law lords' attitudes to their role. These include the importance of self-restraint, of tolerance, of a sense of balance and proportion, of a *profound* sense of respect for individual differences and of the delicate balance between freedom responsibly exercised and licence.

The law lords' conduct and words suggest that they really believe that

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[2] P. 112.

[3] Earlier published as Lord Reid's Unnoticed Legacy—a Jurisprudence of Overruling (1981), 1 Oxford Journal of Legal Studies 375.

they have freedom of choice in the cases before them (so much for Dworkin) but their professional training and their personal philosophies have inculcated an almost intuitive sense of the limits within which this freedom can be exercised within a liberal democratic society. If they did not respect these limits in their professional lives it is unlikely they would have ever risen to the highest judicial offices. Freedom to choose is related to another characteristic, that is, a belief in the individualism which is reflected in the law lords' attitudes to the process of reaching their decisions. Again this reflects not only the paradox of the English Bar, that such a tightly organized and seemingly highly conformist profession encourages a faith in individualism (barristers cannot practice in partnership nor be employees) but also the very fact that these are the most successful men in their profession and hence likely to be determined individualists on their own account. They respect others and possess a personal philosophy which is essentially the best form of classical nineteenth century liberalism in contrast to contemporary social philosophies of collectivism or socialism. The protection and vindication of individual rights, if these are values which modern society should cherish, would therefore seem to rest most securely with judges like Lord Reid rather than with more radical aspirants to the judicial bench with debased collectivist values.

In addition to this failure to draw the broad conclusions, Dr. Paterson's book could be subjected to at least two other criticisms, to some extent really about the book he did not write. First, he purports to adopt the sociologists' concept of "role analysis" in order to elucidate the "role" of the law lords as self-perceived, however, mercifully, this sociological dimension rarely obtrudes into his discussions and is delegated to an unilluminating appendix. It is difficult to discern the methodological value which sociology plays in the study since it seems that at least from Dr. Paterson's use of it, that it means no more than the idea that a person is influenced by his environment and takes his cues as to how he should conduct himself from it. Any minimally self-critical adolescent knows that. As a social science exercise the book fails to convince me that sociology has much to contribute and given the present crisis in the discipline itself it is perhaps best that legal researchers tread warrily in utilizing sociological techniques and jargon.

A second criticism is that Dr. Paterson does not try hard enough to draw connections between the law lords' actual legal philosophies as expressed in their speeches and extra-judicial writings and broadcasts (in a few instances) and his interview results, nor between their philosophy and the judicial trends and those in society generally. But perhaps that is another book (or two). It is to be hoped that Dr. Paterson will pursue this line of research: *The Law Lords* is a fascinating glimpse of a process of vital concern to all.

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Law and Learning—Le droit et le savoir: Report to the Social Sciences and Humanities Research Council of Canada. By CONSULTATIVE GROUP ON RESEARCH AND EDUCATION IN LAW. Ottawa: The Information Division of the Social Sciences and Humanities Research Council of Canada. 1983. Pp. ix, 186. (No Price Given)

Among the more narcissistic of professional behavioural patterns in Canada, and doubtless elsewhere too, are the frequent (perhaps "chronic"), reappraisals by the legal profession of its training and its credibility, its practices and its theory, as a learned profession. For these run the gamut from the banal-mundane to the glorious-philosophic on mountain tops of policy. Every decade or so, interspersed with minor eruptions, the legal profession in Canada and particularly the law schools themselves, take a fresh and often skeptical look at what is happening to the "formation" of the neophyte young and to public confidence in the entrenched old. This is not to minimize the value that such insecurity creates because the very need for so much soul-searching and technique-defining at least permits lawyers (and the general public) to assess the quality of their schooling as well as the level of the professional expertise offered. In an era of endless change and "future shock" a normally cautious discipline should welcome some severe stimulus to re-examine its premises and its performance.

Yet how justified is this habitual preoccupation by lawyers with their professional navels? Is it really different with other groups in society that make claim to special skills and where these are protected by law from use by uncertified strangers as well as misuse by the family itself? Is there anything that is unique about the concerns of Bench, Bar and Law Schools, particularly the latter two, in this repetitive and often tension-ridden self-examination? Of course, lawyers have been so suspect for so long that such jaundice has entered into the literature and reached the dignity of clichés. Indeed, no self-respecting reviewer would even recall those print-worn lines from Henry VI.

This *Report* is possibly the most extensive Canadian appraisal of the law school-research-education process that has appeared to date. Substantial studies of more or less quality have emerged from time to time, beginning with the Canadian Bar Association's own examination of basic requirements in its reports of the late 1920s. Curiously, the Reed (1921) and (1928) studies in the United States, of Canadian legal education, predate most home-grown efforts and are little known and rarely referred to. Indeed, with national and provincial as well as regional reports—(for instance the Soberman study of Legal Education in the Maritime Provinces of 1976)—scarcely half a decade goes by without some new initiative appearing. In the present case the examination was funded by the Social Sciences and Humanities Research Council itself stimulated to action by Dr. Thomas H.B. Symons' *Report, To Know Ourselves* which raised "important . . . questions concerning the state of Canadian legal

scholarship. . .". At the same time both the Committee of Canadian Law Deans and the Canadian Association of Law Teachers almost annually (and naturally) had been occupied with the scholarship-teaching syndrome—re-discovering a subject that was forever challenging and forever there.

All of these patterns of inquiry should be seen in the context also of other reports from institutions and perspectives outside of the profession. Dr. John B. Macdonald and the Science Council of Canada (1969) undertook a survey of Federal funding of research which led to eventual changes in the Canada Council and the creation of the Social Sciences and Humanities Research Council. Indeed, it was a near thing that, in the period when the Canada Council was being re-assessed by Dr. Macdonald, there might have been spawned a Legal Research Council modelled on the Medical Research Council. In 1968 a Committee of Law Deans, of which this writer was one, addressed that subject briefly; but, after a meeting with the Canada Council executive director and staff, the Committee was dissuaded from pursuing the idea on the grounds that the Council's budget would be including increasing research, travel and library funding for law schools and law teachers and there was no need therefore for a separate Legal Research Council. It is some kind of irony that almost fifteen years later a study is undertaken and completed by the Social Sciences and Humanities Research Council where the fundamental issues might have been addressed much earlier by a Legal Research Council had one existed.

Whatever the "might have beens" Professor Harry Arthurs and his Committee now have gone beyond most of their predecessors in the intensity and scope of their inquiry. And, happily, with the budget available to them, they have explored, in almost all provinces, old anxieties in new contexts whose central theme perhaps may be summarized by the question "Are we, were we ever, or can we become truly, a learned profession?"

The mandate of the Arthurs Committee states the following:[1]

> To examine and advise upon legal research and education in Canada, especially in relation to:
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> 1. The discharge by law faculties of both their academic and professional responsibilities, and especially the relationship between those responsibilities;
> 2. The purpose, nature and quality of research in law, including its theoretical perspectives, interdisciplinary aspects, the various institutions and agencies in which it is conducted and the infrastructures (e.g., libraries) and sources of funding that support it;
> 3. The extent and quality of graduate education in law, including its relationship to advanced research;

[1] Appendix 1, p. 165.

4. The means by which the legal profession, university faculties and administrations, legal scholars, governments and granting institutions may encourage and improve scholarship, research and education in law in the Canadian context; and
5. Any other matters which in the opinion of the Consultative Group may be necessary to discharge its mandate, or to identify for the Council more general issues which may relate to other professional disciplines.

Obviously the high purpose of this mandate was to focus on the quality and character of legal research both in relation to the educational process within the law schools as well as elsewhere within universities, government and those other institutions engaged in, affected by, or concerned with, the law in one way or another. Besides questionnaires and other tools leading to four useful supporting studies—Canadian Law Faculties; Profile of Published Legal Research; Sources of Support for Legal Research; Canadian Law Professors—the Committee had the imagination to develop techniques of broad consultation. Five such regional consultative sessions were held in Vancouver, Saskatoon, Halifax, Toronto and Montreal throughout 1981. While the summations of these round tables are not public documents they evidently provided major sources of critiques and ideas for the final *Report*. Indeed, a collection of documents distributed for these consultations became a helpful selection of recent papers directly concerned with legal education and the profession more generally (for instance Symond's, Twinning, Danzig, Burgin, Arthurs, Lajoie and Parizeau, Veitch and Macdonald). The *Report* represents, therefore, extensive, systematic research and broad discussion. Finally, it was "overviewed" by the Advisory Panel of twenty-three law teachers, lawyers plus an occasional "social scientist", all under the chairmanship of the Chief Justice of Canada.

The Arthurs Committee, itself an able assemblage (Arthurs, Courtney, Frazer, Hunt, Lajoie, O'Hearn, Tollefson, Verge, Forster and McKennirey) hence had both resources and advisors as well as a sharply aimed focus. Personnel and format thus assured a lively and possibly an important result. Not surprisingly, the style of the *Report*, is patently "Arthurs" by which one means his personal dimension in language and perception provides these pages with an identifiable character. That character—certainly more plus than minus—may have given the thematic tone to the result and it is now necessary to consider what it is the *Report* tried to achieve and to determine also whether its mandate was the principal modern issue to which such a study of "law and learning" should have been addressed. Such questions about the correctness of the *Report*'s focus and findings are made ever more urgent by the surprising absence in it of any extensive references to the contemporary debate in the United States about law schools and legal education, and indeed about the profession itself. Paradoxically the *Report* both succeeds and fails to meet the issues now deeply and distressingly of concern to the very United States law schools which the Arthurs Committee seemingly adopts for its own prin-

cipal models in measuring Canadian achievement—models that President Bok of Harvard has so recently and so scathingly attacked for their misuse of brains and abuse of the legal order itself.[2]

The *Report* makes two major findings of fact. First, that legal education in Canada, and the intellectual-professional product of that education, is essentially doctrinal-practice oriented. Second, the effect of such an orientation on the one hand, and the related politicial-legal culture on the other, has been to downgrade, minimize and in general be indifferent to what may be described as "fundamental research" in law or about law. The combined effects of these two determinations leads to a general conclusion that runs throughout the fifty-six recommendations (plus others inferentially to be found elsewhere in the *Report*). This conclusion asserts that the absence of "fundamental research" reflects not merely a simple lack of funding—to support the "speculative" mind that is not profession or mission-oriented—but reflects a deeper intellectual malaise within the profession and even within the university and law school systems as well. That malaise may be described as a failure to recognize that a problem-solving discipline, so pragmatic in its aims and operations as the law, needs the refreshing springs of fundamental inquiries—"recherche sublime"—into the nature and validity of the system itself, and employing all the resources that the social sciences can provide, in the development of such creative and "outside" insights.

From these principal findings of fact and the conclusions that follow, the *Report* urges, broadly, two major changes in the philosophy of the law school and in the attitudes of the practicing profession, as well as of the Bench, too. It argues that no fundamental research is possible, on any significant scale, unless there is a body of scholars capable of taking a lead role in the law schools and outside; and that role needs not merely funding but, perhaps more important, it requires a *point of view* now significantly absent within the profession and even among critics of it.

For such a concept would envisage the law school not only as a training center for immediate professional requirements—"the practice of the law" however diversified and complex that now may have become—but even more urgent, there would be recognized a need for a two-track or "two-stream" approach to legal studies themselves. One stream would serve the traditional needs of the profession, however defined from time to time, including the obvious demand for specialization amid the growing variety of new-type skills that laws and clients impose. Indeed, without in any way minimizing the quality of intellect required this practitioner-oriented approach to legal education would invite constant improvements in the skills—substantive law acquisitions by the student with its regular follow up through the growing role of continuing legal education—and the

[2] See Margolick, The Trouble with American Law Schools, New York Times Magazine, May 22nd, 1983, p. 20.

much delayed approach to specialization. The *Report* recognizes these needs and, indeed, says they must not be underrated. But the *Report* also is quite clear that none of these updating, modernizing processes and programmes of doctrine-practice-oriented legal education will provide the kind of "research" that is likely to inspire fundamental critiques of the legal system itself. It is this absence of the "speculative", "investigative" and the "non-committed"—to the profession and to the system as it is—that is so urgent if the law is to be refreshed and refurbished as time and social needs demand.

Thus, says the *Report*, the two-stream approach in the law schools would encourage "fundamental research" because the objective of that stream would be critical and multidisciplinary where law, lawyers and systems would be perceived from the vantage of those not operating the system or committed to it. This scholarship would be aware of all the psychological, economic, political, social and other forces and influences that explain and express the nature of a given legal order and the certified priesthood that operates it—their assumptions, their work habits, their goals, indeed their very mental and operational styles.

The other stream in the educational process, the *Report* recognizes, would continue to be devoted to the more traditional requirements of preparing for admission to the Bar, and for the practice of law, or for many other professional opportunities which a legal training with or without Bar admission so often provides. With these two streams an interaction would follow—between "pure" scholarship and its fundamental research as a significant ingredient and result, and the traditional practice side, enriching teaching materials and pedagogical philosophy as well. Thus, for the first time the modern Canadian law school would be able to offer a student-teacher intellectual life style, in an alternative stream, that may be closer to the less pragmatic and non-profession-oriented standard and mood of the humanities and social sciences, of philosophy and history, than is the case with the one-stream teaching and the professoriate writings of today. A different breed of teacher-scholar would emerge, or would oscillate back and forth between the two streams if each were so tempted and trained, thus reinforcing both sides of this double-track or two-stream law school programme. And the net effect of all of this fundamental programatic change would be to assure the emergence of a quantity and quality of "fundamental" research that would differ from the generally practitioner-required materials that dominate most legal research and writing today, both in journals and monographs.

If this summary is fair to the principal thrust of the Arthurs' *Report* then several delicate and difficult questions are raised at once for both eyebrows and highbrows. Nowhere in the *Report* is there a determined effort to deal with the meaning of "fundamental research" although the French language phrase "recherche sublime" is also employed to help and thus the heavens are called upon to assist with abstractions. Some hint of

the conceptual difficulties faced by the *Report* is to be found in such original language as [quoting a law dean] ". . . a law school has 'twin missions' to perform: the scholarly researching of legal questions and the practical training of lawyers. . .".[3] The *Report* goes on in the same paragraph to say ". . . its scholarly investigation of legal questions places law squarely in the tradition of the social sciences and humanities, complete with the intellectual capacity and the independence necessary to explore not only its own special forms of knowledge, but as well their social and intellectual bases and implications. On the other hand, because of its heavy emphasis on education as a professional training program, law is much less akin to political science, sociology or philosophy than it is to medicine and engineering".[4]

As the next paragraph says:[5] ". . . the analogies between law and medicine are particularly intriguing . . . their positions differ, in part at least, because of the critical differences between their knowledge bases. The 'hard science' basis of medicine profoundly affects the organization of medical teaching and research, to the extent that we hesitate to make direct comparison with law. . . . Perhaps the most radical and interesting aspect of academic medicine in the context of our concerns is the division of medical faculties into the basic sciences and the clinical departments. The former function almost entirely in research and teaching and their faculty members are not necessarily professionally licenced. The clinical departments include, first, certain sections primarily concerned with delivering health care services through teaching hospitals and, second, a group of fulltime university faculty who are professionally licensed and who devote about one-quarter of their time to practice and the rest to teaching and research."

It is now possible to deduce some of the difficulties the *Report* encountered in drawing its analogical models from the social sciences or medicine-engineering. While several more paragraphs are devoted to dealing with the superior successes of medicine, including its well-established funding patterns for basic research and equally well-entrenched student movement into research, yet nowhere does the *Report* examine as to how the social sciences, plus history and philosophy, might become critical infrastructures for the entire legal educational process and, ultimately for the profession itself. For example, while reference is made to the extent to which economics plays a natural role in many areas of legal doctrine, particularly in the newer paradigms of analysis touching on risk-distribution and benefits-costs as found directly or indirectly in judicial awards, there is a serious lack of exploration as to what this kind of basic research would do to obtain both university credibility on the one side and greater professional Bar-Bench acceptance (and utilization) on the other.

[3] P. 92.

[4] *Ibid.*

[5] *Ibid.*

Anyone who has attempted multidisciplinary seminars with non-law students as well as with economists, political scientists or public servants as teacher-partners will recognize at once the inherent difficulties of equivalent analytical standards being developed and maintained for both sides of that teaching equation. Good examples here are economist-lawyer partnerships in courses dealing with "government control of business" (competition policy, regulatory bodies, and so on) or attempts to teach international law and organizations including political science-international relations expertise, with non-lawyer co-teachers and their students at the M.A., Ph.D. candidate level, most often without any legal basics in their equipment.

It might have been expected that these two illustrations that have been operating at McGill, for example, since 1950, would have produced numbers of scholars-teachers or scholar-practitioners in these fields. For here the social basics behind the law and supporting the system whether domestic or international, were examined and presumably gave a new critical dimension, historical, philosophical and analytical, to the standard materials of the legal process under study. In fact, it is difficult to look at the term papers, and some theses stimulated by these seminars among masters' candidates, and so on, and find very much that is rigorously reflective of the double or multiple perspectives, economic social-historical and legal, within which the teaching, studies and writings were undertaken. Indeed, these experiences, while always interesting and informative, may never have amounted to the multi-dimensional scholarship, *qua* student or *qua* teacher, except for the occasional bright mind that might have reached these insights without the pedagogical interactions. In any case, the point being made here is that whatever limited experiments have taken place in Canada—and to which the *Report* makes only passing reference—while not involving the two separate streams as the Arthurs *Report* recommends, these have encompassed a good deal of work on multidiscipline courses not unlike the teaching programmes that would have been part of the scholarly stream and thus of the more research-oriented stream of a law school double track programme. Canadian law schools are therefore not without some modest background here.

That does not mean that the *Report* is far off the mark in its overall perception that the present structure discourages the "speculative" and the "critical" and thus avoids the "fundamental" research leading to a rigorous evaluation of the "law" as it operates in the quotidian life of Canadian and Western society. When Burton was teaching at University College, London, he was a creative and original international relations thinker, but his collaboration with able teachers such as Schwarzenberger and Bing Cheng, was not a very successful one even though Schwarzenberger had been primarily responsible for his presence. On the other side however Walton Hamilton, the economist, and Harold Laswell the political sociologist, were both at Yale and with McDougal as partner Laswell gave

a quantum leap to the reach of legal studies there. That pattern has influenced a whole United States generation but not without occasional expressions of concern by more traditional teachers at Yale and doubtless from many practitioner-graduates as well. Hence, even McDougal and Laswell could not create a "separate" stream programme within the entrenched teaching structures—however policy-oriented they were (and are) at Yale, in the law school generally.

All of this leads to considering the main ambition of the *Report*, namely, how to assure that the quantity of Canadian legal research—with twenty-two law journals and growing numbers of monographs to testify to the volume—will now begin to reflect something more than materials designed primarily for practitioner needs. In sum, the report tries to answer the following: how to fashion an educational-research system which, together, would encourage inquiries into the basics of the legal order, using all the tools that the modern social sciences now provide with increasing abundance if not always with total credibility measured by the standard of the "hard sciences"? Even economics with its own equations and geometry, once the lead-role holder among the social sciences for claims to a "scientific" methodology, (if not predictive success) has in recent years lost that primacy however much arithmetic it continues to employ in aid of the harsh problematics of a depressed international economy. A post-Keynesian model has yet to be designed for economics; but the law has not even found its Keynes to fashion a viable universal theorem for law and social control, value-free if possible, value-varied if not.

If economics cannot "hack it" what shall lawyers be expected to do to reach the scientific heights. Is the answer "fundamental research", "scientific method" with its hopeful credibilities and predictabilities? In other words has the Arthurs *Report* really told us any part of the answer to the central question raised by the *Report* itself, namely, even if it is possible to define with more manageable precision what is meant by "fundamental", how shall law schools proceed to incorporate that definition into programmes that are credible both to the social scientist and humanist on the one side and that will be of some utility to the better understanding and running of the legal order in its daily operational life on the other?

Unless these questions are confronted the remainder of the *Report* becomes a massive exegesis on an antecedent ambivalence. But, indeed, this would be much too harsh a judgment. For the *Report* does fine service in its frank appraisal of how lawyers think about academics, how law teachers are used or misused by governments, law reform commissions and themselves, and how difficult it always has been, and doubtless will continue to be, to retain the bright-eyed idealism of the law student (if any), after some years of practice—with the Bar's immediate demand for definitions and solutions that cannot await upon a philosopher's stone (or a stoned philosopher) to provide durable answers.

Again, what must be questioned is whether the *Report* has not underestimated the already critical, multidisciplinary approach—method and substance—employed by ever larger numbers of experimentally-minded law teachers in Canada and the United States. This is true despite the absence of significant post-graduate facilities in most law schools which, the *Report* says, are a necessary adjunct to, and prerequisite for, the kind of fundamental research and scholarship it finds so lacking at present in the national pattern. Perhaps the problems raised, however, really lie elsewhere: many law teachers come with greatly varied backgrounds, and so they should, to their appointments. Standards for teacher preparation run from zero graduate work to varieties of doctorates, European, British and North American. Yet even at Harvard and doubtless at Yale, Columbia and the other elites, teachers had often greater respect for their best third year students than for the post-graduates, many of whom were there to upgrade, as the *Report* recognizes, frequently inferior training or degrees from elsewhere. In short, graduate studies in law, at the best United States law schools, while substantial in numbers rarely have led to programmes that were not available to, or the same as those provided for, second and third year law students as existing options save for specialized institutes and centres.

Indeed, most of the Canadian law schools find themselves in exactly the same position, namely, that their LL.M. students take the regular courses (but for special graduate centres, for instance, Air and Space Law) available on the second and third year lists—except for Quebec (including civil law at Ottawa) where for a variety of historical reasons graduate studies *per se* have had a "separate" development over and above the first law degree. Yet the Arthurs *Report* finds that "fundamental research" is likely to come not merely from this separate scholarly stream that is less practice and more scholarship-directed, but equally that *special graduate programmes* may be required as part of a general framework for this scholarship-fundamental research nexus to flourish.

Altogether apart from the funding question—which the *Report* squarely recognizes—the *Report* is not entirely convincing that the product of such a new stream would provide a significantly improved critical apparatus from which the rest of the legal community, academic and professional, would benefit in approaches to the reshaping of the substance and modalities of the legal system itself. There is little assurance that the kind of scholarship the *Report* envisages as flowing from this less practice-oriented, and scholarly, "fundamental research" programme would in fact produce the scientifically creative and helpful materials that would improve our criminal justice system; or moderate the adversary process in industrial relations or in dispute settlement generally; or that would better recognize, and institutionalize more clearly and effectively, the risk-benefit distribution required for example in any modernized contract-torts-regulatory framework. In short, what would be the additional benefits,

over and above the critiques now available from the more sophisticated ongoing scholarship already to be found in the best American, and some of the Canadian, law schools? For here multidisciplinary skills and perspectives have been essential to many teachers' lives for the better part of the past twenty to forty years. Moreover, as the *Report* recognizes, the great majority of law students doubtless would opt for the practice stream. Will new and compulsory student requirements from the scholarly stream be part of the cost and will this be matched by an equal concern for modernized and compulsory clinical (and specialization)-training programmes?

The sprightly language and hard-nosed "idealism" of the *Report* must be admired and received with pleasure by the general reader and with selected profit for both academics and law society administrators who should take it to their skeptical hearts. Nevertheless, as the *Report* says in its early pages, there is a sense of "déjà vu" about it all. Kilroy was here. The debate goes on—even more heavily in the United States today—with perhaps greater sophistication, more data but with all the old frustrations alive and well. What the Arthurs Committee has done, however, is to remind the legal profession and the universities that the "twin missions" of the law and law schools—scholarship and problem-solving—have not always been offered resources to assure the success of a decent equilibrium. The mission of the Bar has always overshadowed the mission of "learning"; and in the classical images of a "learned profession", to which so much genuflection is made, "learned" must print in small caps while "profession" reads tall. Hence, there is little likelihood that the *Report* will lead soon to radical changes in Canadian curricula—*note* the special problem in Quebec—or equally to radical alterations of the Bar's view of its long term needs (and duties) and the law school product it envisages to satisfy those needs. Yet something will come from these Arthurian labours. The debate as to whether lawyers belong to a learned profession is now more clearly joined and the issues more fully bared than ever before in Canada.

Of course, all the magnitudes have changed since the Cohen and Scott studies of 1950 (Legal Education) and 1956 (Legal Research), respectively, helped launch the modern period of self-examination that went beyond the *ipse dixits* of "amateur" criticism. Student numbers have increased about five-fold and fulltime teachers almost ten-fold over a thirty year period. The caseload of civil courts, the condition of the criminal justice system, and of custodial programmes more specifically, have challenged the very essence of coping with the law's delays and the humaneness of the state in exercising a monopoly of force in this increasingly interventionist age. In short, the classical view of "truth", emerging from *adversaries* in a fair and neutral forum, is itself now under serious scrutiny from both friends and enemies of the open society.

Hence the central irony of this *Report* may be that somehow the mounting concerns, in both Canada and the United States, with the grow-

ing unmanageability in the uses and abuses of the legal system, are implied but these are not specifically underscored either in the study's mandate or research direction. This valuable inquiry therefore already may have been bypassed, in part, by the recent and radical realization in both countries that the very system itself is now to be questioned. Recent surveys, for example, of the use of law and lawyers in industrialized Japan show striking—even shocking—differences between the Japanese and North American uses of law-rules, and of a professional priesthood to administer them, that aspire to resolve everything from problems of the matrimonial bed to the high politics and policies of a constitution itself. But is the Japanese model at all relevant to the United States or Canada?

It is arguable that perhaps the *Report*'s "scholarly stream" one day would have produced meaningful and persuasive answers to this now pervasive self-questioning of law, lawyership and Canadian legal institutions generally. Perhaps not. In any case, the centralities of this *Report* do stem nevertheless from an anxious recognition that the profession may somehow have lost its learned way. But choosing the right "path of the law" (Holmes' phrase) may no longer be the most urgent of the issues for those who take very seriously the destiny of the legal order. Indeed if such a study were authorized today perhaps the priority now would be not whether the law can be restored or rededicated to its "learned" status, but whether the system as we know it, multiplying now almost geometrically in the demands made upon courts and rules, can survive this onslaught both in the volume and variety of individual and collective claims and of state interventionism everywhere.

To say all of this is not to minimize what the *Report* has achieved. It is only to suggest how difficult it is to shape questions and terms of reference when the "future" is already here and soon becomes the "past" even before a report's recommendations are reached and considered or implemented. No blame therefore can be attached to Professor Arthurs and his merry men for neglecting directly, if not indirectly, to address this primary concern for the viability of law and legal institutions in our time. At the very least the Arthurs' study has laid the basis for the "next" exercise, inevitable in the long self-awareness with which the profession is both blessed and afflicted. And to the *Report*'s ironic credit, whatever tomorrow's detailed priorities may be, only its recommended "second stream" would likely accomplish a holistic reappraisal that the western legal position today may so urgently require—at least in Canada and the United States.

In sum, this is a most readable document, a hard-hitting evaluation of lawyership and scholarship, of some of the fundamentals facing those perdurable misunderstandings when Bar and law teacher cannot make up their minds as to who is Faust and who is Mephistopheles; in short, who is the custodian of the soul of the law? Neither "moonlighting" teachers nor hurried and harassed practitioners—*pace*, of course, the Bench—are in a

position to claim alone this priceless custody. If the Arthurs' *Report* has done nothing else it will have defined better than any recent Canadian study the ultimate responsibility of law and lawyers, of Bench, Bar and law school, for using all of the resources of the intellect, whatever the discipline, to help societies fairly fashion and manage their legal orders without which there cannot be workable justice for all.

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INTERNATIONAL LAW—WRONGFUL REMOVAL—EXTRADITION AND THE JAFFE CASE

To the Editor:

The Jaffe case has rightly caused a greal deal of indignation in Canada and has apparently soured our relations with the United States sufficiently for the United States Secretary of State to make his government's concerns public. It also raises a number of complex issues in the law of extradition, the simplest of which has resulted in the surrender by the United States authorities of the bounty-hunters responsible for Mr. Jaffe's seizure.

There is, however, one point on which serious confusion is evident, namely the rights of a person wrongly removed, whether by kidnap or otherwise.

An extradition treaty is an international agreement between states, and only states incur duties or enjoy rights under it. The victim of an extradition demand or a wrongful seizure is only protected to the extent that a state acts on his behalf. In other words, he has no direct remedy against those who have authorized or committed the unlawful process.

There is a great deal of judicial practice from a number of countries, including the United Kingdom, the United States and Israel, to show that if a person has been wrongly seized in disregard of an extradition treaty he has no remedy at international law. While the government whose territory has been "invaded" may make diplomatic protests or secure the extradition of the wrongdoers, he himself will invariably stand trial and suffer punishment in the country to which he has been taken. His rights in that country, and the right of a local court to try him, will depend entirely on the law of that country. If it wishes to return him it is either as a matter of international

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