Criminal Pleadings and Practice in Canada. By E.G. EWASCHUK, Q.C., Aurora: Canada Law Book Limited, 1983. Pp. cl, 699. ($90.00); Archbold, *Criminal Pleadings, Evidence and Practice in Criminal Cases*. 41st edition, edited by STEPHEN MITCHELL. London: Sweet & Maxwell. 1982. Pp. ccxvi, 2324 ($140).

The first Archbold was published in 1822. Recent editions have been described as "an essential text for the criminal lawyer"[1] and "meant for quick reference or consultation in court by the practitioner".[2] In England, Archbold has become something of a classic and is widely accepted by the practising bar as a source of guidance. Ewaschuk, although this is not expressly stated in the book, is also clearly aimed at practitioners, and its primary utility will be for the practising bar. Because of this and because of the similarities in title between the two books, the question is raised in one's mind whether Ewaschuk's book is published with a view to occupying in Canada the same place as Archbold occupies in England. A comparison of the two books might answer that question.

When reviewing a book, it is essential that superficial criticism be avoided, and that it be judged, in part, from the perspective of the purposes of the book as seen by the author or editor. Insofar as Archbold is concerned, the new edition was prepared to take into account some fairly significant legislative changes such as the Criminal Attempts Act 1981, and the Criminal Justice Amendment Act 1981. In addition, recent House of Lords' decisions in the area of recklessness[3] have caused considerable mischief and led to a substantial rewriting of the part of the text dealing with *mens rea*. Still, Archbold retains its classic form. The topics covered include jurisdiction of various courts, prosecutorial authority, trial procedure, sentencing options, costs, appeals, evidence, and substantive law. The book can in fact be divided into two parts, the first 983 pages being devoted to procedural problems, and the final 1,000-odd pages being devoted to the law of substantive offences. All of the relevant statutory material is reproduced in the text and generous references are made to

[1] F.O. Donoghue, (1974), 90 LQR 142, reviewing the 38th edition.

[2] J.E.H. Williams, (1954), 18 Modern Law Review 428, reviewing the 33rd edition.

[3] *Caldwell*, [1982] A.C. 341, [1981] 1 All E.R. 961 (H.L.); *Lawrence*, [1982] A.C. 510; [1981] 1 All E.R. 974 (H.L.).

common law authority, practice directions, judges' rules, etc. When dealing with a particular topic, the sections of the relevant legislation are set out, followed by a short annotation. In the part of the book relating to evidence, which is extensive, the annotations are long and comprehensive. There is, for example, a twelve-page annotation on the law of corroboration. In this annotation the relevant cases are dealt with extensively, inconsistencies between them are considered, the reasons for the rule are set out, and some attempt is made to reach some conclusions as to the existing state of the law in the area.

The topics and format of Ewaschuk are somewhat different. He deals with jurisdiction and venue, search and seizure, protection of privacy, arrest, release, classification of offences, election and re-election, pleading rules, prosecutorial powers, arraignment and plea, the trial, sentencing, mentally disordered offenders, appeals, and extraordinary remedies. In format, the author uses the factum approach. This approach involves a statement of a proposition followed by a citation of authority. On one count[4] there are seventeen hundred and eighty of these propositions. Unlike the format of Archbold, Ewaschuk does not set out the text of relevant legislation. Perhaps this is because there are fewer statutes in Canada than in England and the volume is seen as a companion to volumes of annotated statutes prepared by the same publisher or others.

With respect to topics, it is clear that Archbold covers a wider range of topics. Over 160 pages are devoted to problems of evidence in Archbold whereas only isolated evidence topics are considered in Ewaschuk. The latter deals with such topics as issue estoppel, evidence at a preliminary hearing, and the provisions of the Protection of Privacy Act as it is known. There is, however, no attempt to deal comprehensively with the law of evidence relevant to a criminal trial, something which the practicing bar would welcome. The other major difference with respect to coverage is that more than half of Archbold is devoted to the substantive law of offences. This is not covered at all in Ewaschuk.

Archbold seems particularly strong in relation to such matters as prosecutorial procedure and authority and trial procedure. Particularly useful is the inclusion of judges rules or practice directions. The strongest part of Ewaschuk's book seems to me to be that part dealing with the rules of pleading in criminal cases, something which he developed from an earlier presentation.[5]

With respect to format, it is difficult to compare the two. Much of the material in Archbold consists of annotations to the statutory provisions which are included within the text. Where common law is dealt with it is in the form of a brief essay concerning a particular topic, an essay which

[4] R. Price, Ontario Lawyers Weekly, June 1983.

[5] E.G. Ewaschuk, Criminal Pleadings, in Criminal Procedure in Canada (V. Del Buono, ed., 1982), p. 345.

includes something about the history of the law and matters of policy. Ewaschuk's factum approach on the other hand, although it does lend itself to occasionally explaining the purposes of procedures and does allow for extensive and useful references to other material as a basis for further research, tends to be less comprehensive. In his preface, the author recognizes this and indicates:[6]

> . . . full development with an analysis of historical background, comparative differences and present social considerations often would entail pages of exposition resulting in a book many sizes larger than the present one . . .

Interestingly, a similar type of comment was made of Archbold in an earlier cited review in which the author said:[7]

> In a book of this sort, clarity and wealth of material are more precious qualities than great learning and criminal analysis.

With respect to the format of the Ewaschuk book, because the propositions of the law stated are so narrow, it is absolutely necessary to read all of the propositions on a certain point to avoid being misled. For example, in Paragraph 1-57, dealing with the question of territorial jurisdiction of courts, it is stated:[8]

> Notwithstanding that an accused is found (present) within the territorial jurisdiction of the court by reason of his conveyance there subsequent to an arrest elsewhere, he is nevertheless found in a jurisdiction of the court.

This must be read with Paragraph 1-59 which reads:[9]

> Where an offence is committed outside the territorial limits of a court, jurisdiction is acquired from the mere fact that the accused, a prisoner, is in custody within the territorial limits of the trial court.

The case of *Seeley*[10] is used for this proposition, but an additional case is then referred to:[11]

> *Cf. R.* v. *O'Gorman* (1909) 15 C.C.C. 173, 18 O.L.R. 427 (C.A.) [which] would limit section 428(a) to situations where the accused is in "proper" custody at the time the information is laid and not where the accused is forced into the jurisdiction where the offence did not occur.

Thus the same proposition is set out twice but then qualified on the second occasion by the reference to a case which would vary it considerably. The other comment with respect to the large number of propositions set out is that in some cases, including the one just dealt with, there seems to be a substantial duplication. Paragraph 8-16 for example deals with "Substantial compliance of election".[12] It is included within the part of the material

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[6] P.x.

[7] *Supra*, footnote 2, at p. 428.

[8] P. 20.

[9] *Ibid.*

[10] (1908), 41 S.C.R. 5, 14 C.C.C. 270.

[11] P. 20.

[12] P. 151.

dealing with elections generally. When dealing with election in the context of trial by magistrate, substantially the same proposition appears as Paragraph 8-21 "Substantial compliance".[13]

One of the strong points of the format adopted by Ewaschuk is that in some parts of the material he gives useful practical examples. In the area of pleading he sets out various counts in informations or indictments which illustrate the propositions which he is stating. When dealing with the effect of the case of *Kienapple*,[14] he includes a list of offences to which the rule has been applied in specific cases. When dealing with the topic of included offences, he also sets out a list of situations in which some offences had been held to be included in others. The latter list covers both these which are included because of the offence as enacted and those which are included because of the way the charge was drawn. The list is thus more useful in the first case than in the second, given that charges may be drawn up in a variety of ways, leading to a variety of included offences.

Chapter 17 of Ewaschuk includes a nine-page discussion of the defence of insanity. Most of the issues concerning the defence of insanity are dealt with, but the reason why the topic is dealt with is a bit unclear. Perhaps it was included because insanity is not a true defence of the justification or excuse kind. The problem, however, is that such other matters as capacity or diplomatic immunity are dealt with in a considerably more summary way in Chapter 1, dealing with jurisdiction. More extensive use of cross references would perhaps make it clear that the same sorts of concepts are being dealt with in separate parts of the book, and an explanation might be included as to why certain "defences" are included and others omitted.

Appendix B sets out the rules of criminal procedure for United States District Courts. It takes thirty-six pages to do this. The reason for the inclusion of this material in the appendix is not explained and it is not totally apparent.

Archbold, then, has established its position as a book which contains all of the material to which a busy criminal practitioner might wish to refer for guidance. Ewaschuk, on the other hand, does not purport to cover such matters as evidence or substantive law of offences or to include statutory material in the text, and therefore is to be seen as a companion volume. Both are, of course, up-to-date and thoroughly scholarly in the sense that most authorities are set out, and, particularly in the case of Ewaschuk, extensive reference is made to other books and to periodical literature. I find reference to this material, included as a guide to further research, to be particularly useful. There is, I think, a danger that the Canadian book will be expanded to the intimidating size of Archbold. Indeed, the author, in his preface, indicates that he plans chapters on the Charter, contempt, posses-

[13] P. 153.

[14] [1975] 1 S.C.R. 729, (1964) 15 C.C.C. (2d) 524, 26 C.R.N.S. 1.

sion, extradition, and defences. There are one or two adequate textbooks on substantive criminal law in Canada, and a few good books on criminal procedure. Thus there is a danger that the proposed chapters, particularly those on defences or on the Charter, will duplicate existing material and make the volume less of the companion volume it presently is. A gap remains with respect to the law of evidence, however, and more attention might be given to that area.

In summary then Archbold has an established reputation. It is what it purports to be, a comprehensive text focussing heavily on practice matters and covering almost all of the topics which a busy practitioner might find useful. Ewaschuk's book is not a Canadian Archbold, nor is it apparently intended to be. Its scope is narrower and its format is different. Its scholarship is of a high quality, and its utility is undoubted. It will, no doubt, occupy a place in Canada similar to that occupied by Archbold in England, but for its own reasons.

PETER G. BARTON*

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Canadian Criminal Law: A Treatise. By DON STUART. Carswell; Toronto. 1982. Pp. vi, 602 ($75.00); *Learning Canadian Criminal Law*. By DON STUART and RONALD JOSEPH DELISLE. Carswell; Toronto. 1982. Pp. xix, 913. ($80.00).

If the publishers want a blurb for the second editions of these two books, let me just say that I have never enjoyed teaching criminal law as much as in the fall of 1982 when I used them for the first time. They provide a wonderful package in a field which has lacked an analytical textbook and a casebook that has good organization of the principles of the criminal law, with a minimal excursus into criminal procedure. Stuart's text is very consciously geared to the case book which he has compiled with Delisle. Both start out with an attempt to place Canadian criminal law in an historical and intellectual context, so that the reader gains some sense of the meaning of codification (this is too short), the principle of legality (too often ignored or underemphasized except by Jerome Hall in his excellent *General Principles of the Criminal Law*),[1] and the aims and scope of the criminal law (and the authors are aided by the admirable reports of the Law Reform Commission of Canada).

I think the authors are almost guilty of misleading advertising when they say that they "contrast methods of statutory interpretation". I find

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[1] 2nd ed., Indianapolis, 1960.

little evidence of it. I do not gain the feeling that we are talking about a *code* of criminal law. That is hardly the fault of the present authors because the Canadian courts have given scant attention to the subject of codification and have too often been content to cite English cases and texts and to ignore the experience of Australian and New Zealand jurisdictions which have similar codes.

I find the casebook chapter on Actus Reus far too long but I do not share the editors' belief that *actus reus* and *mens rea* can be sensibly separated.

The rest of the casebook is a delight to use. The authors clearly understand the problems of *mens rea* and lead us through that labyrinth with clarity of thought and presentation. I found that the classes bogged down a little when chapter 8, "Justification and Excuses" was reached. This is really a reiteration of *mens rea* principles—in a negative sense of course—and the cases did not seem to be worth 100 pages. I have serious reservations about the topics of attempt and conspiracy for first year. Both are so full of messy concepts but I suppose they are thought necessary to complete the discussion of general principles. I omitted the chapter on sentencing which seems a strange appendage.

I approached Stuart's text with some trepidation because I had feared that he would be too strongly influenced by Glanville Williams and that author's nitpicking penchant for "that codeless myriad of precedent, that wilderness of single instances".[2] I was wrong. Stuart is his own man and has created a treatise which is as systematic as the present law, dispensed by Canadian courts, will allow him. I hope that a second edition will be able to show court decisions taking a broader approach to the criminal law, pronouncing on general principles, using the criminal code as a complete body of law and placing less reliance on the single instances of case law. If Dickson J. has his way this might be achieved with the help of the Law Reform Commission of Canada's sensible and constructive suggestions for a General Part to be inserted in the Criminal Code.

Stuart's treatise shows a remarkable grasp of the literature. He is to be heartily congratulated on his industry which is supported by a fine scholarly discussion of his subject.

GRAHAM PARKER*

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[2] Tennyson, Aylmer's Field.

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The Law Merchant: The Evolution of Commercial Law. By LEON E. TRAKMAN. Littleton, Colorado: Fred B. Rothman and Company. 1983. Pp. 195. ($35.00 U.S.).

The central thesis of *The Law Merchant: The Evolution of Commercial Law* is simply that multi-national corporations should be permitted total freedom of contract. The book is a highly repetitive refrain in praise of the autonomy of international business obligations, free from judicial intervention, and this single theme is embroidered from remarkably diverse threads: the mediaeval and early modern law merchant, a socio-legal study of the methods used by multi-national oil companies to regulate nonperformance in international crude oil sales and finally two studies of modern judicial techniques of contract construction. Virtually all the materials in this little book (the narrative text is a mere 105 pages) have been published elsewhere,[1] and it is not entirely clear why they should be drawn together, given how disparate the chapter topics are and how highly repetitive the text. Nor is it clear why its title was chosen since the book is not really an historical treatise on the law merchant, and the historical argument is merely used as one justification for the central thesis.

Dr. Trakman writes well, indeed in an extremely erudite and sophisticated style, and the fifty-two pages of footnotes evidence his familiarity with a wide range of legal materials. Yet although well-documented and pleasingly written the text is disappointing.

The underlying assumption that multi-nationals know what is best for them leads the author to argue that judicial intervention is unwarranted in nonperformance cases. Few could possibly doubt the assumption, yet the conclusion is not necessarily accepted beyond the corporation boardrooms: giving a free reign to regulate international trade to multi-nationals begs the question of for whom such regulation should be designed—the companies themselves, consumers, or national interests. Dr. Trakman does not broach the issue, nor are structural reasons advocated in support of his thesis; indeed the copious footnotes evidence little research in such relevant disciplines as economics or public administration. The implicit "what's good for business, is good for America" approach may well be suitable for businessmens' after-dinner speeches but considerably more documentation is required for an academically or intellectually credible argument.

In support of his thesis, Dr. Trakman invokes several quite different arguments. I will focus on two of these, first the findings of his survey of multi-national crude oil transactions which assessed the interdependence of commercial practice and commercial law, and secondly the argument from

[1] The Evolution of the Law Merchant: Our Forgotten Heritage (1980-1981), 12 J. of Maritime L. and Com. 1153; Interpreting Contracts: A Common Law Dilemma (1981), 59 Can. Bar. Rev. 241; The Nonperformance of Obligations in International Contracts for the Sale of Goods (1981), 29 Oil and Gas Tax Q. 716; Legal Fictions and Frustrated Contracts (1983), 47 Mod. L. Rev. 39.

history in which the same interdependence is examined in the context of the historical evolution of the law merchant.

The oil industry study examined, *inter alia*, how nonperformance problems in international crude oil sales are resolved by reference to contractual nonperformance obligations, settlement and arbitration which Dr. Trakman calls the three "fundamental ingredients of the Law Merchant".[2] The reader is not entirely shocked by the finding that contractual drafting is dependent on commercial practice and corporate self-aggrandizement. While settlement and arbitration are the preferred means of resolving problems, litigation is resorted to in either 9% or 13% of disputes.[3] A clear majority of inside legal counsel freely admit that they can neither foresee nor incorporate all categories of nonperformance risks which might eventually arise into their contracts, and 81% think that oil contractors are not capable of incorporating unambiguously all categories of nonperformance risk into their contracts. Such findings substantially undermine Dr. Trakman's thesis since total self-regulation is admittedly impossible and resort to the courts is required in about 10% of those cases which result in disputes. At another level the findings are irrelevant: no one can doubt that commercial practice directly dictates commercial legal practice, but should it? The fallacy in Dr. Trakman's argument is highlighted in that a blinkered examination of particular contractual clauses, in this case, nonperformance clauses, found the grand generalization which he makes as to who is best equipped to regulate international trade contracts. As George Bernard Shaw is reputed to have said, "Generalisations are generally lies".

The other argument is the argument from history, and just under one-half of the book is devoted to showing how the law merchant has been taking care of its own from the dusty pedlars of the eleventh century to the sophisticated modern law merchant of the COMECON conditions, INCOTERMS, ULIS and the I.C.C. Rules. Professional historians would undoubtedly be driven to suicide if they did not believe in their heart of hearts that history has lessons to teach those willing to learn, but few would be so courageous or as touchingly naïve as Dr. Trakman who states: "History does provide lessons for the future;"[4] "An understanding of the past is the means toward advancing into the future;"[5] "History is the father; our commercial law of today is the son";[6] "The ascent of commercial law into the future must hinge to some degree upon a descent into the

[2] P. 46.

[3] The correct figure is difficult to determine since the text on p. 57 and the cone in Figure 3 on p. 53 record different percentages. Non-performance disputes arise in about 12% of the contracts.

[4] P. 17.

[5] P. 17.

[6] P. 21.

past.''[7] Historical ''facts'' are notoriously susceptible to divergent interpretations and the uses of history are infinite and often sinister.

Dr. Trakman looks to the historical evolution of the mediaeval and early modern law merchant as to a lost golden age in which merchants, still free from the yoke of the common law, were able to develop commercial practices, law and tribunals which provided quick, cheap and flexible justice. Mercantile disputants successfully escaped the grasp of the central royal courts until the development of early modern capitalism in the seventeenth and eighteenth centuries when Lord Mansfield was required to incorporate the law merchant into the common law. His judicial descendants have proved to be less wise, in Dr. Trakman's view, and have interfered with commercial practices rather than accepted them uncritically.

This is the familiar, facile story which we teach first year legal institutions students. But is it true? Since it substantiates the central thesis of *The Law Merchant*, the author would like it to be; moreover, it is the story told in the standard legal materials to which he makes reference in the footnotes. Unfortunately most of these date to the beginning of this century and professional historians, since that time, have done much to fill in the details of Western European socio-economic history leaving legal historians woefully out of date. Dr. Trakman must become one of Professor Graham Parker's ''masochists''[8] if he wishes to use historical arguments to support contemporary legal institutions.

The most serious flaw in the historical argument is the author's apparent lack of knowledge of the extent, sources and reasons for state regulation of contractual relationships in the past. There was a great deal of it. It was, in fact, created for mercantile men and it was protectionist and discriminatory in nature. Mediaeval and early modern society was regulated to an extent that would shock most people today and within our own common law tradition some of the earliest regulation is found in Magna Carta.[9] Trade regulation, whether by a powerful if indebted crown, town communes, guilds or Italian city-states, ensured that the law merchant from the twelfth century onward was not the proud, solitary and unpolluted creature envisaged by Dr. Trakman but assimilated with the socio-economic-political culture of the day. The mercantile classes controlled, influenced or bought regulation which protected their own interests at the expense of foreign competitors and local consumers. That the law mer-

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[7] P. 21.

[8] The Masochism of the Legal Historian (1974), 24 U.T.L.J. 279; see also David H. Flaherty, Writing Canadian Legal History: An Introduction. Essays in the History of Canadian Law, vol. 1. (David H. Flaherty, ed. 1981), p. 3.

[9] Clause 9 provided for standardized weights; clause 13 protected local trading rights and monopolies of boroughs and ports; clause 41 discriminated against foreign merchants, and clauses 10 and 11 against Jewish money-lenders.

chant was applied in its own courts was virtually irrelevant. Early modern society knew a plethora of fora for dispute-resolution and the law administered in such courts was the law of the land; the law merchant must be conceived of within the total cultural context then as now. The sort of regulation and intervention which Dr. Trakman condemns in the modern law merchant on the ground that the mediaeval law merchant operated well without it was in fact very present, and for the same reasons and purposes as today: it was there at the instigation of influential commercial men to enhance their interests at the expense of others. Dr. Trakman should not be deceived by the hypocrisy of modern commercial men who criticize "interference" while at the same time rely on it for their own welfare. *Plus ça change*!

Again, when Sir Edward Coke C.J. encouraged the adjudication of mercantile disputes in the common law courts, his purpose was not to "legalize"[10] (and therefore kill) mercantile law but to aggrandize the position of the common law, to ally the powerful and disaffected mercantile classes with the common lawyers against the royal government which threatened both. And in an age in which "presents" and piece-work payment oiled the judicial machinery, and also which saw increasing competition from Chancery for legal business, it seems not entirely unlikely that financial considerations also motivated the Chief Justice's generous invitation to the merchants to bring their disputes to him. Likewise, political and economic factors were behind Lord Mansfield's incorporation of the law merchant into the common law.[11] However, once lawyers acquired commercial expertise there was no reason why the bench should slavishly ape commercial practice. That the nineteenth century judiciary was won over to the non-interventionist philosophies of its day is no justification for judicial reticence in the late twentieth century.

Arguments from history are difficult, then; and their utility and validity are related to the depth of research and of perception of the individual historian. It is unfortunate that Dr. Trakman has rushed to publication without deeper immersion in the historical materials. Had he plunged into the sources, he would undoubtedly have asked the questions both ancient and modern which a narrow study of specific contractual terms does not necessarily elicit.

M.H. OGILVIE*

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[10] See page 26 which suggests compulsion and legalization as Sir Edward's motives.

[11] One assumes that Lord Mansfield still went to the bench in 1756 and not 1856 as asserted on p. 27.

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Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982. By MORRIS MANNING, Q.C. Toronto: Emond-Montgomery. 1983. Pp. ixiv, 760. ($75.00).

With the entrenchment in the Constitution of a Charter of Rights and Freedoms the modern fathers of Confederation renewed a challenge to lawyers and the judiciary which had not been taken up with the passage in 1960 of the Diefenbaker Bill of Rights. As is well known, the experience with the Canadian Bill of Rights was ultimately frustrating and disappointing. It essentially lay dormant for 10 years until the case of *Regina* v. *Drybones*[1] raised false hopes, at least in the legal community, that Canada had taken an important step towards the protection of its citizens from government encroachment. Since 1970, with few exceptions, the experience with the Bill of Rights has not satisfied that expectation. The Courts in cases such as *Attorney-General of Canada* v. *Lavell*,[2] *Hogan* v. *The Queen*,[3] and *Curr* v. *The Queen*,[4] bowed to the perceived will of Parliament and refused to give supremacy to the rights and freedoms enunciated in the Bill of Rights. For all practical purposes, the Bill of Rights became a dead letter. Far from adopting a liberal and imaginative approach, the Courts ultimately froze the Bill of Rights in the law of 1959 with its inequities and abuses. Yet, buried in these disappointing judgments was the odd phrase which gave some hope that things would be different if rights were constitutionally entrenched. Thus, the Courts, while upholding laws that many would consider patently unfair, noted that they could not do otherwise lest the sovereignty of Parliament would be substantially impaired in a manner which could only be accomplished by constitutional amendment.

In his book, *Rights, Freedoms and the Courts: A Practical Analysis of the Constitution Act, 1982*, Mr. Manning has attempted to set out an approach to the Charter of Rights and Freedoms which, if followed, would ensure that it does not suffer the same fate as the Bill of Rights. As he points out:[5]

> The entrenchment of fundamental rights and freedoms in a written constitution involves a rethinking of the role of the judiciary and the role of counsel in putting constitutional matters before the Courts.

Mr. Manning in the succeeding pages then sets out to show that the task now facing the judiciary in the areas of rights and freedoms is not substantially different from the task performed in other areas of the law, where the Courts have not been reluctant to be innovative.

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[1] [1970] S.C.R. 282, (1969), 9 D.L.R. (3d) 473.

[2] [1974] S.C.R. 1349, (1973), 38 D.L.R. (3d) 481.

[3] [1975] 2 S.C.R. 574, (1974), 48 D.L.R. (3d) 427.

[4] [1972] S.C.R. 889, (1972), 26 D.L.R. (3d) 603.

[5] P. 21.

> While there is a natural reluctance in our Courts to admit that they make law, they have done so in the past and will be required to do so in the future.[6]

In the first 200 pages of his book, Mr. Manning carefully and thoughtfully reviews the role of the Courts in protecting individual rights and freedoms with reference not only to Canadian cases but also to British Commonwealth and American authorities. This first segment of the book will prove most useful to members of the judiciary prepared to adopt the progressive approach which Mr. Manning advocates. Chapter 3, "Rules of Interpretation and Construction" will be of particular interest. Mr. Manning has drawn together many interpretative aids from various sources to support the theory that constitutions are not to be construed in a "narrow and pedantic sense".[7]

In the ensuing pages, Mr. Manning deals with various provisions of the Charter in some detail. Sections 2, 6, 7, 8, 9, 10, 11, 12, 13 and 14 are analyzed and an attempt is made to forecast how they will be interpreted. Throughout, Mr. Manning takes a liberal, perhaps overly optimistic view, but it is a view supported by reference to authority in jurisdictions with similar constitutional guarantees. Accordingly, while in many respects the author is merely speculating, the comparative approach which he has adopted gives substance to his speculation. The interpretation of some sections re-surfaces in Chapter 9: "Application of the Constitution Act, 1982 to Selected Areas of the Law", where Mr. Manning deals in greater detail with areas in which he has a particular interest. Unfortunately, the result is a somewhat disjointed text. For example, the important issues of freedom of expression are dealt with both in the general part in Chapter 7 and in more depth in Chapter 9 under the heading: "Morality and the Criminal Law: Repression of Expression". The two Chapters were obviously produced at different times and no attempt has been made to integrate them. This problem is compounded by the lack of an index. The reader with a 'freedom of expression' problem, searching through the admittedly detailed table of contents, may refer to Chapter 7 and be disappointed in what he then finds, as it is in Chapter 9 that the more useful and thought-provoking analysis of freedom of expression, with particular reliance on American authorities, is found.

In Chapter 8 Mr. Manning deals at great length with the practical problems of Charter litigation, the problems of where to obtain a remedy for a violation of rights, what kind of remedy may be obtained and in what circumstances it will be granted. While the discussion is excellent, the author has a tendency to gloss over difficulties with sweeping conclusions which one might well question. Thus, he states:[8]

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[6] P. 24.

[7] P. 90, quoting Lord Wright in *James* v. *Commonwealth of Australia*, [1936] A.C. 578, at p. 614 (P.C.).

[8] Pp. 459-460.

> It is clear that the prerogative remedies of *certiorari* and prohibition will be available as the raising of Charter issues is a raising of constitutional issues which, in turn, allows the right to seek the writs as a matter of course;

and,[9]

> There is no doubt that a violation of the Charter should be considered a ground of jurisdictional error as it is a breach of a Constitution.

Again this would permit review by way of prerogative writs. Statements such as these could bear closer analysis. One does not need a crystal ball to forecast that, however liberal an approach the Courts would take to interpreting the substantive content of the Charter, they would be most reluctant to interrupt the normal, well developed course of litigation which favours, particularly in the criminal field, the trial and appeal route while discouraging interlocutory applications. At the very least, this part of the text should have included a slightly more refined evaluation in relation to specific kinds of violations. There are different policy considerations involved in attempting to invoke a prerogative writ where the accused alleges an erroneous ruling as to the admissibility of evidence obtained in violation of section 8 of the Charter than when he alleges that he is being deprived of a jury trial in violation of section 11(f). While both may well involve constitutional questions of a jurisdictional nature, the more fundamental nature of the latter complaint would clearly make it more susceptible to review by way of prerogative remedy.

This is not to be unduly critical of Mr. Manning's analysis. He had undertaken an enormous task and addressed himself to many issues both substantive and procedural which undoubtedly will arise under the Charter. Not only has he pointed to these issues, but he has suggested possible solutions and interpretations. Mr. Manning has a tendency to impose his own very liberal views on the existing law, but the careful reader will not usually be misled by the analysis. It would be unreasonable to expect that each section of the Charter would be considered in all its ramifications. Thus, in a relatively comprehensive treatment of section 8 of the Charter, Mr. Manning addresses many of the questions raised by the very new [for Canada] prohibition on unreasonable search and seizure, but his discussion covers less than 50 pages whereas Wayne LaFave[10] needed three 750-page volumes to cover the same area of United States jurisprudence.

However, in their rush to get their book out, Mr. Manning and his publisher have done themselves a disservice. They have produced a book which is sometimes difficult to use and is in a style which is often distracting. Thus, as pointed out earlier, while the book contains a lengthy table of contents, it has no index. Cases are cited in full in places but subsequently only referred to by the case name without directing the reader back to the page where the case is cited in full. The style of beginning key

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[9] P. 478.

[10] Search and Seizure: A Treatise on the Fourth Amendment (1978).

paragraphs with a headline, of sorts, sometimes gives the reader the feeling that he is scanning a newspaper rather than a constitutional law text. Admittedly, in the absence of an index such techniques may have been the only alternative. The poor typesetting and proofreading also detracts from the reader's appreciation of the text. This is unfortunate because the book is one which anyone, be he lawyer or judge, faced with a case under the Charter, will want to consult. At a time when there is little definitive appellate jurisprudence, the case law which Mr. Manning has brought together from many other jurisdictions will be of invaluable assistance in formulating arguments and judgments under our Charter. Mr. Manning has done a vast amount of research uncovering helpful case law from countries as diverse as India and Nigeria. There is a liberal infusion of decisions from the Privy Council and the European Court of Human Rights as well as the United States Supreme Court.

One area where the text is weak lies in the decision to include cases decided under the Charter. Events are moving so rapidly in this field and the whole area is in such flux that it would have been preferable not to include any case law under the Charter. As it is, cases which were already overruled before the book was on sale assume unwarranted importance. Since the book is in hardcover these cases have been given an undeserved permanency which tends to distort the author's approach.

Mr. Manning clearly has a genuine feel for the area and a concern for fundamental freedoms. It is to be hoped that in reading this book members of the bar and the judiciary will permit some of his approach to be introduced into their arguments and judgments so that the Charter will represent a new starting point for the protection of fundamental rights and freedoms.

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