Uniform Law for International Sales under the 1980 United Nations Convention. By JOHN O. HONNOLD. Deventer, Netherlands and Boston: Kluwer Law and Taxation Publishers. 1982. Pp. 586. ($52.00 U.S. cloth bound, $32.00 U.S. paperback).

In April 1980 a diplomatic conference convened by the United Nations unanimously adopted the Convention on Contracts for the International Sale of Goods,[1] thus giving its seal of approval to a decade of intense activity by the authors of the draft Convention, the United Nations Commission on International Trade Law (UNCITRAL).

Professor Honnold's admirable book is the first text in English[2] to provide a detailed commentary on the Convention and, though it has no official imprimatur, it is safe to predict that it will remain one of the most authoritative guides to the Convention for years to come. This is so for a number of reasons. Honnold has been a leading international trade law scholar for many years, and was a member of the United States delegation at the 1964 Hague Conference which led to the adoption of the two uniform laws on the international sale of goods,[3] the precursors of the 1980 Convention. Subsequently, he became the first chief of UNCITRAL's Secretariat and, after completing his term of office, resumed his role as a United States delegate to the Commission. Honnold was therefore uniquely

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[1] U.N. Docs., A/Conf. 97/18. See also UN Conference on Contracts for the International Sale of Goods, 10 March - 11 April, 1980: Official Records (United Nations, New York, 1981).

[2] There is a shorter but incisive work in German by Prof. Peter Schlechtriem, Einheitliches UN-Kaufrecht (Tübingen-Mohr, 1981). A fine collection of articles on the draft Convention appears in Symposium: UNCITRAL's First Decade (1979), 27 Am. J. Comp. Law 201 et seq. For two Canadian perspectives on the Convention see C. Samson, La Convention des Nations Unies sur les Contrats de Vente Internationale de Marchandises (1982), 23 Cahiers de Droit 919, and J.S. Ziegel, The Vienna International Sales Convention, in New Dimensions in International Trade Law: A Canadian Perspective (ed. by J.S. Ziegel and W.C. Graham, 1982), pp. 38 et seq.

[3] Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods ("ULFC"), and Convention relating to a Uniform Law on the International Sale of Goods ("ULIS"). The two Conventions are reproduced in Honnold's text as Appendices D and E respectively.

qualified to write this book. He has gone about his task with a lightness of touch and a felicity of style that will come as no surprise to those familiar with his earlier writings and that will give much pleasure to those new to international sales law and its postwar developments. He has succeeded in writing a text that will appeal alike to generalist and expert, and he has done it with a disarming simplicity and clarity that could only have been achieved by someone as thoroughly at home in the international sales arena as he is.

His approach to the exegesis of the Convention, though fairly orthodox in arrangement, is designed to enable all levels of reader to work their way easily through the Convention and to grasp its key concepts without difficulty. In this, I think, he has succeded admirably. The book begins with a general overview comprising two chapters, one on the history of the 1980 Convention and the other on its salient features. This is then followed by a detailed commentary on the first eighty-eight articles of the Convention and a brief exposition of the Final Provisions in articles 89-101. There are five very helpful appendices, covering almost 100 pages, which contain, apart from the text of the 1980 Convention, a table of concordance between the final Convention and the earlier draft versions, and the texts of the 1978 draft Convention as well as of the 1964 Hague Conventions. The reader is therefore well equipped to begin his own "genealogical" studies. Further guidance is provided by the generous bibliographic notes at the beginning of the book.

So far as the examination of individual articles of the Convention is concerned, Honnold successfully fuses a variety of techniques — historical, comparative and functional — thus accurately capturing the essential ethos of the Convention itself. For the Convention did not spring Zeus-like from the inspiration of a single genius, nor does it reflect the unfolding of a single germinal idea.[4] Instead, it marks the culminating effort of two generations of scholars, working over a period of almost 50 years, to produce an international sales law that would be acceptable to countries with diverse legal, social and economic systems. The Convention is thus a synthesis of many influences, an exercise in international commercial accommodation, and represents above all a determined effort to create a flexible and generally practical framework for the conduct of international sales transactions between merchants and national trading entities with widely differing legal and economic backgrounds and objectives. All these features are amply demonstrated, time and again, in Honnold's limpid commentary on individual articles of the Convention, and in the many helpful examples with which he illustrates the prospective operation of the

[4] Insofar as any single scholar deserves credit for the fruitful outcome, it is the great German scholar, Ernst Rabel, whose exhaustive study of comparative sales law provided the intellectual foundation for the 1964 Conventions. See E. Rabel, Das Recht des Wahrenkaufs, vol. 1 (1936); vol. 2 (1958).

Convention rules. His commentary is also interspersed with a large number of admirable short essays which illuminate key issues in comparative commercial law much better than many pages of turgid prose could have done.

His book can therefore be recommended without hesitation. This is not to say that it does not have its weaknesses or that everyone will agree with his interpretation of individual provisions of the Convention. One obvious difficulty is that, as one of its principal architects, he is too close to the Convention to be able to view it with complete detachment. He does not go out of his way to expose ambiguities or lacunae, of which there are a substantial number in the Convention. (I do not mean to suggest that he avoids controversial questions because this is far from being the case). On occasion he is led to put a strained interpretation on a reasonably clear provision. An example is when he seeks to argue that the seller's right to sue for the price (provided for in article 62) is qualified by the duty to mitigate his loss under article 77 when the buyer has repudiated the contract. Honnold does so because a literal reading of article 62 offends his sense of commercial efficiency and reasonableness.[5] Nor, understandably, does he seek to advise the lawyer when he should counsel his client to exclude the Convention, as article 6 entitles contracting parties to do, or when it would be in the parties' interest to elect to be governed by a national law (English, French or German law, to choose some random examples) with which they may be more familiar.

His closeness to the Convention may also be the reason why he omits any discussion of the important provision in article 94(1). This entitles two or more states with closely related legal rules on matters governed by the Convention to make a joint or reciprocal unilateral declaration that the Convention is not to apply to contracts of sale or their formation where the parties have their places of business in those States. Article 94 therefore offers an attractive compromise to contiguous states (such as Canada and the United States) whose nationals conduct a large volume of business with each other, and where it may not be practicable to expect the parties always to remember to exclude the Convention if they do not wish it to apply.

There are also a number of other omissions in Honnold's scholarly exploration of individual articles which cannot be readily explained in terms of his loyalty to the objectives of the Convention. Does the Convention apply to private sales, that is, where a sale is made otherwise than in the course of the seller's business? And if it does, is the seller bound by the implied obligations of fitness and quality imposed by article 35(2)? Honnold is not alone in glossing over what to domestic lawyers will seem obvious questions, and it may be that the answer is no more profound than that it did not strike him and his predecessors as raising important policy

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[5] See pp. 420-421.

considerations.[6] The conclusion that I draw from these and other examples that could be cited is twofold. First, Honnold did not purport to write an exhaustive text: he has left much ore to be mined by subsequent scholars. Second, the reader should not approach the Convention with misguided idealism. One may warmly subscribe to its objectives (as indeed this writer does) and yet recognize that it has significant flaws, flaws that are directly ascribable to the difficulty of drafting by committee and of reaching agreement among scholars, practising lawyers, and government officials with very diverse backgrounds and legal traditions.

There remains to be discussed two much broader questions. Whither the Convention and what is Canada's own position? For without a reasonably optimistic answer to both these questions, Canadian practitioners may be forgiven if they do not take the Convention too seriously. Honnold himself is very positive on the first question — indeed in the Preface he regards the unanimous approval of the Convention at the Vienna Conference as presaging "the prompt establishment of a uniform legal basis for world trade".[7] History may show that he was a little too sanguine. As of December 31, 1983, thirty-one states had signed the Convention, but only six states had ratified it or otherwise acceded to it.[8] No major common law jurisdiction falls into the latter category. However, President Reagan has given his support to the Convention[9] and it is expected that the United States Senate will hold hearings on its ratification early in 1984.[9a] Among major civil law jurisdictions, only France has so far ratified. Ten ratifications are necessary before the Convention can come into force.[10]

Even allowing for this reasonably early event, it would be fair to say that the Convention's future still hangs in the balance and that so far most of

[6] Honnold recognizes that the implied condition of merchantable quality in s. 14(2) of the English Sale of Goods Act, 1893, only applies where the goods "are sold in the course of a business", and that the warranty of merchantability in UCC 2-314(1) is likewise restricted to cases where "the seller is a merchant with respect to goods of that kind". "Merchant" is defined in UCC 2-104. Nevertheless, he explains (at p. 253) that "no such restriction was imposed [in art. 35(2) of the Convention] in view of the character of international sales and the exclusion in Article 2(a) 'of goods bought for personal, family or household use. . .'". I am puzzled by this explanation. If it means that only merchants engage in international sales this is clearly not so. (Take for example the case of the owner of a valuable painting who sells it to a foreign buyer). If the suggestion is that the Convention is restricted to sales between merchants this too is inconsistent with the scope provisions in arts. 1 and 2 of the Convention, and the provisions in art. 10 on the determination of a party's place of business. It is true that art. 2(a) excludes transactions where a person buys for personal, family or household use, but this casts no light on the essential attributes *of the seller*.

[7] P. 5.

[8] The states were Argentina, France, Egypt, Hungary, Lesotho and Syria.

[9] See Message from the President of the United States to the Senate, September 21, 1983, reprinted in 98th Cong., 1st Sess., Sen. Treaty Doc. No. 98-99 (Washington, 1983).

[9a] The Senate Foreign Relations Committee held a hearing on the Convention on 4 April, 1984. See U.S. Import Weekly, Vol. 9, p. 879 (1984).

[10] Art. 99.

the world's major trading states have shown little urgency in deciding to bring the Convention into operation. The reasons for this relative passivity are many, but for the most part they are not due to hostility to the Convention. Lack of general enthusiasm, or perhaps indifference, by the international trading community is probably the single most important factor. Many businessmen still seem unconvinced that a uniform international sales law is essential for the efficient flow of international trade and that the current position, whatever its theoretical defects, imposes unacceptable transactional costs.

Canada's position is complex and, for a country that has such heavy stakes in a prosperous world economy, not very satisfactory. Canada is not a member of UNCITRAL and has not so far sought to become one.[11] It does send an observer to its meetings, but for the most part has not attempted to play an active role even in that capacity. Canadian representatives played no part in the drafting of the Sales Convention during its formative phase, and although Canada was represented at the Vienna Conference it was too late at that stage to exercise any significant influence.

Given this posture of benign neglect, it will not surprise the reader to learn that the federal government has taken no serious steps so far to move towards accession to the Convention. I confess I am puzzled to know however why the federal government did not even sign the Convention, a step that would have imposed no legal obligations but that would have signaled Canada's support for UNCITRAL's objectives and its appreciation of the many years of effort invested in the sales project by its officials and the members of the drafting committee.[12]

In fairness to the federal government, it must be added that constitutional difficulties have militated against its assuming a high Convention profile. The Department of Justice officials do not see the federal government's trade and commerce power under the Constitution Act, 1867, as encompassing the regulation of the contractual aspects of international sales. Despite Laskin C.J.C.'s strong dicta in *MacDonald* v. *Vapor Cana-*

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[11] Membership in UNCITRAL is currently restricted to 36 states and is distributed on a regional basis. "Western Europe and Others" are entitled to nine representatives. "Others" embraces Australia, Canada and the United States: Honnold, *op. cit.*, p. 50. The U.S. has been a member from the beginning. Australia, I understand, lobbied for membership and has been a member since 1967. The only explanation I have been able to secure as to why Canada has not sought membership is that membership was regarded as too expensive and that the federal government had higher priorities. I understand that the membership question is currently being reviewed by the federal authorities.

[12] A senior federal official told me in 1980, at the time of the approval of the Sales Convention, that it was because signature would have implied a moral obligation to ratify the Convention. However, few of the 31 signatories seem to have been animated by such a sentiment. I suspect the constitutional position may have been a stronger influence in persuading the federal government to withhold its signature.

da Ltd.[13] and liberal hints by members of the Supreme Court in other cases, the federal officials still treat the Privy Council's decision in *Attorney-General for Canada* v. *Attorney-General for Ontario*[14] (I.L.O. Labour Conventions case) as imposing fatal fetters on the federal government's treaty making power in areas falling domestically within provincial jurisdiction. One of the lamentable results of this unduly cautious attitude has been Canada's general failure to ratify treaties in the private international business area, including such important and generally beneficial treaties as the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[15]

Rather than attempting a frontal assault, the federal government has preferred to discharge its international responsibilities by operating through the so called "federal state clause".[16] The Sales Convention contains such a clause.[17] The federal state clause enables the federal government to limit the effectiveness of an international treaty to such of the Provinces as have indicated their willingness to be bound by it. Although an ingenious constitutional device, I have argued elsewhere[18] that it is a seriously inefficient mechanism in the universe of trade, which is no respecter of national, much less provincial, boundaries, and where speed in the formation and consummation of transactions is often essential.

All this notwithstanding, it is encouraging to be able to report that there are many promising signs of a more positive Canadian attitude. Canadian practitioners are taking an increasing interest in international trade law and are playing active roles in such important organizations as the Business Law Section of the International Bar Association and the newly formed Law Institute of the Pacific Rim. A growing number of law faculties are mounting courses and seminars and are sponsoring conferences, alone or in conjunction with the Bar.[19] The federal Department of

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[13] [1977] 2 S.C.R. 134, at pp. 167-169, (1976), 66 D.L.R. (3d) 1, at pp. 27-29.

[14] [1937] A.C. 326 (P.C.).

[15] 330 U.N.T.S. 38 (1959). The text of the treaty is reproduced in Ziegel and Graham, *op. cit.*, footnote 2, p. 129, Appendix C. The treaty has been ratified by 50 states, including most Western European countries, the U.K. and the U.S.A. Other examples involve international Maritime Law. The Canadian Maritime Law Association made strong representations to the federal government in 1983 complaining about the obsolete character of much of Canada's maritime legislation and Canada's failure to ratify many of the international maritime treaties concluded since the war. I am indebted to Professor Wm. E. Tetley of the McGill Law Faculty for supplying me with a copy of the Association's brief.

[16] See H. Allan Leal, Federal State Clauses and the Conventions of the Hague Conference on Private International Law, Horace E. Read Memorial Lecture, delivered at the Dalhousie Law School on 19 September 1983 (in course of publication).

[17] Art. 93.

[18] In Ziegel, "Should Canada adopt the International Sales Convention" in Meredith Memorial Lectures 1982: New Developments in the Law of Export Sales (Richard de Boo, 1983), p. 67 at 84-85.

[19] A.L.C. de Mestral, Book Review (1984) 9 C.B.L.J. 122.

Justice also organized in October 1983 the first of what it hopes will become a regular series of seminars on international trade law developments. So far as the Sales Convention is concerned, if the United States or a significant number of our other major trading partners ratify the Convention then Canada too will be forced to take it seriously. And then, it is safe to predict, Honnold's fine book will also become an indispensable working tool for Canadian practitioners, scholars and law students alike.

JACOB S. ZIEGEL*

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Canadian Tort Law. By the HONOURABLE MR. JUSTICE ALLEN M. LINDEN. Toronto: Butterworths. 3rd ed. 1982. Pp. cxxxlv, 737. ($70 cloth bound, $36.50 paperback).

Publication of the third edition of Linden's Canadian Tort Law is a welcome event to both practitioners and teachers in the field. The book has undergone a metamorphosis since it originally appeared as Canadian Negligence Law in 1973 and now provides the most complete textual material available on the Canadian law of torts.

Most of the material and emphasis in the book reflects the original focus on the law of negligence. The author takes an unashamedly supportive stand on the expansive role of negligence in the law of torts, an approach which is amply borne out by recent developments in the fields of medical negligence,[1] contract and negligence,[2] recovery for nervous shock,[3] and economic loss.[4]

The author's influence on the development of tort law in this country cannot be over stated, particularly if the cause of action is in the field of negligence. The work is the Canadian source most often cited and relied on by courts in this country in arriving at their decisions, and very often Linden's analysis and resolution of an issue are adopted by the judiciary. A striking example is the recent decision of the Supreme Court of Canada in *The Queen in Right of Canada* v. *Saskatchewan Wheat Pool*[5] where Linden's view, that breach of a statute may be evidence of negligent conduct but does not create a separate right of action, was referred to and applied.

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[1] *Hopp* v. *Lepp*, [1980] 2 S.C.R. 192, (1980), 112 D.L.R. (3d) 67, [1980] 4 W.W.R. 645.; *Reibl* v. *Hughes*, [1980] 2. S.C.R. 880, (1980), 114 D.L.R. (3d) 1.

[2] *Junior Books Ltd.* v. *Veitchi Co. Ltd.*, [1982] 3 W.L.R. 477, [1982] 3 All E.R. 201 (H.L.).

[3] *McLoughlin* v. *O'Brian*, [1983] A.C. 410, [1982] 2 All E.R. 298 (H.C.).

[4] *Nicholls* v. *Corporation of Township of Richmond* (1983), 145 D.L.R. (3d) 362, [1983] 4. W.W.R. 169 (B.C.C.A.). This case is under appeal to the Supreme Court of Canada.

[5] (1983), 143 D.L.R. (3d) 9, [1983] 3 W.W.R. 97 (S.C.C.).

The 3rd edition of Canadian Tort Law includes new chapters on nuisance, defamation and occupiers' liability, as well as a completely up-dated chapter on automobile accident compensation. It is not a completely comprehensive text on the Canadian law of torts, but the book's analytic integrity and comprehensive treatment of the topics it covers make it an essential part of the library of practicing lawyers, whether civil litigators or general practitioners. From an academic standpoint the book is an excellent text on which to base a general torts course. No doubt the author will add new chapters to it as time permits; this reviewer looks forward to that occasion.

PETER BURNS*

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Réflexions sur la Responsabilité Civile: Évolution et Problèmes Actuels en Droit Comparé. Par CHRISTIAN LARROUMET. Montréal: Institut de Droit Comparé, Université McGill. 1983. Pp. 134. ($20)

L'Institut de droit comparé de l'Université McGill, dans le cadre de son programme de maîtrise, met l'accent sur le droit comparé. Plusieurs collègues français sont ainsi venus depuis 1981 y dispenser un véritable enseignement de droit comparé. L'Institut a décidé de publier ces cours et il s'agit là d'une heureuse initiative pour la doctrine québécoise et pour le droit comparé en général.

Dans la "*Collection de droit comparé de McGill*", dirigée par le professeur Pierre-Gabriel Jobin, trois ouvrages ont paru successivement: "*Les contrats en droit international privé comparé*" de Henri Batiffol en 1981; "*Le contrat dans le nouveau droit québécois et en droit français: principes directeurs, consentement, cause et objet*" de Jacques Ghestin en 1982 et enfin, "*Réflexions sur la responsabilité civile: évolution et problèmes actuels*" de Christian Larroumet.

Le lecteur ne doit pas chercher dans ce dernier texte un ouvrage de doctrine au sens classique du mot. Le texte a en effet été rédigé par l'auteur à partir de ses notes de cours et doit donc être vu dans la perspective d'une série de leçons magistrales. L'auteur, lui-même, dans son avant-propos met le lecteur en garde contre les "... imperfections d'une présentation orale".

Le lecteur ne doit pas non plus chercher dans l'ouvrage une vue d'ensemble de la responsabilité civile, mais seulement un examen de quelques problèmes particuliers de ce secteur du droit privé regroupés au sein de deux parties. Dans une première partie l'auteur retrace l'évolution de la responsabilité civile sur le plan des idées et du droit comparé en cinq chapitres portant sur la notion de responsabilité, ses fonctions, la crise de la

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responsabilité, l'élaboration du droit et enfin la tendance à l'indemnisation distinction existant entre l'illicéité et la faute, entre l'élément moral et distinction existant entre l'illicite et la faute, entre l'élément moral et l'élément juridique, conclut que la faute ne constitue plus nécessairement un élément permettant de caractériser la responsabilité juridique. Dans son second chapitre, l'auteur insiste de façon intéressante sur la double fonction indemnisatrice et répressive de la responsabilité civile de type classique en replaçant l'évolution du droit dans une perspective historique. Enfin dans le troisième chapitre, il examine l'impact du droit des assurances et des institutions de sécurité sociale sur le droit classique et les effets sur la règle de droit.

La seconde partie de l'ouvrage est intitulée "*De quelques problèmes du droit de la responsabilité civile*". L'auteur a choisi à cet égard de nous faire partager ses réflexions sur la réparation du dommage (chap. I) et sur la faute (chap. II). Le lecteur y trouvera une analyse de droit comparé intéressante et menée avec grande rigueur.

Ce petit ouvrage intéressera surtout les théoriciens du droit puis-qu'il leur communiquera au fond une "vision" contemporaine et une réflexion de l'auteur sur quelques aspects de la responsabilité civile. Il n'est pas non plus sans intérêt pour le praticien du droit qui y trouvera lui une comparaison entre le droit québécois et le droit français et des constatations sur certains autres systèmes juridiques (Israël, la Scandinavie, etc.).

JEAN-LOUIS BAUDOUIN*

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Code Civil—Civil Code 1866-1980. Édition historique et critique—An Historical and Critical Edition. Établie par—edited by PAUL-A. CRÉPEAU and JOHN E.C. BRIERLEY.Montreal: Société québécoise d'information juridique. 1981. Pp. cvii, 1304. ($250.00)

Civilists, legal historians and comparativists owe a great debt of gratitude to Professors Paul-André Crépeau and John Brierley for having published "a complete and accurate text of every provision of the Civil Code as it stood on 1 August 1866 and as it has since become by reason of successive legislative amendments"[1] until 31 July 1980.

Since the publication of the Queen's printer edition of the Civil Code of Lower Canada in 1866, there has been no subsequent official edition of this fundamental part of the law of Quebec. Although many private editions

[1] P. ix.

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have been published since that time, they vary greatly in accuracy. Thus, there is a real need for a reliable text of the Civil Code containing the legislative history of each of its provisions. To add to its value, the present edition will be kept up to date by way of annual cumulative supplements until the full implementation of the new Civil Code of Quebec as further modifications to the Civil Code of Lower Canada are enacted in the future.

The authors describe their work as an *historical* and *critical* edition of the Code, useful for tracing the evolution and ascertaining the present state of the law.[2] The words "historical" and "critical" are given a very narrow meaning as the book does not contain an historical introduction to the Civil Code or a critical analysis of its provisions. All we have is a chronological list of the amendments to the original provisions of the Code. Although the legislative history is the very *raison d'être* for the book, it falls short of a true "historical" analysis of each provision of the Code. The "critical" analysis is also limited to an *exposé* of inaccuracies, misprints, errors in style or grammar and inconsistencies. This is achieved mostly through the use of symbols. The authors did not intend to criticize the substance of the Code provisions which would have been a major task outside the scope of their project. Thus, it is as a reference book that this work is truly original. It should be of great value to the practitioner or judge who wishes to find out the state of the civil law at a particular point of time. It should also be a precious tool for legal scholars and students. However, it is unfortunate that the price of this book places it out of reach of those most likely to use it. As a heavily subsidized project, one could have expected it to be available at a more reasonable price.

From a sociological point of view, it is interesting to note the extent to which the civil law has changed since 1866 by the repeal of some outmoded rules or institutions and their replacement by new ones, particularly with respect to the rights of married women. On the other hand, some archaic rules still remain in the Code, for instance, those dealing with duel.[3] The new Civil Code of Quebec will remove these vestiges of the past.[4]

The lack of uniformity in legal terminology and in the translations from one language to the other, especially in the subsequent amendments to the original provisions of the Code, clearly demonstrate the difficulties inherent in piece-meal amendments of a code, as well as the extreme care required when preparing a new one. The Law Reform Commission of Canada should consider these pitfalls when drafting the new Criminal Code. Actually, the lack of uniformity in legal terminology and in the use of ordinary words is quite understandable since legal institutions and the

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[2] P. xi.

[3] Art. 1056.

[4] See Report on The Quebec Civil Code (1977) and L.Q. 1980, c. 39.

French and English languages have evolved since 1866. Many words in common use at that time are no longer popular today.

In the future, the legislator, when amending the new Civil Code of Quebec, will have to be more careful than in the past in order to avoid inconsistencies and anachronisms. If there is a lesson to be learned from this book, it is the need for a *permanent* Office of Revision of the Civil Code or at least a periodic review of the provisions of the Code.

When the Civil Code of Lower Canada will be replaced entirely by the Civil Code of Quebec, this work will stand as a monument to the past. Today it is an invaluable work of "legal art".[5]

J.-C. CASTEL*

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Les Codes civils—The Civil Codes. A Critical Edition, Third Edition. Edited by PAUL-A. CRÉPEAU with the collaboration of LOUISE LUSSIER. Montreal: Société québécoise d'information juridique. 1983. Pp. xlvi, 857. ($17.00)

This book, unlike *The Civil Code 1866-1980. An Historical and Critical Edition*[1] covers the articles presently in force in both the Civil Code of Lower Canada[2] and the Civil Code of Quebec.[3] In the Preface the editor informs us that Quebec has two Civil Codes because the wide range of the reform proposed by the Office of Revision of the Civil Code[4] makes it necessary to spread the enactment of its various parts over a period of years. Thus, one must cross from one Code to the other depending upon the subject matter involved. Eventually the Civil Code of Quebec will replace the Civil Code of Lower Canada. This may take a long time as some of the topics dealt with by the Office of Revision do not fall within provincial jurisdiction under the Constitution of Canada.[5]

The texts of the Civil Code of Lower Canada have been drawn from the historical and critical edition and the first cumulative supplement

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[5] A supplement to the work has now been published: see, Code Civil—Civil Code, 1866-1980, Supplément—1980-1983—Supplement (1983).

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[1] See preceding book review.

[2] 1866.

[3] L.Q. 1980, c. 39, which came into force on April 2nd, 1981.

[4] Report on the Civil Code (1978), Vol. I, Draft Civil Code, Vol. II, Commentaries.

[5] This explains why some provisions of the Civil Code of Quebec are not yet in force, eg., those dealing with divorce are printed in smaller type.

1980-1983. As for the texts of the articles of the Civil Code of Quebec, they are drawn from the Act to establish a new Civil Code and to reform family law.[6] The book follows the same pattern as the historical and critical edition of the Civil Code of 1866 and uses the same symbols to draw the reader's attention to typographical or other errors which the two codes may contain.

The present edition incorporates legislative modifications introduced into the Codes up to June 30th, 1983. One of the new interesting features of this edition is the inclusion of a correlation table between the provisions of the Civil Code of Quebec and those of the French Civil Code which are also the product of wide ranging reform.

The provisions of the Codes are not followed by annotations with a view to facilitating their understanding, interpretation and application but we are informed that should this new edition find favour with the legal profession, such annotations would be added to subsequent editions. Still as it stands, the third edition should greatly facilitate the work of the legal profession in Quebec.

J.-G. CASTEL*

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The Modern Commonwealth. By SIR WILLIAM DALE. London: Butterworths. 1983. Pp. xxi, 329 ($82.50).

As an idea, the Commonwealth is popularly associated with the person of the monarch, the quadriennial Games and the newsworthy biennial Heads of Government meetings. However, as an institution, the Commonwealth remains in the realm of an enigma. In recognition of this unfortunate circumstance, Butterworths has begun a Commonwealth Law Series, of which the first volume is Dale's The Modern Commonwealth.

The volume is rather evenly divided between the general text, and a lengthy appended catalogue of descriptive synopses of the member countries.

The main text is subdivided into three parts, examining in turn the historical foundations of the Commonwealth, its international organization and, finally, a comparative constitutional review of member states. Part One reviews the evolution of government in member states from the historical imperial prerogative, through dependent status to full independ-

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[6] *Supra*, footnote 3.

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ence within the structure of a common allegiance to the Crown, a shared legal heritage through the Common Law, and imperial constitutional restraints. Included in Part One are helpful sketches of such legal fictions as the date of reception of English law, and the role and evolution of the royal prerogatives. This Part also provides a brief tracing of the institutional evolution from Empire to Commonwealth in terms of the intergovernmental meetings, initiated on the occasion of Queen Victoria's Golden Jubilee in 1887, and of the indivisibility-divisibility of the Crown and its metamorphosis into the role of "symbol" of the Commonwealth.

Part Two continues on the theme of evolution from Empire to Commonwealth and from Crown to symbolic Head, paying particular homage to the flexibility of the organization in responding to the constitutional needs of an independent Ireland and republican India in turn. A somewhat lengthy examination of the various declarations issued at Heads of Government meetings and such constitutive instruments as the Statute of Westminister 1931 leads the author to the conclusion that no obligations *inter se* have been undertaken by member states by virtue of such documents. However, the author ventures to attach a significance to such Commonwealth documents by recognizing with apparent satisfaction their contribution to the evolution of customary international law and their moral strength as indications of the will of member states. This examination is followed by an equally detailed argument that the Commonwealth is indeed an internationally recognized organization, though not enjoying the status of an international person and therefore not able to partake in treaty-making *per se*.

Shifting focus from the external view to the internal, the author recognizes that the obligations of membership in the Commonwealth by the forty-seven member states requires merely "consultation and co-operation" with other member states, the requisite degree of consultation and co-operation being left to the determination of individual members. The organs of the organizational structure are also canvassed briefly *viz.*the Heads of Government meetings, the Secretariat, the ministerial meetings, various agencies and study and operational groups.

Part Three delves into a comparative constitutional analysis. Among other particular topics, the Part contains interesting reviews of the office of Attorney-General, the judicature and of the conventions relating to the executive and royal assent to Bills. The recent (1981) Constitution of Belize serves as the normative model in a discussion of the protection of civil rights and fundamental freedoms among the Commonwealth countries, with brief references to appropriate provisions of the European Convention on Human Rights.

Finally, as noted, Part Four is comprised of a lengthy alphabetized roll call of the member countries of the Commonwealth. Each country is featured in terms of a geographic and brief historical description, followed

by an indication of the basic constitutional document of the state, an overview of its Executive, Legislative and Judicial branches, and mention of its latest revision of statutes, existence of law reports, constitutionally protected fundamental rights, citizenship requirements and a snippet on the legal system and profession.

From the description of the contents it may be already implied that the volume, though in many ways a meritorious addition to the study of the Commonwealth, does have some demerits. As the first in a series of Commonwealth studies, The Modern Commonwealth should be a study and celebration of an ideal—an ideal of co-operation and understanding between peoples, a striving from nationalism to internationalism. It should present the dynamic human forces which have molded a Commonwealth from an Empire. Instead, it is a celebration without the celebration. The author has set about his task in a dry, all-too-cursory style. In so doing, the life forces of the Commonwealth—its people and its vibrant history—have been ignored. One searches in vain for mention of the current Secretary-General Sir Shridath Ramphal; while his predecessor, Arnold Smith, is relegated to an obscure footnote reference. For this historical record one can, however, somewhat gratefully turn to Wheare.[1] It is unfortunate that Dale did not grasp the opportunity in his work to update and re-examine the historical foundations of the Commonwealth.

By striking a closed analytical posture, Dale has presented himself with the task of, in a sense, justifying a social organization against strict legal standards. To examine painstakingly the international status of the Commonwealth and to stress its lack of status as an international person is to lament where no apology is necessary. Internally, it is recognized that the Commonwealth is a vehicle for international co-operation and discussion. It may well be that that is *the* role to which the organization is to aspire, and that no apologetic inferiority complex should be made manifest by frustrated analogies and comparisons to international bodies of more concrete functions.

To cast a cold analytical eye to the organizational structure means also to wear blinders to its imperfect past and present. Dale ignores any reference to the excesses of Empire as so well captured by the Irish folk group the Wolftones in their song Joe McDonnell:

> "You have plundered many nations, divided
> many lands
> You have terrorized their peoples, you
> ruled with an iron hand."

As to the present, Dale goes so far as to state that the forty-seven member countries of the Commonwealth "exemplify every form of democratic

[1] The Constitutional Structure of the Commonwealth (1960).

government, from hereditary monarchy to republic''.[2] This glorified statement denies the reality of many third-world oligarchies.

Additionally, it is unfortunate to note that conspicuous errors exist in the descriptions in Part Four of each country, notwithstanding the author's indication that in the interests of accuracy the description has been approved by authorities in that country. For example, two errors pertaining to Canada on page 215 stand out: (a) the reference in the description of the provincial constitutions to a Legislative Council for Quebec, a body which in fact was abolished in 1968,[3] and (b) the statement that the final Canadian case before the Judicial Committee of the Privy Council was *Attorney-General for Ontario* v. *Attorney-General for Canada*[4] when in fact the final appeal was *Ponoka-Calmar Oils Ltd.* v. *Wakefield Co.*[5]

The Modern Commonwealth is deficient as well in the all-too-cursory analysis of present agencies and structures. The well intentioned reader would do well to refer to the biennial Reports of the Commonwealth Secretary General[6] and to the publication Commonwealth Organizations[7] for a fuller account of today's Commonwealth in action. The author would have greatly enhanced his work by selective inclusion of such information, in appendices or incorporated into the text.

Dale's The Modern Commonwealth is a welcome though limited study as volume one in a series devoted to a significant institution which to date has been all too often ignored by legal scholars.

JOHN MCEVOY*

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Residential Tenancies. Fourth Edition. By DONALD H.L. LAMONT, Q.C. Toronto: The Carswell Company. 1983. Pp. xxvii, 339. ($30.00).

What commenced in 1970 as a short work describing the 1969 legislative changes made in Ontario respecting residential tenancies is, in this fourth edition, a text of over 200 pages, with another 100 pages of appendices, that describes in a clear and well-organized manner the legal framework respecting residential tenancies in Ontario. Since the third edition pub-

[2] P. 3.

[3] S.Q. 1968, c. 9, ss. 1, 2.

[4] [1947] A.C. 127, [1947] 1 D.L.R. 801, [1947] 1 W.W.R. 305 (P.C.).

[5] [1960] A.C. 18, [1959] 3 All E.R. 571.

[6] E.g., Commonwealth Secretariat, Report of the Commonwealth Secretary-General (1983).

[7] Commonwealth Secretariat, Commonwealth Organizations (2nd ed., 1979).

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lished in 1978, amendments have been made to Part IV of the Ontario Landlord and Tenant Act,[1] the part dealing with residential tenancies, and there has been enacted in 1979 the Ontario Residential Tenancies Act.[2] This latter act was to supercede Part IV of the Landlord and Tenant Act; however in a reference to the Supreme Court of Canada[3] only those sections of the 1979 act dealing with rent review were declared *intra vires* the province and only these parts have been proclaimed. Since 1978 there has also been an increasing number of cases respecting residential tenancies in Ontario and in other jurisdictions, necessitating expanded treatment of many subjects in the fourth edition.

Two changes of note that have been made in the fourth edition are reorganization of the chapter on the tort liability of landlords and the reorganization of material to create a new chapter on the obligations of tenants. The reorganized chapter 16 on the tort liability of landlords provides a brief discussion of the importance of the Ontario Occupiers' Liability Act,[4] and ensures easier access to the material in this chapter through the use of detailed headings. The new chapter on the obligations of tenants includes sections on tenants' material covenants and the duty to repair that exists for tenants.

The 1979 legislative activity regarding rent review, combined with the reality that rent review is acquiring a measure of permanence in residential tenancy relations, at least in Ontario, has resulted in the author significantly expanding the chapter dealing with that topic. This chapter constitutes an excellent description and explanation of the Ontario rent review process and is further enhanced by the use of cases drawn from the Summaries of Significant Decisions published by the Ontario Residential Tenancy Commission. There is a detailed discussion of the application of and the exemptions from the rent review sections of the Residential Tenancies Act. There is also a valuable outlining of the factors that the Ontario Residential Tenancies Commission will consider in examining the appropriateness of a rental increase. The Commission publishes its own guidelines regarding these factors, and Lamont warns that, while these self-imposed guidelines are useful, each case must be approached on its own merits and a rigid application of Commission guidelines must be avoided. This warning has proved prophetic in another jurisdiction. A recent Nova Scotia case[5] concluded that rent review guidelines, unless prescribed by regulation or by the act, must not be so rigidly applied that

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[1] R.S.O. 1980, c. 232.

[2] See now R.S.O. 1980, c. 452.

[3] *Re Residential Tenancies Act, 1979*, [1981] S.C.R. 714, (1981), 123 D.L.R. (3d) 554.

[4] R.S.O. 1980, c. 322.

[5] *Re Dale Corporation and Rent Review Commission* (1983), 149 D.L.R. (3d) 113, 58 N.S.R. (2d) 138, (N.S. App. Div.).

little consideration is given to the evidence presented regarding the items enumerated in the act that are to be considered in evaluating applications for rental increases. The Nova Scotia Government responded to this case by making the previously secret guidelines a regulation.[6]

Residential tenancies legislation was enacted to correct the perceived imbalance that existed in the common law of landlord and tenant in favour of landlords. Regarding the balance between landlords and tenants the author comments:[7]

> . . . one may wonder whether perhaps the pendulum has swung too far in favour of tenants. Security of tenure is fine, but these days there are many landlords of duplexes, flats and basement apartments who for one reason or another, but not for the quite limited statutory reasons, wish to regain possession and cannot do so. It would seem time to review Part IV from the point of view of the landlords.

This same comment was made in the third edition.

Security of tenure for tenants was adopted in Ontario as part of the package on rent review in 1975. Security of tenure provides that tenancies can only be terminated with the consent of the tenant, or by an order of the Court, granted only if the landlord shows a reason to terminate the tenancy that fits within the reasons outlined in the legislation. Security of tenure was seen as a necessary element of the rent review process, enabling tenants to actively pursue their rights to rent review without fear of landlord retaliation by eviction without cause. Security of tenure did not receive a great deal of attention when it was first introduced in Ontario, but as the supply of rental housing has decreased security of tenure has become more prominent. This increased awareness of the importance to tenants of security of tenure has resulted in an increased number of cases. The fourth edition accords significantly more attention to security of tenure than the third edition, but beyond the comment referred to above, that the adoption of security of tenure may result in the shifting of the balance between landlords and tenants unfairly in favour of some tenants, there is little reflection on the competing social policies and wider implications of security of tenure.[8] The treatment given security of tenure is consistent with the approach adopted in this text of outlining the legislation regarding residential tenancies and the interpretations the legislation has been given by the courts without significant elaboration or author commentary.

Editorially one comment should be made. On page 171 St. John should be St. John's—an unforgiveable error in some circles.

The value of this book for lawyers, members of the judiciary, and the general public transcends the borders of Ontario, since many other provinces have residential tenancies legislation similar to the Ontario legisla-

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[6] N.S. Royal Gazette, Vol. 7, No. 13, 14 July 1983 N.S. Reg. 134/83.

[7] P. 3.

[8] See, for example M. MacNeil, Property in the Welfare State (1983), 7 Dalhousie L.J. 343, at pp. 355-368.

tion. For example, the Nova Scotia Residential Tenancies Act[9] was based on the original Ontario legislation. The recently released Nova Scotia Report of the Commission of Inquiry on Rents[10] placed emphasis on the use to be made of Ontario legislation as a model for the implementation of many of the 18 recommendations accepted by the Nova Scotia government. Particular reference was made to emulating the Ontario legislation respecting the security of tenure provision recommended to be put in place in Nova Scotia for tenants who have resided in one place for five years.

This fourth edition of Residential Tenancies complements the two volume, fifth edition of Williams and Rhodes, Canadian Law of Landlord and Tenant published earlier in 1983 and volume two of Shopping Centre Leases: A Collection of Articles and Precedents published in 1982, and brings up to date the major materials on Canadian landlord and tenant law.

TED L. MCDORMAN*

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Freedom of Information Trends in the Information Age. Edited by TOM RILEY and HAROLD C. RELYEA. Totawa, New Jersey: Frank Cass and Company Limited. 1983. Pp. 172 ($25.00)

Freedom of information, like freedom of choice, is not necessarily an easily understood term. For the editors of this collection of papers it means that there should be comparatively easy access to at least some of the information possessed by a government. The citizen would "then be in a position, if he so chooses, to know what his government is doing and why".[1] The papers which make up the book survey the provisions for freedom of information in a number of countries, including Canada.

Before looking at the surveys of individual countries, two general impressions are worth noting. The first is the relatively recent time frames in which we are moving. With some obvious exceptions, such as Sweden, one finds that the steps taken by European (and Commonwealth) countries is indeed reflective of a current boom in making information available to the public. Finland, for example, placed its provisions in operation in 1951; Norway, in 1970; Austria, in 1973; France, in 1978; The Netherlands, in 1978. The legislation in the Commonwealth countries of Australia, New

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[9] S.N.S., c. R-20.

[10] Report of the Commission of Inquiry on Rents, released 15 November 1983, was chaired by the Honourable T.H. Coffin, Q.C., a former judge of the Nova Scotia Court of Appeal.

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[1] P. 1.

Zealand and Canada is even more recent. Perhaps as the book suggests, the concept of access to government information is one whose time has come.

The second striking feature is that the subject of access to governmentally-held information has been deemed to be of sufficient importance to warrant the passage of legislation in order to guarantee it. Governmental policy guidelines or even governmental edict have not been the vehicles by which access to information is to be secured. Rather, the strongest political method is used to ensure its workability, always within its own terms.

In his survey of the European position, co-editor Riley refers of course to Sweden which, with the exception of two very short periods, has had legislation on access to government-stored information since the year 1766. West Germany, Denmark, France, Norway and some other European countries are also rather briefly surveyed. Comment is made upon the effectiveness of some countries' provisions. For example, Riley concludes that the Danish law, while good, is not perfect. In his survey of Denmark's legislation he points out that ". . . there is no sufficient indexing system of records to allow a citizen to know what types of information are on file. There are no time limits for the release of information and the burden of proof does not rest on the Government to show why a document should not be released".[2]

Next in the line of countries to be examined are the Commonwealth countries of Australia and Canada.[3] In a review of the Australian legislation, which was proclaimed as law on March 11, 1982, Riley sets out some of the criticisms of the legislation made by Alan Missen, a member of the Australian Senate. These include the advisory-only status of Document Review Tribunal decisions relating to appeals on a denial of access; the fact that the Australian law is largely prospective only and does not cover some existing information; and the vagueness of powers accorded the bureaucrats in dealing with access requests.

The Canadian position is surveyed in considerable detail, with an emphasis on events leading up to the enactment of legislation. The legislation's main points are discussed at page 40 and following of the book. The Access to Information Act[4] came into force in 1983. It ". . . sets out flexible procedures to obtain government information, and provides for the annual publication of an Index identifying the programs each government agency carries out, as well as the classes of documents under its control".[5]

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[2] P. 14.

[3] At the time the book was written, New Zealand was close to passing legislation. An act entitled the Official Information Act (1982 No. 156) was passed in December, 1982 and brought into force July 1, 1983. The book deals with some of the background leading to the Act.

[4] S.C. 1980-81-82-83, c. 111, sch. 1. With the possible exception of two sections, the Act is in force as of July 1, 1983.

[5] Pp. 50 *et seq.*

The Act also provides for a time period within which requests for access will normally have to be answered (30 days). Of necessity, the Act contains limits on the right of access to material on such matters as national defence, international relations and personal privacy. An Information Commissioner will be appointed, to be approved by Parliament, and that person is to hold the same rank as a deputy head of a department.[6] He or she is to be responsible to Parliament, not to the government. Further, a Parliamentary Committee has been established to oversee the operation of the Act on a permanent basis. Within three years a systematic and comprehensive review of the Act is to be undertaken by that Committee with a view to finding ways to improve the legislation as passed. A sister act called the Privacy Act[7] includes new privacy legislation which will strengthen Canadians' rights pertaining to information about themselves held by the federal government. This includes the creation of a right of judicial review with respect to refusals for access requests on information relating to one's self.

The United States Freedom of Information Act, passed in 1966, is dealt with by co-editor Harold C. Relyea in a useful and interesting paper entitled "Modifying the Freedom of Information Act: Ideas and Implications". He indicates that Congress created the Act as a consequence of its own frustration, as well as that of the public and the press, with the restrictive policies and practices of the Executive Branch of the American government. Apparently the secrecy surrounding government information which had been engendered by World War II continued after the war had ended. In addition, a lack of clear direction on the release of information had resulted in a reluctance to release information, as did the interpretation of some existing statutes which was seized upon by the bureaucracy as authorizing retention rather than release. As in the discussion of the Canadian situation, some background materials are provided, and Relyea also sets out his views on modifications of the existing Freedom of Information Act. These include comments on agency immunity, user limitations and cost recoveries. Relyea writes with authority in these areas.

Somewhat to the regret of the reviewer, a thirty-eight page paper, "Oversight of the Administration of the Federal Freedom of Information Act: A Personal Report, November 1981," is included in the book. It is indeed a personal report, prepared by Senator Jim Sasser. Senator Sasser is described as Chairman of the Senate Subcommittee on Intergovernmental Relations. His report came about as a result of oversight hearings by his Subcommittee of the Senate Committee on Governmental Affairs in November 1980. Senator Sasser's recommendations are of such a type and particularity as to be of relatively little interest to the general reader. They may be of value to the United States agencies to which they are primarily

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[6] This person has now been appointed. She is Miss Inger Hansen, former federal Privacy Commissioner.

[7] S.C. 1980-81-82-83, c. 111, sch. 2.

directed, but one might even wonder about that. Perhaps this paper's main general usefulness is its identification of items — government-wide regulations, attorney fees, cost, etc. — which in Sasser's opinion should be reconsidered in the light of past experience under the United States Act.

The last two papers in the book end it on a more informative note. Martin Smith's "Open Government and the Consumer in Britain" gives what appears to be a balanced picture of what a (tradition-bound) country without information access presently looks like, and what it could or should be. According to Smith freedom of information is still regarded as a new-fangled notion by many senior British politicians and civil servants, and this despite Scandinavian, Commonwealth and United States examples. Smith is of the opinion that the British government could be forced to provide more information to its citizens if pressure is put on it from the more general perspective of the citizen as a consumer, in this case of government services. He thinks some progress could be made, despite the existing inconsistency and confusion in the law on government disclosure, a state of affairs made even more confused in some respects by the impact of the concept of commercial confidentiality. Not all sections of the British public are hostile to freedom of information legislation. Two bills have seen the light of day, the Labour Party's Freedom of Information Bill in 1978, and Clement Freud's Official Information Bill, which came remarkably close to passing in April, 1979. But the Thatcher government in mid 1982 made it quite clear that ". . . a Conservative administration will not legislate for open government".[8] Of the three opposition parties it is apparently Labour that has the clearest commitment to fundamental change in freedom of information in Great Britain.

A final brief paper by James Michael comments on the extent to which government should keep information secret on third parties. He argues that there are categories of secret information on individuals which must be kept confidential for a variety of reasons — for example, because the information has been voluntarily given in confidence. He states that a Freedom of Information Act would replace a presumption of secrecy "subject to disclosure largely by discretion and occasionally by law".[9] In its place there would be a presumption of compulsory general disclosure subject to exemptions that would justify (but not require) discretionary withholding. "The most important question for third parties under such a system is when, and how, they may stop government from disclosing information that affects them."[10] Michael states that we are all third parties with interests in seeing that some government information is kept secret. But we also are third parties with an interest in good government which can be

[8] P. 135.

[9] P. 139.

[10] Pp. 139 *et seq.*

served by greater disclosure. His recommendation for reconciling these opposing interests is as follows:[11]

> "The process required is to identify the various third party interests as precisely as possible, to give them their appropriate weights and to provide a disinterested arbiter to decide when public disclosure of particular information is to be required, allowed, or prohibited."

While in some cases brief, the comparisons of freedom of information provisions in countries mentioned in this book are of interest. They would be of at least initial assistance to a jurisdiction about to consider the provision of a mechanism for ensuring access by its citizens to governmentally-held information. It would however have been useful to have been told more of the socio-legal philosophy on which the legislation in some of the countries is based. This was done to an extent in the case of Canada, but not for some of the other jurisdictions, and for this reason, as well as for the inclusion of the Sasser article, this reviewer found the book to be somewhat uneven. Even then, for the reader as yet unfamiliar with freedom of information concepts, the book provides an insight into a number of the more salient items which ought to be taken into consideration when freedom of information legislation is being studied.

BEVERLEY G. SMITH*

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Maori Land Laws of New Zealand. By PAUL G. MCHUGH. Saskatoon: University of Saskatchewan Native Law Centre. 1983. Pp. v, 79 ($13.00).

This publication consists of two quite distinct, yet related, essays on Maori Lands and the law related thereto in New Zealand. They have been written primarily for a North American audience by a New Zealander with considerable expertise in the area who has done extensive research on the subject while in New Zealand, during his LL.M. at the University of Saskatchewan, and then in his doctoral research at Cambridge. In the preface, the author clearly indicates his decision to resist "the temptation to make comparisons between the Maori and the North American Indian", something which he has done elsewhere.

His experience in Canada revealed the extreme lack of information, as well as discussion, in Canada regarding Maori people in general and their unique position in New Zealand law. His intention is to try to fill this vacuum while, at the same time, presenting essays that are sufficiently

[11] P. 142.

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[1] P.G. McHugh, The Economic Development of Native Land: New Zealand and Canadian Law Compared (1982-83), 47 Sask. L. Rev. 119.

broad to be useful, for, and comprehensible by, a North American audience.

In his first essay, "The Constitutional and Legal Position of Maori Customary Land from 1842-1865", McHugh gives an excellent general overview of the legal regime which regulated the relationship and land dealings between the Maori and the settlers (*pakeha*). The essay is divided into eight parts. After a very short introduction (part I), part II gives a very interesting, albeit brief, discussion of the nature of customary land law (communal for the tribe as a whole with subdivisions among kingroups), the source of Maori title and how that title can be transferred within the Maori community (i.e., through ancestry or inheritance, by conquest, and by gift). This provides some context for the subsequent discussion and whets the readers' appetite to learn more about the traditional land law of the Maori people. Unfortunately, due to the extreme difficulty one will find in obtaining copies of the few books that have been written in this area, this is an appetite which will remain largely unsatisfied and to which the author could have provided somewhat more sustenance.

Part III, on the law relating to aboriginal title, is the weakest and the most frustrating in an otherwise excellent essay. It deals with this extremely complex subject in just over two pages. The author does not provide very much in the way of information about the nature of aboriginal title, either as it has been viewed generally, within the common law world, or as it has been viewed in New Zealand. Part IV deals much more satisfactorily with one specific component of the doctrine of aboriginal title, that is, the colonial law rules of extinguishment and pre-emption. Even then, the reader is left with the feeling that far more could have been said about the origin of these rules and their development by common law courts. McHugh does describe some of the New Zealand decisions,[2] but he relies solely upon one of the early United States Supreme Court cases[3] to give an elaboration of the rules.

Part V provides a very brief review of the Treaty of Waitangi and its impact upon the domestic law of New Zealand. McHugh canvasses several of the leading Canadian decisions, as he does in a number of other places in the text, to demonstrate the failure in some of the New Zealand judgments to distinguish between the effect of the Treaty on the Crown in its executive capacity, where it is binding, and its lack of force concerning the Crown's parliamentary capacity. These two issues are examined in greater detail in parts VI and VII. Part VI reviews the situation in New Zealand when it was administered by a colonial governor in the absence of a representative

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[2] He primarily relies upon *R.* v. *Symonds* (1847), [1840-1932] N.Z. P.C.C. 387 (N.Z.S.C.).

[3] *Johnson* v. *M'Intosh* (1823), 8 Wheaton 543 (U.S.S.C.). There are other leading United States Supreme Court and Privy Council decisions which could have been incorporated.

legislative assembly. McHugh demonstrates through his review, as well as by reference to the jurisprudence, that a number of the proclamations of the Colonial Governor of the day were unlawful, as they violated both the respect for aboriginal title contained in Imperial legislation and the gubernatorial instructions, all of which consistently required that Maori lands could only be removed from Maori control through a fair and free sale to the Crown. Part VIII continues the historical orientation of the essay by analyzing developments subsequent to New Zealand becoming a self governing colony in 1852.[4] The enabling legislation also entrenched the continued respect for aboriginal title and precluded the colony from eliminating that title other than by express purchase by the Crown from the Maori people. Subsequent Imperial legislation[5] empowered the New Zealand General Assembly to repeal the constitutional entrenchment if it so chose. Foreshadowing recent political pressures in Canada, the local legislature immediately moved to do so. Following the lack of success with the first few methods selected, the settlers chose the grand plan of establishing a Native Land Court, composed solely of judicial personnel, to resolve the Maori Land "problem". This Court, which is still in existence, was directed to ascertain the owners of Maori land according to Maori customary law, to translate those property interests into a form recognizable under English law, and to facilitate "peaceful" settlement of the colony by encouraging the sales of land to the settlers directly by the Maori people. In doing so, the Court actually perverted the nature of Maori customary law by emphasizing non-traditional concepts of individual ownership, altering the law of inheritance, limiting the number of possible parties with interest in the land, and by eliminating required elements of occupation.

As we consider developing more effective and just methods of resolving Indian, Metis, and Inuit land claims in Canada, as well as the increasing recognition of their customary laws,[6] it is ironic to examine the use of a special judicial mechanism to facilitate the assimilation of the Maori people by minimizing their land base and destroying their customary legal system, while paying lip service to its importance.

The second essay jumps forward in time some ninety years to examine contemporary Maori land law since the enactment of the Maori Affairs Act 1953.[7] This essay is intended to "provide an overview of the Maori land

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[4] This was by virtue of the enactment of the New Zealand Constitution Act 1852, 15 & 16 Vict., c. 72 (U.K.).

[5] 25 and 26 Vict., c. 48, s. 8 (U.K.).

[6] See, e.g., Indian Self-Government in Canada, Report of the Special Committee (Ottawa: Queen's Printer of Canada, 1983); B.W. Morse, Indian and Inuit Family Law and the Canadian Legal System (1980), 8 American Indian Law Review 199; and s. 37 of the Constitution Act, 1982, with its subsequent constitutional conferences and accords.

[7] N.Z. Stat. No. 94.

laws of New Zealand".[8] This is not an easy task; the pertinent legislation has been amended nearly every year since its passage in 1953 and consists of over 450 sections.

There are four types of Maori land holding: aboriginal title, Maori reserved land (which is a trusteeship), Maori vested land (which is also a trusteeship) and Maori freehold land. The thrust of the essay is to focus upon the latter category as it comprises the overwhelming majority of lands in which the Maori people retain some interest. In order to foster assimilation in the conveyance of Maori lands into pakeha hands, these lands are held in fee simple through tenancy in common. One significant difficulty that has occurred over the years as a result of the government's attempt to foster individualized ownership has been the development of completely unexpected fragmentation of title. The Maori people have generally been unwilling to alienate their interest in their traditional land so that the tenancy in common created for each parcel of land is held in multiple ownership. Due to subsequent subdivisions of interest through succession, this has created situations where there can be literally thousands of owners for an individual tract of land. This made it exceedingly difficult to use the land effectively, that in turn fostered an impression among the pakeha that the Maori people were idle and let their land go to waste, and sparked the political pressure for reform.

The bulk of the second essay is found in Part V, and it analyses the efforts made from 1953 onwards to deal with this problem. The two major methods of reform discussed in considerable detail are the disenfranchisement of most owners so as to limit title only to a few, and the creation of special legal entities under national legislation regarding Maori land. After analyzing the different methods used under both types of reforms, McHugh notes with some optimism that one of the devices to create a legal entity, namely to establish Maori trusts of a tribal or small regional nature, does seem to meet most Maori needs for economic advancement while retaining their desire for spiritual connection to their land and their cultural preservation.

In conclusion, although one is tempted to make the common criticism that the author left many important subjects unexplored, this reviewer has no hesitation in strongly recommending this publication for anyone interested in native rights in Canada and for those eager to learn of Maori land law. It is most welcome indeed to have, at long last, a publication, readily accessible to Canadians, that discusses in detail these fundamental and fascinating issues.

BRADFORD W. MORSE*

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[8] P. 39.

* Bradford Morse, of the Faculty of Law, Common Law Section, University of Ottawa, Ottawa.

Compensation for Criminal Damage to Property. By D.S. GREER and V.A. MITCHELL. Belfast: SLS Legal Publication (N.I.) 1982. Pp. xxxviii, 345. (£19.75).

This publication is about compensation for criminal damage to property and is based upon Northern Ireland legislation. Canadians appear to be growing more and more concerned about restitution to and compensation for victims of crime. Thus the book will be of interest to Canadian readers, even though it is, obviously, designed for the Irish practitioner, and though Canadian compensation schemes generally cover only personal injuries. Allowance being made for these qualifications, a Canadian lawyer will find the book valuable, in terms of both principle and practice.

The Criminal Damage Compensation Code is firmly based on principles derived from the law of tort. While the title gives the impression of a broad concept of relief, in fact, the legislation on compensation payable by the state for loss arising out of criminal damage to property is restricted to damage related to or arising out of unlawful, riotous or tumultuous assembly and unlawful association. These must be an element of public disorder or an act of terrorism. The authors note that in the Republic of Ireland there is a broader base for compensation but on lower levels of compensation than in Northern Ireland.

The authors, in dealing with the various heads of compensation, touch on the particular branches of common law relating to damages. The decisions of the Irish Courts on criminal damage compensation can make a useful contribution to the development of an aspect of the law of tort which is at present characterized by a noticeable dirth of modern case law. For those practising in the field of tort law, the book has some value in reviewing the basis on which damages are to be assessed.

In the first chapter, entitled "Entitlement to Compensation for Criminal Damage", the reader learns compensation is payable by the state for loss arising from five different categories of crime.

The second chapter is titled "Refusal or Reduction of Compensation". This deals with the undeserving applicant and with a number of exclusions, including those applying to coins, bank notes and articles of personal ornament. One also learns there is a minimum loss limit for compensation to be provided. The loss must be more than 100 pounds. Past provocation or negligent behaviour which contributed to the loss may limit or defeat the claim for compensation. It is of interest that a person in a public position who receives notoriety because of his public utterances, may be judged to have contributed substantially to the selection of his property for attack, a factor which can be taken into consideration into reducing or denying his claim.

The authors next deal with damages to or destruction of a building and how compensation is assessed. They review the concept of cost of replace-

ment, special interest to the owner and cost of repairing or replacing with an allowance for betterment.

Assessment of consequential loss is a further topic. Here the concepts of damages arising out of negligence do not apply. One learns the *Wagon Mound* test is not applicable on the basis that it would be incongruous, to say the least, for the extent of liability of the state to be determined by reference to the reasonable foresight of a criminal. On the other hand, the destruction of one of a fleet of trucks does not mean any consequential loss of profit for which compensation is available if the remaining trucks could carry the share of the lost truck. The authors review the various principles which have become applicable to situations of this type.

The following chapter relates to compensation for chattels. The authors review various factors, including special value to the owner, and the theory of a "bribe price" or what a person would accept in advance for the destruction of his chattel. All these considerations are, however, governed by the basic rule that the applicant must not be enriched by his compensation.

It will be of interest to the reader to learn that insurance companies, because of the government programme, have taken the position of exempting any coverage when public compensation is available. Those matters which otherwise would be insured, are now generally excluded from coverage.

The authors also touch briefly on the concept of compensation ordered by the criminal court, and how it relates to the public compensation programme.

For those considering approaches to the government to develop a similar compensation programme, the book has value in terms of demonstrating what are some of the practical problems to be faced, and how they are dealt with in other jurisdictions.

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