Constitutional Law of Canada. Second Edition. By P.W. Hogg. Toronto: Carswell Company Ltd. 1985. Pp. lxxv, 988. ($95.00)

Reviewing the first edition of this book, I suggested that it would become "the standard work on the subject for some time to come".[1] It has. I described it as "precise and penetrating, readable and reliable".[2] The second edition is even more so.

The book has almost doubled in size. This is due, in part, to the unprecedented flurry of constitutional developments, both judicial and political, since the first edition was published in 1977. There is more to it than that, however. Several topics that were neglected in the first edition, such as aboriginal rights, natural resources, and language and education rights, have been added, and the discussions of most other topics have been thoroughly re-worked and frequently expanded. Professor Hogg tells us in the Preface that it took him longer to prepare the second edition than the first, and it is easy to see why. It is also easy to see that the additional effort was well worthwhile. Professor Hogg has transformed an excellent introductory text into a modern classic.

There are two ways to assess a textbook on contemporary law. One is to read it, as a reviewer or a student should, from beginning to end. The other is to use it selectively, as lawyers commonly do, to assist in the research of particular topics. I had the advantage of both perspectives, because before I was finished reading the book, I found the need on several occasions to dip into it in connection with ongoing work. Both experiences were satisfying. The book has the qualities of good organization, internal consistency, and clear, interesting writing that carries the reader easily through difficult material, and helps the student develop an overall vision of the subject. It also has the depth and practicality that a practitioner needs when seeking solutions to specific problems.

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[1] (1978), 56 Can. Bar Rev. 533, at p. 537.

[2] *Ibid.*

The most serious criticism that I made about the first edition of this book was that it lacked historical perspective, and that some of the historical generalizations that were offered were questionable. A serious attempt has been made in this edition to strengthen the book's historical foundations. A new chapter entitled "Reception" has been added, for example, to cover some pre-Confederation material, and some aspects of the Supreme Court of Canada's history are now covered. Discussions and footnotes relating to many particular topics draw more heavily upon historical material than was the case in the first edition. Overall, however, the book continues to be deficient in this regard. Surprisingly few opportunities are taken to examine the social, political, and economic factors that influenced crucial constitutional decisions. Relatively little reference is made to the political discussions that brought about Canada's various constitutional documents. The fact that the book's bibliography contains no reference to the published transcript of the historic "Confederation Debates" in 1865 is perhaps symptomatic of this shortcoming. Space poses a problem, of course. This book is already thick, and little that it contains is superfluous. The addition of sufficient material to give it a satisfactory historical dimension could double its present size. Yet the story is incomplete, and potentially misleading, without such material. Perhaps what is required is a companion volume by a constitutional historian.

Professor Hogg is still guilty of occasional exaggerations. He tells us, for example, that "no legal remedy will be available" for violation of constitutional conventions, as opposed to constitutional laws,[3] before going on to acknowledge in the next few pages that the Supreme Court of Canada in the *Patriation Reference*[4] provided such a remedy in the form of a declaration that the Government of Canada would be in violation of convention if it sought the proposed constitutional amendment in the face of opposition by eight provinces. This remedy was "legal" in the sense that it was granted by a court, and it was undeniably effective in changing the Federal Government's conduct. It is probable that, on the authority of that decision, private parties would also be able to obtain judicial declarations relating to important constitutional conventions. When describing the conventional self-restraint exercised by the Governor-General with respect to refusing or reserving royal assent for federal legislation, Professor Hogg says: "There is no circumstance which would justify a refusal of assent, or a reservation . . . ."[5] This appears to overlook the rare but real emergency power of the Governor-General to deal with extraordinary situations. Suppose the election of a Neo-Nazi federal government, and the enactment by the House of Commons and Senate of legislation that grossly violated human rights, and that sought to protect

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[3] P.13.

[4] [1981] 1 S.C.R. 753, discussed pp. 14-16.

[5] P. 202.

itself by a wholesale reliance on the "opt-out" provision—section 33—of the Canadian Charter of Rights and Freedoms.[6] A Governor-General worth her or his salt ought, in those circumstances, to refuse royal assent. The gesture might turn out to be futile, but it would add significantly to the pressures on the government to change its ways.

The latter exaggeration is illustrative of a general tendency of Professor Hogg to downplay the role of the executive branch of government. He refers to several specific modern manifestations of the "royal prerogative",[7] but asserts that prerogative powers have generally shrunk "to a very narrow compass".[8] No reference is made to one very important prerogative: the authority of the Governor-General and Lieutenant-Governor to issue spending warrants where needed between sessions of Parliament or the Legislatures.[9] Moreover, except in regard to the appointment of Prime Ministers and summoning of Parliament, little reference is made to the general "standby" role played by the executive, under the authority of the royal prerogative, where normal governmental arrangements break down for one reason or another. It has been suggested, I believe correctly, that the royal prerogative is potentially so all-embracing as to be capable of dealing, in the absence of other recourses, with constitutional crises as grave as that which Manitoba experienced when almost all of its laws were recently found to be constitutionally invalid.[10] One hopes that occasions will never arise when it is necessary to employ these sweeping executive powers. But students of constitutional law should know that they exist, where normal constitutional processes break down. A reader of Professor Hogg's book could come away from it without appreciating that fact.

Some of the positions Professor Hogg takes are likely to meet with disagreement by other constitutionalists. One illustration is the following statement, concerning the standard of proof and persuasion that must be met by someone launching a Charter challenge to federal or provincial legislation:[11]

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[6] Constitution Act, 1982, Part 1.

[7] P. 11, and pp. 209-212.

[8] P. 11.

[9] See, N. Ward, The Public Purse (1962), p. 253, ff.

[10] See: *Yeryk* v. *Yeryk*, [1985] 5 W.W.R. 705 (Man. C.A.), per O'Sullivan J.A., at pp. 712-713. The remarks were made in an entirely unrelated matter. While it is submitted that O'Sullivan J.A. was correct in the view he expressed of the breadth of the prerogative, the writer does not concur in his opinion that the Supreme Court of Canada had no authority to deal with the language crisis as it did. It is also difficult not to agree with the observation of Monnin C.J.M., at p. 709, that the dictum was "gratuitous, unnecessary, injudicious and perhaps impertinent".

[11] Pp. 99-100.

> [T]he legislative decision should always receive the benefit of a reasonable doubt, and should be overridden only where its invalidity is clear. There should be, in other words, a presumption of constitutionality.

It is true, of course, that courts should be diffident about interfering unduly in the legislative realm. But to suggest that those who attack legislation on constitutional grounds must establish their case beyond reasonable doubt is, I submit, mistaken. The presumption of constitutionality places an onus of proof and persuasion on those who attack legislation to demonstrate a *prima facie* case—that a Charter right has been interfered with. Once such a *prima facie* case has been established, the onus lies with those who support the legislation to demonstrate that it constitutes a "reasonable limit" under section 1 of the Charter.[12] In both cases, the standard of proof and persuasion is the normal civil standard—probability.[13] Professor Hogg's assertion, unsupported by authority, that "the legislative decision should always receive the benefit of a reasonable doubt" seems to invoke the criminal law standard—in favour of the Crown!

Differences of opinion are to be expected in matters of constitutional law. It is an inherently controversial subject. That Professor Hogg's views on some matters should differ from those of other constitutional scholars in neither surprising nor undesirable. There is a danger, however, that the unsophisticated reader may be led to believe that Professor Hogg's views are the only views possible. The quality of his work, the persuasiveness of his writing, and the fact that his book is, for many purposes, "the only game in town", raises the risk that his opinions on controversial matters will be automatically accepted as representing Canadian constitutional orthodoxy.

This is not Professor Hogg's fault; it is, on the contrary, a consequence of his initiative and the extraordinarily high quality of his work. The onus now lies on other Canadian constitutional scholars, who have published "non-Hogg" perspectives on Canadian constitutional controversies in the periodical literature, to produce their competing viewpoints in treatise form. Matching Hogg's quality will be a formidable challenge.

DALE GIBSON*

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[12] *Re Southam No. 1* (1983), 146 D.L.R. (3d) 408 (Ont. C.A.).

[13] *R.* v. *Kunzli* (1983), 10 W.C.B. 205 (B.C.S.C.); *Re Federal Republic of Germany and Rauca* (1982), 141 D.L.R. (3d) 412 (Ont. H.C.).

* Dale Gibson, of the Faculty of Law, University of Manitoba, Winnipeg, Manitoba.

An Introduction to Business Associations Law in Canada: Cases, Notes and Materials. By R.L. SIMMONDS and PETER R. MERCER. Toronto: Carswell Legal Publications. 1984. Pp. xxvii, 778. ($85.00)

There appears to be something of a revolution going on in the publication of teaching materials in the field of business organizations law. 1984 alone witnessed the publication of two major new texts, Corporate Law in Canada: The Governing Principles, by Bruce Welling;[1] and Canadian Business Organizations Law, by Tom Hadden, Robert Forbes and Ralph Simmonds.[2] Both are intended as advanced textbooks for students and practitioners and supplement the more traditional case-oriented materials used in most introductory courses on business organizations law. An Introduction to Business Organizations Law in Canada, by Ralph Simmonds and Peter Mercer, represents a welcome new entrant into this latter category.

While all three publications share an innovative approach to the organization and discussion of the principles of business organizations law, their respective emphases differ radically. On the one hand, Corporate Law in Canada by Bruce Welling represents an attempt to provide what the author claims is a "scientific" analysis of the "new, more principled, order" of Canadian corporate law which has resulted from the wave of statutory reform during the past fifteen years. Welling structures his analysis around what he calls the four main governing principles of corporate law: the principle of corporate personality; the principle of managerial power; the principle of majority rule; and the principle of minority protection. He is very much an advocate of a strict, principled approach to legal reasoning, preferring purity of doctrinal analysis over judicial discretion and the use of "shabby reasoning" to achieve a just result.[3] By the same token, he makes no attempt to locate his discussion of corporate law principles within the social or political environment of corporate activity. Thus, he happily ignores areas of considerable importance to corporate practitioners and theorists, such as corporate finance, securities regulation, reorganizations, take-overs and mergers and even winding-up and corporate dissolution, on the basis that they fall outside the purview of his four governing principles.

By contrast, Canadian Business Organizations Law, by Tom Hadden, Robert Forbes and Ralph Simmonds, consciously attempts to situate the law governing the formation, structure, management, financing and reorganization of business corporations within a broader economic and politi-

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[1] Bruce Welling, Corporate Law in Canada, The Governing Principles (1984), reviewed in (1985), 63 Can. Bar Rev. 424.

[2] Tom Hadden, Robert E. Forbes and Ralph L. Simmonds, Canadian Business Organizations Law (1984).

[3] *Op. cit.*, footnote 1, p. 295.

cal context which allows for the discussion of such issues as the nature of the Canadian capital market, the extent of business concentration in Canada and the role of corporate groups. The book is intended as a Canadian equivalent of Tom Hadden's well-received text, Company Law and Capitalism.[4]

An Introduction to Business Associations Law in Canada, by Simmonds and Mercer, falls somewhere in between these two approaches, but inclines more toward the latter approach than to the former. The book differs from most introductory sets of materials on business organizations law[5] in two main respects. On the one hand, the focus of the materials is not exclusively, or even primarily, centred upon the corporate form. The authors attempt to give equal weight to all three main forms of business associations, partnerships, corporations and sole proprietorships, as well as giving extensive treatment to agency principles, particularly in connection with the discussion of contractual liabilities of a business form. The aim is to provide students with a clear appreciation of the factors governing the choice of a particular form of business association, as well as an understanding of the features of internal and external organization which are common to each. Thus, Part I of the book, dealing with the formation of business associations, contains separate chapters on basic accounting principles and methods and sources of business financing, including a brief discussion of securities law controls. Given the importance of financing considerations to the choice of a particular business form, this approach seems preferable to treating these subjects as discrete topics to be dealt with at the end of an introductory course on corporate law, if at all.

The second major departure from more traditional course materials on business organizations reflects the authors' belief that external aspects of business organization—dealing with such matters as rights and liabilities of a business form in contract, tort and under criminal law—are equally as important as internal matters such as management and control of a partnership or corporation, and shareholders' rights and remedies. Consequently, Part II of the book, which deals with external rights and liabilities of the business form, comprises over 350 pages, considerably more than are devoted to internal aspects of business organization in Part III (253 pages).

In this reviewer's opinion, this approach has much to recommend it, particularly so for those students who are not destined to become corporate law specialists, but to labour in the general corporate and commercial

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[4] Tom Hadden, Company Law and Capitalism (2nd ed., 1978).

[5] See, *e.g.*, E.E. Palmer, D.D. Prentice and B. Welling, Canadian Company Law, Cases Notes and Materials (2nd ed., 1978); Stanley M. Beck, Frank Iacobucci, David L. Johnston and Jacob S. Ziegel, Cases and Materials on Partnerships and Canadian Business Corporations (1983).

field. In practice, questions involving some knowledge of the principles of contractual, tortious or criminal liability of the various forms of business associations are likely to be as important to most corporate and commercial law practitioners, as problems involving a specialized knowledge of internal corporate management or finance. Moreover, in so far as students are exposed to the implications of different forms of business organization in courses on contracts, torts and criminal law, these issues are generally regarded as being marginal to the subject matter of such courses. Thus the development of vicarious liability principles in tort law or the growth of strict liability offences in criminal law are rarely discussed in terms of the proliferation of the corporate form, and the challenge this poses to conventional theories of individual responsibility underlying much of our present systems of tort and criminal law.[6] Instead, such issues are left to be dealt with in isolation in corporate law courses under the nebulous and all-encompassing head of "corporate personality".

The only question which might be raised with regard to the organization of this part of the materials is whether there is a need for almost 150 pages on the contractual authority of an agent. Given that Part I already contains an introductory chapter on principles of agency law, and that issues of actual and apparent authority are raised separately in connection with the discussion of *ultra vires* and the indoor management rule in relation to contractual liability of a corporation, this does seem a little excessive. But this is merely to quibble with what is otherwise a well-organized and carefully selected set of materials.

Part III of the book, dealing with internal aspects of business organization, covers more conventional territory. A brief chapter on the duties owed by principal and agent, and the allocation of control in a partnership, is followed by three chapters on control of a corporation, directors' fiduciary duties, and shareholders' rights and remedies.

The analysis of corporate control takes into account the functional differentiation between closely-held corporations and widely-held corporations in legislation and emerging corporate theory, as well as recent critiques of the statutory model of corporate governance.[7] In addition, there is a useful discussion of shareholders' voting rights, the proxy system and cumulative voting schemes in the final chapter on sharehold-

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[6] See, *e.g.*, L.H. Leigh, The Criminal Liability of Corporations in English Law (1969), pp. 15-22, for a good discussion of the development of corporate criminal liability in the nineteenth century, and the utilization of tortious concepts of vicarious liability by the courts in imposing criminal liability on corporations in respect of public nuisance offences and statutes imposing a positive duty to act.

[7] See M. Eisenburg, The Structure of the Corporation: A Legal Analysis (1976), pp. 554-55, 640-42; V. Brudney, The Independent Director—Heavenly City or Potemkin Village? (1981-82), 95 Harv. L. Rev. 597. See also, Hadden, Forbes and Simmonds, *op. cit.*, footnote 2, pp. 47-84, 285-307.

ers' rights and remedies. In view of the authors' innovative approach to the organization of material elsewhere in the book, it may be worth suggesting that a second edition could profitably contain a single chapter on corporate management and control, addressing all of these functionally-related issues.

The discussion of directors' fiduciary duties in chapter 13 is relatively short (64 pages) and follows a fairly traditional format. The discussion focuses primarily on the corporate opportunity cases, from *Cook* v. *Deeks*[8] to *Canadian Aero Services Ltd.* v. *O'Malley*.[9] Related issues, such as insider trading and the question of fiduciary duties arising on a sale of control are touched on only in passing, or dealt with in the following chapter on shareholders' rights and remedies. The latter chapter explores the tension between the principle of majority rule and the need for minority protection from both a "rights-oriented" approach[10]—which examines the scope of common law duties owed by directors and majority shareholders to minority shareholders personally—and from a "procedural-remedy" approach, which focuses on the recent statutory remedies available to minority shareholders under federal and provincial business corporations statutes. The result is a somewhat confusing analysis. This might be avoided in a future edition by incorporating the discussion of minority shareholders' personal rights of action with the analysis of directors' fiduciary duties in a separate chapter.

Overall, An Introduction to Business Associations Law in Canada provides a valuable addition to the existing teaching materials available for use in introductory business associations law courses. The authors' comparative approach to the organization of materials will ensure that students are exposed to the practical problems of internal and, particularly, external organization of business associations from a different perspective than is normally met with in most introductory courses. However, if it is permissible to voice one criticism of this approach, it is that while innovative from the point of view of the book's structure and organization, the authors are less innovative with respect to the substantive content of the materials selected. Thus, the discussion of directors' fiduciary duties and shareholders' rights and remedies, for example, while informed by the emerging theoretical distinction between closely-held corporations and widely-held corporations and, to a lesser extent, by the limited empirical data available on the structure of corporate ownership and control in Canada, remains firmly grounded within the prevailing tradition of doctrinal analysis. Little attempt is made to place the discus-

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[8] [1916] 1 A.C. 554 (P.C.).

[9] [1974] S.C.R. 592, (1973), 40 D.L.R. (3d) 371.

[10] The terminology is borrowed from Welling, *op. cit.*, footnote 1, p. 497.

sion within an historical context,[11] or to explore the theoretical and practical implications of the transition from the common law rights-oriented approach to shareholders' and directors' rights and duties to the present statutory model of minority protection.[12] Similarly, the discussion of corporate control in chapter 12 makes no mention of the growth of corporate group structures as a predominant form of corporate organization in Canada,[13] or the potential impact of this phenomenon on existing models of corporate control.[14]

It may be argued that opportunities for in-depth analysis of "alternative" approaches to law, and the social, political and economic context in which legal rules have developed rarely arise within a half-year introductory syllabus. Nevertheless, the authors, by their own concentration on the external aspects of business organization, have shown that there is no necessary minimum content, even for a course in business associations, which has to be covered at all costs, to the exclusion of all other considerations. After all, the choice of materials used in any course is as significant in terms of what it excludes as in terms of what it actually includes. If not attempted in first and second year "core" courses, how are law students to gain any understanding or appreciation of the way in which legal structures impact on, and are in turn affected by, other social and economic structures? Given the symbiotic relationship between business associations law and the structure and functioning of Canadian capitalism, the relevance of this approach seems apparent.

N.C. SARGENT*

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[11] See, for example, a recent study by L.S. Sealy, Company Law and Commercial Reality (1984), reviewed in (1986), 11 Can. Bus. Law Jo. 247, which argues that it was the jurisdictional monopoly exercised by the Chancery bar over the early development of company law which accounts for the difficulties courts have subsequently faced in applying fiduciary obligations in "hard cases" such as those discussed by Simmonds and Mercer. Sealy suggests that corporate directors should not be treated simply as trustees *vis-à-vis* the company's assets, and that such situations are better approached from a commercial perspective by examining individual circumstances to determine whether there is any real conflict of interest and duty, rather than by the misapplication of eighteenth century trust law principles to twentieth century company directors; *ibid.*, pp. 38-39.

[12] See Welling, *op. cit.*, footnote 1, pp. 495-565.

[13] See N.C. Sargent, Through the Looking Glass: A Look at Parent-Subsidiary Relations in the Modern Corporation, in Today's Challenge to Law (Ottawa, Institute for Studies in Policy, Ethics and Law, 1983), p. 49, at pp. 53, 54; Hadden, Forbes and Simmonds, *op. cit.*, footnote 2, p. 619.

[14] Sargent, *ibid.*, pp. 65-73; Hadden, Forbes and Simmonds, *ibid.*, pp. 620, 632-639. See also, T. Hadden, The Control of Corporate Groups (1983); D.D. Prentice, Groups of Companies: The English Experience, in K.J. Hopt (ed.), Groups of Companies in European Law (1982), p. 102.

*N.C. Sargent, of the Department of Law, Carleton University, Ottawa, Ontario.

Conflict of Laws: Cases, Notes and Materials. Fifth Edition. By J.-G. Castel, Q.C. Toronto: Butterworths. 1984. Pp. xxiv, 872. ($49.95)

During the past fifteen years of teaching Conflict of Laws in Canada, I have had the privilege of seeing these materials grow with each succeeding edition. In the fifth edition, the author cites ninety-one more cases, sixteen per cent more, than in the fourth. Of the 174 cases reproduced, eighty-eight are new. This edition, therefore, appears to be the result of a detailed revision, and incorporates fully the development in Conflicts since 1978, when the fourth edition was published.

Part I of the book, which consists of an introduction to the subject and includes a consideration of domicile, has undergone very little change. The author has added, under constitutional aspects, Laskin C.J.C.'s judgment in *Tropwood A.G.* v. *Sivaco Wire & Nail Co.*[1] which concerns the jurisdiction of the Federal Court of Canada, and *Block Bros. Realty Ltd.* v. *Mollard*,[2] which follows the decision in *Canadian Acceptance Corp. Ltd.* v. *Matte*[3] and thus updates the law concerning both characterization and the application of the *lex causae*. In the light of section 65 of the Family Law Reform Act,[4] which provides that "for all purposes of the law in Ontario, each of the spouses in a marriage has a legal personality that is independent, separate and distinct from that of the other spouse", the author perhaps has thought it unnecessary to carry *Lord Advocate* v. *Jaffrey*[5] into his fifth edition. By the deletion of the *Jaffrey* case, the whole area of dependent domicile has been removed. This, however, is an issue that could arise in litigation in Canada, particularly when the dispute raises a foreign element from a jurisdiction where dependent domicile is still recognized. Despite the changes in Canada and the United Kingdom, dependent domicile is deserving of some treatment in a study of private international law.

Part II deals with jurisdiction and foreign judgments. It embraces a number of areas, including service of writs out of the jurisdiction, *lis alibi pendens*, sovereign immunity, enforcement of foreign judgments, arbitration awards and other such matters. The author has cut out some of the deadwood,[6] and has also revised his approach to the problem created by Ontario Regulations concerning service of writs out of the jurisdiction.[7] By

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[1] [1979] 2 S.C.R. 157, (1979), 99 D.L.R. (3d) 235.

[2] (1981), 122 D.L.R. (3d) 323, [1981] 4 W.W.R. 65 (B.C.C.A.).

[3] (1957), 9 D.L.R. (2d) 304, 22 W.W.R. 97 (Sask. C.A.).

[4] R.S.O. 1980, c. 152, s. 65(1).

[5] [1921] 1 A.C. 146 (H.L.).

[6] *E.g.*, *Charron* v. *La Banque Provinciale du Canada*, [1936] O.W.N. 315 (Ont. H.C.); *Jenner* v. *Sun Oil Co. Ltd.*, [1952] 2 D.L.R. 526 (Ont. H.C.); *Burpee* v. *Burpee*, [1929] 3 D.L.R. 18 (B.C.S.C.).

[7] See Ontario Regulations 106/75, s. 8.

eliminating *John Ewing & Co. Ltd.* v. *Pullmax (Canada) Ltd.*[8] and *Roger Grandmaître Ltd.* v. *Canadian International Paper Co.*[9] and substituting *Singh* v. *Howden Petroleum Ltd.*,[10] he endorses the undoubted position that, despite the Regulations, the historic right of the courts to control service *ex juris* has not been denied to the Ontario courts. The proposed Rule 17, in the form in which it stood at the time of publication of the book, it also set out *in extenso*. This rule was intended to affirm the courts' discretionary jurisdiction despite the trend to liberalize the availability of service *ex juris*. *Plibrico Canada Ltd.* v. *Suncor Inc.*,[11] dealing with *lis alibi pendens*, is a welcome addition to the materials even though the judgment is an oral one, for there is a noticeable dearth of authority in the area. The State Immunity Act[12] and the Ontario, British Columbia and Nova Scotia rules for service *ex juris* are reproduced in the section on Sovereign Immunity.[13] The inclusion of *Clinton* v. *Ford*,[14] with its reference to the English Court of Appeal in *Henry* v. *Geoprosco Int'l Ltd.*,[15] strengthens the section on submission to jurisdiction.

Part III deals with choice of law matters, and consists of chapters on: Domestic Relations, Status and Capacity, Custody of Infants, Transfer of Property *Inter Vivos,* Administration and Succession, Contracts and Torts.

Some considerable replanning has gone into the area of Domestic Relations. *Kerr* v. *Kerr*[16] introduces a local dimension to *De Nicols* v. *Curlier*,[17] compelling the student to re-think the problem raised for the House of Lords by Lord Eldon's decision in *Lashley* v. *Hog*.[18] It is sometimes difficult to imagine a materials book on Conflict of Laws without *Le Mesurier* v. *Le Mesurier*,[19] *Armitage* v. *Attorney-General*[20] and *Travers* v. *Holley*.[21] These cases are omitted from the fifth edition, although their pith and substance is retained in brief notes. The principal decision on recognition of foreign divorces which is reproduced is *Indyka*

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[8] (1976), 13 O.R. (2d) 587 (Ont. H.C.).

[9] (1977), 15 O.R. (2d) 137 (Ont. H.C.).

[10] (1979), 100 D.L.R. (3d) 121, 24 O.R. (2d) 769 (Ont. C.A.).

[11] (1982), 35 O.R. (2d) 781 (Ont. H.C.).

[12] S.C. 1980-81-82, c. 95; see p. 5-71 *et seq.*

[13] P. 5-10 *et seq.*

[14] (1982), 137 D.L.R. (3d) 281, 37 O.R. (2d) 448 (Ont. C.A.).

[15] [1976] Q.B. 726, [1975] 2 All E.R. 702 (C.A.). See also (1977), 23 McGill Law J. 118.

[16] (1981), 121 D.L.R. (3d) 221, 32 O.R. (2d) 146 (Ont. H.C.), aff'd (1981), 147 D.L.R. (3d) 384, 41 O.R. (2d) 363 (Ont. C.A.).

[17] [1900] A.C. 21 (H.L.).

[18] (1804), 4 Paton 581 (H.L.).

[19] [1895] A.C. 517 (P.C.).

[20] [1906] P. 135 (P.D.).

[21] [1953] P. 246 (C.A.).

v. *Indyka*,[22] and its application in Ontario is illustrated by *Bevington* v. *Hewitson*.[23]

In the chapter concerning status the section on legitimation has been deleted, and the chapter on custody of children expanded to include an extensive treatment of legislation concerning the child and the law. This departure from the fourth edition is fully warranted in the light of the recent Ontario statute, The Children's Law Reform Act.[24] To make room for the Ontario legislation, the author has eliminated some of the older law, such as *Elash* v. *Elash*.[25]

The chapter dealing with the transfer of property has been re-arranged. *Hesperides Hotels Ltd.* v. *Muftizade*[26] provides a recent re-affirmation of the ancient rule regarding immovable property laid down by the House of Lords in 1893 in the *Moçambique*[27] case, the latter however still being reproduced. On the other hand, two equally ancient authorities, *Cammell* v. *Sewell*[28] and *Castrique* v. *Imre*[29] have been deleted, and replaced by a recent decision at first instance in the Chancery Division, *Winkworth* v. *Christie Manson and Woods Ltd.*[30] Although the points of law raised concerning the acquisition of property to moveables are similar in all three decisions, the understanding of both *Cammell* and *Castrique* must form a necessary pre-requisite to the understanding of *Winkworth*. It is true that *Winkworth* does to a large extent cover the same points of law as those raised in *Cammell*, but *Castrique* raised issues peculiar to admiralty law. In any event, the retention of the *Moçambique* case despite the inclusion of *Hesprides*, and the substitution of *Winkworth* for *Cammell* and *Castrique* does not seem to be totally consistent. The chapter has however been strengthened by inclusion of excerpts from the Personal Property Security Act[31] of Ontario, and of the decision in *Westman Equipment Corporation* v. *Royal Bank of Canada*.[32] Aside from these changes, the chapter remains much as it was in the previous edition. The section on the transfer of debts and other choses in action still relies on *Republica de Guatemala* v. *Nunez*.[33] A more recent decision in the House of Lords,

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[22] [1969] 1 A.C. 33, [1967] 2 All E.R. 689 (H.L.).

[23] (1974), 47 D.L.R. (3d) 510, 4 O.R. (2d) 226 (Ont. H.C.).

[24] R.S.O. 1980, c. 68, as am. by S.O. 1982, c. 20, s. 1. There is parallel legislation in other Canadian provinces.

[25] (1963), 43 D.L.R. (2d) 599 (Sask. Q.B.).

[26] [1979] A.C. 508, [1978] 2 All E.R. 1168 (H.L.).

[27] *British South Africa Co.* v. *Companhia de Moçambique*, [1893] A.C. 602 (H.L.).

[28] (1860), 5 H. & N. 728, 157 E.R. 1371 (Exch. Ch.).

[29] (1870), L.R. 4 H.L. 414 (H.L.).

[30] [1980] 1 Ch. 496, [1980] 1 All E.R. 1121 (Ch.D.).

[31] R.S.O. 1980, c. 375.

[32] [1982] 5 W.W.R. 475 (Man. Co. Ct.).

[33] [1927] 1 K.B. 669 (C.A.).

Kahler v. *Midland Bank Ltd.*,[34] which adopted the *Nunez* decision, may well have been a better candidate for inclusion.

No changes have been made in the chapter on Administration and Succession, and rightly so. That area of law has commonly been regarded as an area of slow growth. However, one might have expected more change in the chapter on Contracts. For example, the authorities referred to by Castel in dealing with "absence of express choice" are all pre-1978 decisions, which could be found in the fourth edition. Since that date, and particularly in 1981, a plethora of case law[35] has begun to accumulate regarding the determination of the proper law of the contract in the absence of an express choice. The absence of any reference to these recent decisions constitutes something of a gap in the chapter on contracts, although the more recent cases may do no more than restate and apply traditional principles.

The last chapter, on Torts, has been the subject of some careful revision. Although the bulk of the chapter parallels the fourth edition, the author has included consumer products warranties as a new area in which tort issues in the Conflict of Laws may in future arise. With inter-provincial tradings this is a distinct possibility. Cases that are reproduced include *Diamond* v. *Bank of London and Montreal Ltd.*[36] which, like *Moran* v. *Pyle National (Canada) Ltd.*,[37] goes in search of the location of the tort for the purposes of service *ex juris*. It might perhaps be useful if in future editions Laskin C.J.C.'s dissenting judgment in *Interprovincial Co-operatives Ltd.* v. *The Queen in Right of Manitoba*[38] was also reproduced.

The publication has been well proofed and is in general free from typographical errors. The fifth edition of Castel will be as useful as its predecessors, and should be welcomed by the student and teaching fraternities in Canada.

LAKSHMAN MARASINGHE*

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[34] [1950] A.C. 24, [1949] 2 All E.R. 621 (H.L.). Also see *Re Claim by Helbert Wagg & Co. Ltd.*, [1956] Ch. 323, [1956] 1 All E.R. 129 (Ch.D.) where *Kahler* is explained.

[35] In 1981 alone see, *Power Curber International Ltd.* v. *National Bank of Kuwait SAK*, [1981] 1 W.L.R. 1233, [1981] 3 All E.R. 607 (C.A.); *Trendtex Trading Corporation* v. *Crédit Suisse*, [1982] A.C. 679, [1981] 3 All E.R. 520 (H.L.); *Armar Shipping Co. Ltd.* v. *Caisse Algérienne d'Assurance et de Réassurance*, [1981] 1 All E.R. 498 (C.A.). See also Lord Denning M.R.'s judgment in *Armadora Occidental SA* v. *Horace Mann Insurance Co.*, [1977] 1 W.L.R. 1098, [1978] 1 All E.R. 407 (C.A.); *Amin Rasheed Shipping Corp.* v. *Kuwait Insurance Corporation*, [1984] A.C. 50, [1983] 2 All E.R. 884 (H.L.).

[36] [1979] 1 Q.B. 333, [1979] 1 All E.R. 561 (C.A.).

[37] [1975] 1 S.C.R. 393, (1973), 43 D.L.R. (3d) 239; reproduced at p. 13-103.

[38] [1976] 1 S.C.R. 477, (1975), 53 D.L.R. (3d) 321.

* Lakshman Marasinghe, of the Faculty of Law, Windsor University, Windsor, Ontario.

Labour Code of British Columbia in the 1980's. EDITED BY JOSEPH M. WEILER AND PETER A. GALL. Calgary: Carswell Legal Publications. 1984, Pp. vi, 266. ($58.00)

The introduction of a new Labour Code in British Columbia in 1973 has been described as "one of the most exciting events in Canadian labour law since the advent of collective bargaining in this country".[1] On the other hand, the sponsor of the Code spoke of it "as the dullest bill".[2] There was much to warrant his description.

Many of the provisions of the Code were no more than updating of existing language and concepts, and on substantive matters much of the reform was unexceptional in character.[3] The major changes were institutional. The Labour Relations Board was given jurisdiction to oversee the whole panorama of labour relations within the province. It became responsible not only for such matters as the acquisition and termination of bargaining rights, and unfair labour practices (matters falling traditionally under the aegis of Canadian boards), but the Code also transferred to it jurisdiction over picketing, an area of law the administration of which has hitherto been the preserve of the courts.[4] The Code preserved the original jurisdiction over the administration of collective agreements which the British Columbia Board had enjoyed since 1963,[5] but added to that appellate jurisdiction over the awards of arbitrators.[6] At the same time the remedial authority of arbitrators was expanded by Part 6 of the Code, and they were directed by section 92 to have regard for the "real substance of the matters in dispute and the respective merits of the parties to it under the terms of the agreement", and to "apply principles consistent with the industrial relations policy of the Act". They were also declared not to be bound by "a strict legal interpretation of the issue in dispute".

Further, there was a significant change in the character of the Labour Relations Board itself. The old board had been secretive and gave no reasons for its decisions. It was replaced by a high powered, high profile tribunal which soon began, through the medium of its published awards and the proselytizing zeal of its first chairman, to exert a powerful influence

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[1] P. 219, per George W. Adams, Q.C. Compare J. Baigent, pp. 46-47.

[2] L. Nimsick, Minister of Mines and Petroleum Resources, 1973 Leg. Deb. 464.

[3] P. 243, per James E. Dorsey.

[4] See Labour Code of British Columbia, R.S.B.C. 1979, c. 212, Pt. V. This initiative was presaged by the Woods Task Force: see Canadian Industrial Relations: The Report of the Task Force on Labour Relations (1968), para. 637.

[5] Labour Relations Amendment Act, 1963, S.B.C. 1963, c. 20, s. 3; and see L. McGrady, A Union Perspective on Labour Code Reform: Arbitration, p. 201.

[6] Labour Code of British Columbia, *supra*, footnote 4, ss. 108, 109. For the authoritative pronouncement on the relationship between sections 108 and 109, see *Kinsmen Retirement Centre Association* v. *Hospital Employees' Union, Local 180* (1985), 63 B.C.L.R. 292 (B.C.C.A.).

upon labour relations within and outside the province. Reasons were given. Decisions were reported, and in 1975 the British Columbia board was assured of a national voice when it took over editorship of the Canadian Labour Relations Board Reports.

Whilst the adjudicative role of the Board has continued to be important, the hallmark of the new Board's approach to problem solving has been the adoption of an informal mediative approach designed to persuade the parties to reach an accommodation rather than have the Board impose a solution upon them. The degree of success enjoyed by the Board in the use of informal settlement techniques has varied according to the nature of the dispute. Overall, some two-thirds of all applications to the Board are settled without the necessity for a formal decision.[7] In section 96 applications,[8] the settlement rate has been estimated to be about seventy per cent.[9] At a rough estimate, the settlement rate in section 7 (duty of fair representation) applications appears to have been typically in the range of fifty to fifty-five per cent.[10]

Perhaps the most vocal criticism of the mediative approach and the delays engendered by it, has been in relation to allegations of secondary picketing. The response of the British Columbia legislature has been to require a union to apply to the Board for a declaration of ally status before picketing putative allies.[11] Further, under the most recent amendments to the Code, picketing is basically confined to the situs of the strike or lockout,[12] and in common situs situations the Board is now required to restrict the picketing to the primary employer.[13] One would expect the opportunities for mediative techniques in picketing situations to have diminished in direct proportion to the discretion of the Board.

The tenth year of operation of the Code was an appropriate time at which to assess its impact both in British Columbia and elsewhere. The opportunity to do so was provided at a conference held in Vancouver in January 1983 under the auspices of the Pacific Institute of Law and Public Policy. Out of the speeches presented at the conference sprang the volume of essays which is the subject of this review. The papers are collected under seven headings, commencing with the views of the three British

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[7] Stephen Kelleher, Ten Years with the 'Dullest Bill': The Evolution of Policy and Practice under the Labour Code, p. 20.

[8] In invoking the Board's original jurisdiction over the administration of collective agreements.

[9] Joseph M. Weiler, Grievance Arbitration: The New Wave, p. 176.

[10] Based on an independent survey conducted by the reviewer.

[11] S.B.C. 1982, c. 59, s. 4. See now, Labour Code, *supra,* footnote 4, s. 85(4).

[12] Labour Code Amendment Act, 1984, S.B.C. 1984, c. 24, s. 16, introducing s. 85(3), *inter alia.*

[13] Labour Code, *supra*, footnote 4, s. 85(4), (5).

Columbia board chairmen[14] on the role of the law in labour relations and ending with Professor Arthurs' prognosis on future directions in labour law. Sandwiched in between are chapters on protecting the right to organize, the structure of bargaining, picketing — the institutional issues, grievance arbitration, and the impact of the Labour Code outside British Columbia.

All three chairmen of the British Columbia Board attribute the durability of the Code to the broad consensus of opinion upon which it rested.[15] At the time the conference was held rumours were rife about possible amendments to the Code inimical to labour. Paul Weiler, the first chairman of the new Board, focused upon the processes of reform and emphasized the need for an approach which is sensitive to the concerns of both labour and management. The effectiveness of ideas which are sound in principle has often been marred because they were part of a package which appeared to labour to be punitive in nature. A wide ranging process of investigation and consultation was one of the bases of the Code's initial success. Weiler's words of wisdom have since gone unheeded. The amendments passed in 1984 are generally regarded by the labour movement in British Columbia as unjustified and punitive, whatever their intrinsic merits.

Nor did the British Columbia legislature heed Weiler's plea[16] for promulgation of Part 8 of the Code, which would have established the office of Labour Ombudsman. One effect of the failure to do so has been to increase the workload of the Board as more and more discontented union members resorted to section 7 (the duty of fair representation) in an effort to obtain relief from what they perceived to be unfair or unreasonable policies or practices of their unions. In the 1984[17] amendments, the legislature adopted the very kind of provisions regulating the relations between the individual and the union from which the drafters of the Code shied in 1973 and against which Weiler advised in 1983.[18] Weiler's final proposal,[19] that the individual workers should have the right to have their grievances arbitrated irrespective of the contrary judgment of their union, has not been accepted either by labour relations boards or the legislatures.

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[14] Paul C. Weiler, the first chairman of the new Board, a prominent arbitrator and now Professor of Law at Harvard; Donald R. Munroe, a prominent arbitrator, the second chairman of the new Board, and subsequently a member of the Faculty of Law at the University of Victoria; Stephen Kelleher, labour lawyer and then current chairman.

[15] See Stephen Kelleher, p. 5, commenting on the reason for the durability of the Code; Paul C. Weiler, in his paper, The Process of Reforming Labour Law in British Columbia, especially pp. 29-30; Donald R. Munroe, Role of Law in Relations Between Management and Labour, pp. 41-42.

[16] At p. 33.

[17] *Supra*, footnote 12, s. 3, introducing s. 5 which empowers the Board to determine whether or not fees and dues, or discipline imposed by a union, are "fair and reasonable".

[18] P. 33.

[19] *Ibid.*

Both papers on protecting the right to organize are written from a labour perspective.[20] Both viewed the Board's policies, and particularly its emphasis on industrial stability, as inhibiting rather than encouraging unionization. John Baigent suggested that in order to reduce the incidence of unfair labour practices by employers, a quick vote be held whenever a union has signed up between forty-five per cent and fifty-five per cent of employees in a unit. At that time a union which had signed up fifty-five per cent was virtually assured of certification without a vote. It is somewhat ironic that it was only after the government proposed abolishing "automatic" certification that steps were taken to expedite the vote. Since 1984 votes have been required in virtually all cases.[21] Today votes are typically held within five to ten days of the application for certification.

In the first of the papers on the structure of bargaining,[22] Rod Germaine provided a useful survey of the board's policies and practices, with as much detail as one could reasonably expect within the compass of twenty-two pages. It should be noted, however, that since the paper was delivered and revised, a number of legislative and policy developments have taken place in relation to bargaining structures.[23] In the second paper in this section, Kenneth Strand[24] examined and evaluated four cases in which councils of trade unions were created, with a view to determining whether the invocation of section 57 of the Code was effective in achieving the statutory objectives of "securing and maintaining industrial peace and promoting conditions favourable to the settlement of disputes". His conclusion was that the creation of a council may contribute to the achievement of industrial peace where the primary cause of disputes is "leap-frogging" or where stoppages are caused by a union representing a minority of employees over issues which do not enjoy widespread support among the member unions. He suggests that in some of the cases studied insufficient attention was paid to the means of resolving intraorganizational disputes.

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[20] John Baigent, Protecting the Right to Organize, p. 45; Peter Cameron, Defending the Right to Organize, p. 63.

[21] Labour Code Amendment Act, 1984, *supra,* footnote 12, s. 7, introducing a new s. 43(1). The possibility of "automatic" certification upon organizing 55% or more of employees in the unit is retained under s. 45 for project certifications in the construction areas. Because the bargaining rights conferred under this new provision are cancelled upon completion of the project, applications under it are likely to be rare.

[22] Rod Germaine, The Structure of Bargaining under the Labour Code, p. 76.

[23] See, for example, Labour Code Amendment Act, 1984, *supra,* footnote 12, s. 5, amending s. 40. The Board also appears more willing to permit partial decertification: see *Vancouver City Savings Credit Union and O.T.E.U. Local No. 15*, B.C.L.R.B. Letter Decision #66/83.

[24] Altering Union Bargaining Structure by Labour Board Decision, p. 99.

Three papers on picketing were presented at the conference.[25] Only two were available for publication. On the labour side, Ian Donald focused on the return of the use of the injunction, and argued forcefully for the exclusion of the courts from the field of labour disputes.[26] Peter Gall, who usually acts on behalf of management, viewed the institutional framework as basically sound, and accepted the legitimacy of picketing secondary locations of the same employer. However, he submitted that the mediative approach of the board is not entirely appropriate when the interests of third parties are at stake. In his view, such changes as were necessary could be accomplished by administrative action by the Board without the intervention of the legislature.[27]

As students of labour law will be aware, Donald's pleas fell on deaf ears, and Gall's counsel of moderation did not prevail. Following the dispute in the pulp and paper industry in 1984, in which wholesale use was made of the common employer provision of the Code (section 37) to extend the scope of picketing to the entire forest industry, legislation was enacted restricting picketing to the place of employment of striking or locked-out employees, and to the places of business or employment of allies.[28]

Part VI of the collection deals with grievance arbitration under the Code. The first paper is a substantial and useful analysis by J.M. Weiler of the procedural and other reforms introduced by the Code.[29] He deals with the original jurisdiction of the board under section 96 of the Code, and points out that the success rate of Industrial Relations Officers in achieving settlements under that provision has averaged about seventy per cent. It would have been interesting, in assessing the impact of section 96, to have compared experience under it with that under section 22(4) of the Labour Relations Act, which preceded it. Under the earlier legislation the number of applications appears to have been barely half that under the present Code. Further, the success rate of the officers appears to have been substantially less than the current rate.[30]

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[25] Peter A. Gall, Regulation of Picketing under the B.C. Labour Code: Some Cracks in the Institutional Foundation, p. 133; Ian Donald, The Return of the Injunction, p. 147. The paper by Michael Hunter was not published.

[26] Pp. 153-155.

[27] P. 134.

[28] Labour Code Amendment Act, 1984, *supra*, footnote 12, s. 16, introducing the new s. 85.

[29] Grievance Arbitration: The New Wave, p. 159.

[30] Prior to 1974, it appears to have been running at about 58%. This figure is based on a quick survey of data extracted from Annual Reports of the B.C. Ministry of Labour, 1963-73. About 26% of the cases resulted in Board orders, as compared to between 6% and 7% in 1982, and 10% in 1981. The percentage of cases referred back to the parties was correspondingly lower prior to the Code (about 9% over the period 1963-73, as compared to about 19.6% in 1981 and 22% in 1982).

Both J.M. Weiler and Leo McGrady, who presented the union perspective on the grievance arbitration process,[31] were critical of the delays, costs and legalisms which have crept in. Both endorse the use of alternative forms of dispute resolution, such as expedited arbitration and grievance mediation. The union perspective of the changes introduced by the Labour Code was largely positive, though McGrady gave a mixed review to the use of extrinsic evidence. As a result of a Board decision in 1976, it is no longer necessary in British Columbia to find an ambiguity in the language of an agreement before resorting to the use of extrinsic evidence. Many would agree that much time may be spent in presenting evidence of negotiating history or past practice, which ultimately does little to advance either party's case. In an appropriate case, however, extrinsic evidence may be very useful in identifying and dealing with the substance of the dispute.

Whilst McGrady welcomed the transfer of appellate or supervisory jurisdiction from the courts to the Labour Relations Board, he was critical of delays in the hearing of appeals, with all the attendant problems that that has for the parties. It is a criticism which the Board has sought to meet by tightening the screening process.

What of the impact of the Code on other jurisdictions? The British Columbia Labour Code provided a testing ground for a number of concepts, such as that of dependent contractor and first contract arbitration, which were subsequently exported to a number of other jurisdictions with some modifications. Nonetheless, as a role model its success has been relatively modest.[32] Indeed, J. Dorsey suggests that British Columbia had lost the leadership mantle it wore in the first heady days of the Labour Code. That was a fair comment in 1983. It is certainly true of 1985. Other jurisdictions have not adopted the British Columbia initiatives in the treatment of picketing, in the expansion of arbitral authority, or the diversion of most challenges to arbitration awards from the courts to the Labour Relations Board — all of which steps have a great deal to commend them both in theory and in practice. Even allowing for regional diversity, it is surprising that some of the more successful experiments have not been exported.

This collection of essays is not and does not purport to be a comprehensive statement of the law and practice of the British Columbia Labour Relations Board. Nor can most of the papers be characterized as comprehensive or definitive statements of that area of the law and practice on which they touch. In written form they also tend to lack some of the excitement which the immediacy of their oral presentation engendered. To some extent, the book has been overtaken by events, and it contains

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[31] A Union Perspective on Labour Code Reform: Arbitration, p. 197.

[32] See George W. Adams, Q.C., The Impact of the Code Beyond the Province, p. 219.

some errors which might have been eliminated in the process of editing.[33] Nonetheless the collection will be useful to any serious student of British Columbia Labour Law.

M.A. HICKLING*

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Legal Liability of Doctors and Hospitals in Canada. Second Edition. BY ELLEN PICARD. Toronto, Calgary, Vancouver: The Carswell Company Limited. 1984. Pp. xliii, 556. ($78.00)

Some lawyers regard health law as a rather restricted area of the law. Even if they are correct, none can call it less than complex and fascinating. The literature covering the relevant Canadian jurisprudence is small but growing, and in it Professor Picard's book occupies an authoritative position. Those lawyers, health care providers and administrators who are familiar with the first edition[1] of the work have been looking forward to the second with eager anticipation. They will not be disappointed. Wisely, because of the warm reception which her book upon publication was accorded, the author has left the basic format of the first edition largely intact. Most of the chapters (including those dealing with the doctor-patient relationship; civil actions pertinent to the relationship between health care providers and recipients; negligence; defences to an action in negligence; proof of negligence; the doctor in court; the doctor's liability for the acts of others; liability of hospitals, direct and otherwise; and medical records) have been revised to reflect the significantly expanded body of case law which has been generated during the last few years.

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[33] By some strange lapse the three "wise men" who made up the committee that led to the 1973 Act are identified by Professor P.C. Weiler at p. 27 as McTaggart, Hall and Matkin JJ.A. Neither Professor Noel Hall (a non-lawyer), nor J. Matkin, then assistant professor at the University of British Columbia, have yet been elevated to the Bench, let alone the Court of Appeal. Judge McTaggart still sits in the county court.

Australian readers may not be surprised to see their eighty years of experience with compulsory conciliation and arbitration described as ineffective in eliminating strikes. They may well be astounded, however, to see it cited, at p. 38, as a "*recent* . . . attempt to replace the system of free collective bargaining with a system of compulsory arbitration". (Emphasis added).

* M.A. Hickling, of the Faculty of Law, University of British Columbia, Vancouver, British Columbia.

[1] Legal Liability of Doctors and Hospitals in Canada (1978).

One example of a controversial decision in an exceedingly important area is the trial judgment in *Yepremian* v. *Scarborough General Hospital*[2] which, for the first time in Canada, posited that a hospital could be held liable for the actions of a physician who was an independent contractor rather than an employee. The trial judge came to the conclusion that in situations in which the physician is not a hospital employee and the patient does not personally retain the physician (which is of course the case with the vast majority of casualty officers and other emergency room physicians and the majority of specialists), ". . . all of the circumstances must be considered in order to decide whether or not the hospital is under a non-delegable duty of care which imposes liability on the hospital".[3]

In the event, the decision was that the hospital was under such a non-delegable duty of care. Although this was reversed by the Ontario Court of Appeal,[4] the hospital settled the action, perhaps to avoid the possibility that the Supreme Court of Canada might restore the trial judgment. The author expressed the sentiment in the first edition that ". . . the trend to greater accountability of hospitals to the public for medical treatment seems clear",[5] and echoes this in the second,[6] but had to add that "[u]nfortunately, the *Yepremian* case has left the jurisprudence unsettled".[7] It would at this point have been beneficial to those involved in, and those interested in the outcome of medical negligence suits, including hospital boards, insurers and governments, if Professor Picard had elaborated on the reasons for and against making hospital boards liable for negligent acts committed within their hospitals by physicians who are independent contractors, and had given her own views on the matter. It may be unconscionable that a deserving patient should remain without a remedy but it is not beyond dispute that making hospitals liable in such situations is the best way to accomplish this goal. In this regard it is instructive to note that at least one commentator[8] has proposed a reversal of the trend in the United States to find hospital boards liable in these situations, although

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[2] (1978), 88 D.L.R. (3d) 161, 20 O.R. (2d) 510, 6 C.C.L.T. 81, 2 Legal Med. Q. 216 (Ont. H.C.).

[3] *Ibid.*, at pp. 184 (D.L.R.), 534 (O.R.), 111 (C.C.L.T.), 227 (Legal Med. Q.).

[4] (1980), 110 D.L.R. (3d) 513, 28 O.R. (2d) 494, 13 C.C.L.T. 105 (Ont. C.A.). (Unfortunately, n. 299 on p. 193 of Picard refers to the trial judgment as having been "affirmed", undoubtedly because of the fact that the findings of negligence with respect to the physicians involved were undisturbed. It was this, presumably, that misled the publisher to state in the Table of Cases that the trial judgment was "affirmed" on appeal).

[5] *Op. cit.*, footnote 1, p. 271.

[6] P. 322.

[7] *Ibid.*

[8] G.G. Peters, Reallocating Liability to Medical Staff Review Committee Members: A Response to the Hospital Corporate Liability Doctrine (1984), 10 Am. J.L. & Med. 115.

his suggestion of, instead, holding the members of hospital peer review committees personally responsible leaves one less than breathless with admiration. The fledgling peer review activities in Canada would undoubtedly not survive such a move.

The chapter dealing with consent has been greatly expanded and extensively revised, largely because of the Supreme Court of Canada decisions in *Hopp* v. *Lepp*[9] and *Reibl* v. *Hughes*.[10] These cases profoundly affected the law of consent to treatment by significantly altering the duty of disclosure of risks owed by the physician to the patient and, at the same time, clarified the distinction between, and availability of, actions in negligence and in battery arising out of inadequate or non-disclosure. The duty became that of disclosure of what the reasonable person, in the patient's circumstances, would want to know before giving consent. This generated what is, for Canada, a large number of legal actions, along with considerable trepidation on the part of the medical profession. So far, this commotion has proved to be largely unfounded since the great majority of these suits have been unsuccessful, foundering, as they did, on the causation factor which requires plaintiffs to show that the reasonable person, in their circumstances, would not have consented to the treatment if equipped with knowledge about the particular risk which was not disclosed by the defendant physician. Other reasons for this chapter quadrupling in size are the very welcome additions dealing with consent to transplantation and sterilization, and the expansion of the part dealing with consent to experimental procedures.

Because of the marked increase in the number of lawsuits against health care professionals and institutions, the appendices, which list cases categorized by defendant-type, procedure complained of and injury suffered, and which also provide an accompanying digest of all decided cases, have more than doubled. Although it is probable that for many health care professionals the appendices are the most valuable feature of the book, one wonders if they may not have to be deleted in the next edition, which will surely have to follow in a few years, in order to prevent the book becoming unwieldy or too expensive.

If there is one criticism to be made of the book, it is that one wishes that greater care had been taken regarding statutory references. For example, footnote 646 on page 131 lists four provincial statutes which allow the removal of the pituitary gland of a deceased person during a *post mortem* examination as long as there is no evidence of any objection to this by the deceased during his or her life, or by the family. There is no mention of similar statutes which have been enacted in Saskatchewan, Prince Edward

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[9] [1980] 2 S.C.R. 192, (1980), 112 D.L.R. (3d) 67, [1980] 4 W.W.R. 645, (1980), 13 C.C.L.T. 66, 4 Legal Med. Q. 202, 22 A.R. 361, 32 N.R. 145.

[10] [1980] 2 S.C.R. 880, (1980), 114 D.L.R. (3d) 1, 14 C.C.L.T. 1, 33 N.R. 361.

Island and Nova Scotia.[11] Another example is the statement on page 168 that only four provinces have good samaritan legislation, listed in footnote 124. No reference is made to the British Columbia Good Samaritan Act[12] which was enacted in 1978. However, it should be remembered, as anyone knows who has tried to find similar or comparable legislative enactments of more than one province, what an almost impossible task it can be to do so in the maze of differently named and worded legislation.

One result of the law becoming more complex is that health care professionals are in greater need of correct and clearly worded information, if only to counter the frequently occurring confusion with provisions in United States health law. Professor Picard succeeded admirably in the first edition of her book in her expressed goal of writing a book ". . . which would be helpful to both the legal profession and to health care professionals".[13] Unfortunately, because of the increasing complexity of the legal issues involved, it is somewhat doubtful that certain portions of the second edition, particularly parts of the chapters on Consent and, to a lesser extent, Negligence, are still as comprehensible to non-lawyers as before. At least, that is the preliminary impression gained by this reviewer after using the book in a few health law courses for health care professionals. In this connection, it is a pity that the chapters "The Conduct of a Civil Action" and "The Doctor and the Criminal Law" had to be dropped, no doubt because otherwise the book would have become too bulky.

In summary, Professor Picard has again succeeded in producing a book which will be indispensable to all lawyers interested in the issues covered, whether from the point of view of the plaintiff or that of the defence or, indeed, that of prospective patients. By far the greater portion of the book will also continue to be extremely helpful to health care professionals. The book contains a treasure-house of information coupled with valuable and penetrating commentary in Professor Picard's unusually lucid writing style. It can only be hoped that both the author and publisher can be prevailed upon to publish the third edition sooner than the six years it took between the first and second editions or, at least, to produce annual supplements to the book.

GERRIT W. CLEMENTS*

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[11] The Coroners Act, R.S.S. 1978, c. C-38, as amended S.S. 1979-80, c. 57, s. 5, s. 24.1; An Act to Amend the Human Tissue Gift Act, S.P.E.I. 1980, c. 27; Fatality Inquiries Act, C.S.N.S., c. F-6, s. 17A (S.N.S. 1982, c. 25, s. 3). Incidentally, since the writing of the book the New Brunswick Human Tissue Act has also been similarly amended: S.N.B. 1984, c. 25. Also, the author mentions that a logical extension might be to include kidneys and corneas in such provisions. This happened in Saskatchewan in 1984 with respect to corneas (S.S. 1983-84, c. 32, s. 2).

[12] R.S.B.C. 1979, c. 155.

[13] *Op. cit.*, footnote 1, p. v.

* Gerrit W. Clements, of the Legal Services Branch, Ministry of Attorney General, Province of British Columbia.

The Unborn Child's Right to Prenatal Care, a comparative law perspective. By E.W. KEYSERLINGCK. Montreal: McGill Legal Studies, Centre de recherche en droit privé et comparé du Québec. 1984. Pp. xiii, 211. ($25.00)

L'enfant à naître est certes l'être le plus faible et le plus démuni. L'amour de ses parents et la protection de l'État peuvent seuls assurer sa survie et sa venue au monde en bonne santé. Or notre société, qui se pose en championne des droits de la personne, est déchirée par des intérêts contraires et ne se résout pas à étendre à l'enfant à naître les prérogatives accordées aux individus. L'oeuvre de M. Keyserlingck représente une contribution majeure à l'étude de ce sujet si controversé et crucial pour une communauté menacée par le fléau de la dénatalité.

Dans la première partie de l'ouvrage, M. Keyserlingck fait une étude exhaustive, soutenue par une solide analyse jurisprudentielle, de la situation juridique actuelle du foetus dans une perspective comparée du droit québecois, canadien et anglo-américain. Il aborde ainsi la reconnaissance de ses droits patrimoniaux et du droit d'être indemnisé pour des dommages subis avant la naissance, si se réalise la condition de naître "vivant et viable". L'ambiguïté et la confusion qui entourent le statut de l'enfant à naître sont par là même soulignées: les différents systèmes de droit évitent de se prononcer de façon explicite et irréfutable, et se contentent de mettre l'accent sur la possibilité de compensation des dommages.

La seconde partie souligne les risques encourus par l'enfant avant la naissance, risques que le progrès des connaissances et de la technique médicales permet d'apprécier chaque jour avec plus de précision: environnement ou conduite de la mère pendant la grossesse en sont les principales sources. D'où, dit l'auteur, la nécessité d'une protection accrue de l'enfant contre ces différentes agressions, et non plus seulement d'une indemnisation *a posteriori*. D'où, également, la nécessité de reconnaître, sur le plan légal, le droit de l'enfant à naître en bonne santé, droit qui entraînera en conséquence pour la mère elle-même, l'entourage et la société, des obligations corrélatives.

Le troisième chapitre aborde les moyens juridiques susceptibles de mettre en oeuvre la protection souhaitée pour l'enfant à naître. L'auteur fonde son approche sur la thèse déjà soutenue par le Pr Kouri: la condition de la naissance "vivant et viable" doit être considérée comme une condition résolutoire, et non plus suspensive, l'enfant se voyant ainsi accorder la personnalité juridique dès avant sa naissance. Qui dit personnalité juridique dit mêmes droits que l'enfant déjà né, et obligations correspondantes des parents et des tiers. Ainsi se trouve soulevé directement le conflit entre le droit de l'enfant à la vie et à la santé, et le droit de la mère à l'inviolabilité de sa personne et à l'autonomie, puisque l'on ne peut porter secours au premier sans passer par la seconde. L'auteur analyse les critères retenus par les tribunaux américains pour ordonner ou non l'inter-

vention contre le gré de la mère, ainsi que les théories absolue et relative de l'inviolabilité de la personne humaine.

Le chapitre quatre, enfin, tente de résoudre le conflit qui surgit inéluctablement entre l'avortement et le droit de l'enfant à des soins prénataux. Assez paradoxalement, les obligations de la mère, obligations, bien sûr, de moyens, ne naissent que si elle décide de porter l'enfant, non pas de subir un avortement, et lorsqu'elle connaît sa grossesse. L'auteur va plus loin: toute femme fertile, ayant une activité sexuelle et n'utilisant pas de méthode anticonceptionnelle sûre, doit prendre des précautions pour protéger un foetus potentiel, les premières semaines de grossesse étant pour lui les plus cruciales. Les droits du foetus aux soins prénataux ne devraient céder le pas à l'intérêt de la mère que lorsqu'il y va de la vie ou de la santé de celle-ci.

En conclusion, M. Keyserlingck souhaite la consécration juridique des droits de l'enfant à naître, au nom de l'unicité de l'être humain, la naissance n'étant qu'une étape dans son développement. Les mécanismes de l'exécution forcée des obligations, notamment l'injonction, permettraient dès lors de prendre les mesures nécessaires à sa véritable protection.

Si l'analyse juridique faite par l'auteur ne prête guère à controverse, il n'en est pas de même des solutions qu'il propose. L'idée d'une contrainte juridique exercée sur la femme enceinte, surtout dans les premières semaines de la grossesse, et de la responsabilité encourue par elle, ne risque-t-elle pas de décourager plutôt la maternité? De plus, M. Keyserlingck apporte une réponse des plus contestable, à notre avis, au conflit existant entre l'avortement et les droits juridiques de l'enfant à naître, en soumettant l'existence de ceux-ci au bon vouloir de la mère. Ce chapitre eût demandé, sans doute, une étude plus étoffée et la recherche de solutions différentes.

Reste une oeuvre juridique solide, d'une importance majeure en droit des personnes, rédigée dans un style clair et agréable, accessible à tous ceux qui se posent des questions sur les valeurs à privilégier dans notre société.

SUZANNE NOOTENS*

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* Suzanne Nootens, professeur, directeur du programme de la maîtrise en droit de la santé à la faculté de droit de l'Université de Sherbrooke, Sherbrooke (Québec).

Law in a Cynical Society? Opinion and Law in the 1980's. EDITED BY DALE GIBSON AND JANET K. BALDWIN. Calgary: Carswell Legal Publications, Western Division. 1985. Pp. xviii, 464. ($55.00)

This volume of essays and shorter comment papers is based on a conference held at the Faculty of Law, University of Manitoba, November 18-20, 1982.

As the title suggests, the conference organizers attempted to marry two strands of ideas about the relationship between legal institutions and modern society. The first is cynicism. According to Webster's Dictionary, cynicism is the doctrine of the Cynics, those ancient Greek philosophers "who held the view that virtue is the only good and that its essence lies in self-control and independence".[1] Cynics believe that people act out of self-interest. Thus, the cynical view of the law is that the rich and powerful are better served than the poor by our legal institutions.

The second strand of ideas holds that public opinion shapes reforms undertaken by legislators. This argument extends from Dicey's classic statement on the evolution of reforms in Victorian Britain.[2] In essence, Dicey claimed that the dominant system of ideas (ideology) held by the Victorians structured new laws implemented with respect to protection of workers and improvement of public safety. The editors suggest in their preface to the volume that cynicism about these types of law reforms and disrespect for authority is growing in Canada and other Western nations in the 1980's.[3]

On the whole, the marriage of these two strands of ideas is successfully achieved in this volume. Some of the papers focus primarily on one of the two subjects, but many of the authors have effectively linked the two themes. What emerges are a number of well-argued, interesting papers that will contribute substantially to legal scholarship in Canada. In this short review, it is possible to highlight only some of the contributions.

The book is divided into thirteen chapters. A short preface by the editors provides an overview on the themes of the conference, and Professor Gibson introduces the volume with a provocative and illuminating review of literature on the relationship between law and public opinion. He

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[1] Webster's New Collegiate Dictionary (9th ed., 1983), p. 320.

[2] A.V. Dicey, Law and Public Opinion in England During the Nineteenth Century (2nd ed., 1914).

[3] The spectre of outright defiance of the law in Canada has been brought into sharper relief in recent years. Examples of defiance would include protesters of the nuclear arms race who refuse to pay taxes, and the bombing of a plant in Toronto manufacturing guidance mechanisms for the Cruise Missile in 1983. As conflicts over this type of government-sanctioned activity become more widespread, increasing skepticism about the role of the law in the promotion of certain interests seems inevitable. The volume considers the implications of this pattern for future reforms and is particularly timely for this reason.

draws out several important weaknesses in Dicey's thesis. Moreover, he deftly assesses the implications of more recent scholarship on the relationship between attitudes, public opinion and the law.

The second chapter of the volume is a paper by Robert J. Moore on research that was carried out in 1980 on public attitudes towards the legal system in Canada. The key findings of the study include the following cynical views: that women were less satisfied than men with the operation of the legal system; that the individual does not have a chance against large companies in court; and that almost anything can be arranged by lawyers for a price. Not surprisingly, supporters of the New Democratic Party saw law reform rather than law enforcement as a priority and viewed abuse of powers by authorities most cynically.

Chapter Three considers the results obtained in surveys done outside Canada. Roman Tomasic examines aspects of cynicism in Australian society through a detailed statistical analysis of attitudes towards lawyers and legal services. His work suggests that the Australian public has "little confidence in the professed service ethic of lawyers",[4] and that they perceive lawyers as self-interested and manipulative people. One problem with Tomasic's paper flows from the detailed statistical tables which are presented. Those readers who are unfamiliar with more advanced statistical techniques (for example factor analysis) would be probably mystified by these results. A brief appendix or some explanatory notes would have been helpful.

The fifth chapter begins with a paper by Yves Lafontaine titled, Are Lawyers a Vivid Contradiction? Through analysis of public opinion survey results on the image of lawyers in Quebec, Lafontaine shows that people there think lawyers are both "honest and dishonest" and their "fees are high but reasonable".[5] On the basis of these results, Lafontaine contends the public holds contradictory attitudes about lawyers. Stephen Brickley presents a short piece on dispute-settlement in post-agrarian societies. He argues that the role of expertise in dispute-settlement was expanded when social stratification became feasible. In turn, this expertise tends to cause public cynicism as individual involvement in the process of dispute-resolution is decreased.

F. Murray Fraser offers some critical comments on legal education and the role of legal institutions in promoting law reform. In his view, changes to family law have increased litigation on child custody and the division of property. These changes have overloaded the court system with adversarial cases that would likely have been settled out-of-court prior to the so-called reforms. Fraser also discusses briefly the issue of

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[4] P. 96.

[5] P. 177.

advertising and notes that the bungling of the Law Society of British Columbia probably negatively influenced the public's perceptions of lawyers.

Chapter Seven deals with the notion that public cynicism derives from perceptions that sentencing procedures and penal institutions serve the poor much less effectively than the rich. Marek Debicki provides support for the argument that there is a very strong correlation between socio-economic status and severity of sentence. Those of lower status, whether measured by income or type of job, are treated much more harshly.

The chapter also includes a lengthy paper by Gail Kellough. She outlines the relationship between pressure group activity and law reform with respect to communities and the penal system. She describes the establishment of a community committee which challenged the operation of a Remand Centre in Winnipeg. Kellough shows that this committee was able to bring some of the worst abuses and inequities in the operation of the centre in to the public view and effectively press for reform. Her analysis provides a model for public participation in penal reform for those interested in positively influencing policy-makers.

Four papers in chapter eight consider one of the most significant sources of cynicism in the working class, labour relations. The first by Charles Reasons juxtaposes the stark brutality of laws on worker compensation and the ideological basis of capitalist relations of production. He shows that through promotion of certain myths about accidents (for example, blaming the victim for injuries suffered), industrialists evade responsibility for deaths and injuries in the workplace. Reasons argues for extending penalties to corporations and/or executives that refuse to reinvest profits into safer equipment and worker education.

In the second paper of the chapter, Professor Glasbeek assesses the values promoted in contract law, arguing that liberal notions such as freedom of contract "enfeeble" workers. Glasbeek's view is that collective bargaining fails to rectify the imbalances inherent in capitalist production because the working class is fragmented and generally accepts the dominant class' perception of right and wrong. He maintains that the prevalent myths about labour union, promoted as part of the package of beliefs upheld by capitalists, are a massive barrier to true reform in the workplace.

The third paper of the four is a short piece by Andy Wachtel. He surveys some of the attitudes towards labour unions held by the public, and finds that many of these are similar to those held with regard to the inefficiency of government. The last paper by John Crispo sets out to defend the *status quo* on labour relations law. Unfortunately, it appears that most of the defense has been edited out. One is left with Crispo's critical comments on government intervention in labour negotiations, an assessment which does little to reassure the reader that cynicism is not the proper view of labour relations law and policy.

The ninth chapter presents four papers under the rubric of obedience to the law. The introductory paper by Joseph Raz outlines some of the reasons why individuals refuse to comply with laws they perceive as unfair or absurd. He contends that, while the average citizen should obey the law in most circumstances, they also have an obligation to break it in others and accept the consequences of defiance. Raz suggests that this is particularly true when individuals are cynical about the laws they are violating.

The second paper in the chapter by Professor Albini considers public attitudes towards organized crime. Albini observes that many of the goods and services provided by organized criminals are consumed by ordinary citizens. Thus the distinction between criminal and non-criminal activity breaks down at one level, and this constitutes a major structural barrier to reform. In the third paper, John Hogarth argues that a fundamental cultural shift is taking place in this generation. He maintains that this shift expands the role of the contract relations and de-emphasizes the importance of status. Hogarth finds this situation troubling because it increases the use of the law in resolving familial and labour conflicts that previously were resolved in other ways.

The last paper in the series, by Arthur Schafer, summarizes the important points made in the preceding papers. However, Schafer also adds that a considerable amount of public cynicism about the law stems from alienation and powerlessness in the face of the breakdown of communities, a problem that legal institutions can do little to resolve.

Chapter 10 contains six papers which examine the role of the news media and schools in shaping the attitudes Canadians hold about the law. Tom Kent, chairperson of the 1981 Royal Commission on Newspapers, warns that access to the "truth" is jeopardized by growing corporate concentration in the media. John Meisel notes that exposure to American media virtually ensures that Canadian children become more familiar with the laws of our southern neighbour than with our own. Terry Morrison suggests that the lack of critical analysis of legal institutions and values in our educational system has generated confusion. As a minimum he recommends that high school students receive an introduction to legal reasoning and the laws of evidence, if only to prepare them for their roles as responsible citizens.

June Tapp presents the most interesting paper in the chapter in summarizing her work on legal socialization and jury service. Her research shows that all cultures develop a form of law-abidingness and a sense of justice across age groups and physical settings. Tapp employs her analytic scheme to contrast and compare the attitudes of the jury from the Wounded Knee Incident in the United States in 1973. Her case study suggests that the eventual acquittal of the Indian leaders who had initiated the revolt at Wounded Knee can be attributed to a careful jury selection proces. This

process identified individuals who were sympathetic to Indian self-determination and believed the right to protest is legitimate. In effect, most of the members of the jury who were eventually selected for the Wounded Knee trial held a cynical view of the law.

The titles of the eleventh and twelfth chapters in the volume are "What Influences Policy-Makers" and "Political Responses" respectively. The papers in these chapters are by politicians and bureaucrats and tend to confirm suspicions that politicians do not truly understand the sources of public cynicism about the law.

The volume concludes with a stimulating paper by Edgar Friedenberg. His argument combines the theme of the conference with his thesis in his book, Deference to Authority: The Case of Canada.[6] Friedenberg maintains that Canada is a Hobbesian society in which people are willing to struggle against the harshness of nature but remain obedient to government. He invokes some startling examples of abuses of powers by the courts in protecting the government, examples which would make even the most optimistic champion of Western legal institutions somewhat cynical. In the end he suggests that there is a need for cynicism as a counterbalance to existing public naïvete about the role of the courts in serving powerful interests and perpetuating certain social problems.

Not all of the papers nor all of the discussion that followed their presentation are included. One might have wished for a full list of the authors and titles of all the papers presented, and it would have also have been useful on occasion to have it made clearer what was a formal paper, a formal comment on the paper, or comments made during discussion. Nonetheless, the result is a fascinating collection of ideas. Almost all of the papers are worth reading. The book could be utilized as a supplement to courses on the sociology of law and criminology. It is also suitable for undergraduate courses in sociology and political theory at Canadian universities. Both the publisher and the editors should be commended for having effectively presented such a broad range of materials on the law and public opinion.

DAVID MCROBERT*

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[6] E.Z. Friedenberg, Deference to Authority: The Case of Canada (1980).

* David McRobert, of the second year class, Osgoode Hall Law School, York University, Downsview, Ontario.

The Interpretation of Legislation in Canada. By Pierre A. Coté. Cowansville, Québec: Les Éditions Yvon Blais Inc. 1984. Pp. xix, 577. ($65.00)

This book is a translation of Coté's Interpretation des Lois, which was published in 1982. The English translation is a welcome addition to the number of new books about statutory interpretation which have appeared recently.

It is welcome because, as the reviewer of Driedger's second edition of Construction of Statutes[1] lamented, "a reading of his [Driedger's] useful book does not reward us with a sense of purpose or the presence of a cohesive philosophy of statutory interpretation".[2] By contrast, Coté's book does have both a clear sense of purpose and a cohesive philosophy. He moves beyond a catalogue of rules to set forth general principles which recognize that language is a means of communication and not a precise science.

Coté's structure for analyzing legislation is threefold: the structure of statutes, their operation, and methods of interpretation. The first area is of particular interest because Coté is one of the first writers to point out that many issues in interpretation can be clarified if conventions governing the arrangement and drafting of statutes are properly understood. In this section the author also examines the structures of different types of statutes, for example declaratory, codifying and consolidating legislation.

The second area is a useful analysis of the operation of statutes from enactment to repeal. Coté stresses that many so-called questions of interpretation are really questions of application; the issue for determination is not what the words mean, but when and to what situations do they apply. There is also a very helpful discussion about the operation of statutes in the past (retroactive), in the present (immediate or prospective) and in the future (survival). Coté's discussion clears away many of the obscurities and difficulties unfortunately compounded by earlier writing in this field. Coté credits the French writer, Paul Roubier,[3] for the conceptual framework of his thesis. It is a clear and useful framework.

The third area examines methods of interpretation. Although many writers have discussed the rules, principles and presumptions used in interpretation, Coté presents us with new ideas and a holistic approach to the interpretation process. Rather than adopt the traditional model of the literal rule, the golden rule and the mischief rule, Coté introduces us to the grammatical, the contextual and the teleological methods of interpretation. Building on the conceptual framework he has developed in the first part

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[1] E.A. Driedger, Construction of Statutes (2nd ed., 1983).

[2] (1985), 63 Can. Bar Rev. 662, at p. 663.

[3] Le droit transitoire (Conflit des lois dans le temps) (2ième éd., 1960).

of the book, Coté links the three methods and suggests their appropriateness in different contexts.

After examining the three methods of interpretation, the author looks at the relevance in statutory interpretation of the history of enactments, previous interpretations of the legislation and presumptions of intent. In this discussion he, very properly, questions the relevance of the common law presumptions to modern regulatory schemes.

This is an important book. Since its publication in French the original version has already been cited often and the appearance of the English version will ensure that it will be widely used by practitioners and courts throughout the whole of Canada. For too long common lawyers not familiar with the French language and the decisions of the Quebec courts have been unable to benefit from the high level of competence in that jurisdiction in interpreting legislation. This book assists us in bridging that gap and rectifying the situation. However, other jurisdictions are not ignored. In addition to insights into cases on interpretation from the province of Quebec, the author uses many cases from other jurisdictions in Canada to illustrate his arguments. Further, he exposes the reader to literature not only from Canada, but from Great Britain, the United States and Europe.

This book will be equally valuable to both students and practitioners. The author gives many concrete examples and abundant case law and commentary which makes it a comprehensive research tool for all members of the legal profession, as well as administrators, legislators and others required to deal with questions of interpretation. His attempt to conceptualize interpretation of legislation as more than a series of conflicting rules or proverbs is ambitious, but remarkably successful. He has paved the way for future analysis of legislation and the relationship between the courts as interpreters and legislators as makers of legislation. However, much to his credit, he does not lose sight of the fact that most interpretation does not take place in the courts but by those who are entrusted with administering the statutes, namely officials, users of statutes and practitioners. He gives us important insights and it is to be hoped that the book will lead to further thoughtful commentary on the relationship between legislation and case law. Those involved with legislation will find it well worth its purchase price. Those who purchase it will soon find it becoming well worn.

SANDRA K. MCCALLUM*

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* Sandra K. McCallum, of the Faculty of Law, University of Victoria, Victoria, British Columbia.

Guide to Foreign Legal Materials: French. By CHARLES SZLADITS AND CLAIRE M. GERMAIN. Dobbs Ferry: Oceana. 1985. Pp. xi, 205. (U.S. $35.00)

The Parker School of Foreign and Comparative Law at Columbia seeks to provide American lawyers with the tools they require in so far as comparative and foreign law are concerned. With the increasing complexity of international business relations it has become more urgent for common lawyers at least to know where they can find those items of foreign law which may be of concern to them. For Canadian lawyers the problem is becoming more urgent the closer our relations become with the European Community. For this reason one can only welcome such bibliographies as that on French legal materials compiled by Szladits and Germain.

The first fifty pages of this collection are devoted to providing an outline of the types of sources, their character and position in the legal system. Under the rubric of legislation there is a short account of the role played by statutes and decrees, together with the significance of judicial review. A statute does not become effective in Canada until it has been "signed" by the Governor-General or Lieutenant-Governor, as the case may be, entering into force on a date specified. In France a somewhat similar system prevails, but with the additional proviso that there is never the possibility of a law coming into force without its text being publicly available. Promulgation of a statute by presidential decree is "necessary to render a law (statute) binding; however it does not render it effective until it is published and thus made publicly known. Statutes and decrees become effective upon publication in the *Journal officiel*".[1] The editors then deal with the role of custom and case law. While it is generally known that there is no rule of *stare decisis* in France, decisions "are in fact followed and they form precedents of law".[2] Their exact status depends upon whether one takes the view that they need to be "sanctioned by *jurisprudence constante*", that is, by a line of decisions supporting the rule, or the view that one single decision may be sufficient to become authoritative. The first view is somewhat circuitous, since the very fact that a decision is followed establishes its authoritative character. The theory of *jurisprudence constante* seems to have been abandoned by recent authors. More emphasis is put on the question of whether *jurisprudence* is called a *source de droit* rather than a *source du droit*, that is, whether the *jurisprudence* establishes individual legal norms or just presents an authoritative guide for solutions. There is no doubt about its authoritative character. "It is [, however,] only the determination by the *Cour de cassation* which gives to a decision real authority as a precedent".[3] This

[1] P. 9.

[2] P. 26.

[3] Pp. 26-27.

introductory chapter also includes a note on the importance of legal science — *doctrine* — and general principles and equity.

The bibliographical material is divided into bibliographies, legislative materials, case law (*jurisprudence*), encyclopedias and dictionaries, and doctrinal writings according to topic. There is also a useful note on English translations of the Codes as well as a short bibliography on English writings on French law. In addition, there is a valuable listing of French legal abbreviation, together with the addresses of French legal publishers.

While texts and judicial decisions are always of significance, it is essential to bear in mind that "the French lawyer usually looks first for the relevant code provision and then turns to one of the leading manuals; he rarely uses commentaries and — as a practitioner — prefers the *répertoire*".[4] The *répertoire* is a publication that may be compared to Halsbury or perhaps the Canadian Encyclopedic Digest, for it describes "various legal subjects listed alphabetically under broad subject-headings with numerous references to and quotations from laws, codes, case-law and doctrinal opinions. . . . [They] are highly rated in France and are always written by well-known specialists, law professors, judges or practitioners. The articles are usually signed. They are used frequently by legal scholars and practitioners alike. . . . The general organization of the *Répertoires* is to treat each subject in a comprehensive article alphabetically arranged under subject headings. These articles consist of consecutively numbered paragraphs".[5]

It is beyond the competence of this reviewer to comment in any detail upon the various specialist sections of the bibliography. It is with regret, however, that he is compelled to issue a warning based on his special interest. Care must be taken in assuring oneself as to the identity of any named author. The *doyen* of French international lawyers is Charles Rousseau, and he appears in the index as both Rousseau, C. and Rousseau, Ch. In fact, both entries appear on the same page — 132.

L.C. GREEN*

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[4] Pp. 255.

[5] P. 95.

* L.C. Green, of the University of Alberta, Edmonton, Alberta.