Principles of Criminal Law.
By ERIC COLVIN.
Carswell: Toronto. 1986. Pp. xxix, 340. ($55.00)

Reviewed by Bruce P. Archibald*

Eric Colvin has provided students and practitioners of criminal law with an excellent little handbook. It is a work of admirable doctrinal synthesis, taking the disparate (not to say desperate) sources of the general principles of criminal liability and presenting them in a readable and coherent fashion.

Quite properly, he precedes his discussion of the familiar principles of *actus reus* and *mens rea* with a short but pithy analysis of the aims of criminal punishment and the principles which ought to limit the invocation of the criminal sanction. Those still partial to rehabilitative goals for the criminal sanction might take issue with Colvin's concentration on "reductivist" justifications for criminal punishment (denunciation, deterrence and incapacitation), and those hard line moralists who might wish to revive "retributivist" theories may not find his discussion entirely satisfying. However, he is surely right to emphasize at the outset the necessary connection between the purposes of punishment and the principles underlying the definitional elements of offences, justifications and excuses. The general principles of criminal liability must take their form and practical application from appropriate moral standards for the imposition of criminal sanctions. In this regard it is somewhat shocking that we are witnessing in this country a "criminal code review" and a process of "sentencing reform" which are proceeding simultaneously on parallel paths with only remote prospects for meaningful reconciliation.

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The Law Reform Commission of Canada is drafting a new Criminal Code, but has prepared its proposals on the general principles and specific offences without detailed regard to sentencing and the principles of punishment.[1] Meanwhile, the Canadian Sentencing Commission has proposed far reaching changes in the structure of sentencing and correctional law[2] without serious reference to the content of criminal law or the principles underlying a finding of criminal liability. Whether or not the drafters of the Department of Justice under the pressure of a parliamentary timetable will want or be able to knit together these basic elements of the criminal justice system remains to be seen. In any event, they might take their cue from Professor Colvin's succinct treatment of this area.

The substance of the "general part" is presented by Professor Colvin under familiar doctrinal headings—*actus reus, mens rea*, strict and absolute liability, justifications and excuses, deficient mental capacity, inchoate liability and secondary liability. The chapter on the *actus reus* of criminal offences contains an enlightening discussion of the vexing problem of "causation" in offences requiring proof of "consequences". The chapter on *mens rea* gives an in-depth consideration of "recklessness" which may, however, give unnecessary credibility to the intellectually bankrupt notions of the House of Lords in the aberrant case of *Reg.* v. *Caldwell*.[3] The chapter on strict and absolute liability helps to sort out the aftermath of the Supreme Court of Canada's decision in *The Queen* v. *Sault Ste. Marie*,[4] and provides a timely reminder that the label "absolute liability" is a misnomer—there are many defences to so-called absolute liability offences.

The longest chapter in the book is entitled "Justifications and Excuses" and covers defence of the person, defence of property, correction of children, duress, necessity, impossibility, mistake of law, partial defences to murder, and abuse of process. Each of these topics is treated with care, and the text presents a thoughtful analysis of the latest caselaw. The discussions of defence of the person and defence of property are particularly effective as they analyze the ambiguities and contradictions of the Criminal Code provisions in the light of judicial attempts to make sense out of them. Similarly, the discussion of duress is a fine example of scholarly craftsmanship as Professor Calvin draws from the interplay

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[1] Law Reform Commission of Canada, Report No. 30, Vol. 1, Recodifying Criminal Law (1986).

[2] Canadian Sentencing Commission, Report: Sentencing Reform: A Canadian Approach (1987).

[3] [1982] A.C. 341 (H.L.).

[4] [1978] 2 S.C.R. 1299.

between legislative and judicial lawmaking some useful observations about "code" and "common law" as sources of legal rules.

While the chapter on "Justifications and Excuses" is as competent and as well written a treatment of the substance as any text in the field, and indeed better than many, it represents to me the fundamental weakness of the book—a weakness shared with other criminal law texts. This is the failure to take cognizance of developments in comparative criminal law which demonstrate the importance and the usefulness of distinguishing carefully between elements of offences, justifications, excuses and procedural or non-exculpatory public policy defences. The most powerful exponent of this approach in the common law world is the American, Paul Robinson, writing in his path-breaking two volume text, Criminal Law Defences.[5] A brief outline of the fundamentals of this structural approach is presented in the following paragraphs.

The distinction between "justification" and "excuse" is basic to this exercise. While some prominent common law jurists have been willing to accord only moral significance to this distinction, its value for legal purposes has now been recognized by doctrinal writers, courts and law reformers, and legislators in common law jurisdictions.[6] A justification exists where an accused's conduct falls within the definitional elements of an offence, but where the law recognizes that he or she acted in furtherance of an interest which takes precedence over that protected by the creation of the offence. Hence the argument inter alia: "Yes, I shot and killed the victim intentionally, but I was legitimately acting in self-defence." An excuse will exculpate the accused where his or her conduct falls within the definitional elements of the offence and is not justified as acting in furtherance of a legally protected interest, but where the accused's personal disability or debilitating circumstances are legally recognized as rendering the conduct blameless. For example: "Yes, I did it, I know it was unjustified, but someone forced me at gunpoint." While the conceptual distinction between justifications and excuses seems relatively clear and reasonably easy to apply in practice, the borderline between an excuse and the failure to prove the mental elements of an offence is much more problematic. Professor Colvin starts down this road of distinguishing between justifications and excuses, but does not go the whole way. This leads him erroneously to place "abuse of process" under the heading justification and excuse, and prevents him from making the full conceptual link between the category "excuse" and the matters which he discusses under the chapter heading "deficient mental capacity"—insanity, intoxication and automatism.

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[5] P. H. Robinson, Criminal Law Defences (1984).

[6] The Supreme Court of Canada, not without some difficulty, has recognized the distinction between justifications and excuses in *Perka* v. *R.*, [1984] 2 S.C.R. 232.

The category "non-exculpatory public policy defences" recognizes the existence of a heterogeneous set of legal arguments based on factual circumstances which will exculpate the accused even though the definitional elements can be proved and there are no grounds of justification or excuse. These arguments arise from a variety of legal sources. Most have traditionally been viewed as matters of criminal procedure. although many may have a constitutional basis. The unifying analytical concept is that there is a class of "defences" based on the principle that there may be circumstances where it is unfair for the state to proceed against an accused for reasons of "fairness" or even *raisons d'état* unrelated to the definitional elements of the offence, or to any justifications or excuses. The failure to develop this category in his book detracts from Professor Colvin's analysis of entrapment, and forces him to leave the subject of the "de minimis defence" dangling at the end of his chapter on *actus reus*.

While this is not the place to expound at length upon the value of structuring the general part in terms of definitional elements of offences, justifications, excuses, and non-exculpatory public policy defences, it may be important at least to make the bald assertion here that these distinctions have important practical consequences. This scheme will be invaluable to courts in sorting out pressing constitutional issues, particularly the question of how far section 7 of the Charter of Rights and Freedoms[7] ought to "constitutionalize" general principles of criminal law, and how elements of offences should be analyzed for the purposes of burden of proof arguments over section 11(d). The scheme should also be invoked during the present law reform efforts to clarify problems of liability for participation in offences and for resisting justified aggression. Finally, this approach contains the germ of a solution to a rational system of differentiated verdicts in Canadian criminal law.

Despite these criticisms, Professor Colvin and Carswell are to be congratulated for an extremely valuable and well produced text. Indeed, no student, practitioner or judge who wishes to stay up to the mark in Canadian criminal law ought to be without it. Happily, the length and the format of the paperback student edition make the price of this volume a reasonable one, at least in relation to many other legal texts on the market today.

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[7] Constitution Act, 1982, Part I.

Canadian Criminal Code Offences.
By JOHN L. GIBSON.
Carswell: Toronto. 1986. Pp. xxix, 383. ($30.00 softcover) ($78.00 looseleaf).

Reviewed by Frederick W. Hansford*

This is an extremely useful book. Its professed purpose is to serve as a "quick reference to solve courtroom problems in criminal law". On the whole, it succeeds in that task. Given its focus on providing a ready summary of the law, it would be absurd to expect this textbook to solve every problem which might arise in a trial. Within its limits, however, it is excellent value for money.

The book consists of forty-seven chapters, each dealing with a common Criminal Code offence. Each chapter is arranged in the same manner. A short index is set out, following which all the relevant Criminal Code sections are set out in full. There is no cross-referencing from chapter to chapter. The next part of the chapter is devoted to "Best Wording of the Charge", followed by a checklist of matters which the Crown must prove.

The next sub-heading is entitled "Summary of the Law". In this part, the author highlights a number of issues which are likely to arise in the prosecution of the offence. Each issue noted is followed by a short "black letter" statement of the law on that issue, with a reference to one, and sometimes more, leading cases. Last, the author goes on to deal with recent developments in the law.

This format is very effective for Crown counsel called upon to prosecute a case on short notice, as sometimes happens. In that context, the book serves as a crash course on the substantive law governing that offence. It would be most unwise to rely on the book exclusively, since each chapter is far from being a treatise on the offence. This is not intended as a criticism, as the book was never intended to fill that niche.

The book's orientation towards the needs of Crown counsel is not suprising, given that the author is a district Crown counsel in British Columbia. However, the format is also quite useful for defence counsel. In particular the collected Criminal Code provisions, the checklist of matters to be proven, and the suggested wording of the charge are very useful aids when conducting an initial interview or reviewing a set of particulars and an information.

There are two points about which some comment is warranted. Some of the checklists could usefully be expanded. For example, the

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checklist for a charge under section 237(b) of the Code (over .08) contains a reference to the "demand" which does not specifically mention the desirability of bringing out the express words of the demand (as does the reference to the Charter of Rights and Freedoms warning found later in the same checklist). The same checklist omits any reference to proof of delivery of the notice of intention to rely on the breathalyzer certificate.

The second point concerns format. Defences peculiar to the charge could be collected under a single sub-heading of "defences". In addition, under this head could also be made some comments on defences of general application which are, in the experience of the author, commonly raised in connection with that offence. While such a discussion may be found in the text, collecting it in one place would render it somewhat more accessible to defence counsel.

This book is available both in softcover and looseleaf versions. Although more expensive, the looseleaf version can be easily updated, and in fact, Carswell recently issued an updating package. This version is, however, less portable than the softcover one and, therefore, less useful for Crown counsel who intends to use the book as a *vade mecum*. Defence counsel would be better advised to purchase the looseleaf version, since there is little need in such a practice to have the whole text available in court.

In summary, this book will certainly appeal to junior counsel or to those who venture into the criminal courts but rarely. Students will also appreciate the format, and there is no doubt that anyone who purchases the book will soon find it a valuable companion to the Criminal Code.

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Droit de la consommation.
Par NICOLE L'HEUREUX.
Montréal: Wilson & Lafleur Ltée. 1986. Pp. 325. ($32.50)

Compte Rendu de Me Pauline Roy*

La troisième édition[1] du livre de Madame Nicole L'Heureux traitant du droit de la consommation est paru à l'automne 1986. En publiant ce livre pour la première fois en 1980, soit à peine quelques mois après

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[1] La recherche pour cet ouvrage est à jour au 31 août 1986.

l'entrée en vigueur de la Loi sur la protection du consommateur,[2] l'auteure a fait oeuvre de pionnière, puisqu'il s'agissait du premier ouvrage du genre à traiter du droit québécois de la consommation.

L'abondance des décisions rendues au cours des dernières années a, à juste titre, incité l'auteure à publier cette seconde mise à jour de son ouvrage.[3] Cet événement mérite d'être souligné à plus d'un titre. Tout d'abord, cet ouvrage de référence à la fois pratique et doctrinal a permis, tant aux étudiants qu'aux praticiens et aux juristes, de s'initier au droit de la consommation tout en leur servant de source première d'analyse et d'interprétation des nouvelles règles du droit. De plus, cette publication a contribué non seulement à mettre en évidence l'importance de ce nouveau domaine du droit, mais aussi à illustrer dans quelle mesure les principes fondamentaux qui l'animent s'avèrent mieux adaptés aux réalités de la société de consommation, en mettant en lumière la portée des nouvelles règles de droit désormais applicables en la matière.

Même si le contenu du livre et la présentation de la matière demeurent substantiellement les mêmes au fil des rééditions, cette nouvelle version constitue une source de référence grandement enrichie puisqu'elle intègre, en majeure partie, l'orientation et la teneur des controverses jurisprudentielles et doctrinales auxquelles l'application de la loi a donné lieu dans les six dernières années.

En introduction, l'auteure identifie les principales transformations socio-économiques qui ont favorisé l'apparition et l'évolution de l'idée de protection du consommateur. Elle présente le droit de la consommation dans son acception la plus complète possible, en se référant aux différentes lois adoptées tant au niveau provincial que fédéral et qui ont une incidence en matière de protection des consommateurs. C'est cependant au droit de la consommation pris dans son sens le plus restreint que l'essentiel de cet ouvrage est consacré, soit la nouvelle Loi sur la protection du consommateur.

Cette étude est divisée en trois parties: le contrat de consommation, la protection du consommateur dans la phase préalable au contrat et la mise en oeuvre des mesures protectrices.

C'est dans la première partie consacrée au contrat de consommation que l'auteure traite, au titre premier, du domaine du contrat de

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[2] L.R.Q., c. P-40.1, dont la majorité des dispositions sont entrées en vigueur le 30 avril 1980. Cette loi fut précédée par la Loi de la protection du consommateur, L.Q. 1971, c. 74, qui ne concernait que les contrats de crédit et les contrats conclus par un commerçant itinérant.

[3] La deuxième édition de cet ouvrage, qui a été publiée en 1983, était à jour au 31 août 1982. À quelques exceptions près, l'auteure y avait ajouté des références nouvelles dont la doctrine et la jurisprudence s'étaient enrichies depuis la parution de la première édition.

consommation. Avant de cerner le champ d'application de la Loi, l'auteure identifie et analyse les principes fondamentaux que le législateur a choisi de privilégier pour favoriser l'atteinte d'une justice contractuelle que l'application des principes traditionnels de droit civil ne permettent pas de favoriser dans le contexte de la société de consommation. Cette analyse constitue une démarche essentielle à la compréhension de l'esprit de la loi et par le fait même, à une interprétation adéquate pour la mise en application des différentes mesures de protection retenues pour atteindre cet objectif.

Cette mise en situation générale est complétée au titre II par l'étude des mesures générales de protection applicables à tous les contrats de consommation au sens de la Loi. Il s'agit essentiellement des dispositions introduisant le concept de lésion et interdisant l'introduction de clauses abusives dans le cadre du contrat de consommation. On retrouve aussi sous cette rubrique l'analyse des mesures qui permettent de protéger les usagers d'un bien ou d'un service en imposant des obligations minimales de garanties.

L'auteure consacre ensuite, au titre III une partie importante de son ouvrage à l'étude des dispositions particulières qui régissent certains contrats, tant au niveau des règles de formation qu'à celui des modalités d'exécution et des effets de ces contrats.

La diversité des règles imposées par le législateur et leur caractère dérogatoire par rapport à certains principes fondamentaux de droit civil justifient que l'auteure en fasse une analyse détaillée et ordonnée en se référant, au besoin, aux types de sanctions que le non-respect de ces différentes exigences peut entraîner. L'abondance des décisions rendues par les tribunaux depuis l'entrée en vigueur de cette loi, et que l'auteure a intégrées à son analyse, illustre bien l'importance des enjeux concernés par ces nouvelles mesures.

Paradoxalement, la deuxième partie de l'ouvrage traite des mesures de protection du consommateur dans la phrase préalable au contrat. Sont concernées par cette étape du processus de consommation, les informations objectives que les commerçants doivent donner au consommateur pour lui permettre de faire un choix libre et éclairé, la répression de la publicité fausse ou trompeuse et les différentes mesures permettant de contrôler l'utilisation de procédés de mise en marche qualifiés d'agressifs.

Dans cette partie, l'auteure intègre à son analyse non seulement les dispositions de la Loi sur la protection du consommateur, mais aussi celles contenues à la Loi relative aux enquêtes sur les coalitions[4] qui

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[4] S.R.C. 1970, c. C-23, telle que modifiée S.C. 1974-75-76, c. 76. Cette loi a de nouveau été modifiée en 1986 et porte le titre abrégé de Loi sur la concurrence, S.C. 1986, c. 26.

vise à assurer l'exercise de la libre concurrence en sanctionnant la commission de pratiques commerciales fausses, trompeuses ou déloyales. Pour circonscrire la notion d'information objective que les commerçants doivent donner à l'éventuel acquéreur d'un produit, l'auteure donne un aperçu des principales législations fédérales ou provinciales qui imposent un contenu informatif concernant la nature d'un bien, les dangers qu'il peut représenter pour l'usager et les données nécessaires à l'appréciation de son coût, tels que les poids, les mesures et le prix du produit. Ce tour d'horizon, bien que sommaire, offre au néophyte une vision générale du droit de la consommation et permet ainsi de mieux saisir la dimension élargie des besoins de protection, lesquels débordent largement du cadre contractuel au sens restreint du terme. Il nous semble cependant que cette partie de l'ouvrage aurait gagné à être traitée en premier lieu, tant pour la logique du sujet que pour mettre en évidence cette perspective plus globale et mieux intégrée du domaine de la protection du consommateur.

La troisième partie de l'ouvrage porte sur la mise en oeuvre des mesures protectrices prévues à la Loi sur la protection du consommateur, telles qu'analysées dans les deux précédentes parties. Dans les éditions antérieures, cette partie s'intitulait "Exécution et surveillance". Ce changement de titre n'affecte ni l'organisation de la matière ni son contenu.

Pour présenter les mesures d'exécution prévues à la Loi sur la protection du consommateur, le premier chapitre est consacré aux recours de nature contractuelle dont le consommateur dispose et un second chapitre aux sanctions administratives et pénales imposables aux contrevenants.

L'ensemble des recours civils offerts au consommateur pour faire valoir ses droits sont regroupés sous un même chapitre. Il s'agit d'une synthèse qui rappelle les différents types de sanctions prévues à la loi, dès lors qu'un contrat est lésionnaire ou lorsqu'il appert que les exigences de forme ou les conditions de fond liées à la conclusion d'un contrat n'ont pas été respectées.

L'auteure reprend ici, de façon ordonnée et intégrée, des notions qu'elle a déjà analysées plus en profondeur principalement dans la partie traitant du contrat de consommation. Pour conserver la clarté et la simplicité nécessaires à une telle synthèse, certains problèmes types déjà étudiés sont repris sous forme d'exemples, alors que les références à la jurisprudence et aux passages pertinents de l'ouvrage sont faites aux notes infrapaginales.

Evidemment, le lecteur désireux d'approfondir un des aspects traités ne peut se contenter de cette analyse-synthèse qui ne peut refléter à elle seule les nuances et les difficultés d'interprétation soulevées par l'application des différentes sanctions appropriées.

Bien que cet ouvrage présente un aperçu général du droit de la consommation il est, de l'aveu même de l'auteure, essentiellement consacré

à l'étude de la Loi sur la protection du consommateur. C'est avec beaucoup d'à propos que l'auteure identifie au point de départ la teneur et la portée des principes qui doivent inspirer l'interprétation de l'ensemble des règles retenues par le législateur pour atteindre une meilleure justice contractuelle. L'esprit de cette approche se reflète tout au long de l'ouvrage, l'auteure identifiant les problèmes auxquels le législateur a voulu remédier en imposant certaines règles particulières qui, de prime abord, ont pu apparaître déraisonnables compte tenu de l'importance des sanctions offertes en cas de manquement à ces règles.[5]

Cette approche adoptée par Me l'Heureux dans la première édition de son ouvrage s'est avérée d'un apport précieux pour les tribunaux appelés à trancher pour la première fois des litiges relatifs à l'application de la Loi sur la protection du consommateur. Six ans plus tard, la nouvelle édition du droit de la consommation reprend cette analyse et intègre l'abondante jurisprudence à laquelle la nouvelle loi a donné lieu, jurisprudence elle-même grandement inspirée par cet ouvrage général[6] de doctrine encore unique en droit québécois de la consommation.

Plusieurs facteurs peuvent expliquer pourquoi un tel ouvrage fait ainsi sa marque. Outre le fait qu'il s'agissait du premier ouvrage à paraître sur le sujet, après l'entrée en vigueur de la loi, on doit aussi reconnaître que la clarté du propos et le ton affirmatif que l'auteure adopte, lorsqu'elle analyse ou interprète les différents problèmes soulevés par l'application de la loi, ont certes contribué à faire de ce précis la principale source de référence des juristes, des étudiants et des praticiens.

La troisième édition conserve ces caractéristiques puisque, à quelques exceptions près, le texte substantif demeure le même. Parmi les

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[5] La lecture des décisions rendues depuis l'entrée en vigueur de la loi de 1971 permet de constater que les magistrats n'ont pas tous accueilli avec le même esprit ouvert l'application des sanctions découlant des manquements aux nouvelles règles, principalement celles relatives au formalisme contractuel. Depuis lors, certaines résistances se sont estompées et la loi de 1978 a aussi permis d'en atténuer les manifestations en offrant un éventail de sanctions plus appropriées (articles 271 et 272). Pour une analyse des tendances jurisprudentielles portant sur certains aspects de la Loi sur la protection du consommateur, voir: J.-G. Belley, P. Garant, N. L'Heureux, F. Coulombe, J.-P. Proulx, C. Robillard, Les Consommateurs et la justice au Québec, Faculté de droit, Université Laval, 1983, 441 p. (Rapport présenté a l'Office de la protection du consommateur).

[6] Outre les nombreux articles spécialisés parus depuis la fin des années 1970, et auxquels le livre de Me Nicole L'Heureux fait référence, certaines monographies portant sur des aspects particuliers du droit de la consommation ont été publiées. Voir par exemple: Françoise Lebeau, Etiquetage et emballage des produits de consommation, Montréal, Groupe de Recherche en consommation, Université de Montréal, 1977; F. Lebeau, La publicité, Montréal, Groupe de Recherche en consommation, Université de Montréal, 1981; D.-A. Dagenais, Le crédit, Montréal, Groupe de Recherche en consommation, Université de Montréal, 1980.

exceptions citons, à titre d'exemple, le développement plus étoffé concernant les clauses exonératoires de responsabilité[7] et la notion d'ordre public.[8]

La notion de dommages exemplaires fait aussi l'objet d'une nouvelle analyse des plus pertinentes. La référence au débat suscité par l'introduction de cette notion en droit civil est suivie par l'exposé des objectifs poursuivis par le législateur en offrant pareil recours en droit de la consommation. Les tendances jurisprudentielles en la matière font ensuite l'objet d'une analyse présentée sous forme de tableau synoptique très révélateur.[9]

Il importe cependant de souligner que certains problèmes d'interprétation particulièrement complexes sont soulevés et analysés par l'auteure qui expose sa perception d'une question sans nécessairement faire état de la controverse inhérante à ce sujet.

À titre d'exemple, on peut citer l'analyse que l'auteure fait du rapport existant entre les articles 37, 38, 53 et 54 de la loi. Selon Me L'Heureux, l'article 37 (concernant l'usage normal d'un bien) et l'article 38 (concernant la durabilité raisonnable d'un bien) n'offrent pas de garantie légale nouvelle au consommateur mais ne reprennent que des éléments inhérents à la garantie contre les défauts cachés à laquelle l'article 53 de la loi fait référence.[10] Si cette interprétation est retenue, l'article 54 qui précise contre qui le consommateur peut exercer son recours fondé sur les articles 37 ou 38 devient dès lors inutile. Jusqu'à tout récemment, la jurisprudence et la majorité de la doctrine ont retenu cette interprétation de la question.[11]

Il a fallu attendre une décision de la Cour supérieure, *Létourneau* c. *Laflèche Auto Ltée*,[12] rendue peu de temps avant la publication de la troisième édition, pour que cette interprétation soit remise en question, mettant en relief les prétentions ou les interrogations soulevées à cet égard par certains auteurs.[13] Dans la cause *Létourneau* c. *Laflèche Auto*

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[7] P. 39.

[8] Pp. 29 à 30.

[9] Pp. 245 à 249.

[10] Pp. 44 à 50.

[11] Pour une première étude approfondie de cette question, voir: Louis Perret, Les garanties relatives à la qualité d'un produit selon la nouvelle loi de la protection du consommateur (1979), 10 R.G.D. 343.

[12] [1986] R.J.Q. 1956.

[13] Anne-Marie Morel, La protection du consommateur, Cours de formation professionnelle du Barreau du Québec, 1981-82, p. 28 et ss.; Didier Lluelles, Chronique bibliographique—Droit de la consommation (1982), 60 Rev. du B. Can. 211, aux pp. 212-213.

Ltée Madame le juge Tourigny considère, en effet, que la garantie légale contre les vices cachés (article 53) constitue une garantie distincte de la garantie de conformité et de durabilité d'un bien comme prévu aux articles 37 et 38 de la loi. Le débat est relancé et on ne peut que s'en réjouir puisqu'il s'agit d'une question des plus importantes pour les consommateurs.[14]

C'est fort à propos que l'auteure soulève, tout au long de son ouvrage, certaines difficultés d'interprétation auxquelles les articles 271 et 272 relatifs aux recours civils ont donné lieu. Cette loi a, en effet, le mérite d'offrir aux consommateurs non seulement des sanctions traditionnellement reconnues en droit civil mais aussi toute une gamme de sanctions "nouvelles" plus appropriées à chaque cas.[15]

Citons d'abord le fait que des recours distincts sont prévus à la loi, selon que le manquement dont se plaint le consommateur concerne les règles de formation et les exigences de forme (article 271) ou une exigence de fond (article 272).[16] Cette distinction est fondamentale puisque, dans le premier cas, le consommateur dispose d'un choix plus limité de sanctions et que le commerçant peut invoquer en défense le fait que le consommateur n'a pas subi de préjudice du fait de ce manquement. Pareille limite n'existe pas dans le cadre des recours prévus à l'article 272. En analysant les différentes règles applicables aux contrats spécifiquement réglementés, l'auteure rappelle toujours les sanctions appropriées selon la jurisprudence majoritaire. Cependant, la controverse ou les enjeux que certaines questions sous-tendent ne sont pas toujours mis en évidence.[17] Or, si l'on peut remarquer des tendances importantes dans

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[14] Thérèse Rousseau-Houle, Droit de la consommation—Garanties légales contre les vices cachés: Banque Canadienne Nationale c. Forget; Rochefort c. Automobile A. Lavoie Inc. (1986), 46 Rev. du B. 676, pour une importante analyse de l'impact de la jurisprudence récente, dont la décision précitée, concernant l'interprétation des articles 37-38-53, 54 et 159 de la L.P.C.

[15] Au sujet de l'amélioration des sanctions civiles, voir l'important article du professeur Louis Perret, L'incidence de la nouvelle Loi sur la protection du consommateur sur le droit positif (1985), 15 R.D.U.S. 251, à la p. 278 et ss.

[16] L'auteure qualifie de "manquement à une obligation légale" le manquement à une exigence de fond, par opposition à une exigence de forme ou de formation; p. 243.

[17] Tel est le cas par exemple au sujet des problèmes d'interprétation soulevés par l'application des sanctions appropriées lorsque le commerçant omet d'apposer une étiquette sur la voiture d'occasion offerte en vente (art. 155) ou encore, lorsque le commerçant qui a effectué une réparation sur une automobile omet de remettre une facture au consommateur (art. 173). Dans les deux cas, même si un courant jurisprudentiel majoritaire se dessine dans le sens mentionné par l'auteure, il demeure fragile principalement parce que la question fondamentale concernant la distinction entre exigence de forme et exigence de fond a très rarement été analysée avec la profondeur requise pour donner un sens et une portée au caractère distinctif des recours prévus aux articles 271 et 272.

l'interprétation que les tribunaux font de ces questions, de nombreuses ruptures se manifestent aussi régulièrement. Dans ce contexte, et compte tenu du fait que peu de décisions ont émané des tribunaux supérieurs, la diversité des orientations retenues demeure une réalité dont il faut tenir compte et dont le consommateur doit se prémunir lorsqu'il prépare sa cause.

Le problème soulevé par l'obligation de remettre les parties en état lorsque le consommateur choisit de demander la nullité du contrat illustre malheureusement bien cette dangereuse incohérence. À ce sujet, les tribunaux ont adopté des positions des plus diversifiées, allant du rejet de l'action lorsque la remise en état est impossible, à l'annulation pure et simple du contrat malgré cette impossibilité. D'autres décisions ont retenu des solutions mitoyennes moins pénalisantes pour le consommateur qui n'avait pas choisi le recours le plus approprié à son cas, évitant toutefois un enrichissement sans cause du consommateur aux dépens du commerçant.

Il s'agit d'une question importante pour le consommateur et le praticien qui doivent tenir compte des limites posées par une certaine jurisprudence[18] pour choisir la sanction la plus appropriée en l'espèce, évitant ainsi le rejet d'une action par ailleurs bien fondée. Loin de s'attendre à une prise de position ferme à ce sujet, dans le cadre d'un ouvrage général, on peut tout de même souhaiter que les tenants et aboutissants de cette importante question soient mis en évidence.

La même tendance se manifeste lorsque l'auteure affirme que la commission d'une pratique interdite ne donne pas ouverture aux sanctions prévues à l'article 272 "puisqu'il ne s'agit pas d'obligations que la loi impose".[19] Dans cette édition, elle ajoute des arguments pour soutenir son interprétation, mais elle ne souligne qu'en note infrapaginale les décisions rendues à l'effet contraire et ne se réfère pas à la doctrine qui soulève un point de vue différent ou qui, tout au moins, suggère d'autres éléments d'analyse.[20] Or, sur cette question, le débat ne nous apparaît pas résolu de façon aussi catégorique.

Le lecteur averti qui recherche des avenues différentes de celles retenues par l'auteure doit donc, dans certains cas, porter une attention

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[18] À ce sujet, l'auteure affirme que même pour les recours exercés en vertus de la L.P.C., le principe de droit civil concernant la remise en état des parties pour qu'un contrat puisse être annulé continue de s'appliquer, pp. 242 et 244. Or, une certaine jurisprudence n'applique pas ce principe avec une même rigueur alors que certaines décisions refusent de l'appliquer. Pour un bilan éloquent à ce sujet, voir la Loi annotée sur la protection du consommateur et règlement d'application, 3e éd., C.S.J. et S.O.Q.U.I.J., Montréal.

[19] P. 206, par. 250 et p. 244, p. 287.

[20] Lebeau, *op. cit.*, note 6, par. 354 et ss.

particulière aux nombreuses notes infrapaginales qui se réfèrent à la jurisprudence et à la doctrine dissidente. Cette contrainte, nécessaire dans le cadre d'un précis qui fait la synthèse d'un si vaste sujet, doit être perçue par le lecteur désireux d'approfondir un point controversé. Dans le contexte d'un domaine de droit nouveau comme celui de la protection du consommateur, pareille précaution s'impose davantage compte tenu de son importance et du fait que les principes qu'il véhicule sont susceptibles d'influencer l'évolution du droit civil en général.[21]

Le lecteur, conscient des contraintes qui s'imposent à l'auteur d'un tel précis, saura trouver dans cette troisième édition une source de référence de grande valeur, tant pour cerner l'évolution de ce domaine du droit que pour saisir l'esprit nouveau qui l'anime.

Les qualités de style et de présentation contribuent à faire de cet ouvrage de synthèse un instrument de référence pédagogique et doctrinal des plus utiles. De plus, sa consultation est facilitée par l'existence d'un index analytique, d'une table de jurisprudence et d'une table de référence aux articles de la Loi sur la protection du consommateur. Une recherche plus approfondie est facilitée par les nombreuses références à la jurisprudence et à la doctrine québécoise et étrangère, complétées par une bibliographie détaillée présentée à la fin de chaque chapitre et à laquelle ont été ajoutées les plus récentes parutions.

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Specific Performance.
By GARETH JONES and WILLIAM GOODHART.
London: Butterworths. 1986. Pp. lxiv, 274. ($110.00)

Reviewed by M.H. Ogilvie*

Specific Performance by Gareth Jones and William Goodhart is the first book concerned exclusively with the law of specific performance to be published in England in sixty-five years. The sixth edition of Fry on Specific Performance was published in 1921. The publication of any book on this subject is a scholarly event. But the publication of this book is a major scholarly event. Specific Performance exemplifies the finest traditions of English textbook writing and is one of the best exem-

[21] Perret, *loc. cit.*, note 15.

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plars of those traditions. It is thoroughly researched, well-organized, synthetic, articulate and concise. It shows a comprehensive and sophisticated understanding of the broad underlying principles of specific performance, partly concealed or even wholly disguised beneath the historical encrustations of case law, and a coherent articulation of these principles in the patiently detailed exposition of the doctrines and rules of the law relating to specific performance. In addition, as is to be expected in a treatise jointly written by the Downing Professor of the Laws of England at Cambridge University and a leading member of the Chancery Bar, the book is characterized by a balanced blend of the theoretical and the practical not only in the discussion of the substantive remedial law itself but also in the choice of topics including, for example, the chapter on procedure.

As a text in the English legal treatise tradition, Jones and Goodhart's Specific Performance may be contrasted with Robert J. Sharpe's Injunctions and Specific Performance,[1] which while also avowedly a treatise, differs stylistically in being more interdisciplinary and reflective. Thus, in contrast to Sharpe, Jones and Goodhart do not attempt to analyze specific performance in the light of the insights of the law and economics movement, nor are they as self-conscious of the historical contingency of the rules of specific performance and sensitive to historical analysis in order to assess their relevance in the late twentieth century. Jones and Goodhart, while thoughtful, are less reflective and less theoretically intense than Sharpe. Nevertheless, Specific Performance is a *tour de force* of the English law of specific performance and together with Sharpe's text provides the Canadian lawyer with a complete compendium of Anglo-Canadian law on the subject, past, present and, perhaps, future.

The dearth of treatises devoted exclusively to specific performance until recently may be explained by several reasons. First, until the 1960s there would appear to have been few new cases on specific performance since the turn of the century. However, since *Beswick* v. *Beswick*[2] in 1967 there have been a number of innovative decisions including *Beswick* itself; *C.H. Giles & Co. Ltd.* v. *Morris*,[3] in which the courts indicated a willingness to enforce contracts involving personal services;

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[1] (1983). The companion volume to Injunctions and Specific Performance is The Law of Damages by S.M. Waddams (1983). See the justifiably excellent reviews of these two books by T.A. Cromwell, In the Matter of an Arbitration Between the Union of Doctrinal and Theoretical Legal Scholars and the Consultative Group on Research and Education in Law (1984), 22 Osgoode Hall L. J. 761; and P. Carlson, Book Reviews (1984), 17 Ottawa L. Rev. 458 and 462.

[2] [1968] A.C. 58 (H.L.).

[3] [1972] 1 All E.R. 960 (Ch. D.).

Price v. *Strange*,[4] which undermined the dubious principle that specific performance would be refused for want of mutuality; *Johnson* v. *Agnew*,[5] which re-oriented the law relating to the award of specific performance in contracts for the sale of land; and *Sudbrook Trading Estate Ltd.* v. *Eggleton*,[6] in which an evaluation clause was enforced over the wishes of one of the parties.

Secondly, these decisions have been most innovative in nature, casting doubt on a number of long accepted but little analysed legal rules somewhat mindlessly repeated by lawyers and contract treatise writers. Thirdly, it would appear that these innovations consist not merely of tinkering with the old rules, but their actual elimination and replacement by a single principle which constitutes the whole law of specific performance, that an order for specific performance may be granted where it is just, equitable and practical to do so. The time, then, is ripe for scholarly analysis of these developments and the production of reflective prospectuses for the future growth of the law relating to specific performance.

In the preface to his first edition of 1858 Sir Edward Fry remarked: "[I]t is by no means easy to decide how much of the law on many questions ought to find place in a treatise on the principles and practice of the courts in specific performance, and how much ought to be referred to a discussion of the particular species of contract to which the law may relate."[7] The difficulties are those of extricating the substantive law of remedies from the substantive rights for whose infringement remedies are typically awarded. How much of the substantive law of contract should be discussed in order to give context, meaning and substance to the discussion of the remedies?

In Specific Performance Jones and Goodhart resolve this dilemma with a more generous discussion of the contractual context than is found in Sharpe. This broader drawing of the boundaries of their treatise on specific performance permits the authors to discuss relevant general principles of the law of contract, for example, by extensive treatment of the equitable defences, which are not restricted to specific performance alone; by inclusion of outline discussions of how contracts are formed and the legal criteria for valid and enforceable agreements; and by consideration of the unenforceability of contracts pursuant to section 40 of the Law of Property Act, 1925[8] prior to an extensive discussion of the law relating

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[4] [1978] Ch. 337 (C.A.).

[5] [1980] A.C. 367 (H.L.).

[6] [1983] 1 A.C. 444 (H.L.).

[7] Reproduced in Fry on Specific Performance (6th ed., 1921), pp. v-vi.

[8] 15 & 16 Geo. 5, c. 20.

to part performance. In addition, Jones and Goodhart include a chapter which has no counterpart in Sharpe, analyzing the persons by or against whom specific performance can be claimed (Chapter 8) and a chapter which is primarily of interest to English practitioners but for which there should be a Canadian equivalent, on various procedural matters relating to specific performance (Chapter 6).

Specific Performance is a timely and important book of great utility to scholars and practitioners alike. Its appearance will, it is hoped, promote greater understanding and further discussion of the law relating to specific performance, particularly its relationship to damages, and more creative use of the remedy than at present.

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The Canadian Law of Architecture and Engineering.
By BEVERLEY M. MCLACHLIN AND WILFRED J. WALLACE.
Toronto and Vancouver: Butterworths. 1987. Pp. li, 453. ($95.00)

Reviewed by Rodney L. Hayley*

Madam Justice McLachlin and Mr. Justice Wallace[1] of the British Columbia Court of Appeal have sought to write a treatise on the law which would be equally accessible to architects, engineers, and lawyers throughout Canada. To a limited degree, they have succeeded in their efforts. One suspects that the work will be read and enjoyed, at least in part, by both legally-trained and lay readers. The Preface states that: "Notwithstanding the obvious complexity of many of the subjects discussed, an attempt has been made to simplify the discussion as much as possible without compromising the value of the book to those with special legal training."[2] The authors point out that they "have tried to keep the work simple and accessible".[3] Certainly, the book is written in a straightforward and lucid style that makes it less forbidding to the lay reader than many other legal texts. The work is well organized and wide-ranging: it covers, *inter alia*, such topics as the legal requirements for practising architecture and engineering; ethical obligations of architects and engineers; their relationships with clients; problems of agency; professional duties and

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[1] Wallace J. was a judge of the Supreme Court of British Columbia when the volume being reviewed was written. He has since become a member of the British Columbia Court of Appeal.

[2] P. v.

[3] P. vi.

liability; insurance; the arbitration process; ownership of drawings, copyright and patent; and remuneration for professional services.

However, the book is marred by a certain unevenness of tone. The point of view shifts from that of engineer/architect to that of lawyer from chapter to chapter (and sometimes from paragraph to paragraph), and as a result, neither the legally-trained nor the lay reader will find the work totally satisfying. For example, Chapter 1 gives a brief overview of the Canadian legal system which was obviously written with the lay reader in mind. We are informed that: "The doctrines of contract and tort, of fundamental importance to persons in the construction industry, are common law doctrines," and that: "Their rules and principles are to be found in the decisions of the courts."[4] Chapter 4, "Business Organization", which gives a well-written, albeit very basic overview of sole proprietorships, partnerships, corporations, and informal associations, and Chapter 6, "General Principles of Contract Law", were also included primarily for the lay reader. These chapters do provide good summaries to lawyers who may have forgotten a good deal of what they learned in law school; however, the space which was devoted in this work to setting out familiar and basic legal concepts could have been used to develop in detail some of the more complex and controversial issues in the subject area. Chapter 8, "Authority of the Architect or Engineer", Chapter 9, "Duties of the Architect or Engineer to the Client", and Chapter 10, "Professional Liability" form the heart of the book; they deal with intricacies in the law which will be of particular interest to lawyers, although, given the authors' crisp and intelligent prose, one suspects that architects and engineers will derive much useful information from these chapters as well.

Because of the amount of material the authors wish to cover, some of which is merely general background information for non-lawyers, the discussion moves at a brisk pace throughout, and one regrets that there is not more in the way of detailed analysis. For example, the notorious *Peter Kiewit* case[5] is mentioned only twice: once in support of the proposition that: ". . .many contracts authorize the architect or engineer to make changes or additions to the work and to order the performance of extra work";[6] once for the proposition: "If the contractor proceeds with the work ordered by the engineer as though it were work under the contract, he cannot thereafter claim that the work was outside the scope

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[4] P. 3.

[5] *Peter Kiewit Sons' Co. of Canada Ltd.* v. *Eakins Const. Ltd.*, [1960] S.C.R. 361.

[6] P. 125.

of the contract and payable on a *quantum meruit*."[7] Despite its undoubted importance, the authors neither provide an analysis of the case nor refer the reader to the sizable body of writings which comment (often negatively) on the decision.[8] In fairness to the authors, one should note that the Preface contains the following disclaimer: "While aspects of construction law are discussed as they touch on the duties of architects and engineers, this work does not purport to provide a comprehensive treatment of construction law."[9] Goldsmith does refer to *Peter Kiewit* several times in his standard text on Canadian construction law,[10] but at no point does he deal with the implications of the case for engineers. One would have wished that The Canadian Law of Architecture and Engineering had either expressed an opinion about this controversial case or at least referred the reader to recent attempts to distinguish the case or ameliorate its effects.[11]

For the most part, the authors refer very rarely to other academic commentators in their footnotes. Nor does the work give a bibliography of literature in the area. The recent case of *Trident Construction Ltd.* v. *W.L. Wardrop & Associates Ltd.*,[12] which has attracted a great deal of attention, is referred to briefly in a footnote only.[13] The authors dismiss the case with a minimum of analysis: they note that *Trident* followed *Demers* v. *Dufresne Engineering Co. Ltd.*,[14] which "held an engineer liable to a contractor for negligent design", and they conclude that the *Trident* case is wrongly decided "in that the provision of the *Civil Code* upon which the reasons in *Dufresne* depend is not applicable outside of

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[7] Pp. 192-193.

[8] See, for example: S.R. Ellis, Case Comment (1961), 19 U.T. Fac. L. Rev. 171; W.H. Angus, Restitution in Canada since the Degelman Case (1964), 42 Can. Bar Rev. 529, at p. 551 ff.; A.J. McClean, Unjust Enrichment—Common Law Wine in Civil Law Bottles (1969), 4 U.B.C. Law Rev. 1, at p. 9 ff.; I.N. Duncan Wallace, Hudson's Building and Engineering Contracts (10th ed., 1970), esp. pp. 543 and 687; G.H.L. Fridman and J.G. McLeod, Restitution (1982), pp. 216, 426, 446-449, and 589; G.B. Klippert, Unjust Enrichment (1983), pp. 102, 177, and 331-336; Lord Goff and G. Jones, The Law of Restitution (3rd ed., 1986), pp. 38 and 232-233.

[9] P. vi.

[10] I. Goldsmith, Canadian Building Contracts (3rd ed., 1983), pp. 64, 85, 88, 90, 93, 95 and 96. Goldsmith states at p. 64, n. 54 that: "It is unfortunate that the somewhat more realistic attitude of Cartwright J. in his dissenting judgment in the *Peter Kiewit* case did not prevail."

[11] See Law Reform Commission of British Columbia, Report No. 81: Report on Performance Under Protest (1985), which provides an excellent discussion of the case generally.

[12] [1979] 6 W.W.R. 481 (Man. Q.B.).

[13] P. 141, n. 59.

[14] [1979] 1 S.C.R. 146.

Quebec''.[15] The authors give *Cardinal Construction Ltd.* v. *Brockwell*,[16] a case which follows *Trident*, somewhat greater attention, but they restrict the significance of the case to a fairly narrow proposition of law (the engineer/architect has a duty to include in the tender documents all material information in his possession); the authors do not cite Henry J.'s wide-ranging summary of an engineer's duty to a contractor in pre-tender situations.[17] Throughout the work, the authors generally assume a conservative stance, and downplay the importance of cases suggesting that a consultant for an owner on a construction project owes a broad duty of care to the contractor. One of the authors, Madam Justice McLachlin, was the judge in *Westcoast Transmission Co. Ltd.* v. *Interprovincial Steel & Pipe Corp. Ltd.*,[18] in which a third party proceeding brought by a manufacturer (in a position analogous to a contractor) against an engineer was struck out on the basis that the latter owed no duty of care to the former when each party had contracted separately with an owner. That case has now been narrowly restricted to its particular facts by *Quintette Coal Ltd.* v. *Bow Valley Resource Services Ltd. and Kilborn Engineering (B.C.) Ltd.*,[19] a decision not referred to in the book, presumably because it was decided too late to be included.

There are various aspects of the book which detract from its value. The editing has not always been well done; there are numerous typographical, spelling and grammatical errors. One finds it particularly frustrating that all too often footnotes which refer to other chapters or sections of the work are inaccurate. There are several references in Chapter 11, ''Professional Liability Insurance'', to various Loss Control Bulletins. It would have been helpful if the authors had alerted the reader to

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[15] In this regard the authors reach the same conclusion as B.S. Shapiro, Exploring the Duties and Liabilities of the Design Professional on a Construction Project (1985-86), 13 C.L.R. 7, at p. 16. Shapiro's article is not mentioned by McLachlin and Wallace, nor are the following papers which discuss the implications of the case: G.E.H. Betts and R.A. Row, The New Responsibilities of the Engineer in Relation to the Contractor (1986), 14 C.L.R. 209; S. Stieber, Design Professionals—Duties and Liabilities (1986), 14 C.L.R. 183; G.E.H. Betts, Architects and Engineers: Limiting Responsibilities to Owners and Contractors (1986-87), 20 C.L.R. 125.

[16] (1984), 4 C.L.R. 149 (Ont. H.C.).

[17] For comments on the *Cardinal* case see G.E.H. Betts, The Engineer's Duty to Contractor in Pre-Tender Activities (1984), 6 C.L.R. 249; J.R. Singleton, The Consultant's Liability to the Builder (1986), 14 C.L.R. 220; J. M. MacEwing, Contractors' Assumption of Risk for Site Conditions: Application of the Rule in *Esso* v. *Mardon* in Light of *Carman Construction* (1987), 21 C.L.R. 257.

[18] (1985), 60 B.C.L.R. 368 (B.C.S.C.).

[19] (1986), 19 C.L.R. 153 (B.C.S.C.); leave to appeal dismissed April 23, 1986 (B.C.C.A., per Taggart J.A., CA005746); application to review the decision of Taggart J.A. dismissed May 16, 1986 (B.C.C.A., *en banc*, CA005746). A useful annotation of the case, by L. Nowlan, is found at (1986), 19 C.L.R. 154.

the fact that these are bulletins issued by a particular insurer and not generally available to the public.

The authors have chosen to include in Part II of the work several standard form contracts relating to architects and engineers, and also various relevant municipal forms. While it is convenient to have these precedents in one place, one would have wished that the authors had chosen instead to devote the 150 pages taken up by these documents to a more detailed analysis of some of the important issues which are set out in Part I of this book. In any case, because the various contracts and other forms in Part II are neither tabbed nor given running titles on each page, readers must leaf through the pages each time they wish to turn to a particular provision referred to by the authors in Part I (page numbers are not provided).

On balance, however, The Canadian Law of Architecture and Engineering is an important addition to the literature in the construction law area. While one regrets the lack of careful editing and the fact that certain important issues are dealt with in a rather cursory manner, the authors should be congratulated for providing a succinct and extremely readable introduction to the rapidly expanding law of architects and engineers.

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Collective Bargaining in Canada, Second Edition.
A.W.R. CARROTHERS, E.E. PALMER, W.B. RAYNER.
Toronto: Butterworths. 1986. Pp. clii, 785. ($135.00)

Reviewed by Michael MacNeil*.

The second edition of Collective Bargaining Law in Canada, published twenty-one years after the first edition, has two new co-authors and 232 additional pages. The text attempts to provide a comprehensive picture of Canadian labour law.

This a particularly daunting task in the Canadian context. Canada is unlike Great Britain, with its essentially unitary legislative system, or the United States, where the dominant jurisdiction over labour law lies with Congress. Here the legislative power over labour relations is divided among eleven jurisdictions. Furthermore, regulatory legislation is built upon either a common law base or a civil code base. Whether there is a "Canadian" labour law or a series of disparate labour laws is worth considering.

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The authors do not directly address this question. However, one of the book's positive features is its historical introduction and its attempt to explain some of the fundamental assumptions underlying Canadian developments. The authors' perspective that there is indeed a Canadian labour law is implicit. They characterize Canada as a nation that embraces "in a general sense the political, economic and social policies of free enterprise, private ownership of property and 'free competition'".[1] An effective system of collective bargaining is said to require a balancing of a range of interests such as: the employees' freedom to form associations which can invoke meaningful economic sanctions in bargaining with employers; individual employees' freedom of choice and actions; employers' freedom to engage in entrepreneurial activity; the interests of strangers to the collective bargaining process; and the public interest generally.[2] This is essentially a pluralist perspective which views the state as a neutral arbiter of the competing demands. Unfortunately, no attempt is made to defend the legitimacy of this perspective or to canvass alternative views.

As well as claiming that there are these shared values, the book describes how different jurisdictions have relied on similar institutional mechanisms to control the collective bargaining process. This is partly attributable to a shared common law base (except for Quebec), and the early preeminent federal role, a result of uncertainties about jurisdictional competence and the use of wartime emergency regulations.

Despite these supposed common values and similar institutions there is a range of policy alternatives on any particular issue which can lead to considerable divergencies from jurisdiction to jurisdiction. This text undertakes the huge task of describing many of these differences and the judicial gloss put on the multiplicity of statutes. Disappointingly, there is seldom an indication of the policy considerations that lead to the differing approaches. For example, the description of certification procedures indicates that some jurisdictions always require a vote while in others evidence of membership may suffice.[3] Neither justifications for the policy choice nor the impact of one rule as opposed to another is canvassed. The lack of emphasis on the policy underlying the legal rules is further demonstrated by reliance on court, rather than board interpretation of statutory provisions. Reference to board decisions is confined primarily to those areas where courts have not deigned to tread.

Hence in the Canadian context, the descriptive and comprehensive format results in a text which answers the needs of neither those familiar with Canadian labour law nor those wishing to learn. As the authors

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[1] P. 3.

[2] Pp. 4-6.

[3] Pp. 358-370.

recognize, labour law practitioners, union officials and industrial relations personnel would probably prefer more detail through a series of monographs either by jurisdiction or by topics such as grievance arbitration or public sector collective bargaining.[4] Those likely to seek an introduction to Canadian labour law or those interested in labour law policy would probably desire fewer technicalities and more analysis of the justifications for and effects of policy choices.

Enlightening and provocative opinions are, however, offered on some issues. For instance the criticism of conciliation procedures, in particular of tripartite conciliation boards, is vigorous, although hardly novel.[5] Unfortunately, no mention is made of changing patterns of resort to these mechanisms. The jurisprudence controlling picketing is described as being of "unknown content", with principle transformed into dogma "learned for its own sake and applied without regard to its ineptitude",[6] resulting in an irrational body of law. Chapter 25 on Secondary Picketing and consumer boycotting is particularly good in highlighting not only the doctrine, but the nature of the interests at stake. It calls for a fundamental reappraisal of the justifications for restraining picketing generally and consumer boycotting in particular. The authors are probably overly confident that the Charter of Rights and Freedoms will produce such a change of attitudes but the text is useful in analyzing the issues. This, by the way, is the only chapter where extensive reference is made to the relevant periodical literature.

The text has other weaknesses. First, there are some errors of law. For instance, police officers are said to be excluded from the Nova Scotia Trade Union Act; in fact they are covered by the Act.[7] The text claims that in British Columbia a union may be certified without a vote if there is fifty-five per cent membership support,[8] but fails to note that this is true only for construction projects.[9] The statement that a vote is always required by statute in New Brunswick is just not so.[10]

Second, the text appears to have become out of date even before its publication in 1986. With the exception of the chapter on Secondary Picketing, it fails to address the impact of the Charter of Rights and Freedoms on collective bargaining. The cut-off date for including court and board decisions is 1983 and for legislative changes is 1984. In discussing judicial review and the collateral fact doctrine, no reference is

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[4] P. vi.

[5] Pp. 468-472.

[6] P. 574.

[7] P. 169. The law is, however, correctly stated on p. 180.

[8] P. 359.

[9] Labour Code, R.S.B.C. 1979, c. 212, s. 43 (re-en. S.B.C. 1984, c. 24, s. 7).

[10] P. 361.

made to the more recent Supreme Court decisions warning about the doctrine's extremely limited nature, even though some of these decisions were rendered before 1983.[11]

Third, the writing style is of inconsistent quality. For example, the text illustrates the concept of just cause by saying that arbitrators do not apply the same rules to a man in a mine as to a woman in an office.[12] Whether this distinction is based on the different sex or the different workplace is not clear. If the former, surely one should question whether a proper concept of "just" is being applied. If the latter, then the authors have lapsed into invidious role stereotyping by identifying a particular workplace with a particular sex.

Further, what is a reader to make of the following passage:

> Problems presented by uncertainties created by the administration of the common law of unincorporated associations and the statute law of collective bargaining may be polarized under those bearing on the legal status of unions and those relating to the degree of control by administrative boards over the system of collective bargaining.

Ultimately the text is disappointing. Although there is much that is tantalizing, one must search through the plethora of descriptive passages to find the juicy tidbits.

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[11] In particular, there is no discussion in Chapter 9, Judicial Review of the Exercise of the Board's Powers, of the Supreme Court decision in *CUPE Local 963* v. *N.B. Liquor Corp.*, [1979] 2 S.C.R. 227, 97 D.L.R. (3d) 417. The decision is referred to, however, in Chapter 12, p. 340, dealing with the meaning of "trade union".

[12] P. 492.

[13] P. 769.