Lawful Authority. Readings on the History of Criminal Justice in Canada.
Edited by R.C. MacLeod.
Toronto: Copp Clark Pitman Ltd. 1988. Pp. 296. ($14.95)

Reviewed by M.H. Ogilvie*

Only in the past twenty-five years or so have historians been interested in any serious way and to any great extent in past criminal behaviour, the society in which it took place and the paraphernalia of law enforcement, such as police and prisons, which governments have devised to control socially unacceptable, if not sinful, behaviour on the part of their citizens. Pioneered by the Annales school in France, which began to study criminal activity as a part of the everyday fabric of society,[1] historians in Western Europe, Great Britain and the United States have since produced a number of significant books and articles investigating past criminal conduct in their respective jurisdictions. Within the last decade or so, Canadian historians and legal historians have begun to piece together the criminal past of Canada.

To date the published literature is small and fragmented, although the quality is good. Indeed, the high quality of much of the work to date is its most encouraging feature. However, the work is only at best preliminary in relation to the topics tackled, and great unexamined gaps remain. It is as yet impossible to produce any synthetic account of Canadian criminal justice history. It is even as yet impossible to conduct a systematic research project. Rather, much of what has been done to date is "one-offish" and idiosyncratic—the results of individual scholars dipping into the primary sources for chosen blocks of time and chosen geo-political units rather than any systematic plundering of relatively well-known sources for the production of a masterpiece.

Much of the writing to date, then, has been of articles devoted to narrow themes,[2] and some of the best of these have been reproduced in

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[1] The classic study is, of course, L. Chevalier, Classes laborieuses et classes dangereuses (Paris, 1958). For a recent survey, see, A. Somar, Deviance and Criminal Justice in Western Europe, 1300-1800: An Essay in Structure, in Criminal Justice History: An International Annual, vol. 1 (1980).

[2] For a recent review of the literature to date, see, M.H. Ogilvie, Recent Developments in Canadian Law: Legal History (1987), 19 Ottawa L. Rev. 225.

Lawful Authority: Readings on the History of Criminal Justice in Canada. The volume is one of the dozen or so in the series New Canadian Readings[3] which deals with selected Canadian issues and topics.

Lawful Authority is comprised of four sections each containing four articles. All sixteen articles have been published before. The sections deal with criminality,[4] the police,[5] the courts,[6] and prisons.[7] Fourteen of the sixteen articles come from historical journals or books. With the exception of two contributors (Professors Mewett and Friedland) the articles are by social historians, sociologists or criminologists. The earliest paper was published as long ago as 1963, but twelve were published in the period 1978-1986. Seven of the papers relate to Ontario, two to Quebec, two to the Prairies, one each to Nova Scotia and British Columbia, and three to federal historical topics. Six papers deal with the early twentieth century, five with the late nineteenth century, four with the early nineteenth century and one with the early eighteenth century.

Comparison of these observations with general observations about Canadian legal history to date[8] reveals that the study of history of crime is similar to that of Canadian legal history generally. While there is activity across the country, the preponderance of work is being done in and about

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[3] Edited by J.L. Granatstein.

[4] A. Lachance, Women and Crime in Canada in the Early Eighteenth Century, 1712-1759, in L.A. Knafla (ed.), Crime and Criminal Justice in Europe and Canada (1981), pp. 157-197; J. Weaver, Crime, Public Order, and Repression: The Gore District in Upheaval, 1832-1857 (1986), 78 Ont. History, at pp. 175-207; M.S. Cross, Stony Monday, 1849: The Rebellion Losses Riots in Bytown (1971), 63 Ont. History, at pp. 177-190; J. Fingard, Jailbirds in Mid-Victorian Halifax, in P. Waite *et al.* (eds.), Law in a Colonial Society: The Nova Scotia Experience (1984), pp. 81-102.

[5] E. Kyte Senior, The Influence of the British Garrison on the Development of the Montreal Police, 1832-1853 (1979), 43 Military Affairs, at pp. 63-68; C. Betke, Pioneers and Police on the Canadian Prairies, 1885-1914, in Canadian Historical Association, Historical Papers (1980), pp. 9-32; P.E. Roy, The Preservation of the Police in Vancouver: The Aftermath of the Anti-Chinese Riot of 1887 (1976), 31 B.C. Studies, at pp. 44-59; S.W. Horrall, The Royal North-West Mounted Police and Labour Unrest in Western Canada, 1919 (1980), 61 Can. Hist. Rev., at pp. 169-190.

[6] A.W. Mewett, The Criminal Law, 1867-1967 (1967), 45 Can. Bar Rev. 726; G.H. Homel, Denison's Law: Criminal Justice and the Police Court in Toronto, 1877-1921 (1980), 72 Ont. History, at pp. 171-186; M.L. Friedland, A Century of Criminal Justice, in M.L. Friedland (ed.), A Century of Criminal Justice: Perspectives on the Development of Canadian Law (1984), pp. 233-245; N. Boyd, The Origins of Canadian Narcotics Legislation: The Process of Criminalization in Historical Context (1984), 8 Dalh. L.J. 102.

[7] C.J. Taylor, The Kingston, Ontario Penitentiary and Moral Architecture (1979), 12 Social History, at pp. 385-408; D.G. Wetherell, To Discipline and Train: Adult Rehabilitation Programmes in Ontario Prisons, 1874-1900 (1979), 12 Social History, at pp. 145-165; D.W.F. Coughlan, The History and Function of Probation (1963), 6 Can. Bar J. 198; A. Jones, "Closing Penetanguishene Reformatory": An Attempt to Deinstitutionalize Treatment of Juvenile Offenders in Early Twentieth-Century Ontario (1978), 70 Ont. History, at pp. 227-244.

[8] Ogilvie, *loc. cit.*, footnote 2.

Ontario. Moreover, the period attracting most attention is that between the mid-nineteenth century and the time of the Great War. However, there is one significant difference between the study of Canadian legal history generally and of criminal justice history: whereas Canadian legal history is mostly done by scholars trained as lawyers who have subsequently strayed into legal history for a variety of reasons, most criminal justice history is done by social historians, sociologists and criminologists.

Lawful Authority is a case in point. Indeed, comparison of the contributions by the two "lawyers" with the other articles shows how differently the legal scholar goes about the task of doing legal history than the historian, for example. While Professors Mewett and Friedland are widely regarded as two of Canada's top criminal law scholars, their legal history pieces are bland, merely descriptive, legalistic and lacking in contextual depth in comparison to the other articles in the volume. Professor Mewett's survey of criminal legislation and Professor Friedland's chronology of three late nineteenth century murder trials seem impoverished scholarship in contrast to the rich contextual analysis in Professor Michael Cross's study of the Rebellion Losses Riots in 1849 in Bytown, which explores their religious (Irish Roman Catholic *vs.* English Protestant), class (hungry labourers *vs.* lumber barons) and economic (high unemployment) factors, or Professor Judith Fingard's study of Halifax jailbirds as a pathological criminal underclass, or Professor Carl Betke's study of the historical reasons for the popularity of the Northwest Mounted Police on the Prairies resulting from their knowledge of veterinary science and disease control, as well as their welfare concerns for the early pioneers.

At the present moment it would appear that the most useful scholarly approaches to Canadian criminal justice history are those of disciplines other than law, although at some future time detailed knowledge of the history of substantive criminal law and procedure in Canada will be required to supplement and contextualise this scholarship. Moreover, with the exception of one paper in the collection, Lawful Authority provides a powerful reminder of how not to do legal history for those budding legal historians in Canada who lack professional historical training, simply by showing how to do good legal history.

With the exception of Professor Neil Boyd's study of the history of narcotics legislation in Canada, and the legalistic pieces of Professors Mewett and Friedland, the articles in Lawful Authority are models of how to do legal history. For that reason alone, they should be studied by legal

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[9] G. Parker, The Masochism of the Legal Historian (1974), 24 U.T.L.J. 279; R.C.B. Risk, A Prospectus for Canadian Legal History (1973), 1 Dalh. L.J. 227; D.H. Flaherty, Writing Canadian Legal History: An Introduction, in D.H. Flaherty (ed.), Essays in the History of Canadian Law, vol. 1 (1981), p. 3; J.B. Wright, Towards a New Canadian Legal History (1984), 22 Osg. H.L.J. 312; G. Parker, Canadian Legal Culture, in L.A. Knafla (ed.), Law and Justice in a New Land: Essays in Western Canadian Legal History (1986), p. 3.

historians of areas other than criminal justice history. Professor Boyd has obviously engaged in extensive research in the primary sources and has produced an extremely valuable paper whose utility is marred by his attempt to fit his findings into a neo-Marxist framework. Unfortunately, they do not fit. Professor Boyd is not an historian, however, but a criminologist.

One distinctive feature of the Canadian legal history enterprise from the start is the sensitivity of some of its practitioners to "getting it right". Thus, concurrently with the growth of an historical literature, a literature devoted to the philosophy of Canadian legal historiography has also developed.[9] This literature indicates complete unanimity among some contemporary legal historians that they should model their work on that of professional historians rather than on an earlier generation of legal historians such as Maitland, Vinogradoff or Radzinovicz.

The essays in Lawful Authority are suitable models. They demonstrate what can be gained from an honest bare-eyed grappling with the primary sources and an unblinkered struggle to make sense of the Canadian criminal justice past in its own terms. There is much to be done. Lawful Authority shows how to do it.

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The Annotated Tremeear's Criminal Code 1990.

By DAVID WATT and MICHELLE K. FUERST.
Toronto: Carswell. 1989. Pp. 1, 1368. ($55.00)

Reviewed by Alan W. Bryant*

The 1990 edition of Tremeear's Criminal Code by Mr. Justice Watt and Michelle Fuerst is well conceived and written. The new Tremeear's Code is quite different from its predecessor and the other annotated codes in its organization, structure and content. The annotations for the sections of the Code are organized under three major headings. A "Commentary" and a "Related Provisions" section accompany each provision of the Code. Also, unless the Code section is an obscure one under which a prosecution would be rare, a collection of the leading cases is found under the heading "Case Law". Because the material is collected under these headings, there is a uniform structure for the annotations which allows the reader to find the necessary information quickly.

The commentary and case digests are useful and informative. The theft provision is illustrative of the content of the annotations found under these headings. The text of the commentary accurately and concisely

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[1] [1965] 3 C.C.C. 55 (N.S.C.A.).

[2] P. 464.

describes the external circumstances and requisite mental state for this crime and analyzes the scope and meaning of the various subsections. Often the commentary also contains an illustration of the prohibited type of conduct that the section is directed at. Under the heading "Case Law" the authors briefly summarized the essence of the leading cases which are arranged according to sub-headings. For example, the summary of *R.* v. *Pace*[1] found under the sub-heading "Fraudulent Intent", states:[2]

> A belief by the taker that the object taken will be of no use or value to the owner is none the less a depriving of the owner. Therefore a cook who took home a loaf of bread which would ordinarily have been put in the garbage was held to have taken it fraudulently.

Because the cases are arranged under topical sub-headings, it is unnecessary to search through several unrelated case excerpts to find what you are looking for. The case digest also deals with other important subjects such as "Res Judicata" and "Charter Considerations". Like the other digested cases, the leading constitutional decisions in relation to that section of the Code are concisely summarized. In my view the case digest is an excellent starting point for more in-depth legal research.

The third major heading for the annotations is appropriately called "Related Provisions". In this section the authors set out the related definitional, procedural and sentencing provisions of the Code and any related offences. This section is a signpost for the related subject matter or sections of the Code—a useful guide for the novice and busy practitioner alike.

The new Tremeear's Code is easy to use and understand because the essential information is written in clear language and the material is well organized. The arrangement of the material eliminates the need for reading and cross-checking back and forth through a patchwork of detail as required by some of the other Codes. The simplicity of its style and form, however, belies its scholarship, as it is a well researched and comprehensive annotated Code.

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Professional Conduct for Canadian Lawyers.

By B.G. SMITH.
Toronto and Vancouver: Butterworths. 1989. Pp. xxix, 276. ($75.00)

Reviewed by R.D. Gibbens*

The traditional functionalist[1] view on the sociological aspects of the rise of a profession suggest that a necessary development is the emergence among the professional group of special expertise and ethical responsibility. These notions often develop into specific practical attributes like education and testing, associational and disciplinary bodies, codes of conduct and a common sense of purpose. The legal profession has made this professional transition relatively recently and one incidental development tied to this transition is the emergence within the legal profession of the law relating to professional conduct.

A code of conduct is now a necessary prerequisite for any group that aspires to be seen as a profession. As Professor Wolfram notes, the "law was among the last of the professions to adopt a common code of behaviour."[2] There are of course disparate rationales behind the desire for a code of member conduct,[3] ranging from the altruistic to the avaricious. The code for professional conduct in the legal profession is really a product of this century. The Canadian Bar Association adopted certain Canons of Ethics in 1920,[4] twelve years after the American Bar Association adopted its Canons of Professional Ethics in 1908. The genesis of both of these Codes can be tied to the early work of David Hoffman,[5] a University of Maryland professor and George Sharswood,[6] a Pennsylvania judge. The former, however, was primarily a hornbook full of shibboleths on etiquette,[7] while the latter, although at times seeming more like a political manifesto on Lockean private property rights, advanced the notion of the separation

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[1] T. Parsons, A Sociologist Looks at the Legal Profession, in Essays in Sociological Theory (rev. ed., 1954). Also see G.C. Hazard and D.L. Rhode, The Legal Profession—Responsibility and Regulation (2nd ed., 1988), pp. 2-29.

[2] C.W. Wolfram, Modern Legal Ethics (1986), p. 48.

[3] *Ibid.*, pp. 48-50.

[4] P. 4.

[5] D. Hoffman, Professional Deportment, in II A Course of Legal Study (2nd ed., 1836), pp. 720-775.

[6] G. Sharswood, Essay on Professional Ethics (2nd ed., 1860).

[7] *Cf.*, M. Bloomfield, David Hoffman and the Shaping of a Republican Legal Culture (1979), 38 Md. L. Rev. 673.

of personal and professional morality.[8] This concept, for better or for worse, still lies at the heart of much of the thinking on this subject today.[9]

The area of law known as professional responsibility or the law of lawyering even today is often neglected. Professor Smith emphasizes this point in the introduction by noting that it has been "over thirty years since a major Canadian text dealing with the professional conduct of this country's lawyers was published".[10] While the topic of professional conduct may be good fodder for some empty rhetoric at an after dinner speech, it has, at least in this country, mainly avoided any substantive systematic analysis.[11]

The dominant paradigm in the area of professional conduct law has always been the single client hiring a single lawyer and engaging him or her to prosecute or defend a single lawsuit.[12] From this simple concept all questions of professional conduct seem to be both defined and determined. The problem is that this vision of legal practice does not now dominate the legal landscape. Professor Smith recognizes this problem, for the book does not concentrate entirely on the litigation side of professional conduct problems. Chapter Three deals entirely with the "lawyer as solicitor" situation. The specific areas of real estate transactions[13] and the preparation of wills[14] are given priority. One unfortunate oversight is the omission of any reference to the professional problems faced by tax lawyers.[15] The role of the lawyer as counsel or advisor is also discussed in Chapter Six, concentrating here on the pre-trial aspects of litigation.

The lawyer as in-house counsel is discussed in Chapter Ten. The roles of lawyers in modern society are infinitely diverse. Whether they

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[8] This notion of role-differentiated morality is also seen in Macaulay's words that a lawyer,

> ... with a wig on his head, and a band round his neck [will] do for a guinea what, without those appendages, he would think it wicked and infamous to do for an empire.

(D. Salmon (ed.), Macaulay's Essay on Bacon (1914), p. 37). Also see Hazard and Rhode, *op. cit.*, footnote 1, pp. 162 *et seq.*

[9] As Professor Smith notes, p. 6, Chief Justice Sharswood's essay is reprinted in part in the New Brunswick Professional Conduct Handbook, at p. 3.

[10] P. ix. The reference is to M.M. Orkin, Legal Ethics: A Study of Professional Conduct (1957).

[11] The most recent American hornbook on the subject is Wolfram, *op. cit.*, footnote 2. Also see the various American references cited in Hazard and Rhode, *op. cit.*, footnote 1.

[12] G.C. Hazard and W.W. Hodes, The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct (1985), pp. xxix; Wolfram, *op. cit.*, footnote 2, p. 54 *et seq.*

[13] Pp. 51-59.

[14] Pp. 59-66.

[15] For an indepth discussion of the particular professional problems facing business lawyers generally, see G.C. Hazard, Ethics in the Practice of Law (1977); for a general bibliography on this topic, see (1981), 56 Notre Dame Law 947; and on the specific problems facing tax lawyers, see B. Bitker, Professional Responsibility in Federal Tax Practice (1970), and B. Wolfman and J.P. Holden, Ethical Problems in Federal Tax Practice (1981).

are found in large or small corporations, be they profit or non-profit organizations, or in some governmental organization—either local, provincial, or federal—their activities bear little resemblance to the dominant paradigm of the litigation lawyer. The organizational structure and the political and economic pressures operating in these various environments are often unique and multi-dimensional. These various aspects can raise concerns when the lawyer assumes certain non-legal corporate or executive functions and starts identifying more closely with the objectives and goals of the employer-client.[16]

Similarly, even the litigation end of the professional conduct spectrum does not present a unified picture. Professor Smith, in fact, distinguishes the role of a lawyer in a civil trial from the role of a lawyer in a criminal trial.[17] Beyond that basic distinction, however, various types of civil litigation present their own particular problems. When the client is not a single individual, and once again strays from the dominant paradigm, then other issues arise. Class action suits and corporate litigation raise preliminary questions as to who is one's client (entity representation).[18] Secondary issues like obtaining independent counsel can easily flow from this question.

When the lawyer is not a sole practitioner as assumed by the prevailing paradigm, conflicts within the law firm become of greater significance. Similarly, the responsibility of supervising lawyers over subordinate lawyers and law assistants also arises in these situations.[19]

Beyond the problematic nature of the dominant paradigm is the question of the sources of law on professional conduct. Professor Smith concentrates most heavily on the various Codes of Professional Conduct. The law of professional conduct is, however, also a product of other positive law, whether it be the common law, statutes, or regulations.[20] These two aspects of professional conduct law can lead to various enforcement measures such as malpractice actions, disqualification or law society disciplinary hearings—the dispensers of these forms of enforcement are generally the governing body itself or the courts. But in addition to these sources, the law of

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[16] P. 224.

[17] C. 6 (The Lawyer in Civil Pre-Trial), C. 7 (The Lawyer at the Civil Trial) and C. 8 (The Lawyer at the Criminal Trial).

[18] The issue of entity representation and primary and derivative clients (generally arising in a fiduciary situation) are only explored in the book in the Chapter dealing with the lawyer as in-house counsel. The litigation aspect of this problem is only incidentally touched on, p. 28.

[19] The various legal issues arising out of practising in a large multi-client law firm are not directly dealt with by the author. Issues of positional, serial and simultaneous conflicts are rarely touched on.

[20] While these two sources of law should be distinguished for heuristic purposes, they of course inform and constitute each other. See p. 6, especially *Enns* v. *Panju*, [1978] 5 W.W.R. 244 (B.C.S.C.), where a finding of professional negligence was based in part on a breach of the code.

professional conduct is infused with the lawyer's own moral law. Professor Smith does not dwell on this aspect of professional conduct. The enforcement mechanism in this area is dealt with through the bar itself, and that is self censorship by the lawyer or censorship by his or her peers.[21]

For the most part, Professor Smith concentrates on the minimum standards of professional practice as determined by the various Codes of Conduct.[22] But this emphasis is clear from the title of the book, the concern is more with Professional Conduct law than with moral philosophy and legal ethics. There is very little normative discussion as to what ought to be the law nor is there much critical discussion on the existing law.[23] The book confines itself primarily to annotating the various jurisdictions' professional conduct handbooks. While the book may not address all professional conduct concerns, it certainly is a necessary addition to this long overlooked subject.

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[21] One of the most famous uses or abuses of this form of obloquy was directed against Justice Louis Brandeis in his 1916 confirmation hearings where various questions of ethics and judgment were raised about the way he ran his Boston law practice. On the questionable motives underpinning these allegations, see J.P. Frank, The Legal Ethics of Louis D. Brandeis (1964-65), 17 Stan. L. Rev. 683. For a discussion of Justice Brandeis' concept of "Lawyer for the Situation", see Hazard, *op. cit.*, footnote 15, pp. 61 *et seq.*

[22] One of the more controversial changes made by the Kutak Committee in the United States in writing the ABA's 1983 Model Rules was the abolition of the 1969 Code's tripartite structure. Beyond the minimum standards set by the Black Letter Disciplinary Rules, the Code also contained the axiomatic principles in the Canons and aspirational and explanatory provisions known as Ethical Considerations, which represented "the objectives toward which every member of the profession should strive". Most jurisdictions used the Ethical Considerations in a non-binding way.

[23] For instance at p. 12 Professor Smith suggests that there are four basic steps in attempting to resolve a problem of professional legal conduct. One must ascertain whether duties are owed, whom they are owed to (*i.e.*, to the state, court, client, profession or colleagues), determine if there is a conflict among the duties, then resolve the conflict among the various duties owed. The problem is that one need not be a critical legal studies scholar to see that the test is inherently unstable and can be rigged to suit one's own ethical compass.

This form of critique is not new. Justice Harlan Fiske Stone, The Public Influence of the Bar (1934-35), 48 Harv. L. Rev. 1, at p. 10, suggested that the platitudes of professional conduct law were really irrelevant to society, and argued that the lawyer should reappraise his relationship to the public and colleagues:

> That appraisal must pass beyond the petty details of form and manners which have been so largely the subject of our code of ethics, to more fundamental considerations of the way in which our professional activities affect the welfare of society as a whole. Our canons of ethics for the most part are generalizations designed for an earlier era. However undesirable the practices condemned, they do not profoundly affect the social order outside our own group.

Human Rights and Social Technology: The New War on Discrimination.
By RAINER KNOPFF with THOMAS FLANAGAN.
Ottawa: Carleton University Press. 1989. Pp. 233. ($21.95)

Reviewed by Abdullahi Ahmed An-Na'im*

According to the authors, in this book they are "concerned with how the language of human rights has been successfully appropriated by the partisans of a novel form of anti-discrimination policy, one in which the term discrimination has itself been linguistically transformed, meaning something today that its earlier opponents would not have recognized".[1] The book focuses on three interrelated "equality rights" initiatives in the Canadian context: (1) anti-discrimination legislation enforced by human rights commissions, (2) the constitutional prohibition of discrimination in section 15 of the Canadian Charter of Rights and Freedoms,[2] and (3) affirmative action programs. This list is not intended by the authors to be exhaustive, but they believe it to be sufficient for their purpose of making an argument rather than writing a textbook. They perceive their analysis as having wider significance because "the same trends are evident in all of the Western liberal democracies".[3]

The authors describe two interrelated recent transformations in anti-discrimination policies: first, the shift from an attack on direct discrimination based on irrational prejudice or bigotry to a broader attack on prospective decision making and the generalization underlying it; second, the increasing tendency to define discrimination not as the act of differential treatment arising out of some form of mistaken categorical thinking but as the effect of non-discrimination behaviour on one of the protected groups, a development reflecting the current emphasis on the achievement of equality of group results rather than mere formal equality of opportunity for individuals. Their central argument is that this "'new war on discrimination' promotes social equality at the cost of undermining private liberty and the democratic political process, and that it implies an exercise in 'social technology' which, despite its rhetoric of human rights, actually deprives the idea of rights of any solid foundation".[4]

The book consists of eight chapters entitled: Introduction, Policy Development, The Protected Groups, Individual Treatment, Equality and Difference, Systemic Discrimination, Affirmation Action and Conclusion.

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[1] P. 9.

[2] Constitution Act, 1982, Part I.

[3] P. 10.

[4] P. 11.

There is also an appendix offering a comment on *Andrews* v. *Law Society of British Columbia*.[5] In this short review, I will present a brief summary of the authors' central argument, as outlined in the Introduction, and then offer some comments and raise some questions. I should explain, however, that I am an outside observer of the Canadian situation. My special interest is in comparative constitutionalism and international rather than domestic human rights.

In the first section of chapter I, the authors explain the difference between classical liberalism and contemporary anti-discrimination policy in terms of the former's emphasis on individual freedom and the latter's emphasis on social equality. While liberal theorists saw equality and liberty as intimately, though ambiguously, interconnected, they were concerned with political rather than social equality.[6] Assuming that human beings are naturally rather nasty and anti-social, though reasonable, creatures, classical liberals believed that it will be impossible to expunge discrimination altogether except by undermining the individual freedom that permits it to flourish. "From the perspective of classical liberalism, then, discrimination poses a permanent and insoluble dilemma or tension and is thus a perennial object of liberal democratic statesmanship."[7] The authors accept the early forms of anti-discrimination policy as appropriate expressions of such statesmanship.

The new war on discrimination, according to the authors, reverses the terms of the classical liberal equation. "In the name of social equality it is willing to restrict individual freedom and to whittle away the private domain in favour of increased public authority."[8] They perceive it as fostering the growth of relatively unaccountable administrative, judicial, and quasi-judicial agencies, and encouraging a shift in power from more accountable institutions to these agencies. Consequently, they maintain, the new war on discrimination fosters a "guardian" rather than a "liberal" democracy.

In the authors' view, the new war on discrimination embodies a constructivist or social technological perspective, namely, that it is possible to know the societal or "systemic" determinants of human "behaviour" in a way that permits them to be manipulated and controlled. "Discrimination is seen as a much broader or more pervasive problem, but not one that we must learn to live with; in principle it is amenable to technical solution and does not require ongoing statesmanship."[9] They perceive the technological approach to discrimination as augmenting the power of administrative and judicial agencies at the expense of more democratically accountable institutions; and transferring decision-making power from the

[5] [1989] 1 S.C.R. 143, (1989), 56 D.L.R. (4th) 1, [1989] 2 W.W.R. 289.

[6] P. 17.

[7] P. 19.

[8] *Ibid.*

[9] P. 21.

private realm to these institutions. "This suppression of both private freedom and government by consent", they say, "is inherent in projects of social engineering."[10]

If human beings are really the product of their social environment, and if it is possible successfully to remake them by reconstructing their environment, this suppression of freedom can be seen as a temporary expedient in the historical march to a greater and more comprehensive freedom. However, since the authors agree with the view that anti-social tendencies are rooted in nature rather than social environment, they see projects in social engineering as "fundamentally misconceived and the suppression of freedom they require will be permanent, not temporary".[11]

The authors then note Rousseau's argument that if man was not naturally social neither could he be naturally anti-social, for both sets of traits presuppose society. Rousseau was therefore correct in charging Hobbes and Locke of having failed to pursue the true state of nature, a state in which human traits as we know them, including anti-social traits, scarcely exist. The authors admit that "[t]he assumption on which social technology rests—that man is not the product of nature but of society—thus represents the logical fulfillment of central assumptions in classical liberal theory".[12] Nevertheless, they insist on defending "the view that there are permanent dilemmas, rooted in *nature*, which more appropriately evoke statesmanship than technical solutions".[13]

It is true that the authors qualify their critique of the new war on discrimination as being a criticism of its logical extreme rather than of its current practice. They believe this to be "an important exercise because ideas are powerful; they have a way of working themselves pure and of taking policy in the direction of corollaries that may not be apparent at the outset".[14] However, it seems to me that the "logical conclusions" they derive are conditioned by their own assumptions and sharp distinctions without taking into account possibilities of internal adjustments that may modify the "purity" of the ideas of "the new war on discrimination" and the policy direction of those ideas.

For example, it may be argued that the authors draw too sharp a distinction between democratic statesmanship and social technology as opposing and mutually exclusive notions, whereas they tend to overlap and interact in practice. There is an element of social technology in statesmanship in the sense that whatever statesmen do is based on their knowledge of societal or "systemic" determinants of human "behaviour"

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[10] *Ibid.*

[11] P. 22.

[12] P. 23.

[13] *Ibid.* (Emphasis added).

[14] P. 11.

and of ways of manipulating and controlling it. Conversely, social technocrats would employ "statesmanship" in their work.

Moreover, "democratic accountability" is not an end in itself, but a means to such ends as ensuring justice and responsiveness to legitimate demands. Whereas formal democratic accountability may not achieve its purposes in some cases, those purposes can be achieved through appropriate mechanisms in relation to administrative and judicial agencies.

The authors also maintain too sharp a distinction between "nature" and "social environment". These notions need not be mutually exclusive, especially in light of Rousseau's charge that Hobbes and Locke failed to pursue the true state of nature. It seems clear to me that whatever "nature" is, it is significantly influenced by social environment. When we add the overlap between "statesmanship" and "social technology" and concern with the purpose rather than the form of "democratic accountability", we may find that the "new war on discrimination" is neither as new nor as objectionable as the authors seem to suggest.

One of the authors' main concerns seems to be with the expanding definition of discrimination. In the course of their discussion of affirmative action, for example, they say:[15]

> In common parlance the word [discrimination] inevitably conveys the sense of deliberate design, and the rhetorical effect of its new use is not at all to dispense with intentionality but subtly to attribute intentionality to "society" as a whole. Changing the meaning of a word so that it can cover new and quite different phenomena almost always serves rhetorical need, hardly ever scientific clarity.

Although they explain the "rhetorical need" served by the expanded definition of discrimination, they do not explain what they mean by "scientific clarity" which they claim is not served by the expanded definition.

They are also concerned with maintaining the liberal notion of rights.[16] In the conclusion, they warn against the collapse of rights into values:[17]

> The collapse of rights into values means that rights are ultimately whatever we choose or will them to be. This accounts for the unending proliferation of rights and our inability persuasively to deny the label to any claim that wishes to adopt it, thereby robbing the notion of rights of any real significance.... In a world so conceived, technology cannot be constrained by a particular set of rights (or values); instead, the rhetoric of rights will be used to legitimate whatever technological projects are fashionable. Fashionable, moreover, not among democratic coalitions working through representative institutions—these are by definition tainted by the corrupt system—but among rationalistic, rule-oriented intellectuals and their favoured (i.e., accountable) institutions).

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[15] P. 201.

[16] See, for example, pp. 168-169, in relation to s. 23 of the Canadian Charter of Rights and Freedoms, *supra*, footnote 2, and the decision of the Supreme Court of Canada in *A.G. Quebec* v. *Quebec Association of Protestant School Boards*, [1984] 2 S.C.R. 66, (1984), 10 D.L.R. (4th) 321.

[17] Pp. 216-217.

It seems to me that the real question is not whether "rights" are ultimately whatever we choose or will them to be, but rather who is the "we" and how is that choice or will articulated and justified. To displace the elitist classical liberal definition of "rights" is not necessarily a bad thing provided we are clear on the new rationale of the concept. Given such clarity, we can persuasively deny the label to a claim which does not qualify as a right under the new definition. The proliferation of rights is the inevitable and welcome consequence of the diffusion of political power beyond the narrow base contemplated by classical liberalism.

The main problem I had with the authors' thesis as a whole is their unqualified use of *loaded* terms such as "democratic coalitions" and "representative institutions". I would be more concerned with the actual composition of these coalitions, who is represented by these institutions and the interests they really serve than with the formal labels of "democratic" and "representative". Accountability to the wrong constituency is, to my mind, as objectionable as lack of accountability. In other words, I am more concerned with effective means for achieving legitimate ends than by "traditional" means which no longer serve the *new* and *expanded* ends.

Nevertheless, I find this book a valuable contribution to a continuing debate. It is well written, thought provoking and very helpful even to one who remains committed to the new war on discrimination.

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The State of the Art in Industrial Relations.

Edited by G. HÉBERT, H.C. JAIN and N.M. MELTZ.
Kingston: Centre for Industrial Relations. 1989. Pp. xx, 301. ($35.00)

Reviewed by Michael Mac Neil*

This book is an evaluation by leading Canadian industrial relations academics of the state of industrial relations research and theory in Canada. Some of the contributors may take exception to being characterized as industrial relations academics, as opposed to labour economists, labour lawyers, labour historians, management scientists or social scientists, which serves to indicate one of the themes of the book: does the field of industrial relations actually constitute a separate academic discipline? This may be more a matter for the convenience of academic classification, rather than a matter of pressing concern to anyone else.

The editors in their introductory chapter define industrial relations as dealing with the "relationships existing between the various actors involved in the day-to-day life of the workplace: the employer and his representatives, the employees and their union if they are organized, inspectors and

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government officers, and a few others like lawyers and the production or social consultants".[1] A distinction is made between industrial relations as a field of practice, and industrial relations as a subject of academic inquiry, while acknowledging the interrelationship between practice and theory. The primary focus of this book is the latter. It attempts to determine whether industrial relations can be considered a separate discipline, or is best regarded as a field of study using the perspectives of a variety of disciplines such as economics, history, law, sociology, psychology and perhaps management science. It also investigates the contributions each of these disciplines make to an understanding of industrial relations, and what further research would be valuable in furthering the development of industrial relations theory.

There are chapters on the mainstream industrial relations view,[2] labour economics and industrial relations, law and industrial relations in Quebec, law and industrial relations in common law Canada, management studies and industrial relations, behavioral sciences and industrial relations, and two chapters on history and industrial relations. Finally, a concluding chapter by the editors assesses the evidence, indicating that no definitive conclusion can be claimed that industrial relations has reached sufficient maturity to call itself a discipline. They also discuss what kinds of further research may be needed in order to permit the development of the kinds of general theories, laws and principles which are seen as the distinguishing traits of a discipline. One disappointment is the failure to consider explicitly political economy approaches to industrial relations. Although these are referred to in the chapters dealing with law and labour history, they deserve to be singled out for separate treatment, especially as they provide the possibility of a competing paradigm to the mainline industrial relations theory in Canada.[3]

Rather than attempting to describe each of the chapters in any detail, I will concentrate on the discussion in the text about the law-industrial relations nexus, and the assessment of the contribution of legal academics to the study of industrial relations generally. The editors note that "legal studies, among all the subjects covered in this book, are the most favoured and privileged"[4] from the perspective of research and publications. However it is claimed that the vast majority of this work is directed towards interpreting the law (studies in law) rather than evaluating it (studies on law). The implication is that the latter is a more valuable contribution to the understanding of industrial relations generally. The two chapters on law

[1] P. 1.

[2] The mainline view of industrial relations is based on a systems approach. This has been subjected to devastating critique. See, for example, Antony Giles and Gregor Murray, Towards an Historical Understanding of Industrial Relations Theory in Canada (1988), 43 Relations Industrielles 780.

[3] Murray and Giles, *ibid.*

[4] P. 286.

and industrial relations are very much concerned with the desirability of "turning more to fundamental studies using historical, theoretical, comparative and empirical approaches".[5]

Pierre Verge's chapter on "Law and Industrial Relations in Quebec: Object and Content" is designed to accomplish several purposes. It provides a descriptive account of the system of legal regulation of labour relations in Quebec. It also inquires into the extent to which industrial relations have an impact on the development of the law and the impact of law on work and labour. In answering these questions, he focuses primarily on legal values and assumptions, rather than attempting to provide any discussion of work in other disciplines that may answer these questions.

Verge points out the extent to which there is an assumption made within legal thought of a shared consensus among employers and employees. At the same time, the schematic notion of juridical equality that supposedly informs much legal theory is not completely adhered to in legal rules operating in the sphere of labour law. Examples proffered include the use of seniority as an important criterion for measuring the extent of an individual's claim to particular benefits, and the displacement of individually bargained contracts by collective agreements. A more important observation is that the "traditional foundation of management's right to make its own decisions concerning the firm, according to common and general law, has not really been brought into question by union activity".[6] Although the general law adapts to the particular circumstance of labour relations, the legal regulation of labour relations nevertheless reflects many facets of the general law.

Verge makes a general plea for labour lawyers and labour law academics to turn to other disciplines for the purpose of understanding the possible contribution of these other disciplines to the design and application of the rule of law. Unfortunately, there is not very much discussion of the kinds of things that can be offered. His attempt to trace the impact of legal values on the operation of labour relations does make a point that is not sufficiently developed: "the scope of legal intervention to resolve interest disputes depends on political attitudes and viewpoints".[7] A more detailed consideration of this point of view may have contributed a great deal of additional insight into the nature of labour law.

There appears to be some inconsistency in Verge's account of the role of law. For instance, he seems to believe that the final answer to such questions as the right to engage in secondary boycotts can be answered by carrying out an accurate analysis of opposing fundamental principles

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[5] Consultative Group on Research and Education in Law, Law and Learning: Report to the Social Sciences and Humanities Research Council of Canada 83 (1983).

[6] P. 90.

[7] P. 95.

such as freedom of trade and commerce and freedom of association.[8] On the other hand he acknowledges that law cannot have more than an instrumental value, giving precedence to social and political forces and reflecting widely held views regarding social order.

Bernard Adell's chapter on law and industrial relations in common law Canada seeks to review that portion of legal scholarship which is interdisciplinary in nature. In particular, he highlights work which involves value analysis, wherein concepts developed in other social science disciplines are used to study the values and assumptions underlying the law.

Although the chapter is intended primarily as an investigation of the state of labour law research, Adell engages in a partially descriptive discussion of what he identifies as the most important event for Canadian labour law in the 1980s—the coming into effect of the Canadian Charter of Rights and Freedoms.[9] The conflicting views of David Beatty, Harry Arthurs and Joseph Weiler about the potential effects of the Charter on labour law are identified, without any attempt to favour one or the other side of the debate. Adell refuses to take a stand on the correctness of the Supreme Court's decisions on the scope of Charter protection for the right to strike, but there is searing criticism of some of the statements of the majority opinions regarding the fundamental nature of the rights claimed by unions, and of the function of unions. The distinctions made by the Supreme Court of Canada in the *Dolphin Delivery*[10] decision are labelled as arcane. In discussing challenges to the basic system of collective bargaining that has been established in Canada, Adell suggests that a heavy burden is placed on anyone who would argue for more court involvement in labour law, whether through the Charter or otherwise.

Adell identifies three and perhaps four intellectual perspectives in labour law scholarship in Canada. The prevailing orthodoxy is labelled the "regulated countervailing power" perspective, and is the mainline pluralist perspective which sees the system based on the interaction of competing interest groups. A second perspective, identified with the work of David Beatty, is called the egalitarian individualist perspective. It seeks to assess the fairness of our collective bargaining structures by measuring what it does for those individuals who are actually disadvantaged in Canadian society today. It also demands a respect for the autonomy, dignity and worth of the individual, which requires much fairer decision-making processes as well as substantive legislative protection. The third perspective, identified with England and Glasbeek, is named the "unchained collective action". This view takes into account class conflict and the lack of a common

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[8] Pp. 97-98.

[9] Constitution Act, 1982, Part I.

[10] *Retail, Wholesale and Dept. Store Union, Local 580* v. *Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573, (1986), 33 D.L.R. (4th) 174.

interest among the classes. Legal constraint on industrial conflict is viewed as a means of favouring capital at the expense of workers. It is therefore recommended that there be a removal of many of the legal restraints on collective action, without at the same time ignoring the substantive justice of bargaining outcomes. A possible fourth perspective is called the "universal joint regulation" perspective. This perspective calls on policy makers to provide a greater role for workers in the governing of their workplaces. There is some doubt expressed about the viability of collective bargaining as the best means of ensuring this participation. There is also concern that the strike imposes too many costs on the parties, including the employees, for it to be the primary means of settling disputes. Where collective bargaining is not yet in place, joint worker-employer committees are recommended as an alternative means of dealing with job regulation. These serve an educative role concerning the value of joint governance.

None of the four models has given rise to much legal impact research of an empirical sort. All four do, however, draw on interdisciplinary value analysis to some extent, using concepts developed particularly in the fields of philosophy and economics. Although each perspective is reform oriented, rather than concentrating on understanding for its own sake, this is characterized as a strength rather than a shortcoming.

The chapter then goes on to explore the scholarly work done in recent years in major areas of labour law. These include establishment of collective bargaining, where the author's own concerns for the barrier to collective bargaining created by majoritarian principles is manifested, as well as a concern that insufficient measures are being taken to enforce unfair labour practices against employers who interfere with union organization and representation. The discussion of bargaining process refers to the recent debate over the scope of the duty to bargain in good faith, the use of first contract arbitration, and research on bargaining unit structure.

The discussion of strikes and picketing suggests that the high number of working days lost due to strikes in Canada may be due to the lengthy procedural prerequisites required by Canadian law. Again, Adell seems to be promoting a cause when he raises the suggestion that broader availability of compulsory interest arbitration in the private sector be considered as an alternative to the present option of relying almost solely on the right to strike.

In his conclusion, Adell discusses the reasons why there may not be a sufficient or satisfactory level of scholarly research in labour law. These include the tendency of labour law academics to devote a great deal of time to professional rather than scholarly research, and the danger that such professional activity undermines the intellectual independence required of scholarly investigation. He also characterizes much of the current scholarship as displaying intellectual curiosity and social concern, but says that for the most part, the writing is too heuristic and unsystematic.

For any person who is interested in the problems of the integration of multidisciplinary perspectives on a single field of study, this collection of essays provides a valuable contribution to the literature. For those engaged in the practice of industrial relations, the text contains a useful review of the current literature and state of the research in many disciplines that touch on industrial relations. For those who are particularly interested in law as a social phenomon, the two chapters dealing with law and industrial relations offer some insights about difficulties of conducting research that is not merely concerned with an internal legal point of view. There are no clear answers, however, to the question of how one goes about doing truly interdisciplinary work that integrates legal theory and method with the theory and method of other disciplines.

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Fiduciary Duties in Canada.

By MARK VINCENT ELLIS.
Richard De Boo Publishers. 1988. Pp. lvii, 414. ($135.00)

Reviewed by J.C. Shepherd*

In reviewing a major piece of legal scholarship, one must always acknowledge the achievement it represents, particularly when one has been through the pain and suffering of producing a book-length treatise oneself. Mark Ellis' Fiduciary Duties in Canada should therefore receive that acknowledgement and the work indeed has some valuable features. But, unfortunately, my overall assessment of the book is that it has basic flaws.

The main offender (although the problem persists throughout the book) is the first chapter—"The Fiduciary Concept". The Chapter contains numerous errors and misconceptions. At the most fundamental level, Ellis has not fully thought through what the law of fiduciaries is all about. On his first page, he tells us with great specificity exactly what a fiduciary relationship is:

> Where one party has placed its 'trust and confidence' in another and the latter has accepted—expressly or by operation of law—to act in a manner consistent with the reposing of such 'trust and confidence', a fiduciary relationship has been established.

While it is indeed true that most fiduciary relationships will have this reposing of trust and confidence, with some form of actual or deemed acceptance, the obverse is often (even usually) not true. That is, the fact of trust and confidence accepted by another does not necessarily create a fiduciary relationship.[1] Many commercial contracts, for example, have

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[1] See the comments of Sopinka J., in *Lac Minerals Ltd.* v. *International Corona Ltd.*, [1989] 2 S.C.R. 574, at pp. 599-601, (1989), 61 D.L.R. (4th) 14, at pp. 62-64, concurred

as the basis of their operation mutual trust and confidence. This does not make them fiduciary in nature. Consider the manufacturer contracting with his main supplier. He knows perfectly well that, whatever the contract says, if his supplier cuts him off, he may go under. Yet, he has no restitutionary claim against the supplier for a breach of the contract. He trusts in the supplier's goodwill and willingness to deal fairly, but his remedies are in contract.

Similarly, there are many personal relationships that are not recognized as operative in law, even though they fall within Ellis' parameters. Consider fiancees and the mutual trust and confidence that goes along with that relationship. Where one party decides he or she is going to drop the other and marry somebody wealthy, is there an accounting of profits?

These are, of course, quite absurd examples, but they are used to illustrate the basic point. Simplistically put, the law of fiduciaries is about how the legal system decides *which* of the relationships in the class that Ellis describes will be treated as fiduciary and enforced in law. Ellis' statement is akin to saying that a tort is an act or omission that hurts somebody else. That is all very fine, but gets us little further in understanding.

On page three, Ellis correctly points out that, in a situation in which the fiduciary benefits from his position, his motive is not relevant. Two paragraphs later, he goes on to say that motive is a defence to the "rebuttable presumption" that the fiduciary has breached his duty. Both of these statements cannot be right. Indeed, the latter is clearly wrong, and numerous cases tell us that. When Boardman, in *Boardman* v. *Phipps*,[2] carried out his impugned actions, he was attempting—and the court recognized this—to act in the best interests of the beneficiaries. That was not enough. The same was true in *Regal Hastings*,[3] and many other leading cases.

A related point is the question of whether, to be in breach, the fiduciary must have placed his own interests ahead of those of the beneficiary. Ellis suggests that this is true, but it is not. *Regal Hastings* is probably the best example of this, and there are many others. Consider the case of a trustee who uses trust assets to buy 40% of a company, that being the maximum the trust can acquire, and then uses his personal assets to acquire another 10.1%, in order to help the trust estate by getting a control position. When the trustee makes a large profit on his 10.1%, is there any doubt that the trust will have a claim against him for an accounting of those profits? The court might be sympathetic, and might even be soft on him on the remedies side, but the court will *not* consider his good motives, or his placing of the beneficiaries' interests ahead of his own, as being in any way a defence.

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with by a majority of the court on the fiduciary issue. This decision, of course, came after the publication of the book under review.

[2] *Boardman* v. *Phipps*, [1987] 2 A.C. 46, [1966] 3 All E.R. 721 (H.L.).

[3] *Regal (Hastings) Ltd.* v. *Gulliver*, [1942] 1 All E.R. 378 (H.L.).

On the fourth page, Ellis makes an ill-advised attempt to analyze the concept of conflict of interest. Aside from the fact that conflict of interest is not the essence of breaches of fiduciary duty (personal benefit is), Ellis tries to tell us that it is potential conflict that is the issue, not operative conflict.

Ellis is not the first person to get confused over the conflict of interest question. The comments in the cases and the writings themselves contain a number of equivocations on this issue. This is most often seen in conflict of duty and duty, but it is just as relevant in conflicts between duty and personal interest.

The law of fiduciaries contains many statements to the effect that a fiduciary cannot (or is not allowed to) serve two masters.[4] A good example of this is the statement of Donaldson J. in *North and South Trust Co.* v. *Berkeley*[5] where he said:

> ... an agent cannot lawfully place himself in a position in which he owes a duty to another which is inconsistent with his duty to his principal.

However, statements such as this are not in fact the law. They are, rather, a convenient shorthand that truncates a more subtle distinction between actual and potential conflicts.

Conflict of interest is an unusual concept. The actual conflict that exists in any fiduciary situation exists at the time that a fiduciary is presented with a choice between the interests of a beneficiary and either personal interests or the interests of another beneficiary. Once the fiduciary has made the choice for or against the interests of a particular beneficiary, there is no conflict. The conflict has been resolved (albeit perhaps by a breach). Nevertheless, the terminology used in the law applies the term "conflict of interest" to the act of making the choice against the interest of the person to whom the duty is owed. This equivocation is at the root of understanding statements such as the ones made above.

As a general rule, the courts do not step in and prevent a latent conflict of interest from being realized.[6] That is, they will generally not take a fiduciary out of a position in which the fiduciary is presented with a choice for or against a beneficiary. The reason for this, practically speaking, is that fiduciaries are faced with choices for or against their beneficiaries all the time. The vast majority of fiduciaries elect to promote the interests of their beneficiaries, and no one is hurt. Therefore, the courts are reluctant to intervene to punish, or supervise, the fiduciary until the fiduciary has demonstrated in some way that he or she will not be furthering the beneficiary's interests.

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[4] *E.g. Re Moll and Fisher* (1979), 23 O.R. (2d) 609, at p. 612 (Ont. Div. Ct.).

[5] [1971] 1 W.L.R. 470, at p. 484 (Q.B.D.).

[6] See, for example, *Boulting* v. *A.C.T.A.T.*, [1963] 2 Q.B. 606 (C.A.); discussion in *Orenstein* v. *Feldman* (1978), 2 E.T.R. 133 (Ont. C.A.); *Ingraham* v. *Hill* (1920), 51 D.L.R. 98 (N.S.C.A.).

The courts, in considering the removal of fiduciaries from positions where they are presented with conflicting choices, evaluate in an abstract way whether the fiduciary duty is likely to be abused, and in many respects this process is similar to the process a court goes through in another context, the mareeva injunction. Usually the court will look at whether the fiduciary has in the past chosen against the interests of a beneficiary.[7] Generally the case law suggests, often by implication, that there must be some potential for irreparable harm to the beneficiary or at least the possibility that the potential breach would in some way result in the beneficiary being prevented from seeking his or her normal remedies.[8]

The point is, conflict of interest is the state of mind of a fiduciary prior to doing something bad. For the most part, the courts have not attempted to punish or restrict that state of mind. Ellis has failed to realize this, and as a result gets confused in many areas of the book.

In going on to talk about prohibited activities—in effect the specifics of the fiduciary's duty—Ellis also makes numerous statements that are inaccurate or too general. The subduties he discusses are:

(a) A positive duty to disclose information material to the beneficiary. This is not true in many situations, such as trustees, and where it is true it is often not a duty arising out of the fiduciary nature of the relationship, but out of the contractual or other non-fiduciary basis of the relationship.[9] So, the positive duty to disclose is most common in agency situations, where it is the contract between agent and principal that creates the obligation.

(b) Adherence to the beneficiaries' instructions. Again, Ellis is dealing with a subgroup of fiduciaries, and even then is looking at a duty not based on the fiduciary aspect of the relationship. Also most often seen in agency relationships, following the beneficiaries' instructions is an obligation that arises by contract, by statute, or other non-fiduciary obligation. Many fiduciaries are not under such an obligation. The trustee is the most common of these fiduciaries, but one could include corporate directors, persons in a position to exercise undue influence, and many others.

(c) The prohibition against a fiduciary gaining personally from the position. Ellis tells us that this contains two categories: "First, the duty prohibits the use of the property against the 'beneficiary'—as in the case of soliciting clients or the use of 'secret' processes, for example, and second, it prohibits use of the information instead of the 'beneficiary'—as in

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[7] Although this is not essential: see, *Re Consiglio Trust (No. 1)* (1973), 36 D.L.R. (3d) 659 (Ont. C.A.).

[8] See, on these points, *Rose* v. *Rose* (1914), 22 D.L.R. 572 (Ont. C.A.); *Re Holmes Trust*, 139 A. 2d 548 (Pa. Sup. Ct., 1958).

[9] A common problem. See the comments of Southin J., in *Girardet* v. *Crease* (1978), 11 B.C.L.R. (2d) 361, at p. 362 (B.C.S.C.).

the case of usurping a corporate opportunity."[10] While the author's examples are true, this hardly exhausts the prohibition. Many of the most difficult fiduciary cases are ones in which the fiduciary has a personal gain, not in any way at the expense of the beneficiary, but in addition to the gain of the beneficiary, or in circumstances in which the beneficiaries could not have received the gain themselves, and were not injured by the fiduciaries' gain. It is axiomatic in corporate opportunites cases, for example, that the fact that the beneficiary could not take the opportunity, or the fact that the beneficiary suffered no loss because of the opportunity going to the fiduciary, are simply not defenses.

(d) The prohibition against "serving two masters". He seems to view this as primarily the issue of conflict of duty and duty—that is, the conflict between duties to different beneficiaries. Most of the writing and cases in the law of fiduciaries, though, treat the "serving two masters" concept as serving the beneficiary and serving one's personal interest. Conflict of duty and duty is in fact a much more Byzantine issue, and one that he does not address well, there or elsewhere in the book.

Finally, Ellis tells us that there are certain relationships that "unquestionably" are fiduciary in nature. Among his examples are: accountants, elected officials, priests, family members, *etc.* Surely, anyone who has read the cases realizes that this is wrong. Some formal relationships are almost always fiduciary in nature, but most—maybe all—formal relationships are fiduciary in nature only in the context of the particular circumstances of the case.[11] Elected officials, for example, will often have fiduciary duties, but not in all cases and not in all situations within those cases. Accountants are another good example of professionals whose duties may, on the facts of the particular case, include fiduciary duties, but do not always. By calling people in certain relationships automatic fiduciaries, Ellis tends to set up the categories as barriers, rather than as information that assists us in analyzing a real life situation.

There is no doubt that the fiduciary concept is difficult[12]—it is both complex and subtle. In one sense, it tries to do the impossible: take a fundamental aspect of human relationships and make it conform to rational, legal rules. Human relationships are not essentially rational, and the problems of the legal system in coming to grips with "trust and confidence", and when it should be enforced by the legal system, are grounded in the obvious

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[10] P. 1-6.

[11] See, on this point, Sopinka J. in *Lac Minerals Ltd.* v. *International Corona Ltd.*, *supra*, footnote 1, at pp. 596-597 (S.C.R.), 61 (D.L.R.), quoting Dickson J. in *Guerin* v. *R.*, [1984] 2 S.C.R. 335.

[12] On this we can all agree. See, P.D. Finn, Fiduciary Obligations (1977), p. 1; *Hospital Products* v. *U.S. Surgical* (1984), 55 A.L.R. 417, at p. 432 (Aust. H.C.); and many other comments.

flaws of having a rational system try to grapple with irrationality. It is the legal system trying to jam a square peg into a round hole. This no doubt makes writing in the area particularly difficult.

However, even allowing for that, Fiduciary Duties in Canada contains too many inaccuracies. It may be used as a reference for case citations and quotes, perhaps, but not for its substantive content.

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Remedies: Cases and Materials.

Edited by J.B. BERRYMAN, J.L. CASSELS, T.A. CROMWELL, D.J. MULLAN, S. SADINSKY, R.J. SHARPE and S.M. WADDAMS.
Toronto: Emond Montgomery Publications. 1988. Pp. xl, 1071. ($94.00)

Reviewed by David McRobert*

This volume is a comprehensive collection of cases, articles, notes and questions on the law of remedies. In the Preface, the editors explain that their key objective "in compiling this volume has been to provide a collection of cases and other materials that could form the basis of a law school course on the law relating to remedies".[1] Measured against this objective, the text is a worthwhile and timely contribution to Canadian legal literature.

The editors include some of the most distinguished legal scholars in Canada and, not surprisingly, the volume draws on extracts from some of their leading works.[2] However, the editors have also made an effort to ensure that many of the leading cases, books, government reports and articles on remedies are extracted or at least referenced in the volume.

The book is divided into two parts, the first dealing with monetary relief and the second examining equitable remedies. Each part is made up of five chapters. The volume is beautifully bound and the publisher appears to have met the high standards of editing and typesetting that characterizes most of its publications.

The first chapter of the volume focuses on the general principles of damages, beginning with cases on remoteness, mitigation and time of the assessment of damages. Sections on exemplary damages and compensation for loss of money conclude the chapter. Sprinkled throughout this chapter and all subsequent ones are problems and questions that are sure to provoke interesting discussions in Canadian law classes. The chapters that follow

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[1] P. iii.

[2] Some of the writings by the editors that are extracted include: S.M. Waddams, The Law of Damages (2nd ed., 1984); R.J. Sharpe, Injunctions and Specific Performance (1983); J. Berryman, Anton Pillar Orders: A Canadian Common Law Approach (1984), 34 U.T.L.J. 1.

are titled Awards Measured by Benefit to Defendant, Damages for Breach of Contract, Damages for Invasion of Property Interests, and Damages for Personal Injury or Death respectively. Of particular interest in this first part of the volume is the fifth chapter on damages for personal injury and death. The materials extracted attempt to compare various approaches to compensation including the workers' compensation schemes in Canada, the accident compensation scheme developed in New Zealand, and other insurance systems in a scant thirty pages. The remaining seventy-three pages of materials in the chapter concentrate on personal injury damages assessment and civil litigation, reinforcing the conventional view that the courts and lawyers can achieve justice and economic security for individuals and families devastated by the social, economic and psychological consequences of serious accidents.

The second part of the volume dealing with equitable remedies, provides stimulating materials on areas such as nuisance, criminal equity and interlocutory injunctions in labour disputes. Following a brief introductory chapter on the origins of equity, longer chapters on injunctions and interlocutory injunctions are present. The quality of the materials in these chapters is uniformly high and should provide readers with a basis for evaluating the appropriateness of different remedies in various situations. Similarly, the ninth chapter deals with specific performance in considerable detail. The materials are divided into ten sections and most of the cases cited are those typically found in popular texts on the law of contracts. One strength of this particular selection of materials is the unique manner in which it has been organized.

The last chapter of the book is an exposition of the emergent area of Charter remedies. The editors identify several worthy articles and cases on the subject, including a short extract from a seminal article by Professor Marilyn Pilkington on monetary redress and Charter remedies.[3] In light of Mandel's incisive critique of the Charter,[4] the materials extracted in the chapter seem intellectually limp and may exaggerate the importance of the remedies provided in the Charter.

One criticism that extends from this point is that the editors have failed to canvass more critical perspectives on contract law and the role of remedies in perpetuating the *status quo*. While some of the articles make reference to the social implications of particular remedies, the overwhelming majority of the materials reflects either liberal or conservative interpretations of conventional welfare economics. For law students and lawyers who are interested in marxist approaches or other more radical theories about the law of remedies, very little is offered.

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[3] M. Pilkington, Monetary Redress for Charter Infringement, in R.J. Sharpe (ed.), Charter Litigation (1987).

[4] M. Mandel, The Charter of Rights and the Legalization of Politics in Canada (1988).

Another related problem that limits the value of the book for serious scholars is that the materials do not provide any kind of coherent policy overview with respect to the law of remedies. A third problem is that restitutionary remedies are generally ignored, a decision that may prove frustrating to some law teachers. Both these limitations are understandable given the breadth of the materials covered in the volume, and the editors have consciously acknowledged them in their Preface.[5]

In conclusion, I would recommend this book to students, researchers and practitioners who are interested in a survey of the ideas and common law decisions that have shaped monetary, equitable and Charter remedies in Canada. It certainly appears to fill the need for a comprehensive text for students in Canadian law schools. However, it will not satisfy those people who want to develop a critical perspective on the law and the limitations of the courts in resolving disputes.

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International Technology Joint Ventures in the Countries of the Pacific Rim.

Edited by JAMES A. DOBKIN.
Massachusetts: Butterworths Legal Publishers. 1988. Pp. xviii, 211. ($75.00)

Reviewed by P.J. Davidson*

The Pacific Rim is the most dynamic area in the world today and has become a major centre for global economic development. It is increasingly becoming an area of interest for Canadian business, government and academics. Canada has recently launched the Pacific 2000 program which is aimed at increasing its relations with the countries of the Pacific Rim, and is currently actively involved, along with other Pacific Rim countries, in seeking to establish a mechanism for economic cooperation in the region. Information on international technology joint ventures in the countries of the Pacific Rim is essential for investors interested in investing in the region; this book is intended to "serve as a meaningful resource for those interested or actually engaging in multinational industrial cooperation involving the Pacific Rim countries".[1] However, while it provides a useful introduction to international technology joint ventures and presents a preliminary overview of some joint ventures concerns in the selected Pacific Rim countries, it unfortunately falls short of reaching its stated goal.

The book is a publication of the Pacific Rim Advisory Council, an association of law firms located in countries bordering on the Pacific Ocean

[5] P. iii.

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[1] P. xviii.

or having an interest in and active practice involving substantial clientele in those countries. It comprises the expanded and edited papers of a seminar on international technology joint ventures which was held in Singapore on January 19, 1987 as an adjunct to the first annual board of directors meeting of the Council. At the time of the seminar, the membership on the Council included thirteen law firms from nine countries: Australia, Canada, Hong Kong, Korea, New Zealand, Singapore, Taiwan, Thailand and the United States.

Chapter one, "International Technology Joint Ventures: An Overview and Some Important General Principles", provides an introduction to technology joint ventures. It first discusses some of the relevant considerations in entering into such a relationship and the alternate legal structures which may be used for such a venture. This discussion is followed by an overview of negotiating an international technology joint venture, from initial exchanges of information with a potential partner, through important general provisions of the joint venture agreement, to a review of the special considerations relating to the patents and technology to be transferred and the conveying, recovering, and protecting of the rights in patents and technology. This chapter provides a good introduction to situations in which an international joint technology joint venture might be used and gives a useful review of the most important considerations in drafting such an agreement. Although written from the perspective of a United States practitioner, the comments, in most cases, are universally applicable, and where specific reference is made to United States law or legal issues, the analogous Canadian position is usually readily apparent. It would have, however, been useful from a practical point of view to have a checklist of points to be considered in entering into an international technology joint venture as well as examples of a joint venture agreement and some of the supporting documentation.

The remaining chapters are country specific and comprise contributions from a firm for each of the countries represented on the Pacific Rim Advisory Council. In addition, although the Council did not have members from the People's Republic of China or Japan at the time of the seminar, chapters on these two countries were included "because of their obvious importance to the international business community".[2] However, although chapters are included on Singapore and Thailand, no mention is made of any of the other ASEAN countries.

The Association of Southeast Asian Nations (ASEAN), comprising Brunei, Indonesia, Malaysia, the Philippines, Singapore and Thailand, is the most important regional organization in the Pacific Rim and failure to include mention of it and four of the six member states is a major oversight in a book dealing with "the Countries of the Pacific Rim". Also, neither the chapter on Singapore nor the chapter on Thailand make reference

[2] *Ibid.*

to the ASEAN Industrial Joint Venture Scheme which is a regional industrial cooperation programme in ASEAN for encouraging the private sectors of the ASEAN member countries to join up in industrial ventures and take advantage of the economies of scale of production made possible by the presence of a large regional market.[3] Participation in ASEAN Industrial Joint Ventures is open to non-ASEAN parties in cooperation with ASEAN parties and thus would have been most appropriate to deal with in a book on international technology joint ventures in the Pacific Rim.

Each of the country chapters follows more or less a standard format for presenting information which makes for ease of comparison among countries. First, a brief description of the country's legal system is given. This is followed by a discussion of: the forms a joint venture may take; applicable antimonopoly/competition law; government approvals and controls; tax considerations; intellectual property law; and other material considerations.

The quality of these chapters is variable; however, the main limitation is the brevity of the treatment given. Country chapters vary in length from eight and one half to twenty pages with the average length being only about twelve pages. This means that the issues, for the most part, are dealt with at a very basic level which only gives an introduction to the matters to be considered in each of the countries when establishing a joint venture there. An extreme example of the brevity of treatment occurs in the section on industrial property in the chapter on Canada, reproduced *in its entirety* below:[4]

> Canada maintains a national registration system for the protection of patents, trademarks and industrial designs, and copyrights. If the Canadian operation uses industrial property owned by a JVP [Joint Venture Party], an appropriate licensing agreement should be entered into and the appropriate registrations made.

The publishers advise that "[a]ttorneys using [their] publications in dealing with specific legal matters should also research original sources of authority".[5] With respect to this particular volume, readers interested in pursuing a joint venture in one of the subject countries would have to do substantial further research before proceeding. However, the book lacks any footnotes or any form of bibliographical references to assist with this further research.

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[3] For further details of AIJVs, see P.J. Davidson, ASEAN Industrial Joint Ventures (Ottawa: ASEAN-Canada Business Council, 1989); for further details on investment in ASEAN member countries, see P.J. Davidson, ASEAN Business Laws and Investment Procedures (Ottawa: ASEAN-Canada Business Council, 1987). The ASEAN-Canada Business Council of the Canadian Chamber of Commerce was established in 1986 to promote closer ties between Canada and the countries of ASEAN, and its objectives include the study and identification of problems impeding trade, investment and *technology transfer*. Its address is 55 Metcalfe Street, Suite 1160, Ottawa, Ontario, K1P 6N4.

[4] P. 57.

[5] P. iv.

Although this book may be of use to a businessperson or a lawyer seeking an introduction to international technology joint ventures and a very general overview of the legal framework for joint ventures in the selected countries, it is of limited value to the practitioner actually involved in negotiating and drafting international technology joint ventures in those countries.

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Law of Intervention, Status and Practice.

By PAUL R. MULDOON.
Aurora, Ontario: Canada Law Book. 1989. Pp. xxx, 239. ($49.00)

Reviewed by Philip L. Bryden*

With this book, Paul Muldoon establishes himself as the leading Canadian commentator on the law of intervention. Building on his previous writing in the field,[1] Mr. Muldoon has provided Canadian lawyers with the first monograph that attempts to deal comprehensively with the intervention regimes employed in courts across the country. His previous writing had a major influence on the recommendations on intervention found in the Ontario Law Reform Commission's recent report on the law of standing,[2] and the present book is bound to become the standard reference work on the subject of intervention for both practitioners and members of the judiciary. For all of this we owe Mr. Muldoon a debt of gratitude.

The book is in four parts. The first introduces the concept of intervention, distinguishes it from related concepts, and provides an overview of the rationales that are offered for the use of intervention before the courts.[3] The second examines the intervention regimes employed in the superior courts of each of the common law provinces for intervention as an added party. In the third part of the book, Muldoon surveys the law relating to intervention as a friend of the court (or *amicus curiae*),

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[1] P. Muldoon and D. Scriven, Intervention as Added Party: Rule 13 of the Ontario Rules of Civil Procedure (1985), 6 Advocates' Quarterly 129; D. Scriven and P. Muldoon, Intervention as Friend of the Court: Rule 13 of the Ontario Rules of Civil Procedures (1985), 6 Advocates' Quarterly 448.

[2] Ontario Law Reform Commission, Report on the Law of Standing (1989), pp. 111-136.

[3] Muldoon does not discuss intervention before administrative agencies, or the significance of the acquisition of intervenor status for purposes of judicial review of agency decisions. This is unfortunate, since much interesting and creative work is being done by administrative agencies to foster intervention by public interest organizations, but one must respect the author's decision not to add to the already considerable body of research to which he committed himself.

and in the final part he discusses the "special" intervention regimes found in Quebec, the Federal Court of Canada and the Supreme Court of Canada.

For the legal practitioner, the book has several virtues deserving of special mention. First of all, it is comprehensive. Thus, a practitioner can find material on all of the intervention regimes in Canada in one place and can relate the concepts employed in his or her jurisdiction to the experience elsewhere.[4] Second, the organization of the material follows the categories that appear in the statutory schemes and court rules in use across the country rather than a conceptual framework developed independently by the author. Because of this, the practitioner can identify quite readily the material relevant to the particular intervention regime under consideration and is not likely to be misled by general observations that may be appropriate in the context of some regimes but not others. Finally, Muldoon attempts to make sense of intervention at the level of principle rather than simply describing the existing rules and their judicial interpretation. This is of practical importance because of the extent to which judges are given broad discretion to control opportunities for intervention and the scope of participation by intervenors. One would assume that counsel who are best equipped to address the court's questions at the level of principle should have a significant advantage in influencing the exercise of this discretion.

Unfortunately, the organization of the material is a source of weakness as well as strength. The law of intervention in Canada suffers from conceptual incoherence, especially with respect to the growing phenomenon of public interest intervention, and the author tends to sidestep this problem rather than address it head on.[5] Although Muldoon considers public interest intervention at length, he does not address this type of intervention in a discrete section of the book but weaves it into his discussion of intervention as an added party in Part II and intervention as a friend of the court in Part III.

I believe there are three drawbacks to this approach. First, it relies on the idea that courts have sufficiently adjusted their thinking about the traditional neutral status of the *amicus curiae* to accommodate the modern "partisan" form of public interest intervention under rules allowing for intervention by friends of the court. Muldoon believes that this adjustment has been made, and in some instances he may be correct, but he is constrained to argue that two recent leading decisions expressing the opposite view are either wrongly decided or turn on the particular wording of the rules

[4] The author thoughtfully provides an appendix setting out the text of all of the rules of court governing intervention in Canada, as well as the relevant federal court rules in the United States.

[5] The author does make reference to suggestions for reform at pp. 9-10, but the possibility of restructuring the legal categories within which opportunities for intervention are assessed is not a major focus of this book.

under which intervention was sought.[6] Second, the organization of the material encourages the author to overlook similarities (and disparities) between the treatment of public interest intervention in the superior courts of the common law provinces on the one hand, and under the "special" intervention regimes found in Quebec, the Federal Court of Canada and the Supreme Court of Canada on the other.[7] Finally, failure to deal with public interest intervention as a discrete topic tends, as a practical matter, to obscure rather than highlight the range of expectations and choices that public interest intervenors may have with respect to such things as the scope of their participation in the litigation, their rights to appeal and their responsibility for costs. To his credit, Muldoon does not ignore these considerations,[8] but he does not draw sufficient attention to the extent to which the choice of one form of intervention rather than another has implications that ought to be addressed by counsel.

Despite these reservations, the merits of this book clearly outweigh its shortcomings. Litigators will find it a very handy reference work, and scholars and law reformers will find that the book identifies the key issues to be addressed in the improvement of our intervention regimes, even if we disagree with the specific approaches Muldoon takes to the resolution of these problems.

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[6] See the author's discussion, pp. 140-141, of *Borowski* v. *Minister of Justice of Canada* (1983), 144 D.L.R. (3d) 657, [1983] 3 W.W.R. 505, 23 Sask. R. 259 (Sask. Q.B.), and *A.G.N.S.* v. *Beaver* (1984), 66 N.S.R. (2d) 419, 31 C.C.L.T. 54 (N.S.S.C.).

[7] For example, in discussing at p. 163 the type of public interest that might be sufficient to support intervention in Quebec, Muldoon makes note of the judgment of the Quebec Superior Court in *Imperial Tobacco Ltd.* v. *A.G. Canada* (1988), 55 D.L.R. (4th) 555 (Que. C.S.), aff'd (1989), 59 D.L.R. (4th) 743 (Que. C.A.), denying the Canadian Cancer Society's application to intervene in a case in which Imperial Tobacco sought to challenge the constitutional validity of federal legislation regulating the advertising of tobacco products. He ignores, however, the extent to which the court canvassed authorities from the common law provinces, and in particular relied on the Nova Scotia Supreme Court decision in the *Beaver* case, *supra*, footnote 6 (see 55 D.L.R. (4th), at pp. 570 and 574). This is especially unfortunate because it has implications for Muldoon's assumption that the courts have overcome their reluctance to accept "partisan" submissions by persons seeking intervenor status as friends of the court.

[8] See pp. 99-108, 145-153.

Competence and Human Reproduction. Report No. 52
Edmonton: Institute of Law Research and Reform.
February 1989. Pp. iii, 91. (Free of charge)

Reviewed by Moira L. McConnell*

> In our view, a superior court judge can be relied on to act prudently and with due caution when properly informed of the facts in a case before him (sic).... Superior court judges are practiced in recognizing and enforcing human rights, and in determining competence for various purposes ... it is our opinion that both courts and legislators would regard the issue [sterilization] as too important to be left to any decision maker other than a judge of a superior court.[1]

> Judges are generally ill-informed about many of the factors relevant to a wise decision in this difficult area [sterilization]. They generally know little of mental illness, of techniques of contraception or their efficacy. And, however well presented a case may be, it can only partially inform ... the legislature is the appropriate body....[2]

"Never ask a question unless you know the answer" is the first rule aspiring litigators learn. A corollary of the rule is the gist of law school training: the answer usually depends on how one poses the problem.[3] This sage advice was evidently taken to heart by the authors of the Edmonton based Institute of Law Research and Reform's Report on Competence and Human Reproduction. Rather than examining the undeniably difficult question of sterilization of people who are unable to give informed consent from the usual perspective—that is, when, if ever, is violation of a person's physical and mental security and liberty justifiable—the Report frames the problem as raising two questions:[4]

> The first is whether sterilization for any purpose other than physical health or mental health, narrowly interpreted, can be for the *benefit* of the person sterilized. The second is whether, if there is a benefit, the law should withhold it from a person unable to make an informed choice for or against it.

Predictably, the Report concluded that there is clearly a benefit, and that the law should not withhold it. This is hardly surprising, given that human rights law is rarely employed to deny privileges to people, particularly vulnerable people. To classify sterilization as a privilege *de facto* determines the conclusion. Whatever the merits of the views presented in the Report,

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[1] P. 60.

[2] *Re Eve*, [1986] 2 S.C.R. 388, at p. 432, (1986), 31 D.L.R. (4th) 1, at pp. 32, 33, per La Forest J., for the court.

[3] Critical analyses of cases is increasingly focusing on the historical, political and social assumptions conveyed in the way legal issues are framed.

[4] Preface. (Emphasis added).

the reader is immediately struck with a sense of being set-up. This is so even though framing the issue in the more usual way could also be seen as equally determinative of the result. Perhaps this is because human rights protections are usually understood as exactly that, with the issue being the extent of protection offered.

Approaching the issue of sterilization of legally incompetent individuals as an issue of privilege is an interesting idea, since presumably it reflects an attempt to accord more recognition to a human need for sexual relations. Unfortunately, the Report undercuts this apparently progressive approach on a number of fronts so that even the most sympathetic of reviewers would be unable to accept the recommendations without some suspicion. A prime example is the gender of the participants in the decision-making process advocated by the Report. Without getting embroiled in arguments about gender neutral language, it is nevertheless important to consider the implications of describing participants in such a sensitive legal issue as he or she. The Report and the draft legislation go to great lengths to make the legislation applicable to both sexes. As the Report explains:[5]

> In the accompanying draft legislation, we have avoided pronouns as much as possible, employing combined pronoun references where pronoun usage is unavoidable. This is in accordance with the drafting convention adopted by the Drafting Section of the Uniform Law Conference of Canada in 1986.

Nonetheless the Report states earlier:[6]

> ... because the situations considered overwhelmingly involve women and girls, the feminine pronoun has been used to refer to the subjects of a proposed sterilization.

Given that the legislation covers the use of the hysterectomy procedure for "menstrual management", this is unsurprising. What is more troublesome is that, despite this superficial acknowledgement of the question, nearly every participant in the decision-making process—that is, everyone except the prospective sterilizee and the lawyer appointed to represent her—is expressly male. The judges are male,[7] the medical practitioners are male,[8] and even the guardian or interested relative of the incompetent is male.[9] In 1989 this is not only politically insensitive and inaccurate, it is inexcusable.

The Report is a response to the "problem" said to arise from the decision of the Supreme Court of Canada in *Re Eve*.[10] *Re Eve* involved an application by an elderly widow concerned about the possible sexual activity and consequent pregnancy of her adult daughter, Eve, who was

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[5] P. 29.

[6] P. 1.

[7] Pp. 61, 63 ff.

[8] P. 31.

[9] Pp. 68, 77.

[10] *Supra*, footnote 2.

developmentally handicapped and suffered from expressive aphasia. The legal question was whether the court could exercise its *parens patriae* jurisdiction to authorize *non-therapeutic* sterilization (sterilization for birth control). La Forest J., writing for the Supreme Court of Canada, disagreed vehemently with the Supreme Court of Prince Edward Island's decision authorizing a hysterectomy. He stated:[11]

> The grave intrusion on a person's rights and the certain physical damage that ensues from non-therapeutic sterilization without consent, when compared to the highly questionable advantages that can result from it, have persuaded me that it can never safely be determined that such a procedure is for the benefit of that person. Accordingly, the procedure should never be authorized for non-therapeutic purposes under the *parens patriae* jurisdiction.

La Forest J. recognized that the line between sterilization for therapeutic reasons, which could be consented to by guardians, and non-therapeutic sterilization, which could not be consented to either on the basis of best interests or on a "substituted judgment" basis, was difficult and "utmost caution must be exercised....".[12]

According to the Report, *Eve* created a lacuna in the law. What is to happen to the person who is not competent to consent to sterilization for birth control or menstrual management, but who if legally competent would request the operation on the basis of his or her best interests? The Report concludes that sterilization is a form of birth/menstrual control adopted by a majority of Canadian women and should be available to everyone who wants or needs it. The draft legislation provides a statutory basis for the exercise of judicial discretion, in effect a statutory *parens patriae* jurisdiction.

The legislation attempts to meet the concern of the Supreme Court of Canada that sterilization of people unable to give informed consent is usually for social interest reasons—that is for the benefit of their society, community and family. It does this by providing for independent representation of the proposed subject,[13] an extensive list of guidelines for judges to consider in determining the best interests of the person once they make a finding as to the person's competence and/or minority. The role of the judge is inquisitorial and he or she is empowered to conduct whatever investigation he or she deems necessary, including interviewing the proposed subject. The standard the judge is to apply is that of the best interests of the individual concerned, taking account of matters such as age, cultural/religious background, likelihood of pregnancy, availability and feasibility

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[11] *Ibid.*, at pp. 431 (S.C.R.), 32 (D.L.R.).

[12] *Ibid.*, at pp. 434 (S.C.R.), 34 (D.L.R.).

[13] In addition there are numerous notice requirements although it appears that it can be dispensed with in some circumstances; pp. 16, 78.

of alternate methods of birth control, as well as a number of factors which, arguably, do involve cognizance, perhaps not unrealistically, of the caregiving circumstances of the person. The Report argues:[14]

> ... we think it would be a mistake to pretend that persons who are not competent to make sterilization decisions live in a social vacuum when in fact they depend on a network of family, friends, and others to assist them in living as normal a life as possible. As we see it, the nature and extent to which a person can count on others is relevant to a determination of her present and likely future circumstances and this, in turn, is relevant to the consideration of her best interests.
>
> Admittedly [this] ... carries with it the risk of misapplication. However, we think the risk is minimized, if not eliminated, by the choice of a superior court judge as decision maker and by the provision of a broad range of substantive and procedural safeguards for the judge to observe.

The legislation is designed to provide the person whom the law has denied the means of making an effective decision, in part because of medical practitioners' concerns about liability for procedures where informed consent was not available, with a means of making a decision "based strictly on her best interests and on consideration of her individual circumstances".[15] Thus what the law has taken away with one hand it will replace with the other.

Does this elaborate construction accord with any sort of reality for the people affected by it, or does it achieve nothing more than an exemption from liability for medical practitioners by shifting the decision making control to judges rather than physicians? The Report does not completely satisfy on this underlying issue.

Although the Report does not address the issue, an interesting aspect of the proposed legislation is that it will be more clearly susceptible to a challenge under the Charter of Rights and Freedoms[16] than would the *parens patriae* jurisdiction. After *Retail, Wholesale and Department Store Union* v. *Dolphin Delivery*[17] and *Tremblay* v. *Daigle*[18] it may be difficult

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[14] P. 68.

[15] P. 4. This concern for individualization is intended to meet the concern expressed in *Re Eve* and the Law Reform Commission of Canada's Working Paper 24, Sterilization Implications for Mentally Retarded and Mentally Ill Persons (1979), p. 105: "The law tends to be a very blunt instrument which, by its very nature, cannot accommodate the individual differences of every case." The Law Reform Commission solution involved a determination by a Board comprised of medical, ethical, social and legal professionals.

[16] Constitution Act 1982, Part I.

[17] [1986] 2 S.C.R. 573, (1986), 33 D.L.R. (4th) 174.

[18] [1989] 2 S.C.R. 530, at pp. 570-571, (1989), 62 D.L.R. (4th) 634, at pp. 664-665.

to challenge a court's decision to exercise its common law jurisdiction.[19] Under the proposed legislation, although the judge is essentially making the same sort of determination as under the common law *parens patriae* jurisdiction, the decision and ensuing Order are firmly connected to a familiar form of government activity, legislation, and potentially challengeable on the basis of sections 7 or 15 of the Charter.

The Report is important to a large extent because of the way it frames the issue. The problem of over-protection of people, resulting in another form of denial of humanity, is clearly a difficult issue. The Report, in strictly defining therapeutic sterilization to include only sterilization necessary for the protection of the *physical* health of the person, shifts the decision making discretion from medical practitioners to judges, and in so doing accords more explicit procedural protection of the individual. Since this is combined with the possibility of costs also being awarded to assist in such cases it may in fact operate for the benefit of individuals potentially vulnerable to such discretionary decisions.

As a final note, the Report is also remarkable, given the unhappy events in recent months in various provinces in connection with the judiciary, law officers and the protection of human rights, for its unswerving faith in the institution of the superior court judge.

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[19] Unless one adopts the view that the court is effectively exercising a Crown prerogative and is therefore an agent of the government in this instance rather than acting as adjudicator in issuing an injunction. It is, however, worthwhile noting that in the *Daigle* case the court expressly commented, *ibid.* at pp. 571 (S.C.R.), 664 (D.L.R.):

> The issue as to whether s. 7 could be used to ground an affirmative claim to protection was not raised.

It may be then that the argument for finding "state action" by omission is still possible.

Contract Law Today—Anglo-French Comparisons.
Edited by Donald Harris and Denis Tallon
Don Mills: Clarendon Press Oxford. 1989. Pp. xxv, 414. ($110.00)
A review by M.G. Bridge of the French version of this work was published in (1989), 68 Can. Bar Rev. 655.

Traité de droit administratif. Deuxième édition. Tome II
By René Dussault and Louis Borgeat.
Les Presses de l'Université Laval. 1989. Pp. xvi, 1393. ($79.00)
A review by S.K. McCallum of the English version of this work was published in (1989), 68 Can. Bar Rev. 843.