Towards a Feminist Theory of the State.

By CATHARINE A. MACKINNON.
Cambridge, Mass.: Harvard University Press. 1989. Pp. xvii, 330. (US$25.00)

Reviewed by J.C. Smith*

The disputes in legal philosophy over the past forty years all took place within a set of assumptions which we might refer to as legal liberalism, whether it was an individualistic version or a communitarian one. Feminist theory, postmodernism, critical theory, critical race theory, deconstructionism, psychoanalytic social theory, and cognitive science have moved into the field, raising new and very different questions, and offering exciting new insights into problems. The new jurisprudence is challenging the very presumptions which legal philosophy took as given.

The single most important book in the new jurisprudence is C.A. MacKinnon's Towards A Feminist Theory of the State. It is, in my opinion, the only book in legal theory produced in the twentieth century which can rank with H.L.A. Hart's The Concept of Law.[1] Both change the framework and transform the paradigms of the theoretical debate. All discourse within the framework of liberal legal theory has had to place itself in relationship to the ideas and theories of Hart. All feminist legal theory, likewise, must place itself in reference to the writings of MacKinnon. Her work, however, is much more significant than that of Hart, because her perspective has the potential of social revolution, while that of Hart does not.

Catharine MacKinnon, of course, is not the only academic writing in the field of feminism and law, but there are two unique aspects to her work. First, many scholars doing outstanding work in various aspects of those areas of law which directly affect the interest of women, work within the framework of liberal or Marxist theory or Critical Studies. Their writings involve the application of some other kind of theory to the problem of male domination and sexual inequality and/or the transformation of a traditional theoretical perspective through feminist scholarship, but they do not, as does MacKinnon's writing, constitute a uniquely feminist jurisprudence. Second, MacKinnon's scholarship is filled with passion expressed in brilliant prose. It strikes not only at the mind, but at the

* J.C. Smith, of the Faculty of Law, University of British Columbia, Vancouver, British Columbia.

[1] (1961).

heart. This rare combination of controlled anger and penetrating analysis, expressed in a truly remarkable literary style, has produced a book which will be numbered among the classic texts on legal and political theory.

One of the central themes of the book—and long a central issue in philosophy—is the problem of cognition; that is, how we know what we believe that we know, and what is the nature of knowledge. Knowledge consists of an interrelationship between experience and ideas. Knowledge must be systematic in that it requires a coherency between experience and ideas, and between different experiences, and between different ideas. The book is divided into three sections: Feminism and Marxism, Method, and The State. The first two sections, dealing in general terms with methods of knowing, explore the relationship between women's experience and men's ideas in general terms. The third section takes specific male ideas and examines them from the perspective of women's experience.

The first section takes the methodology of classical Marxism with its focus on social domination, its recognition of dynamic social forces, and its development of theory in the context of an historical framework, and develops a critique from a feminist perspective. The second section develops a post-Marxist cognitive theory for feminism, and it is this methodology which makes MacKinnon's feminism truly radical. Marxist methodology, whereby beliefs are tested against the experience of being in a subordinate position in class relations, has led feminists, through women's experience of being situated in a subordinate position in a set of social relations based on sexual hierarchy, to deconstruct male conceptions of reality and patriarchal ideology. MacKinnon, as do other feminists, refers to this methodology as "consciousness raising". It consists of measuring legal and political concepts and theory from the perspective of female experience. Knowledge entails beliefs about what reality is thought to be. MacKinnon demonstrates that there is little coherency between women's experience and male ideas. The epistemological implications of MacKinnon's discussion of feminist methodology are profound. The point of view of traditional legal theory is that sexual inequality is an aberration and an abuse which takes place when the legal system fails. MacKinnon, on the other hand, demonstrates that these abuses are integral to the legal system in that they are implicit within the world view in which legal reasoning seeks coherency. The third section commences with a significant critique of legal liberalism and follows it with chapters on rape, abortion, pornography, and sex equality, which establish that the purported objectivity of the law is in fact male subjectivity. In each chapter she takes the fundamental issues and conceptual structures and reinterprets them from the focal point of what women experience.

There is no question that MacKinnon relies upon and builds on the writings of the pioneers of the feminist movement. Outstanding theory, however, gives the debates a different perspective, an alternative paradigm, and refocuses the issues in terms of a new hypothesis. In the best tradition

of good theory, MacKinnon does just that. It is her focus on the relationship between male sexuality and male domination which is unique, truly innovative, and brings her work together into a comprehensive theoretical focus, making it a classic. It is also this very element which will probably be selected by other feminist theorists as the focus of their criticism, because, as stated by Camille Paglia, "Sex is a far darker power than feminists have ever been willing to admit".[2] MacKinnon commences the first chapter of Towards a Feminist Theory of the State with the statement that "Sexuality is to feminism what work is to marxism: that which is most one's own, yet most taken away".[3] She writes:[4]

> Sexuality is the social process through which social relations of gender are created, organized, expressed, and directed, creating the social beings we know as women and men, as their relations create society.... As the organized expropriation of the work of some for the benefit of others defines a class, workers, the organized expropriation of the sexuality of some for the use of others defines the sex, woman. Heterosexuality is its social structure, desire its internal dynamic, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue.

MacKinnon's focus on sexuality as the dynamic force behind social order might be seen as leading us back to an essentialism rooted in biology. She is not, however, an essentialist. She recognizes that what we believe essential maleness and femaleness to be, is a construct and not a given. The biological foundations of human sexuality in no way necessarily determine social order. It is within the relationship between experience and ideas that social order is forged. Legal and political authority are ideas which have their origin in male sexuality. Sex is one of the most fundamental forces in human existence. Our ideas, however, affect the very nature of our experience, and our experience shapes our ideas. Towards a Feminist Theory of the State has laid the foundation for radical feminist legal and political theory, first by demonstrating the relationship between male sexuality and male political and legal theory, and second by reshaping some of the fundamental ideas in terms of a range of experience which includes all of humanity.

The right to equality before and under the law and to the equal protection and benefit of the law, for example, is one of the fundamental presuppositions of legal and political theory. Yet, at the same time, inequality between the sexes is the norm because male sexual dominance and female sexual submission is institutionalized. Male power entails the capability of constructing social reality from a male point of view and imposing it on females as right, proper, just, legitimate, and natural. Thus, as stated by MacKinnon, "Power to create the world from one's point of view, particularly from the point of view of one's pleasure, is power in its male

[2] C. Paglia, Sexual Personae: Art and Decadence from Nefertiti to Emily Dickinson (1990), p. 3.

[3] P. 3.

[4] *Ibid.*

form".[5] From the male point of view, the right to produce, sell and purchase pornography is a right to freedom of expression. Since, however, pornography defines women in particular ways, the right to produce, sell and purchase it entails the right of men to define women in terms of male sexual desire. The power of males to define abortion as a crime entails the right of males to control the body of females. The power of males to determine what constitutes coercion and consent in the law of rape determines the limits of the power of females to resist male sexual advances. Would the law of rape be what it is today if women had the power to define what constitues coercion and consent? Gender inequality is pervasive because of the power of males to define equality. MacKinnon demonstrates the close interrelationship between male sexuality, male sexual exploitation of the female, gender hierarchy, male domination and female submission and the power of males to construct and shape reality through the legal and political definitions of what constitutes equality, justice, lawfulness and crime. Thus "sexuality is the linchpin of gender inequality".[6] "Male power is a myth that makes itself true",[7] and because law is a part of that mythic structure, equality before the law from the male point of view is consistent with the gender inequality experienced by women.

Feminist jurisprudence has moved from the class rooms into the courts, and from the scholarly journals into the cases. The Women's Legal Education and Action Fund (LEAF), in particular, has been granted intervener status in a number of cases where the outcome will have a significant impact on the welfare of Canadian women. Feminist legal theorists have played a major role in the preparation and presentation of these arguments to the courts. As a result of these presentations, three recent decisions of the Supreme Court of Canada have actually taken women's experience into account in giving new meaning to traditional legal concepts. In an earlier case, *Law Society of British Columbia* v. *Andrews*,[8] McIntyre J., setting out an interpretation of equality which was unanimously accepted by the court, stated that "[t]o approach the ideal of full equality before and under the law—and in human affairs an approach is all that can be expected—the main consideration must be the impact of the law on the individual or the group concerned". This test requires that the meaning of equality, as it applies to a particular person or group, must be determined in the light of the actual experience of that group, and how that experience will be modified in the light of alternative interpretations. The *Andrews* test was applied by the Supreme Court of Canada in *Brooks* v. *Canada Safeway Ltd.*[9] The court, in concluding that a benefit plan which excluded pregnant women was discriminatory on the basis of sex, reversed its earlier

[5] P. 121.

[6] P. 113.

[7] P. 104.

[8] [1989] 1 S.C.R. 143, at p. 165, [1989] 2 W.W.R. 289, at p. 300.

[9] [1989] 1 S.C.R. 1219, [1989] 4 W.W.R. 193.

decision in *Bliss* v. *Attorney-General of Canada*,[10] on the grounds of its incompatibility with the actual situation of women in the work force, and the recognition that pregnancy should not be cause for disadvantage. The reasoning in *Brooks* was adopted by the Supreme Court of Canada in *Janzen and Govereau* v. *Platy Enterprises*,[11] where the court ruled that sexual harassment in the work place constituted a form of sexual discrimination. In reaching this conclusion the court expressly discussed the related issues in terms of women's experience and the new feminist paradigms of traditional concepts. In the third case, *Lavallee* v. *The Queen*,[12] Wilson J., writing the majority judgment for the court in a case where a woman was charged with the murder of the man who battered her, stated that the "reasonableness" component of the test for the plea of self-defence is not that of the reasonable man, but must be judged from the perspective of battered and abused women. These three cases clearly reflect the influence of feminist jurisprudence on approaches to judicial reasoning. If the legal profession and members of the judiciary wish to understand the jurisprudential theory which is shaping legal arguments in cases involving the interests of women, then they should start their reading with Towards a Feminist Theory of the State.

The sterile debates of patriarchal liberalism are being replaced by a new jurisprudence. Embracing, as it does, feminist theory, cognitive theory, postmodernism, and psychoanalytical social theory,[13] its focus is gradually converging on human sexuality, and in particular male sexuality as the critical factor in determining human social order. Male sexuality, however, is a dark continent which even frightened the intrepid explorer of the psyche, Sigmund Freud. "Men still have everything to say about their sexuality."[14] Alice Jardine, in recognizing the importance of male sexuality as a focal point for critical theory, reiterates Nietzche's challenging questions:[15]

> What has *The Man* not been able to talk about?
> What is *the Man* hiding?
> In what respect is *the Man* mistaken?

If the new jurisprudence faces these questions then Catharine MacKinnon's book, Towards a Feminist Theory of the State, will be its cornerstone.

* * *

[10] [1979] 1 S.C.R. 183, [1978] 6 W.W.R. 711.

[11] [1989] 1 S.C.R. 1252, [1989] 4 W.W.R. 39.

[12] Unreported, May 3, 1990, File No. 21022.

[13] See, for example, J.C. Smith, The Neurotic Foundations of Social Order (New York University Press, in press); Linda J. Nicholson (ed.), Feminism/Postmodernism (1990); Jane Flax, Thinking Fragments: Psychoanalyses, Feminism, and Postmodernism in the Contemporary West (1990); Henry Kariel, The Desparate Politics of Postmodernism (1989).

[14] Alice Jardine, Men in Feminism: Odor di Uomo or Compagnons de route?, in A. Jardine and P. Smith (eds.), Men in Feminism (1987), 54, at p. 60.

[15] *Ibid.*, p. 61.

The Judicial Process in Comparative Perspective.

Par MAURO CAPPELLETTI.
Don Mills: Oxford University Press. 1989. Pp. xxxiii, 417. ($110.00)

Compte rendu de Pierre Legrand jr*

Variations sur l'ordre judiciaire

Comme il sied à l'auteur d'un ouvrage dévolu à une matière déjà bien labourée,[1] Cappelletti se préoccupe d'emblée de justifier l'intérêt de son entreprise. Le recueil d'essais qu'il consacre au processus judiciaire entend ainsi, d'abord, se distinguer par la promotion qu'il fait d'un examen des questions politiques et philosophiques en cause à l'aune du socio-libéralisme—"troisième voie" que l'auteur situe sur l'échiquier idéologique quelque part entre l'individualisme libéral et la pensée socialiste. C'est cette optique socio-libérale que Cappelletti applique, par exemple, à deux des thèmes qui figurent en bonne place dans l'ouvrage en rubrique, soit le conflit entre la règle de droit et la discrétion judiciaire dans le processus d'élaboration du droit par le juge, d'une part, et l'opposition entre l'idéal d'indépendance du juge et les préceptes démocratiques appelant l'officier public à répondre de ses actes, d'autre part.

Cette dernière dichotomie entre les principes d'autonomie du judiciaire et de responsabilité publique du juge transparaît particulièrement nettement à travers le processus d'adjudication constitutionnelle. À l'instar de tout mécanisme d'adjudication, celui-ci ne saurait, selon Cappelletti, être réduit à un simple exercice d'herméneutique formaliste dans la mesure où toute interprétation implique un choix et une certaine créativité; c'est dire que l'adjudication fait donc nécessairement sa place à une certaine élaboration du droit. Étant entendu qu'on ne saurait confier l'adjudication constitutionnelle à des organes politiques—ceux-ci relevant de la branche même de l'État qu'ils se proposent de contrôler—non plus qu'à l'électorat, puisque l'objectif d'un texte constitutionnel est précisément de protéger certains individus ou groupes contre la tyrannie de la majorité, la seule option réaliste reste la révision judiciaire. Dès lors que l'on abandonne ainsi la tâche d'adjudication au juge, lequel n'a pas à répondre au pouvoir politique, d'aucuns—les adhérents à l'école critique, par exemple—s'estiment toutefois autorisés à interroger la légitimité de ce contrôle judiciaire. Comment, en effet, accepter que des non-élus puissent exercer une censure sur des élus?

---

* Pierre Legrand jr, de la Faculté de droit, Université McGill, Montréal, Québec.

[1] Voir, pour des analyses comparatives, H.J. Abraham, The Judicial Process (5e éd., 1986); M. Shapiro, Courts (1981); M.R. Damaska, The Faces of Justice and State Authority (1986); J.P. Dawson, The Oracles of the Law (1968); R.C. Van Caenegem, Judges, Legislators and Professors (1987). Voir aussi, F.L. Morton, Judicial Review in France: A Comparative Analysis (1987); A. Pizzorusso (éd.), Law in the Making: A Comparative Survey (1988); K. Lenaerts, Le juge et la Constitution aux États-Unis d'Amérique et dans l'ordre juridique européen (1988).

D'autres contradictions paraissent semblablement incontournables. Il est également vrai qu'alors qu'on se tourne vers le judiciaire précisément en raison de son indépendance du politique, l'on opère, ce faisant, une politicisation du processus adjudicatif. Il est encore vrai qu'alors qu'on justifie l'adjudication constitutionnelle en soutenant qu'un pouvoir politique qui n'est assujetti à aucun contrôle est dangereux—surtout quand il se fait aussi puissant et aussi tentaculaire qu'à notre époque—on choisit de confier ce droit de critique même à des non-élus. Mais Cappelletti soutient que de telles antinomies ne sauraient être irrémédiables et ne doivent surtout pas impliquer un rejet obligatoire de l'un ou l'autre—voire des deux—principes en présence. Il y a plutôt lieu d'opérer une synthèse qui permettra à chacune des préoccupations d'occuper toute la place que la nécessaire coexistence avec sa rivale autorise. Selon l'auteur, le socio-libéralisme dont il se réclame doit sanctionner la primauté de la reconstruction dialectique sur la déconstruction abstraite. Pour Cappelletti, l'existence d'une contradiction, c'est donc le problème imaginaire. Et la véritable difficulté consiste à opérer la réconciliation des thèses opposées. En rejetant comme futiles et pseudo-rationnelles certaines tentatives de proclamation de la stérilité des antithèses, Cappelletti se montre ainsi résolument hostile à l'école critique.

Une autre application de cette approche socio-libérale nous est présentée dans la partie de son ouvrage que l'auteur consacre à l'accès à la justice. Pour Cappelletti, il y a là un mouvement qui reflète de manière tout à fait claire l'engagement de l'État providence à rendre également et effectivement accessibles à l'ensemble des justiciables les bénéfices du système juridico-politique en place. Certes, l'État providence, dans ce contexte particulier, se voit confronté à une crise: impossibilité de jamais atteindre à une égalité d'accès totale; coûts; encombrement des tribunaux; aliénation du justiciable face à une bureaucratie toujours davantage omniprésente. Mais pour Cappelletti, il n'est ici que crise de croissance, à laquelle le développement de mécanismes protecteurs de l'intérêt collectif en marge du gigantisme législatif et administratif—c'est-à-dire, un déplacement vers l'initiative privée—se présente comme un exemple de solution originale.[2]

Il est toutefois une deuxième justification offerte par Cappelletti pour expliquer son recueil d'essais. Il s'agit de la méthode retenue, soit une approche qu'il qualifie de "phénoménologico-comparative".[3] L'auteur entend par là une étude qui, sans verser dans l'empiricisme pur, reste toutefois fondée au premier chef sur des événements et faits observables. Pour Cappelletti, le procédé choisi a l'heur de situer son entreprise à mi-chemin entre le droit naturel—domaine de valeurs abstraites énoncées *a priori*—et le positivisme, où la règle et la justice, la norme et la valeur participent de deux domaines distincts. C'est ainsi que l'ouvrage de Cappelletti ne se présente pas comme une analyse structurale du processus judiciaire,

[2] Pp. 279-299.

[3] P. xiv.

au sens d'une anatomie de ses phases et éléments constitutifs qui s'attarderait aux parties, aux témoins ou à la preuve. Ce qui occupe l'auteur, c'est plutôt de faire ressortir ce qu'il perçoit comme étant les principaux problèmes et défis auxquels se voit confronté de nos jours l'appareil judiciaire. Il a recours, dans son examen, à la méthode comparative laquelle, selon Cappelletti, ne peut être dissociée de l'étude historique, c'est-à-dire de l'examen des causes des normes et institutions à l'étude. L'optique retenue se fait résolument fonctionnelle. L'auteur identifie ainsi un problème social, puis relève les solutions offertes par les différentes juridictions retenues. Il enchaîne avec une identification des différences et des analogies, que celles-ci se manifestent sur le plan historique, sociologique ou culturel. Il tente de dégager des tendances, s'il y a lieu. Il conclut en évaluant chacune des solutions eu égard à l'efficacité avec laquelle elle réussit à résoudre le problème initial. Par l'adoption de cette méthode, qu'il qualifie de positivisme "réaliste",[4] l'auteur fait ressortir, à travers les éléments institutionnels communs qu'il identifie et les valeurs communes qu'expriment ces institutions, des réalités qui, toutes relatives soient-elles, se font néanmoins, parce que supra-nationales, moins contingentes que des réalités purement locales.

L'auteur réunit, dans l'ouvrage en rubrique, neuf études parues entre 1970 et 1988. Globalement appréhendées, celles-ci témoignent de la profondeur de la révolution qu'a vécue le processus judiciaire des dernières décennies relativement aux nouveaux types d'adjudication et aux nouvelles procédures, mais peut-être surtout quant aux nouveaux rôles et responsabilités des juges. Ces derniers sont en effet devenus les fiduciaires d'une conception repensée, soit bi-dimensionnelle, d'un gouvernement dont les pouvoirs se voient, d'une part, davantage circonscrits par l'avènement de documents constitutionnels en matière de droits de la personne et, d'autre part, progressivement plus étendus vu l'expansion de l'État providence et de ses besoins. Le choix de ces textes—dont l'existence fut par ailleurs restée secrète pour nombre de lecteurs canadiens—a été dicté à l'auteur par les trois préoccupations majeures auxquelles le processus judiciaire contemporain lui paraît devoir faire face. Il est question, premièrement, de ce que Cappelletti appelle le "défi constitutionnel": comment assurer la liberté individuelle face à l'oppression gouvernementale? Il s'agit, deuxièmement, du "défi social". Quelle réponse apporter aux problèmes que soulèvent les exigences de la justice distributive et de l'égalité d'accès à la justice? Cette interrogation demande qu'on s'attarde à considérer non seulement les implications de la pauvreté économique mais également l'impact de la pauvreté dite "politique", notion qui doit englober la pauvreté "juridique" des groupes dont les intérêts ne sont pas effectivement représentés au sein de l'appareil judiciaire. Troisièmement, l'auteur relève le "défi transnational" auquel fait face le judiciaire et souligne l'importance de

[4] P. xx.

construire un modèle qui dépasse les frontières de l'État et ce, dans le dessein ultime d'éviter des conflits entre nations.[5]

Dans la première partie de son ouvrage, où il traite de l'évolution du rôle et de la responsabilité du juge, Cappelletti se penche, dans un premier chapitre, sur le pouvoir judiciaire d'élaboration du droit et cherche à en cerner les limites. L'expansion récente de ce pouvoir est avant tout redevable, selon l'auteur, aux deux phénomènes suivants: la croissance de l'interventionnisme législatif et l'adoption par plusieurs pays de déclarations des droits de la personne. Comme il a été mentionné, Cappelletti se montre persuadé que toute interprétation entraîne inévitablement un certain degré de créativité judiciaire. Les vieilles théories selon lesquelles le juge ne ferait que déclarer le droit ne résistent pas à l'analyse.[6] De même qu'en musique ou en poésie, la fidélité au texte passe nécessairement par une marge de liberté créatrice. Des limites, tant processuelles que de substance, demeurent toutefois: la discrétion n'est pas l'arbitraire. Et pour Cappelletti, c'est précisément dans l'identification de ces contraintes—telles la motivation—qui permettent de marquer la frontière entre le légitime et l'illégitime que se situent les difficultés. Dire que les juges élaborent le droit, c'est un truisme. Cela étant, il n'est pas question, pour l'auteur, d'affirmer d'un juge qui construit le droit qu'il peut se conduire comme un législateur.[7] En effet, si la substance de ce que fait le juge peut ressembler à ce que fait le législateur, le processus en cause reste fondamentalement différent. Au-delà de son examen des aspects positifs de cette expansion des pouvoirs judiciaires, Cappelletti ne manque pas d'en souligner les facettes négatives. Il note, par exemple, que le juge est souvent mal équipé pour jouer son rôle créateur.[8] Il réfute toutefois l'argument tiré de l'illégitimité du pouvoir judiciaire dans une société démocratique.[9]

Toujours dans le cadre de cette première partie, l'auteur consacre un deuxième chapitre à la responsabilité des juges. Il s'agit là du rapport général présenté par Cappelletti au onzième Congrès de l'Académie internationale de droit comparé, tenu en 1982.[10] Le rôle du pouvoir judiciaire, constate l'auteur, se trouve singulièrement accru de nos jours et ce, sur deux plans. Dans une optique administrative, ou processuelle, les tâches du juge incluent maintenant des responsabilités telles que l'administration des litiges, l'expédition des auditions, la conduite du procès et l'administration de la preuve. On rejette ici l'idée selon laquelle le litige

---

[5] P. xxi.

[6] Pp. 54-55.

[7] P. 31.

[8] P. 37.

[9] Pp. 40-46.

[10] Voir, pour le rapport présenté au nom de l'Association québécoise pour l'étude comparative du droit, H.P. Glenn, La responsabilité des juges (1982-83), 28 McGill L.J. 228.

ne serait que l'affaire des parties, le juge n'étant selon cette philosophie qu'un arbitre à leur merci, dépourvu de tout pouvoir. D'un point de vue davantage substantif, le juge doit voir à une détermination des faits et procéder à l'application des normes juridiques pertinentes à ceux-ci—opérations dont la complexité se fait toujours davantage ressentir.

Le problème de la responsabilité du juge ne manque pas de se faire à son tour plus aigu au fur et à mesure qu'on lui confie un rôle plus actif en matière de développement du droit. Après avoir exploré l'impact des doctrines d'immunité (et donc d'infaillibilité) de la Couronne et de la chose jugée[11] et déterminé la mesure dans laquelle celles-ci ont fait obstacle à la reconnaissance d'une responsabilité légale du juge, Cappelletti entreprend une typologie des formes de responsabilité du juge, à la lumière de différents systèmes juridiques. L'on constate que cette responsabilité peut d'abord se faire d'ordre politique. Elle peut également être d'ordre social—ce qui comprend les pressions informelles de l'opinion publique voire le rôle de l'électorat lorsqu'il se fait déterminant comme en matière d'élections de juges d'État aux États-Unis. S'agissant, donc, de responsabilité sociale, il sera question tantôt d'une responsabilité du juge lui-même, tantôt d'une responsabilité du système judiciaire pour le fait de son juge. La responsabilité du juge peut encore se faire légale, c'est-à-dire pénale, civile ou disciplinaire. Ici de même, le juge sera tenu responsable à titre personnel ou encore cette responsabilité se verra transférée à l'État, alors responsable pour le fait d'autrui.[12] De cet examen, l'auteur fait ressortir trois modèles. Il rejette le système de la subordination du judiciaire au politique comme celui de l'étanchéité des deux pouvoirs. C'est une troisième construction—"the responsiveness model"—offrant une position médiane entre les deux premières dont il favorise plutôt l'adoption.[13]

La deuxième partie de l'ouvrage de Cappelletti porte sur la révision judiciaire. Il offre, tout d'abord (chapitre III), une analyse comparative qui lui permet de démontrer dans une perspective historique comment s'explique la diversité des approches contemporaines. Ainsi la tradition de common law confine la révision judiciaire au sein du processus judiciaire traditionnel alors que les juridictions de droit civil tendent plutôt à nommer des cours spéciales dotées de pouvoirs particuliers en la matière. Dans ce dernier contexte, la révision judiciaire met directement l'accent sur les lois et non sur les arrêts. Puis (chapitre IV), l'auteur entreprend d'établir que, comme le pluralisme s'accroît dans des pays tels que la France, l'Autriche, l'Allemagne et l'Italie, c'est-à-dire comme les sources de droit se font plus nombreuses, les exigences d'un contrôle sur ce droit se révèlent davantage pressantes. Ainsi y constate-t-on l'existence d'un phénomène de révision judiciaire aussi marqué que ce que l'on connaît aux États-Unis—

---

[11] Pp. 64-69.

[12] Pp. 71-104.

[13] Pp. 112-113.

notamment dans le contexte de la réalité européenne, c'est-à-dire de l'interventionnisme toujours plus marqué de la Cour européenne de justice.

Cappelletti enchaîne avec un essai consacré à la justice constitutionnelle, c'est-à-dire à l'adoption de normes constitutionnelles, d'institutions et de mécanismes processuels dans le but de limiter et de contrôler le pouvoir politique (chapitre V). Dans le contexte particulier de la mise en vigueur de constitutions écrites et de déclarations des droits de la personne—développement qui a notamment modifié la structure gouvernementale d'une grande partie de l'Europe occidentale d'après-guerre—l'auteur s'attarde à la révision judiciaire de la constitutionnalité de l'intervention gouvernementale, tout particulièrement de la législation. Cappelletti analyse dans quelle mesure cette évolution se présente comme une répudiation de Montesquieu, lequel avait écrit que le judiciaire n'est pas un pouvoir.[14] Chemin faisant, il note que cette constitutionnalisation a pour effet d'opérer, par exemple par le biais de déclarations de droits, la positivisation—donc la sanction de l'obligatoriété et du caractère exécutoire—de valeurs traditionnellement reconnues comme non contingentes, c'est-à-dire comme relevant du droit naturel.

Cappelletti s'attarde, dans la troisième partie de son collectif, à considérer les épineuses questions posées par ce qu'il appelle la "justice sociale" et "l'intérêt public". Il se penche d'abord sur l'accès aux remèdes judiciaires dans le cadre du procès civil (chapitre VI). Il explore ainsi les tenants et aboutissants de la question suivante: y a-t-il un *droit* d'accès au tribunal? Dans ce contexte, Cappelletti met en relief deux approches distinctes. Tout d'abord, il souligne comment les juridictions participant de la tradition de common law—comme en Angleterre, aux États-Unis et au Canada, notamment—confient les fonctions d'adjudication à des organes non judiciaires tels des agents administratifs. Quoiqu'il existe une possibilité limitée d'en appeler de ces décisions aux tribunaux, il n'y a là aucune exigence constitutionnelle. Ainsi il est de nombreux cas dans lesquels les prononcés de ces organismes adjudicatifs non judiciaires peuvent être finals et non sujets à révision en cour. Une autre approche consiste, comme en Allemagne et en Italie, à mettre de l'avant une prohibition constitutionnelle empêchant la délégation de pouvoirs adjudicatifs à des organismes non judiciaires à moins que ne soit garantie la disponibilité d'une révision complète—c'est-à-dire tant en fait qu'en droit—de la décision rendue.[15] Au-delà de ces divergences, Cappelletti cherche à mettre en lumière les similarités entre les deux optiques.[16] Une fois discutée la question du droit à l'accès au tribunal, l'auteur s'arrête pour considérer les exigences

---

[14] Voir Montesquieu, Oeuvres complètes (éd. R. Caillois, 1951), t. II, liv. XI, ch. 6, p. 404: "les juges de la nation ne sont ... que la bouche qui prononce les paroles de la loi; des êtres inanimés qui n'en peuvent modérer ni la force ni la rigueur".

[15] Pp. 222-228.

[16] Pp. 231-235.

qu'impose la reconnaissance d'un tel droit sur le plan de son effectivité. Il s'attarde notamment à l'aide juridique[17] et aux petites créances.[18] Puis, l'auteur considère les exigences de l'équité processuelle, soit ce qu'il dénomme l'aspect "qualitatif" de la justice.[19] Dans le cadre de sa discussion du droit à un procès équitable, Cappelletti, au-delà de considérations relatives aux droits d'être avisé et d'être présent au procès, discute de l'admissibilité de la preuve obtenue illégalement.[20]

Cappelletti entreprend par ailleurs d'examiner les moyens par lesquels il se révèle possible de donner effet à l'intérêt public devant les tribunaux (chapitre VII). Considérant, par exemple, les recours collectifs à l'américaine, il discute les obstacles particuliers auxquels sont confrontées les juridictions de droit civil dans ce contexte, notamment en raison de l'aversion pour les corps intermédiaires qui y prévaut depuis l'époque révolutionnaire.[21] Ayant passé en revue tant les nouvelles institutions que celles, parmi les plus classiques, qu'il considère potentiellement adaptables aux nouveaux objectifs poursuivis—comme, par exemple, la constitution de partie civile en France[22]—Cappelletti conclut que les sociétés modernes assistent au déclin progressif de ce qu'il appelle le "two-party, *laissez-faire* concept of civil justice".[23]

Dans la quatrième et dernière partie de son livre, Cappelletti analyse comment les tribunaux sont à même de favoriser l'intégration juridique. L'auteur examine les façons dont le judiciaire peut, par exemple, faciliter l'intégration dans une union fédérale, comme aux États-Unis, et dans une union trans-nationale, comme en Europe (chapitre VIII). Enfin, il s'arrête plus particulièrement à considérer l'activisme dont fait preuve la Cour européenne de justice, attitude qu'il choisit d'endosser (chapitre IX).

S'il faut savoir gré à l'auteur de s'être ainsi imposé, au profit de la communauté juridique, cette systématisation du fruit de plusieurs années de recherche, l'on doit lui être plus reconnaissant encore d'avoir, au fil des différents textes de l'ouvrage en rubrique, démontré de façon éclatante comment, loin de n'être qu'une méthode, l'analyse comparative du droit fait en outre véritablement figure de "perspective", c'est-à-dire de construction scientifique originale érigée à l'enseigne du conséquentialisme.[24] Or n'est-ce pas précisément la marque de la richesse d'un ouvrage que de

---

[17] Pp. 239-240.

[18] Pp. 242-243.

[19] P. 246.

[20] Pp. 257-262.

[21] Pp. 294-299.

[22] Pp. 287-288.

[23] P. 307.

[24] Voir, en ce sens, P. Legrand, Beyond Method: Comparative Law As Perspective (1988), 36 Am. J. Comp. L. 788 (chronique bibliographique sur D.-M. Philippe, Changement de circonstances et bouleversement de l'économie contractuelle (1986)).

se distinguer non seulement par les propositions qui y sont émises mais en outre par les synthèses que celles-ci autorisent le théoricien du droit à opérer? N'est-ce pas, ainsi que l'écrivait Foucault,[25] à la génération de ses doubles que l'on reconnaît la fécondité d'une pensée?

* * *

The Responsible Director.

By JAMES A. MILLARD.
Toronto: Carswell. 1989. Pp. 116. ($39.95)

Reviewed by R. Lynn Campbell*

It was a daunting task that James A. Millard undertook—to organize and write a book on the responsibilities of directors for consumption by directors. He was faced with two primary challenges. First, voluminous material from cases, statutes, regulatory agencies, committees, journals, reviews and other books had to be condensed into readable form for the selected market. Second, and by far the more difficult challenge, a balance had to be struck between extensive analysis of directors' responsibilities and their practical application in the day to day operation of a modern corporation. As Mr. Millard noted, this balance was even more difficult because of the changing social climate in North America together with the resulting change in concepts of corporate morality.

However, in a mere 106 pages, Mr. Millard has gone a long way in meeting these challenges. The Responsible Director has five chapters. Chapter one, Assessing the Position, deals with the considerations that should be taken into account prior to accepting a Board position. Chapter two, Normal Business Activities, examines responsibilities of directors primarily as they are prescribed by various statutes. Financial reporting, dividends, loans, guarantees, trading in the corporation's securities, disclosure of financial information for proxy solicitation, criminal acts, regulatory offences, and taxation are canvassed. Chapter three covers the financing of corporate reorganizations. This includes amalgamations, acquisitions, dispositions, corporate opportunities, public offerings and private placements. Chapter four, Takeover Bids, examines the responsibilities of a director in the acquiring corporation and then in the target corporation. The Canadian experience with poison pills and shark repellents is discussed. The final chapter deals with insolvencies and liquidations. This chapter also includes extracts of pleadings from the impending Canadian Commercial Bank and Northland Bank cases.

---

[25] Voir M. Foucault, Histoire de la folie à l'âge classique (1972), pp. 9-10.

* R. Lynn Campbell, of the Department of Law, Carleton University, Ottawa, Ontario.

The scope of the first challenge would normally succeed in filling several volumes. However, The Responsible Director does cover important areas of concern to directors in an orderly and informative fashion. The writing style is easy and very readable for the non legally trained person. No topic is given too lengthy consideration relative to others. Emphasis is placed upon proper procedures to assist the director in discharging responsibilities when dealing with normal business activities. The practical suggestions given will no doubt add to the current list of reminders of busy directors.

The author admits in the preface of the book that he probably did not succeed in the second challenge. This candid admission for the most part is true. With the possible exception of chapter one, the book is primarily descriptive in nature. In itself that is not a cause for concern, but there are ways in which even at a descriptive level the book might have been more useful. First, footnotes could have been given for further reading to assist the director who wishes to pursue a specific issue. For example whether income tax should or should not be included in determining the solvency test could easily have been referenced for further guidance.[1] Further, instead of simply stating that a debate was "beyond the scope of this book",[2] it would be helpful to the director to give reference as to where further reading on such a debate might be located.

Another area in which the book is lacking is in the balance of subject matter of interest to a director. Certain areas of interest to a director are dealt with much too briefly or are omitted entirely. For example, both environmental and consumer protection legislation are dealt with in the same paragraph.[3] With the changing climate of director responsibility, and public awareness and increasing legislative activity[4] it is submitted that these two areas deserve more than mere mention. There is scant recognition of any responsibility towards the employees.[5] The *Parke* v. *The Daily News*[6] approach has been supplanted with an abundance of legislation which is of interest to directors. Health and safety, workers' compensation, employment standards, labour relations, equal pay and redundancy must now be considered by a responsible director.

In certain areas the author has not developed the subject matter to the extent that the information given is sufficient to even the non legally

---

[1] P. 23.

[2] Pp. 27, 43.

[3] P. 37.

[4] See, *e.g.*, Environmental Protection Act, 1980, R.S.O. c. 141, as amended, S.O. 1986, c. 68 and S.O. 1988 c. 71.

[5] Only a "moral" responsibility is noted at p. 46 with respect to amalgamations. Liability for employees' wages under s. 119 of the Canada Business Corporations Act is noted as well at p. 91.

[6] [1962] Ch. 927, [1962] 2 All E.R. 929 (Ch. D.).

trained person. In the part dealing with corporate taxation, the author notes the provisions under the Income Tax Act which make a director personally liable for defaults of the corporation,[7] and enough is said to make readers aware of the potential liability in this area. However they are then advised to retain experienced legal counsel once an investigation has started. This may be of no assistance to the director because any action taken at this time will be too late. Clearly, reference to at least some of the many cases on the topic, and a reference to further reading would have been useful.

In addition to presenting subjects of interest in a balanced and adequate manner, they must be accurate so that the director who reads them will not be mislead. There is a problem with the author's treatment of corporate opportunity. One is left with the impression that *Peso Silver Mines Ltd.* v. *Cropper*[8] is one of the two leading cases in Canada, but it is submitted that this is not necessarily correct.[9] The author notes that the rationale for directors not being able to profit from their position in the company is that allowing them to profit has historically resulted in corporate scandals and loss to the investing public. This may be true, but the legal rationale for the application of fiduciary duties to directors is deeply rooted in equity's insistence that a person in a fiduciary position must act with loyalty and good faith.[10]

It is the reviewer's opinion that a book of this nature would have been more complete if the author had spent more time with matters noted in the preface. The author states that there are changes in corporate morality and in the responsibilities of directors not contemplated by the founders of limited liability. Why? What changes in society or in the values we share today have precipitated such changes? Are they brought about merely by external factors, or also by internal forces in the modern corporation? A discussion of the concerns raised in the preface would have provided an excellent complement to the existing first chapter.

The final part of the book deals with the future of fiduciary obligations. The material given is interesting, but very descriptive. The reader is denied the benefit of the author's own views. Should directors have an association to respond to issues that affect them as suggested by the Alberta Institute of Law Research and Reform?[11] Should directors receive a minimal level of training before being eligible to serve? Could such training affect insurance premiums? These are all concerns of a practical nature to directors.

---

[7] P. 39.

[8] [1966] S.C.R. 673, (1966), 58 D.L.R. (2d) 1.

[9] See S.M. Beck, The Saga of Peso Silver Mines: Corporate Opportunity Revisited (1971), 49 Can. Bar Rev. 80.

[10] See Laskin J. in *Canadian Aero Service Ltd.* v. *O'Malley*, [1974] S.C.R. 592, at p. 610, (1973), 40 D.L.R. (3d) 371, at p. 384.

[11] P. 104.

This book will probably not be found in the reference section of many law firms. However, it should be recommended reading to corporate clients because it is informative and instructive to a non legally trained director. The author indicates that the book is written primarily for directors of public corporations. Directors of all corporations will find the book useful reading.

* * *

Environmental Approvals in Canada.

By MICHAEL I. JEFFERY, Q.C.
Toronto: Butterworths. 1989. Pp. 406. ($115.00)

Reviewed by Andrew J. Roman*

The Federal and Provincial Governments of Canada together have approximately seventy statutes in force which directly or indirectly regulate the environment. Every province and territory has some form of environmental protection and environmental assessment legislation. There is already a large and growing body of lawyers specialized in environmental law, not to mention closely related fields such as municipal law and land use planning. Yet there is not a single comprehensive Canadian text or service dealing with environmental law.

That is why Michael Jeffery's new loose-leaf service, Environmental Approvals in Canada, is so welcome. Although it does not deal with every aspect of environmental law, it does provide a delightfully comprehensive coverage of the environmental assessment and approval process, covering substantive law, practice and procedure.

Scope of the Work

Michael Jeffery was until recently the chairman of the Ontario Environmental Assessment Board. The focus of his book is Ontario, but its coverage is by no means confined to that province. The very first chapter provides an overview of environmental regimes in every part of Canada, covering environmental assessment and other regulatory legislation. Chapters 2 and 3 then examine the Ontario Environmental Assessment Board and its processes in detail. Chapter 4 covers the extremely important topic of intervenor funding, costs and public participation.

Chapter 5 analyses the principles of environmental management through selected cases and commentary. This makes it possible for someone who has read the applicable legislation to learn quickly how to develop relevant substantive arguments directed to the underlying principles and

* Andrew J. Roman, of the Ontario Bar, Toronto, Ontario.

policies of the environmental approval system. This system has a vocabulary and set of policies all its own, comprising a specialized Environmental Assessment "culture". This chapter will help the outsider to become an insider more quickly, thereby making the process more open and accessible.

Chapter 6, the final chapter, is dedicated to future directions. On the premise that environmental law not only "is", but is also "becoming", it examines new strategies in Canada and also the United States, Australia and New Zealand. The proposed federal environmental assessment review process, currently awaiting the tabling of legislation, is of particular interest. At the provincial level, Ontario's pending statutory reforms and procedural initiatives undertaken by the Environmental Assessment Board and Joint Boards are described. The fact that this book is in loose-leaf form means that it can be revised rapidly as new legislation is proclaimed in force.[1]

Appendices

Of particular value to the practitioner are the appendices. These are marvellously well-organized and complete.

Appendix A sets out the text of environmental legislation in Ontario in the form of the Environmental Assessment Act[2] and the Consolidated Hearings Act,[3] and also provides the Statutory Powers Procedure Act,[4] and the Intervenor Funding Project Act.[5] This would be essential baggage to carry to any environmental assessment hearing.

Appendix B provides an index of public hearings before the Ontario Environmental Assessment Board or Joint Boards, indexed by particular statutes. Thus, under the heading of the Ontario Water Resources Act of 1972,[6] every decision made pursuant to this Act is set out, with the result (for example, approved or rejected). (It is interesting to observe that in those days virtually every application was approved). Similarly, in subsequent years, decisions under the Ontario Water Resources Act[7] are listed, year by year, in alphabetical order. The same coverage is given to the Environmental Protection Act,[8] the Environmental Assessment Act[9] and the Consolidated Hearings Act.[10] (It is again interesting to note that

---

[1] Consistent with this loose-leaf format, each of the paragraphs is individually numbered (*e.g.* 1.40 would be paragraph 40 in chapter 1.

[2] R.S.O. 1980, c. 140.

[3] S.O. 1981, c. 20.

[4] R.S.O. 1980, c. 484.

[5] S.O. 1988, c. 71.

[6] App. B.1.

[7] App. B.2 *et seq.*

[8] App. B.16 *et seq.*

[9] App. B.30 *et seq.*

[10] App. B.33 *et seq.*

approvals were virtually routine under these statutes until the mid-1980s, when a small percentage of applications began to be either denied or approved with special conditions imposed).

As but one indication of the thoroughness of this book, not only are the decisions under the various substantive statutes summarized, even the intervenor funding hearings are covered, with a description of the nature of the project, its proponent, and the amounts awarded to various named intervenor groups which were funded.

Appendix C sets out the text of various referrals from the Minister to the Environmental Assessment Boards and various notices of public hearings issued by the Board itself so that these may be used as forms or precedents by those drafting them, or for general information by others.

Appendix D contains the rules of practice and procedure of the Environmental Assessment Board and the Joint Board for their regular hearings and also for the special applications under the Intervenor Funding Project Act. This appendix includes a sample intervenor funding application so that counsel acting for an intervenor (or even an unrepresented intervenor) can prepare an application for funding with a maximum of convenience.

Appendix E sets out the Environmental Assessment Board's "scoping procedures", which are used by the Board to focus and narrow the issues in environmental assessments. The particular sample given is the proposed class environmental assessment by the Ministry of Natural Resources for timber management on Crown lands in Ontario, which was a major assessment with hearings occupying many months. Because the scoping of hearings is used by the majority of environmental assessments boards, with varying degrees of success, this precedent should be of great value to regulators and practitioners alike.

The Index

A pet peeve of this reviewer is books without an index, or with a poor index. No such complaint arises in this case. Not only is there an index, but it is comprehensive, cross-referenced, and richly detailed. This is in addition to a detailed table of contents. To the busy practitioner, for whom time is money, the index makes the book a pleasure to skip around to find just the right reference quickly. Someone has obviously spent many hours preparing a good index so that we, the readers, can save many hours finding what we need.

Table of Cases

Despite literally hundreds of environmental assessment hearings which have taken place across Canada, there has been relatively limited litigation, mostly involving judicial review. All of the important cases are set out in the Table of Cases, together with additional case references dealing

with related topics such as costs, the fairness doctrine and its various aspects such as notice, the principle of "he who hears shall decide", and so on.

Table of Statutes

The Table of Statutes lists all of the major federal and provincial environmental legislation found in Canada. Where certain statutes are examined in some detail (for example, the Saskatchewan Environmental Assessment Act[11] or the Quebec Environment Quality Act[12]) the Table of Statutes even indexes the specific sections of the statute and where in the text they are discussed.

Summary

Overall, the book is superbly organized. It appears spare in the sense that there is nothing one would wish to edit out as superfluous; there is not the slightest sign of "padding", even in what is the first edition of a brand new service. For the busy practitioner, this is a virtue: less is more. However, as environmental assessment law and practice are still very much in their early and formative years, the book is likely to expand considerably. For now, however, this reviewer was hard pressed to think of anything which the author could have included but did not. Perhaps the only information in this category might be a more detailed account of the decisions of tribunals outside of Ontario, either merely by listing the decisions by statute and by year, as is done for Ontario, or by providing an expanded view of the policies and practices in other provinces by distilling these out of reasons for decision. The same comment could be made for reports of the Federal Environmental Assessment Review Panels. Nevertheless, these additions would have a considerable cost. First, the size, weight and price of this portable volume would have to be increased and, second, the amount of research may be magnified to such an extent that only a national editorial board could deal with it. It is questionable whether the delays and costs in producing this additional detail would be worthwhile at present.

As Mr. Justice Robert F. Reid of the Supreme Court of Ontario states in his foreword to this book, it is difficult to think of anyone better qualified than Michael Jeffery to write it. This reviewer would adopt, with respect, Mr. Justice Reid's closing sentence: "I congratulate him on his accomplishment, and warmly recommend his book."[13]

* * *

[11] R.S.S. 1978, c. A-17.

[12] R.S.Q. 1977, c. 9-2.

[13] P. v.

Evidence in the Litigation Process. Third Edition. Volumes 1 and 2.

By STANLEY SCHIFF.
Toronto: Carswell. 1988. Pp. xxxii, 648; xi, 555. ($120.00)

Reviewed by Marc Rosenberg*

The third edition of Professor Schiff's casebook, Evidence in the Litigation Process, is a comprehensive study of the rules of evidence. It covers all of the areas of evidence from the order of the trial and burden of proof to the intricacies of the major exceptions to the hearsay rule. Many evidentiary rulings are fact specific and the cases included in the book have been skilfully edited so as not to lose the impact of the factual context. Professor Schiff has as well accompanied most of the cases with comments and observations of his own or reference to other writings and cases.

There have, however, been dramatic changes in the law of evidence in the approximately five years since publication of the Second Edition, most obviously the five years of experience with the Charter of Rights and Freedoms.[1] When the second edition was published the Charter had only just been proclaimed and there was virtually no guidance from the appellate courts and the Supreme Court of Canada. The federal government's attempt to codify a substantial part of the law of evidence through Bill S-33[2] was also placed before the Senate. The bill was later withdrawn by the government and while it was apparently intended that a new Bill be placed before the House of Commons, after further consultation with the Bar and the provinces, to date nothing further has been heard.

It is somewhat surprising, therefore, to see that Professor Schiff continues to devote so much space and effort to consideration of the Uniform Evidence Act,[3] the predecessor to Bill S-33, and so little space to the effect of the Charter. The only substantial treatment of the Charter is in Chapter 15: "Exclusion of Evidence under Social Policies unrelated to truth-finding or protection of Adversary Interests at Trial". The discussion, limited to cases and some commentary on the interpretation of section 24(2) of the Charter, follows subchapters on privilege against self-incrimination, evidence obtained by illegal conduct including reference to American caselaw, and evidence obtained by means which are "unjust or unfair" to the accused.[4] In Chapter 14, "Statements by Accused Persons" the only mention of the Charter is a cross-reference to the discussion in

---

* Marc Rosenberg, of the Ontario Bar, Toronto, Ontario.

[1] Constitution Act 1982, Part I.

[2] First Session, Thirty-Second Parliament, 29-30-31 Eliz. II, 1980-81-82, First Reading, November 18, 1982.

[3] See Uniform Law Conference of Canada, Report of the Federal/Provincial Task Force on Uniform Rules of Evidence (1982), p. 541, Appendix 4.

[4] See, *The Queen* v. *Wray*, [1971] S.C.R. 272, (1970), 11 D.L.R. (3d) 673.

Chapter 15. This is not simply a quibble over organization of material or chapter headings. The Charter has worked fundamental changes to the procedure for obtaining statements and the admissibility of confessions. While voluntariness as a test for admissibility of confessions remains important, there should be emphasis on the Charter commensurate with its theoretical and practical importance. Further, the effect of the Charter potentially pervades all aspects of the law of evidence, and while Professor Schiff need not be prescient one would also expect greater discussion not only of those areas where the impact of the Charter is likely to be felt, but greater reference to those cases where the courts, especially the Supreme Court of Canada, have already spoken. For example, the discussion of self-incrimination contains only passing reference to section 13 of the Charter. Neither of the decisions of the Supreme Court of Canada, *R.* v. *Mannion*[5] and *Dubois* v. *The Queen*[6] which deal in great detail with section 13, are included. While *Dubois* is referred to, it is only as a passing reference as authority that section 11(d) of the Charter imposes on the Crown the burden of proving the accused's guilt beyond a reasonable doubt. The Charter has presented an unprecedented challenge to the courts, practitioners and law teachers. Professor Schiff must, I think, take up that challenge if his work is to continue to be the standard casebook in evidence courses in this country. In fairness to Professor Schiff, however, it should be noted that some of the important cases were reported very close to the date of March 1, 1988 which he sets as the cutoff for inclusion of published cases, and it may be that the publisher was reluctant to undertake major revisions at that time.

In contrast virtually every chapter makes reference to the provisions of the Uniform Evidence Act, reference which I would suggest is far out of proportion to the importance of that endeavour. Unless and until Parliament or the Legislatures decide to adopt that Act in some form or other the Uniform Evidence Act is of no practical importance. Moreover, I think it is of limited utility as a teaching device, at least as employed in Evidence in the Litigation Process, where Professor Schiff's lack of enthusiasm for the attempt at codification is apparent. Because the actual text of the Uniform Evidence Act provisions are not included in the two volume casebook the discussion is largely inaccessible. All that the reader gets is something like the following:[7] "Section 103(1) of the Uniform Evidence Act deals with the scope of cross-examination. The qualifier 'substantially' before 'relevant' labels the result of the accommodation between probative value and counterbalancing factors.... Note that the provision does not mention cross-examination to *another* witness' credibility." Unless the user of the case book has a copy of the Uniform Evidence Act at hand, it is simply not possible to follow the discussion.

[5] [1986] 2 S.C.R. 272, (1986), 31 D.L.R. (4th) 712.

[6] [1985] 2 S.C.R. 350, (1985), 23 D.L.R. (4th) 503.

[7] P. 202.

With these faults, it is still my view that Evidence in the Litigation Process is the best vehicle for teaching the law of evidence which is presently available. While often attacked, the case method is very much the preferred way of exploring a subject which is still almost completely driven by judge-made law. Students would obviously prefer a more textbook format, but such an approach would be misleading as it would give false reassurance that the law of evidence is capable of precise definition. Because evidence is an exercise in application of reason, logic and experience to particular fact situations the reasoning process as displayed in the cases and in Schiff's very thought-provoking and insightful comments is a far more valuable way of understanding the subject. Evidence in the Litigation Process could be improved by greater use of problems and hypotheticals but this gap is easily made up during the classroom discussion. Students tend also to be somewhat taken aback by the volume of material. However, once it is recognized that there is no reasonable possibility of getting through all the material in a basic half-year evidence course, then the task of the lecturer is to pick and choose from the material, hoping that by the end of the term the students will have at least understood the process sufficiently to be able to apply the method to areas not covered in the course.

While Evidence in the Litigation Process is not particularly intended for the practitioner it is nevertheless a useful source of caselaw and Schiff's accompanying comments can be helpful in attempting to sort out some of the more difficult evidentiary problems such as the collateral fact rule. The value of the book to the practitioner could, however, be enhanced if Professor Schiff would include more of the case references for some of the principles which are set out in the commentary. A comment like the following: "In several recent cases, the Court of Appeal for Ontario has said no: *Koufis* does not affect the 'well-established principle' that the non-party witness may be cross-examined fully about previous misconduct not resulting in conviction"[8] is extremely frustrating for counsel attempting to use Evidence in the Litigation Process as a research tool. Professor Schiff's explanation for the absence of these case references—"to minimize distraction during reading and to conserve space"[9]—is unconvicing. Yet some of the comments do contain extensive reference to case names and citations without any loss of context or flow of the argument. As regards space, Evidence in the Litigation Process is already a two volume work of over 1200 pages. I doubt very much if inclusion of some case names and citations would have a serious impact on the size of the work at this point.

* * *

[8] P. 557.

[9] P. 3.

Biomedical Experimentation Involving Human Subjects/ L'expérimentation biomédicale sur l'être humain.

Law Reform Commission of Canada / Commission de réforme du droit du Canada. Working Paper 61 / Document de travail 61. 1989. Pp. 69/ 71. (Free of charge)

Reviewed by William A. Webber*

This working paper deals with the ethical and legal issues associated with biomedical experimentation involving humans. It specifically excludes from consideration various kinds of experimentation, such as psychological studies, that do not relate to medical issues concerned with the understanding, diagnosis or treatment of disease. The authors conclude that biomedical experimentation is justified because of its clearly established benefits to the health of individuals and the community. They then attempt to define the conditions and limitations under which such studies may legally take place.

The paper begins with a useful and quite comprehensive review of the history of biomedical experimentation and the evolution and current state of international, Canadian, United States, and French law on the matter. Public concerns on the matter are largely the result of a number of explicit abuses during the past fifty years. It comments on the Nuremberg Code which appears to exclude from participation as subjects those who are incapable of giving informed consent and the Helsinki Declaration which, with certain constraints, would permit it. While breaking no new ground, the paper provides a useful review of the merits of a legislative approach to controlling such experimentation, as opposed to dependence on guidelines such as those developed by the Medical Research Council of Canada. Of the issues raised in this section one of the most interesting is the concept developed under Dutch policy of "no fault" insurance protection for participants in biomedical experiments. Another key issue referred to from French legislation but not elaborated on is that participation must be gratuitous. A significant problem for ethics committees concerned with human experimentation is, for example, what monetary reward constitutes undue inducement to participate in an experimental program.

The report then focuses on the issue of consent and the concept of risk/benefit ratios. In general it concludes that free, uncoerced, consent based on full accurate information is essential and that the benefits of the study must significantly outway the risks. There is the implication that even with full, informed consent, an experiment is not acceptable unless a third party such as an ethics commiteee believes the project to have a sufficiently good risk/benefit ratio. It then goes on to consider those

* William A. Webber, of the Faculty of Medicine, University of British Columbia, Vancouver, British Columbia.

special cases where free informed consent may not be obtainable. In the case of studies on prisoners, the report does not come to a conclusion about whether or not studies on such groups are permissible under any circumstances but concludes that more review of this issue is required. In the case of children and of individuals with impaired mental status it concludes that there must be clear major benefits, the risks must be minimal, the guardian must consent and there should be third party consent, for example, by a judge. If the subject individual is able to give an indication of his or her wishes, the desire not to be a subject of the research should always be respected.

There is a thoughtful section concerning experimentation on embryos or fetuses. The focus is on respect for life and the report takes the position that it is never permissible to produce a human embryo exclusively for purposes of experimentation. It goes on to raise concern about the possibility of commercial exploitation of such research and the risks which could result. It also makes a clear distinction between legislation dealing with the use of embryos or fetuses for experimentation and public policy with respect to abortion. Interestingly, the report comes down in favour of requiring consent by both parents for embryonic or fetal research while present policy on abortion requires only maternal consent.

Overall the paper succeeds remarkably well in reviewing and summarizing the complex and potentially controversial issues surrounding biomedical experimentation on human subjects. It provides an informative background section on the history and status of the subject. Its approach is thoughtful and its conclusions and recommendations for possible legislation are moderate. It raises some interesting issues such as no fault insurance and with the exception of the issue of the use of prisoners, comes down with sufficient definition that the recommendations are a useful basis for debate. The report is clearly written and would be understandable by an intelligent layperson as well as by the medically and legally sophisticated. I found it an excellent summary of the issues and would recommend it to both students or practitioners of law or medicine as well as to health administrators or others, such as members of hospital or university ethics committees, who find themselves wrestling with these difficult but important matters.

* * *

Enforcement of Family Law Orders and Agreements: Law and Practice.
By ANN WILTON and JUDY MIYAUCHI.
Toronto: Carswell Legal Publications. 1990. Pp. 610. ($125.00)

Reviewed by David R. Main*

The enforcement of family law orders and agreements is an issue which no practitioner can afford to take lightly. Although compliance is anticipated when orders are made and agreements are entered into, too often this is not the result. In the event of breach, enforcement is often a complicated and, frequently, a costly process which may be made even more onerous by conflicting case law, less than uniform provincial and territorial legislation and dramatic, recent intervention by the state.

Against this backdrop, the authors have produced a text which sets forth a comprehensive catalogue of enforcement remedies available under all federal and common law provincial family law legislation, the relevant portions of that legislation and an impressive review of more than 575 reported and unreported decisions from across the country.

The substantive portion of the book is divided into three chapters dealing with enforcement issues in each of the areas of support, custody and separation agreements. The appendix contains the legislative provisions relevant to enforcement, inclusive of the federal Family Orders and Agreements Enforcement Assistance Act,[1] which provides a tracing mechanism which may be used in the enforcement of support, custody and access rights and, for the first time, the establishment of a remedy for the garnishment of monies against the Queen in the right of Canada to satisfy support orders and provisions.

Most enforcement proceedings relate to the issue of support and it is not surprising therefore that the longest chapter is devoted to this topic. The discussion covers a wide spectrum of issues, ranging from garnishment to constitutional challenges under the Canadian Charter of Rights and Freedom.[2]

The abduction of a child by a non-custodial parent, particularly in the face of a valid custody order, constitutes one of the most serious and urgent issues in family law. The gravity of such a situation is compounded by the mobility of many parents who resort to such a manoeuvre and seek refuge in another province or country. In chapter 2, the authors review the remedies available for the enforcement of legitimate custodial rights as well as the significant jurisdictional problems which arise when more

---

* David R. Main, Judge of the Ontario Court of Justice (Provincial Division), Toronto, Ontario.

[1] R.S.C. 1985, c. 4 (2nd Supp.).

[2] Constitution Act, 1982, Part I.

than one court may be the appropriate forum in which to settle the issue. Included is a discussion of practical aids to enforcement as well as international ramifications of the Hague Convention.

In chapter 3, the authors turn their attention to separation agreements. This subject is dealt with from three perspectives: factors which make agreements enforceable; the grounds for setting aside agreements; and the remedies, statutory and otherwise, which are available to enforce agreements.

Although the book appears to be orientated towards the law and practice in Ontario, the fact remains that much of the case law, both reported and unreported, emanates from this province. Nonetheless, the principles enunciated in the Ontario cases may have some application in other jurisdictions, particularly if the applicable statutory provisions are the same as or similar to those in Ontario. In that regard, one of the attractions of the text is the appendix which contains all of the relevant federal and provincial legislation.

Throughout, discussion of the issues and the case law is clear, concise and orderly. Multifaceted topics, such as the so-called "one-year-rule", are dealt with in a way in which the reader can focus on any particular aspect while at the same time being able to appreciate the subject matter as a whole.

It is anticipated that the material will be updated by way of insert release at least once per annum. With the excellent base established and the addition of expanded notes on practice, this book constitutes a comprehensive and very useful resource for any family law practitioner or judge.

* * *