Equity, Fiduciaries and Trusts.

Edited by T.G. YOUDAN.
Toronto: Carswell. 1989. Pp. xxix, 438. ($80.00)

Reviewed by Jim Phillips*

This volume is a collection of papers presented at the "International Symposium on Trusts, Equity and Fiduciary Relationships", which was held at the University of Victoria Law School in February 1988. The sixteen authors include academics, judges and practising lawyers from Canada, Australia, the United Kingdom and the United States brought together at a time when equity principles are being increasingly enlarged and debated. The symposium was organized in six sessions, and the order in which the papers appear in the volume reproduces this arrangement although there is no explicit division of the book into parts, and consequently no attempts by the editor to introduce and/or conclude each of the disparate sections. The essays deal with the taxation of trusts, pension plans, business trusts, fiduciary principles, unjust enrichment and constructive trusts, and "New Directions in the Employment of Equitable Doctrines".[1]

I shall say little about the papers in the first three categories, which are largely descriptive of current law or rather narrowly focused. In the former category are Wolfe Goodman's "A Study of Comparative Taxation of Trusts in Four Countries", Maurice Cullity's "Legal Issues Arising Out of the Use of Business Trusts in Canada", Robert Austin's "The Role and Responsibilities of Trustees in Pension Plan Trusts: Some Problems with Trust Law" and Mary-Louise Dickson's "Pension Surplus". The last named's rather unrevealing title conceals a fine review of the ways in which various common law jurisdictions have dealt with the unexpected accumulation of pension fund surpluses. She ends by noting, with specific reference to Ontario, that the enactment of a minimum standard of inflation protection will largely cause the problem to disappear. Each of these four papers are fine surveys of current law and evolving problems, and should be required reading for anybody interested in these areas, although Goodman strangely excludes business trusts from his survey.

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[1] See chapters 13, 14, 15 and 16.

More narrowly focused are Sheldon Jones', "The Massachusetts Business Trust and Registered Investment Companies", which is little more than a potted history and brief survey of the development and uses of the most popular form of business trust in the United States, and Sir Robert Megarry's piece on "Investing Pension Funds: The Mineworkers' Case" which is a short, if trenchant, account of one of his own cases, *Cowan* v. *Scargill*,[2] in which he held that union-appointed trustees were in breach of trust for automatically excluding some investments on political grounds. It makes lively reading and invites comparison with the current issue of South African divestment. Not surprisingly Megarry concludes that his decision was correct, but he notes also that "a policy of preference, rather than prohibition, is by no means a like case".[3] The most strident piece among these three sections is that of John Tiley, "The Taxation of Trusts—Comments", which takes the form of a response to the Goodman paper noted above and is generally critical of tax policies in the United Kingdom and the United States as they relate to trusts, arguing that they have resulted in over-use of the Trust and to unnecessarily complicated trust arrangements for tax avoidance purposes. Unfortunately Tiley is really only concerned with these jurisdictions and ends rather frustratingly with a series of questions titled "Conclusions". I know what my answer would be to questions such as "Do we accept that people should not be encouraged to set up trusts for fiscal reasons alone?", and "Do we accept that with the many different purposes to which the trust idea can be put that it may be appropriate to have differing tax regimes?"[4] I would like to know his answer.

Of perhaps greater interest to readers of this journal are the essays in the other three sections (the fiduciary principle, unjust enrichment, and new directions in equity). In the last decade or so equity has been given new vigour in a series of Supreme Court of Canada decisions,[5] with the result that there has emerged a substantial gulf between the Canadian law of constructive trusts and that of the United Kingdom and Commonwealth jurisdictions such as Australia. A crude characterization of the debate over the wisdom of these developments would pit the "conservatives" who warn us about "palm tree justice", classificatory confusion and the particular inadvisability of extending equitable principles to commercial relationships, against the "liberals", who praise productive innovation and laud the flexibility and modernization of ancient equitable principles. These themes permeate the essays in each of these sections, although their invocation produces at times more heat then light.

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[2] [1985] Ch. 270 (Ch. D.).

[3] P. 158.

[4] Pp. 345-346.

[5] See notably, *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834; *Guerin* v. *The Queen*, [1984] 2 S.C.R. 335; *Holt* v. *Telford*, [1987] 2 S.C.R. 193; *LAC Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Rawluk* v. *Rawluk*, [1990] 1 S.C.R. 70.

The section on fiduciary duty contains the volume's best paper, Paul Finn's "The Fiduciary Principle", in which we are reminded that, "once seen only in familiar environments—trusts, partnerships, agencies and the like—fiduciary has become the peripatetic adjective".[6] His concern is not about the extension of the term *per se*, but about its vague invocation and the unstated judicial rationales for its use, although this criticism is perhaps now substantially less valid in Canada following the Supreme Court's decision in *LAC Minerals*.[7] Finn argues that there is no longer one fiduciary standard, but that the various common law jurisdictions have "more or less explicitly evolved, or are in the process of evolving, a three-tiered hierarchy of standards of protective responsibility".[8] In what he describes as their "ascending order of intensity"[9] they are the unconscionability standard, the good faith standard, and the fiduciary standard. The first of these, which has not found favour in the English courts, has "won an expansive endorsement in the United States and is resurgent in Canada, Australia, and New Zealand".[10] It covers situations in which one person is vulnerable to exploitation by another, either because of the vulnerable party's own circumstances or attributes or because of the positions in which each party finds himself or herself. Finn argues that in such situations the non-vulnerable party's responsibilities are that independent advice be obtained or that full disclosure of the effects of any bargain be made, and that the non-vulnerable party demonstrate to the court that the bargain was fair. He notes perceptively that whereas historically unconscionability was invoked because of one party's weakness, increasingly the modern tendency is to "protect that person because of another's strength".[11] He rejects the labelling of such a relationship as a fiduciary one, arguing that the reasons for its use lie in the fiduciary's duty of disclosure. The result is that this "allow[s] the end one wishes to achieve (that is, the imposition of an actionable duty of disclosure) to contrive the means of it, the finding of a fiduciary relationship". This has "obvious consequences for the meaning of the term 'fiduciary' itself".[12] Finn's second standard, that of good faith, is underpinned by the notion that one should, to some extent, "subordinate the regular pursuit of one's individual interest to the maintenance of reasonable community standards in and for relationships". Good faith "does not encapsulate a single, readily definable idea, it encompasses at least three overlapping themes: the promotion of cooperation between parties to a relationship; the curtailment of the use of one's power over another;

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[6] P. 1.

[7] *Supra*, footnote 5.

[8] P. 3.

[9] *Ibid.*

[10] P. 6.

[11] P. 7.

[12] P. 10.

and the exaction of 'neighbourhood' responsibilities in a relationship".[13] In none of the many situations covered by the good faith standard[14] should one of the parties be considered a fiduciary. That designation, the third and highest standard, should be more clearly defined and restricted: "a person will be a fiduciary in his relationship with another when and insofar as that other is entitled to expect that he will act in that other's or in their joint interest to the exclusion of his own several interest".[15]

While Finn's piece is a majestic *tour d'horizon*, one is left at the end with the nagging question—why engage in such sophisticated classification? He admits that the courts are inclined to throw around the term fiduciary because it "holds out the prospect of a flexible, often bountiful, remedy system" whereas "[g]ood faith and unconscionability do not".[16] Therefore, he argues, the remedies available in the latter two instances should be expanded. If so, there will then be little need to engage in such exercises of categorization as this one!

The remedies issue is dealt with in the two other papers in this section, Mr. Justice Gummow's "Compensation for Breach of Fiduciary Duty" and Timothy Youdan's "The Fiduciary Principle: The Applicability of Proprietary Remedies". The former provides a review of the duties of trustees and other fiduciaries and an instructive but inconclusive discussion of whether the doctrines employed to limit compensation in contract and tort should be similarly invoked in cases of *losses* flowing from breach of fiduciary duty. Youdan's paper complements this by focusing on proprietary remedies for a fiduciary's wrongful *gains*. He revisits the well-known and contentious debate about the "conflict test" and the "profit test" and concludes that proprietary remedies (constructive trust and tracing) should only be available when a fiduciary gains property which the principal/beneficiary would otherwise have acquired.

The two papers on unjust enrichment and constructive trusts highlight the gulf between "conservatives" and those who advocate expansion of this cause of action. David Hayton's "Constructive Trusts: Is the Remedying of Unjust Enrichment a Satisfactory Approach" is disappointing. It begins

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[13] P. 11.

[14] Finn notes, pp. 11-12, that such situations are numerous and include:

> ...(1) the mortagee exercising a power of sale; (2) majority shareholders in their treatment of the minority; (3) the applicant for insurance cover; (4) an insurer settling claims under a limited liability policy; (4) the directors of a marginally solvent company diminishing its assets in the face of outstanding debts; (6) a bank or creditor accepting third party guarantees of a customer's or debtor's liabilities; (7) a broker "closing out" a margin account; (8) one contracting party in his decision or action in relation to the other; (9) the doctor in counselling a patient on proposed treatment; and (10) the possessor of superior information dealing with one to whom that information is not reasonably accessible.

[15] P. 54.

[16] P. 56.

with a brief review of Supreme Court of Canada decisions after 1980 which laments that the court has not yet adequately defined what is or is not a juristic reason for enrichment. While this may be true, he makes little contribution to our understanding of this, choosing instead to attack the line of cases in which Canadian courts have made awards to unmarried cohabitees on the basis of their housekeeping labours. This criticism of these cases both confuses the (familiar to the English) common intention implied trust with the unjust enrichment constructive trust, and displays a lack of understanding of the socio-economic realities of women's position in society which prompted judicial intervention in this country.[17] Hayton follows his brief opening review of Canadian law with an essay about English law. He describes all of the situations in which a traditional "substantive" constructive trust will be awarded by the English courts—breach of fiduciary relationship, trustee de son tort, mistake, undue influence, secret trusts, *etc.* He also discusses "common intention constructive trusts of homes" and proprietary estoppel. He ends with a couple more pages on the inadequacies of Canadian jurisprudence. He seems principally concerned to make two arguments: first, that since the constructive trust has traditionally been employed in a variety of conceptually distinct situations, most of which do not involve unjust enrichment, it would be incorrect to state that the true basis for a constructive trust is the remedying of unjust enrichment. This may be true, but it misses the point that Canadian developments have merely added the unjust enrichment constructive trust to the various other situations in which a constructive trust may be imposed.[18] In developing the law governing constructive trust situations we are told that we should "build on what we have, rather than start afresh".[19] Leaving aside the likelihood that this is precisely what the Supreme Court of Canada has been doing, it is surely absurd to suggest that there is any rational link between the various constructive trust situations that have traditionally

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[17] This section of the paper contains the following rather startling statement on one such Canadian case, *Herman* v. *Smith* (1984), 56 A.R. 74 (Alta. Q.B.) (p. 207):

> Did this woman reasonably expect to receive monetary compensation for her housewifely services and, if so, was the man cognizant of that expectation or ought he reasonably to have been cognizant of the expectation? If they marry they know financial provision may be available under matrimonial legislation.... Many women therefore risk co-habiting with a man in the hope that marriage will follow, while many men take advantage of this by deferring marriage for as long as they can. *The majority of such women surely make a gift of their housewifely services or perform them in return for board and lodging, holidays, and a good time.* Whether unmarried co-habitees should be able to obtain a monetary award and so, to some extent, be put on the footing of married cohabitees seems to be a question of public policy to be resolved by legislation and not by judges.

(Emphasis added).

[18] For an excellent review of Canadian developments, see M.M. Litman, The Emergence of Unjust Enrichment as a Cause of Action and the Remedy of Constructive Trust (1988), 26 Alta. L. Rev. 407.

[19] P. 241.

been accepted in English law. Unjust enrichment is no more distinct from these than they are from each other. Hayton's second point is that constructive trusts may be inappropriate in some unjust enrichment cases, a personal monetary remedy being more suitable. This may or may not be true, although in many cases it will be an irrelevant quibble. In any event it seems less important than deciding whether a party should be compensated at all.[20]

The other paper in this section, Marcia Neave's "Three Approaches to Family Property Disputes—Intention/Belief, Unjust Enrichment and Unconscionability", covers familiar ground in pointing out the artificiality of finding intention in co-habitation property disputes and in criticising the conservative approach of trying to solve such disputes by reference to existing categories: they "have novel facts" and "cannot be resolved by mechanically applying existing rules".[21] She praises the Canadian unjust enrichment approach and finds hope for the future in the recent Australian application of a similar doctrine, that of unconscionable retention of benefit.[22]

This volume's final section comprises four papers on "New Directions in the Employment of Equitable Doctrines". William Fratcher's piece on "Home Purchase Developments" in the United States deals with purchase money resulting trusts and with the equity of redemption. It is primarily descriptive, and most of its value lies in its succinct analysis of historical developments, which dominates the essay. J.D. Davies gives us a broad-ranging review of two developments: the undermining of the rigid certainty rules for express trusts, marked most notably in the House of Lords' decision in *McPhail* v. *Doulton*,[23] and developments in "equity's remedial side". The latter comprises descriptions of recent cases on notice, undue influence, part performance, estoppel, and unconscionability, and he concludes from them that while unconscionability is "the ultimate rationale for equitable intervention in many areas", such intervention must, of course, be related

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[20] In this regard see his conclusion where, having belaboured the conceptual consistency of English law, Hayton correctly comes to acknowledge that while the doctrine may be stable, its application is not. He notes, at p. 244:

> In England, it is possible to do justice according to law due to the leeway afforded judges in concentrating upon, or even exploiting the "mechanics" of common intention constructive trusts and equitable proprietary estoppel principles so that unjust enrichment may be prevented.... Lesser judges, however, may get led astray by the artificialities in searching for an inferred subjective common intention for the detrimental conduct sufficient to establish an estoppel interest.
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> The reality of the matter is that there is probably more scope for "palm tree" justice in common intention constructive trusts and equitable proprietary estoppel principles than there is in the purposive doctrine of unjust enrichment, so that appearances are misleading. The English judiciary, however, likes traditional appearances so that the law may appear stable, though it must always be changing.

[21] P. 264.

[22] *Muschinski* v. *Dodds* (1989), 160 C.L.R. 583 (H.C. Aust.); *Baumgartner* v. *Baumgartner* (1987), 62 A.L.J.R. 29 (H.C. Aust.).

[23] [1971] A.C. 424 (H.L.).

to defined and settled criteria because "Equity must always be able to resist the charge of being palm tree justice".[24] This is the familiar refrain, accompanied by the usual failure to suggest any such criteria of certainty. Davies expounds some rather more interesting themes in the first section of his article, noting that *McPhail* v. *Doulton* has produced a "remarkable" transformation in the express trust. The "tail of enforcement" is no longer "to wag the dog of validity",[25] and emphasis is henceforth to be given to "trusteeship" rather than trusts. Davies might have made this point all the more forcefully by reference to other judicial developments which have greatly weakened the force of the rule against non-charitable purpose trusts.[26] Much of this part of Davies' paper is taken up with the interplay between the new certainty rules for discretionary trusts, which have given trustees much more freedom, and the English statutory provisions for variation of trusts which have also increased the powers of trustees.

J.R.F. Lehane's paper on "Some Australian Developments" starts broadly by reference to the "quite extraordinary number of significant equity cases"[27] decided by the High Court of Australia in the last decade, but then deals primarily with relief against forfeiture in contracts for the sale of land. It ends, strangely, with some very cursory references to other areas of equity. The volume ends with a review of "The Canadian Experience" by Donovan Waters, this country's leading equity scholar. The paper is an enthusiastic assertion of both Canadian distinctiveness and of the importance of moulding legal principle to social reality. The words "palm tree justice" do not appear in the paper. Instead we are referred to the "desire of ... Canadian courts ... to exploit the potential and so interpret the applicability of equitable principles in a manner which reflects the values Canadians hold".[28] The court's enthusiasm for the broad principles of equity has, most notably, led them "out of the wilderness of traditional constructive trust doctrine into the Canaan (as we see it) of unjust enrichment".[29] He then examines three specific areas: the fiduciary relationship between native peoples and the Crown, in which the *Guerin*[30] case plays the starring role; remedies for unjust enrichment when the enriched party is bankrupt; and whether a general judicial power to determine unconscionability should be statutorily enacted. His insights on all these issues are, as ever, worth reading. This paper, which ends the volume, and Finn's paper, which begins it, are undoubtedly the best two. The editor,

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[24] P. 391.

[25] P. 366.

[26] *Re Denley's Trust Deed*, [1969] 1 Ch. 373 (Ch. D.); *In Re Recher's Will Trusts*, [1972] Ch. 526 (Ch. D.); *Re Lipinski's Will Trusts*, [1976] Ch. 235 (Ch. D.).

[27] P. 393.

[28] P. 411.

[29] *Ibid.*

[30] *Guerin* v. *The Queen*, *supra*, footnote 5.

Professor Youdan of Osgoode Hall Law School, is to be congratulated on this piece of packaging in particular and on having produced a generally useful, occasionally provocative and overall very admirable collection of essays.

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Report on the Basis of Liability for Provincial Offences.

Toronto: Ontario Law Reform Commission. 1990. Pp. viii, 60. (Free of charge)

Reviewed by Kent Roach*

Law reform commissions share much in common with codifiers and text writers. In the common desire to reduce an area of law to intelligible principles, they risk losing the tangible trees of life in a forest of abstraction. The Ontario Law Reform Commission's recent Report on the Basis of Liability for Provincial Offences is an example of this phenomenon. A combination of misplaced criminal law orthodoxy and abstract analysis of sections 7 and 11(d) of the Charter of Rights and Freedoms[1] has produced a recipe for losing many trees as well as other tangible public goods that are protected by regulatory or public welfare offences. The Commission has proposed a radical restructuring of regulatory offences which significantly reduces the chances for successful deterrence and prosecution of harmful social and corporate behaviour.

From the start the Commission's perspective is clear. In its introduction, no effort is made to survey the history or present importance of the great variety of regulatory offences that are used as governing instruments.[2] Rather the problem is defined as the possibility that "a person may be convicted where she has merely committed the physical act, or *actus reus*, of the offence, but has not been at fault".[3] Throughout the report the target of regulatory offences is assumed to be individuals outmatched by the state. From this assumption, it follows that the appropriate response is one that is dictated by the "mandate" of "principles" and of "the Charter".[4] Little attention is given to the pervasiveness of corporate and other forms of organizational misconduct in areas such as pollution, workplace safety or

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[1] Constitution Act, 1982, Part I.

[2] On the history, see I. Paulus, Strict Liability: Its Place in Public Welfare Offences (1978), 20 Crim. L.Q. 445, at pp. 450ff. On the extent of such offences, see Law Reform Commission of Canada, Studies in Strict Liability (1974), pp. 45-62.

[3] P. 1.

[4] See, for example, pp. 42-43.

the conduct of licensed or regulated economic activity. The crucial distinctions that the Supreme Court of Canada has made under section 7 of the Charter between individuals and corporations and between the interests of life, liberty and security of the person and those of economic liberty are ignored as is the basic fact "that it is nonsensical to speak of a corporation being put in jail".[5] The result is that the case for absolute liability and reverse onus provisions as part of regulatory schemes is made to depend on the fairness of their use against individuals.

The report focuses on three issues in the administration of regulatory offences which are seen as problematic under the Charter. The first is the use of absolute liability offences in which a conviction follows from proof of the prohibited act. Following the Supreme Court of Canada in *Reference Re British Columbia Motor Vehicle Act*,[6] the Commission concludes that the use of absolute liability where there is a possibility of imprisonment violates section 7 of the Charter. The Commission suggests that the possibility of imprisonment should be interpreted broadly to include even offences for which fines are the only available penalty because of the possibility that the accused could be imprisoned in default.[7] This would mean that the imposition of absolute liability would be constitutionally prohibited for nearly all regulatory offences directed against individuals despite the availability of the narrower option of prohibiting imprisonment should a default of a fine occur.

The Commission goes further and proposes that absolute liability offences should be abolished with no exceptions. It rejects arguments about the deterrent efficacy of absolute liability offences by concluding that "punishment of honest mistakes and unavoidable accidents will not, in fact, exact greater deterrence to unlawful behaviour".[8] This argument assumes that an absolute liability offence could only affect behaviour at the point of time just before the offence is committed. At this time the threat of sanctions will obviously achieve little in preventing honest mistakes and unavoidable accidents. Nevertheless at some point before the prohibited act occurs the threat of absolute liability may very well induce positive behavioral changes. To use an example in which the Commission rejects the use of absolute liability, the threat of absolute liability will obviously not prevent speeding when a driver has a speedometer which does not work; it may, however, encourage drivers to keep their speedometers well

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[5] *Irwin Toy Ltd.* v. *Quebec (A.G.)*, [1989] 1 S.C.R. 927, at p. 1003, (1989), 58 D.L.R. (4th) 577, at p. 632. See also *Thompson Newspapers Ltd.* v. *Director of Investigation and Research* (1990), 54 C.C.C. (3d) 417 (S.C.C.), at pp. 428, per Lamer J.; 440-441, per Wilson J.; 526-527, per L'Heureux-Dubé J.

[6] [1985] 2 S.C.R. 486, (1985), 24 D.L.R. (4th) 536.

[7] P. 42.

[8] P. 43.

maintained.[9] The preventive effects of such general deterrence strategies on organizations operating in complex regulatory schemes may be even greater than on individuals engaged in discrete acts. Harnessed to the narrow time framing of traditional criminal law doctrine,[10] the Commission ignores this important aspect of general deterrence.

The Commission also gives short shrift to the argument that absolute liability achieves what the Supreme Court has termed "administrative expediency" in the successful prosecution of offences.[11] The Commission argues that it has not been demonstrated that strict as opposed to absolute liability offences are unenforceable. Such an empirical conclusion should be supported by a detailed study of compliance before prosecution and the rate of charges, guilty pleas and successful prosecutions. As a doctrinal matter the Commission cannot be faulted for using the policy arguments against absolute liability accepted by the Supreme Court in its leading cases. Nevertheless, an important role for Canadian law reform and royal commissions is to help the judiciary become more sophisticated in the policy analysis that they may have to undertake under section 1 of the Charter.

The Commission proposes the abolition of absolute liability offences largely on the basis of the Supreme Court's reasoning in *Reference Re British Columbia Motor Vehicle Act*.[12] Given the source of their reasoning, it is strange that they apparently gave little consideration to the possibility recognized in that judgment of creating a separate regime of absolute liability offences that are applicable only to corporations.[13] The rationales which led the Supreme Court to reject absolute liability revolve around the protection of individuals from imprisonment without proof of personal fault. The Commission should have offered some explanation of why it believes that a constitutionally recognized distinction between individuals and corporations is either unprincipled or inexpedient.

The second major constitutional problem that the Commission addresses is the reverse onus placed on the accused to make out a due diligence

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[9] This fact situation is taken from *R.* v. *Hickey* (1976), 30 C.C.C. (2d) 416 (Ont. C.A.), discussed in the Report, pp. 43-44.

[10] See generally, M. Kelman, Interpretative Construction in the Substantive Criminal Law (1981), 33 Stan. L. Rev. 591.

[11] *Reference re British Columbia Motor Vehicle Act, supra*, footnote 6, at pp. 518 (S.C.R.), 561 (D.L.R.).

[12] *Ibid.*

[13] *Ibid.* Under such a regime, corporations would not have standing to challenge the offence in the name of individuals who would by definition not be affected; *contra*, *R.* v. *Metro News* (1986), 29 C.C.C. (3d) 35 (Ont. C.A.); *R.* v. *Wholesale Travel Group Ltd.* (1989), 52 C.C.C. (3d) 9 (Ont. C.A.). See generally, K. Webb, Regulatory Offences, the Mental Element and the Charter: Rough Road Ahead (1989), 21 Ottawa L. Rev. 419.

defence to crimes of strict liability. In the landmark decision in *R.* v. *Sault Ste. Marie*[14] Dickson J. reasoned that:

> In a normal case, the accused alone will have knowledge of what he has done to avoid the breach and it is not improper to expect him to come forward with the evidence of due diligence. This is particularly so when it is alleged, for example, that pollution was caused by the activities of a large and complex corporation.

Accepting the Supreme Court's rejection of distinctions between elements of offences and defences in *R.* v. *Whyte*,[15] the Commission concludes that the onus on the accused to make out the due diligence defence violates the presumption of innocence protected under section 11(d) of the Charter. If the court is able to adhere to the rigorous logic of *Whyte*, this conclusion is sound.[16] Even so, matters do not end with the conclusion that rights have been violated. When the Commission deals with section 1 analysis it does so on a global basis even though the Supreme Court shortly after *Whyte* seemed to create an exception in the licensing context.[17] The Commission rejects the approaches taken by law reform bodies in both Saskatchewan and Alberta which argue that the reverse onus is a fair assignment of responsibility to those subject to regulatory offences.[18] The argument that large organizations are in the best position to prove that they exercised due diligence is tossed aside with the assertion that: "[t]he presumption of innocence is a fundamental right that ought to apply to both individuals and institutions."[19] Surely this proposition requires more justification in light of the distinction that the Supreme Court has recognized between constitutional protection of individuals and the regulation of corporations.

The Commission defends its proposal that the accused have only an evidential burden to point to some evidence of due diligence rather than a reverse onus as "a compromise solution that balances the fundamental rights of the accused with the need for effective law enforcement".[20] Despite reaching this compromise, it never really struggles with the fundamental policy question of whether corporations and licensees should benefit from any reasonable doubt before they are fined for hazardous activities such as pollution and safety violations. The Commission assumes all along that

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[14] [1978] 2 S.C.R. 1299, at p. 1325, (1978), 85 D.L.R. (3d) 161, at p. 181.

[15] [1988] 2 S.C.R. 3, (1988), 51 D.L.R. (4th) 481.

[16] See *R.* v. *Wholesale Travel Group Ltd.*, *supra*, footnote 13.

[17] *R.* v. *Schwartz*, [1988] 2 S.C.R. 443, (1988), 55 D.L.R. (4th) 1. In general, the report uses very few concrete examples and does not attempt to break down the wide array of regulatory offences into functional categories.

[18] See Law Reform Commission of Saskatchewan, Proposals for Defences to Provincial Offences (1986), pp. 12-13; Institute of Law Research and Reform, Defences to Provincial Charges, Report No. 39 (1984), pp. 27-28.

[19] P. 48.

[20] *Ibid.*

the standards required for protecting individuals who are prosecuted for Criminal Code offences should govern regulatory offences.

The third major constitutional problem is the one that the Commission tackles most satisfactorily. Using data which suggests that over a quarter of the population of Ontario's correctional institutions is imprisoned for non-payment of fines, it concludes that only clearly wilful defaulters should be imprisoned and that no one should be imprisoned because he or she is too poor to pay a fine. It is in the "imprisonment in default" context that the traditional criminal law and civil libertarian orientation of the report seems most appropriate.

In conclusion, the Commission's report is symptomatic of the distorting influence Charter abstractions can have on tangible policy issues. The Commission re-enforces abstract criminal law principles by reference to sections 7 and 11(d) of the Charter without considering the contextual data that influence legislators to make exceptions from general principles in order to deter and successfully prosecute social and corporate misconduct. Without a detailed consideration of the factors which could justify various regulatory offences under section 1 of the Charter, the Commission replicates the abstract analysis that has issued from text writers, ignores the constitutional distinction between individuals and corporations and unfortunately adds little to the crucial debate about the future of regulatory offences in Canada.

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Journal of Banking and Finance Law and Practice.
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Consulting Editor: Professor ROBERT BAXT; Editor:
GREGORY BURTON.
Melbourne: The Law Book Company. (A.$ 176.00 per year—four issues)

Reviewed by Bradley Crawford*

Despite the relatively large numbers of legal periodicals dedicated to banking and finance law and practice[1] there is still a lot of interest in the appearance of a new journal. For the practitioner there is fresh hope of effective assistance in the continuing struggle to keep up with current developments; for the academic there is the prospect of provocative new perspectives and topics;

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[1] For instance, Banking and Finance Law Review (Canada), Banking Law Journal (U.S.A.), International Banking Law Journal (U.K. and Europe), plus extensive coverage in less specialized journals such as the Business Lawyer (U.S.A.), the Business Law Journal (U.K.) and the Canadian Business Law Journal.

for the student there are new opportunities to publish, as every entry increases the demand for material.

The first number of the Journal of Banking and Finance Law and Practice introduced in Australia this year does not disappoint any of these expectations. Consulting editor, Professor Robert Baxt, who is also Chairman of the Australian Trade Practice Commission, and Editor Gregory Burton have, together with publisher The Law Book Company Limited and the Australian Banking Law Association Ltd., assembled an attractive collection of timely comment and information that promises to be a very helpful and stimulating addition to the available literature.

The content of this first number strikes a good balance between scholarly work and topical informational pieces. There are two lead articles of about twenty-five pages, followed by about a dozen shorter pieces focusing on recent events or developments. If this first number is typical, seven of these shorter pieces will address developments in Australian law on specific topics of interest to the banking and finance Bar (including a survey of recent publications and a book review). The other five are reports on matters of current interest from world banking and financial centres: Tokyo, New York City, London, Singapore and Hong Kong. The list of international editors on the inside cover indicates that future numbers may have, in addition, contributions from Canada by Professor Benjamin Geva of Osgoode (York), Editor-in-chief of the rival Banking and Finance Law Review published by Carswell in Toronto.

Most of the titles or topics will look very familiar to a Canadian reader, but some look distinctly foreign. For example, one editor (Peter Short of the firm of Feez Ruthning) is assigned "Securities and Mortgages"—two topics no Canadian editor would ever link in that manner. It takes a moment for a Canadian reader to realize that "Securities" is the Australian (and English) term for *collateral* or perhaps, *secured transactions*, and has nothing to do with marketable securities or the many esoteric concerns of our securities Bar. Readers will probably also share my wonder at discovering that problems of stamp duties are of sufficient importance and interest in Australia to warrant a share of the section on tax, and a separate editor.

The quality of the articles and notes appears to be quite high. There is a tidy piece by Toronto practitioner Greg A. Fellinger (Borden & Elliot) on the autonomy principle and the fraud exception in letters of credit law. It won the $5,000 (Australian) prize in the inaugural banking law essay, more (I think) for its competent array of the usual cases and commentary on that group of familiar issues than for any attempt to break new ground. How urgently that topic needs some new thinking to break out of the sterility of its present conceptual bounds! When will the courts realize that the so-called doctrine of strict construction is a trap for honest bankers and a refuge for the others? The authorities (assiduously collected

and quoted by Fellinger) continue to insist that the doctrine protects bankers from having to know the customs of the thousands of trades they serve with letter of credit facilities. But to me, it appears to be an impediment to bankers being able to use their common sense to give a reasonable interpretation to both their instructions and the documents submitted in satisfaction of the terms of the credits they issue. In every other banking service the standard of care is that of a reasonable banker, and the law of negligence (plus the generally high levels of competence in the profession) suffice to redress the occasional grievance by a customer. Why should letters of credit be any different?

Gerry McLaughlin (a Professor at Brooklyn law school) wrestles with the same problem in his editorial comment from New York City (an unfortunate duplication in the coverage; no doubt an accident of the editors' need to deal at long distance and with long lead times for publication). He notes judicial authority in the United States refusing to apply the strict compliance doctrine to documentary defects he feels able to describe as "truly trivial" and "hypertechnical". But he sees as an alternative only the quagmire of "substantial compliance", without considering the possible compromise position mid-way, requiring "reasonable compliance" as assessed by the reasonable banker. He is not to be faulted for that, of course. There is absolutely no foundation for such a test in the Uniform Customs or the Uniform Commercial Code. That is my whole point. Instead of replicating articles that document precisely the jam the courts have got themselves into with the strict compliance rule, should not our journals be looking for work that offers some new thinking or opens up some new approaches on these traditional problems?

Gregory Burton of the New South Wales Bar (among others) does an excellent job in his carefully expounded critique of the new Australian Banking Ombudsman scheme. For the average Canadian reader, I suspect it is rather more than he or she would want to know about the subject, but as a comment on a current matter (at the time of writing the first incumbent had not been appointed) it appears to be exceptionally thorough and very helpful.

Professor Alan Tyree (Sydney) comments very briefly on a new money-laundering reporting statute; G. David Cooper and John G. Fox (Hollingdale & Page) review at greater lengths the problems raised by letters of comfort; Schuyler Henderson and George C. Harris (Baker & McKenzie) briefly note the *London Borough* swap case.[2]

In the foreign correspondent section, editor Michael Ryland (Nishimura & Sanada) in Tokyo reports on the change in the approach by the Japanese National Tax Agency that has ended the practice of double-dip depreciation in aircraft lease financing; in London, John Jarvis Q.C. briefly notes three

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[2] *Hazell* v. *The Council of the London Borough of Hammersmith and Fulham*, [1990] 2 W.L.R. 1038 (C.A.).

recent cases (including the *London Borough* swap case); in Singapore, editors Andrew Boxall (Allen Allen & Hemsley) and Sheelagh McCracken, comment, again briefly, on changes introduced by the Malaysian Banking and Financial Institutions Act, 1989; and in Hong Kong, editor Jonathan Brayne (Allen & Overy) notes recent amendments to the Colony's Banking Ordinance, capital adequacy rules, foreign exchange risk supervision rules and the then proposed (since introduced) Hong Kong Interbank Offered Rate futures contract. It seems to me that coverage is very broad, if not very deep, and will be of considerable assistance to subscribers outside the centres themselves.

The Journal's format is ten inch by six inch pages run two columns of text wide, with the footnotes filling uneven amounts of space at the foot of the columns. This gives the page a slightly cluttered appearance, but the text is in fact quite open and easy to read. The publisher proposes four parts per year and is asking $176 (Australian) for new subscriptions. For those with a need or curiosity to know what their counterparts in Australia are doing and thinking about, this Journal should be just what they want.

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Cour d'appel en matières civiles. 1ère édition.

Par F. Brabant, A.R. Hilton, M. Legendre, S. Lussier et P. Rayle. Montréal: Wilson & Lafleur, 1990. Collection "Aide-mémoire", no 106, pp. x, 98. ($19.95)

Compte rendu de Michel Le Bel*

Si l'on se fie à la jaquette de l'opuscule *Cour d'appel en matières civiles,* l'on pourrait être tenté de s'écrier "Enfin!". On nous présente en effet l'ouvrage comme "un guide pratique et complet qui indique toute la marche à suivre pour mener à bien son dossier devant la plus haute instance de la province". Soi-disant rédigé à l'intention des "personnes qui ne veulent rien laisser au hasard",[1] on est censé y trouver une synthèse de législation, jurisprudence, doctrine et ouvrages de référence offrant des modèles de rédaction. Objectif très ambitieux que la première édition n'atteint pas pleinement.

Ce guide n'est toutefois pas dépourvu de toute qualité. Bien au contraire. Le juge en chef du Québec observe dans la Préface que cet aide-mémoire "fait non seulement oeuvre utile mais comble une lacune depuis longtemps déplorable".[2]

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[1] P. v.

[2] P. iii.

Rédigé par cinq praticiens, ce guide renferme effectivement un grand nombre de renseignements théoriques et pratiques dont la prudence commande de prendre connaissance avant de s'adresser à la Cour d'appel. Néanmoins, est-il besoin de le dire, il s'agit d'un ouvrage complémentaire, qui ne saurait nullement remplacer la consultation des sources législatives ou réglementaires. Le praticien qui aura recours à ce guide pratique ne doit pas croire non plus qu'il peut passer outre à la consultation des passages pertinents dans des ouvrages généraux tels le *Code de procédure civile: complément—jurisprudence—doctrine*[3] dans la collection "Alter Ego" ou le *Formulaire de procédure civile*,[4] ne serait-ce qu'en raison de l'omission dans l'aide-mémoire d'un modèle d'une inscription en appel dont la rédaction ne saurait être négligée, surtout depuis l'arrêt *Doyle* c. *Sparling*.[5] Le praticien serait également bien avisé de consulter *L'initiation à l'art de la plaidoirie*[6] de M. Jacques, j.c.a., que *Cour d'appel en matières civiles* contredit sous plusieurs rapports.[7]

On s'attendrait d'un guide qu'il fournisse au moins au praticien peu familier avec la Cour d'appel les références d'ouvrages généraux pouvant l'informer sur les règles, les conventions et les "attentes des juges" en matière de pratique devant la Cour d'appel. Malheureusement, les auteurs se sont arrêtés à la seule mention du classique *Manuel de la Cour d'appel, juridiction civile* de 1941!

Voilà pour illustrer entre autres qu'il ne s'agit pas d'un "guide complet" et qu'il serait imprudent de se présenter à la Cour d'appel sans avoir consulté d'autres sources.

Il faut souhaiter qu'une prochaine édition vienne combler les lacunes dont souffre ce guide (comme d'autres de la collection "Aide-mémoire"). Ainsi, si l'on compare le guide *Cour suprême*[8] à celui qui porte sur la *Cour d'appel*, on notera une même absence de bibliographie, une même absence d'index (d'où consultation obligatoire de la Table des matières qui est beaucoup mieux structurée dans le guide *Cour suprême*), et surtout une même absence de mention de la date du terme des recherches. Il ne s'agit pas là d'une exigence fantaisiste de théoricien, mais bien d'un

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[3] H. Reid, *Code de procédure civile; complément jurisprudence et doctrine* (6e éd., 1990).

[4] H. Kelada et F. Payette, *Formulaire de procédure civile* (1985).

[5] [1987] R.D.J. 307 (C.A.).

[6] (1987); voir particulièrement les chapitres VI, VII et VIII, intitulés à l'instar des parties du mémoire: "Les faits", "Les questions en litige et les moyens" ainsi que "L'argumentation".

[7] Par exemple, M. Jacques conseille à juste titre d'éviter à l'endroit des parties les "désignations fantaisistes" (telles que "Défendeur/REQUÉRANT INTIME", "Demanderesse intimée/REQUÉRANTE") que l'on trouve dans les modèles suggérés par le guide (p. 59), ou d'éviter les formules archaïques (telles ledit, dudit, ladite) qui regorgent dans certains modèles proposés (pp. 96-97).

[8] R. Décary, *Cour suprême* (1988), collection "Aide-mémoire", no 103; l'auteur depuis a été nommé juge à la Cour d'appel fédérale.

défaut important qui réduit l'utilité pratique du guide. Prenons un exemple concret puisque ce guide vise justement la résolution de problèmes concrets.

La personne qui ne veut rien laisser au hasard doit mettre à jour les références qu'elle trouve dans l'aide-mémoire. Celui-ci se limite à donner la référence originale (1982) des *Règles de procédure de la Cour d'appel en matière civile*; une recherche s'impose alors, qui révèle que ces Règles ont fait l'objet de modifications en 1988. Or, cette recherche aurait pu être abrégée si on avait indiqué une date de fin des recherches. Une lecture des quelque cent pages du guide nous apprend en effet que les quatre premières parties du mémoire (501 C.p.c.) ne peuvent normalement excéder cinquante pages; on en déduit que les modifications de 1988 ont été prises en compte par les auteurs malgré l'absence de référence là-dessus. Par ailleurs, ce renseignement important (puisqu'il peut entraîner le refus du mémoire, article 16 R.P.C.A.) ne peut pas être facilement repéré dans l'Aide-mémoire: vu l'absence d'index, seul le recours à la Table des matières peut guider l'usager: or, la rubrique "Présentation matérielle du mémoire et de ses annexes" est muette quant à la limite des cinquante pages. Seule la rubrique "Le contenu du mémoire" en fait état, mais s'agit-il là d'une exigence de contenu?

De nombreux détails encombrent la présentation des renseignements que cherche le praticien. Par exemple, quel besoin pour lui de connaître l'historique de l'article 514 C.p.c. relatif à la désignation de juges *ad hoc*?[9] Quelle utilité pratique d'apprendre que "[l]es juges bénéficient d'une pension égale aux 2/3 de leur dernier traitement après avoir exercé des fonctions judiciaires pendant au moins 15 ans . . ."?[10]

Plusieurs redites alourdissent inutilement la lecture de ce guide. Par exemple, en raison d'un plan défectueux, on est conduit à lire deux fois le numéro et le nom des salles où sont présentées les requêtes. D'abord sous la rubrique "Questions d'ordre pratique", division "Audience", puis sous la rubrique "Jour de l'audience", division "Considérations pratiques".[11]

Une relecture attentive aurait sans doute permis d'éviter ces répétitions, comme elle aurait pu favoriser l'uniformité des références. Un exemple: l'article 501, paragraphe 5 C.p.c. est indifféremment désigné comme "art. 501 al. 5 C.P.",[12] "art. 501(5) C.P."[13] et "art. 501 sous-paragraphe 5 C.P.".[14]

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[9] La résolution de problèmes concrets exige-t-elle de savoir que l'article 514 C.p.c. a fait l'objet d'un amendement en 1987 et que "[c]et amendement a été suggéré à l'époque par feu l'honorable juge Marcel Crête, J.C.Q., afin de réduire les délais d'audition au mérite."? (P. 2). Quel besoin encore de répéter ce renseignement en page 3?

[10] P. 3.

[11] *Cf.*, pp. 42-43, 46-47.

[12] Pp. 25 ou 53.

[13] P. x.

[14] P. 77. Une relecture aurait aussi évité que la note 153 se lise ainsi: "V. *supra*, note 153." On peut aussi déplorer que dans le guide, les références aux diverses lois révisées

Mieux: une relecture par des personnes jouissant d'une bonne compétence linguistique aurait permis la correction d'anglicismes tels que le détestable emploi du verbe "loger (un appel)"[15] dans le sens d'interjeter ou de former (un appel), ou l'emploi du mot "soumissions"[16] dans le sens de prétention. Elle aurait aussi favorisé la ré-écriture de phrases contournées telles que: "Il est souhaitable de communiquer avec le bureau du greffier pour vérifier ... si le jour choisi par l'avocat à l'égard de sa requête est libre."[17]

On peut enfin penser que si l'ouvrage avait été soumis en pré-lecture à d'autres praticiens, un article aussi riche d'interprétations jurisprudentielles que l'article 523 C.p.c. aurait fait l'objet de commentaires plus élaborés; on a consacré une rubrique de plus d'une page à l'article 524 C.p.c. alors que l'article 523 C.p.c. ne figure même pas dans la Table des matières!

Une prochaine édition aurait avantage aussi à mieux cerner le champ couvert: le titre du guide précise que l'on traite des appels "en matières civiles" (curieux pluriel qui disparaît dès la première page[18]) alors que l'on fait référence à plusieurs lois pénales dont le *Code de procédure pénale* (non en vigueur lors de la publication). Il est vrai que l'on exclut nommément le champ des appels en matière criminelle, mais le traitement des appels en matière pénale (autre que criminelle) est inexistant, quoique couvert en apparence.[19] Idéalement, on devrait inclure, comme dans le guide *Cour suprême*, le traitement des appels en matière criminelle auquel s'applique une très importante partie de ce que contient déjà le guide *Cour d'appel.*

Malgré ces lacunes, la première édition de l'Aide-mémoire *Cour d'appel en matières civiles* constitue un instrument indéniablement utile à condition de l'utiliser comme complément aux quelques rares autres ouvrages traitant de la pratique devant la Cour d'appel du Québec.

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du Canada ne respectent pas les exigences formelles de la *Loi sur les lois révisées du Canada (1985),* S.C. 1987, chapitre 48, art. 9, qui prescrit un "ch." comme abréviation de "chapitre" (à l'encontre il est vrai de ce qui est d'usage au Québec).

[15] Par exemple, pp. 7, 19.

[16] Par exemple, p. 49.

[17] P. 43.

[18] Dès la rubrique "1.1 Définition et note préliminaire" (p. 1), on précise que le guide "concerne les appels à la Cour d'appel du Québec en matière civile" (au singulier).

[19] On cite plusieurs dispositions pénales sans préciser les règles qui doivent être suivies lors de l'appel en matière pénale autre que criminelle et sans traiter du problème que pose le défaut par la Cour d'appel du Québec d'avoir adopté en matière pénale provinciale des règles de pratique comme l'y autorise l'article 129 de la *Loi sur les poursuites sommaires* (L.R.Q., c. P-15); voir notamment là-dessus SOQUIJ, *Loi annotée des poursuites sommaires* (2ème éd., 1983), à la p. 153.

The Enforcement of Judgments Between Canadian Provinces. Working Paper No. 64.

Law Reform Commission of British Columbia. Vancouver. 1989. Pp. 103. (Free of charge)

Reviewed by Vaughan Black*

Over the years British Columbia has been the origin of significant initiatives for reform of the law relating to enforcement of judgments between Canadian provinces. While at the University of British Columbia in the 1950s Gilbert Kennedy published two articles in this journal urging courts to adapt the reciprocity approach of the English decision of *Travers* v. *Holley*[1] to the enforcement of *in personam* judgments within Canada.[2] This found favour in the British Columbia courts in the 1980s,[3] with the result that the British Columbia Court of Appeal in *Morguard Investments Ltd.* v. *De Savoye*[4] rewrote the law on interprovincial enforcement of money judgments in accord with Kennedy's suggestion. *Morguard* is on appeal to the Supreme Court of Canada and was argued in April, 1990. That case offers the court an ideal opportunity to reform this area of the law, and since the Supreme Court's reasons will affect the enforcement rules in all the common law provinces the decision is awaited with interest. Meanwhile the Law Reform Commission of British Columbia has issued the present Working Paper[5] setting forth proposals which go even further than *Morguard.* If adopted, the Commission's suggested reforms would result in a complete reworking of the way in which extra-provincial judgments are enforced in that province.

The first half of the Working Paper is a review of the existing law relating to enforcement of judgments between the Canadian provinces. This encompasses both the judge-made law on enforcement of foreign judgments

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[1] [1953] P. 246, [1953] 2 All E.R. 794 (C.A.).

[2] G. Kennedy, 'Reciprocity' in the Recognition of Foreign Judgments (1954), 32 Can. Bar Rev. 359, and Recognition of Judgments in Personam: The Meaning of Reciprocity (1957), 35 Can. Bar Rev. 123.

[3] The first case in which Kennedy's articles were used as ammunition in a frontal assault on the existing enforcement regime was *New York* v. *Fitzgerald* (1983), 148 D.L.R. (3d) 176, [1983] 5 W.W.R. 458 (B.C.S.C.). That attack was unsuccessful, perhaps because it concerned enforcement of a judgment from another country, but Kennedy's views were eventually adopted by the B.C. County Court in *Marcotte* v. *Megson* (1987), 19 B.C.L.R. (2d) 300, 24 C.P.C. (2d) 201, which was decided four months before *Morguard, infra,* footnote 4.

[4] [1988] 5 W.W.R. 650, 27 B.C.L.R. (2d) 155 (C.A.). There has been academic commentary on the appeal decision in *Morguard*: J. Blom, Case Comment (1989), 59 Can. Bar Rev. 359, and V. Black, Enforcement of Judgments and Judicial Jurisdiction in Canada (1989), 9 Ox. J. Leg. Stud. 547.

[5] Hereinafter, Working Paper.

and the reciprocal enforcement legislation in force in the common law provinces. The general contours of the law in this area are well known and not in dispute. The field has not changed significantly since Horace Read mapped it in 1938 in Recognition and Enforcement of Foreign Judgments.[6] Recent descriptions of the law can be found in either of the Canadian texts on Conflict of Laws[7] or in John Swan's Recognition and Enforcement of Extra-Provincial Judgments.[8] Indeed as descriptions of the law these sources are more comprehensive than the Working Paper, for it deals exclusively with enforcement of *in personam* money judgments and consequently does not touch on such matters as recognition of divorce judgments, receivership orders, custody orders or *in rem* judgments relating to property. Still, for persons seeking a succinct encapsulation of the rules relating to enforcement of extra-provincial money judgments in the common law provinces the Working Paper is as good a source as any.

Throughout this review of the current law the Working Paper is quick to assume that the law is cumbersome and "out of step with modern day needs".[9] The rule which stipulates that a foreign judgment will not be enforced unless the defendant was either served with the process of the rendering court while present in that jurisdiction or otherwise submitted to the foreign proceedings is assumed virtually without argument to be inappropriate within a federation. This assumption is also readily accepted in the following section of the Working Paper, which details the need for reform. There the existing rules are assessed as "little more than historical curiosities in a federal state in the closing decade of the twentieth century".[10] Those criticisms are not new. They have become almost conventional wisdom and were repeated in *Morguard*. The rule which made the defendant's submission a precondition to enforceability was crafted by English judges in the last century and reflects a suspicion of foreign proceedings that is out of place when one Canadian province is considering whether to recognize a judgment of another. Still, it would have been helpful if the British Columbia Law Reform Commission had been able to employ its resources to gather some empirical evidence to support its rejection of the present rule. To what extent, for instance, do the existing rules actually result in duplicative litigation? Is the obvious doctrinal antiquity actually productive of waste and injustice? The lack of empirical evidence is particularly glaring in light of the fact that the Working Paper's critique of the existing regime is based primarily on principles of utility, that is,

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[6] Horace Read, Recognition and Enforcement of Foreign Judgments in the Common Law Units of the British Commonwealth (1938).

[7] J.G. McLeod, The Conflict of Laws (1983), pp. 579-756; J.-G. Castel, Canadian Conflict of Laws (2nd ed., 1986), pp. 237-280.

[8] Law Society of Upper Canada, Special Lectures in Rights and Remedies in the Law of Creditor and Debtor (1988).

[9] Working Paper, p. 26.

[10] Working Paper, p. 28.

on the argument that the present rules frustrate Canada's need for greater economic union. It would have been interesting, therefore, to see the results of a survey which inquired into the evasion of money judgments within Canada or which asked lawyers how frequently enforcement considerations dictated their choice of where to bring an action.

The Working Paper does offer one form of evidence to support its dislike for the existing rule, namely the example of comparable federations. Both Australia and the United States have virtually automatic enforcement of sister-state judgments. Moreover, the Working Paper is to be commended for going further afield and noting that the European Economic Community has also moved toward easy enforcement of judgments among its member states.[11] The fact that it is easier to enforce a French judgment in the United Kingdom than it is to enforce an Alberta one in Saskatchewan is a strong argument for reconsideration of the Canadian rule.

The Working Paper's core proposal for reform is as simple as it is fundamental. Money judgments emanating from another Canadian province would be rendered enforceable in British Columbia by the simple expedient of registering them with the British Columbia Supreme Court. With minor exceptions[12] any extraprovincial judgments which would be enforceable under the existing rules if the defendant had submitted to the original action would now be enforceable regardless of whether there was such submission. Judgment creditors would be able to register extra-provincial judgments in British Columbia as of right, without the requirement of obtaining a court order or providing notice to the debtor.

These proposals might appear to be the equivalent of a one-sided dropping of tariff barriers: extra-provincial judgments would be easily enforced in British Columbia, yet British Columbia plaintiffs would still encounter the existing hurdles when faced with actions against defendants in other provinces. The Working Paper seeks to deal with this by calling on the Uniform Law Conference and the provincial Attorneys General to consider the matter at a national level. In any event the metaphor of a one-sided reduction of tariff barriers is not one which the Law Reform Commission accepts, and with this I agree. Existing restrictions on enforcement of judgments within Canada represent a policy of mutual assured destruction, and the appropriate course is unilateral disarmament.

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[11] The Working Paper mentions the EEC position at p. 46. Within the EEC the 1968 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters requires contracting states to enforce each other's civil judgments. The Working Paper fails to point out that three EEC states, Spain, Portugal and Greece, are not yet parties to that convention. However they will have to accede eventually.

[12] The proposed reforms would not apply to judgments below a threshold of $5,000. The reason for excluding such claims is that defendants in actions for relatively small debts should not necessarily be required to defend those actions wherever the plaintiff might choose to bring them.

I have two criticisms of the Working Paper's proposals. First, they do not seek to alter the rule by which foreign judgments for the payment of taxes, penalties or fines are rendered unenforceable. This restriction is based on authorities and reasoning which are at least as antiquated as the cases and considerations which support the rule precluding enforcement of judgments of foreign courts to which the defendant did not submit. Lord Mansfield's statement that "no country ever takes notice of the revenue laws of another"[13] is of dubious applicability among the Canadian provinces, yet although the Working Paper purports to take up this issue it does not engage in any serious consideration of it. This is particularly unfortunate in light of the fact that courts are beginning to reconsider the judge-made bar to enforcement of foreign tax claims.[14] Perhaps the Commission's reluctance to suggest reform to this branch of the law is based on political expediency. Twenty-five years ago the Uniform Law Conference drafted a model statute which would effectively eliminate the bar to enforcement of extra-provincial tax judgments and no province has yet acted on it.[15] Adding this rejected proposal to the Working Paper's already radical suggestions might have ensured the demise of the more significant reforms. However the Commission seeks to ground its refusal to recommend elimination of the bar to tax and penal claims on a more principled basis:[16]

> Judgments for taxes or penalties represent an assertion of one province's authority in another. Enforcement of these judgments does offend, at least symbolically, notions of sovereignty.

This concern with symbols of sovereignty conflicts with the focus on the needs of an economic union which permeates the rest of the Working Paper. Moreover, the Commission rejected this reason when it evaluated the general rule that denies enforcement of judgments in actions to which the defendant did not submit:[17]

> Whatever relevance sovereignty has in the context of enforcing judgments between countries, it has *none* in the context of the enforcement of judgments between provinces. There is little need to explore at any length the relevance of sovereignty in a federation. To the extent that the provinces are sovereign states, it is difficult to see how, except on a philosophical level, the enforcement of one province's judgment in another represents any erosion of sovereignty.

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[13] *Holman* v. *Johnson* (1775), 1 Cowp. 341, at p. 343, 98 E.R. 1120, at p. 1121 (K.B.).

[14] See *Re Sefel Geophysical Ltd.* (1988), 62 Alta. L.R. 193 (Alta. Q.B.). There is a useful analysis of this decision by S.K. Harding, Re Sefel Geophysical Ltd.: A Canadian Approach to Some Specific Problems in the Adjudication of International Insolvencies (1989), 12 Dal. L.J. 412.

[15] Reciprocal Enforcement of Tax Judgments Act, Proceedings of the Conference of the Commissioners on Uniformity of Legislation in Canada, 1966, App. M.

[16] Working Paper, pp. 44-45. The Working Paper also acknowledges the argument for political expediency which I made in the text.

[17] Working Paper, p. 33. (Emphasis added).

It seems strange that sovereignty can be dismissed as a reason for refusing to enforce "regular" judgments between provinces, yet offered up as a justification for refusing to enforce tax or penalty claims. The economic arguments which are deployed throughout the rest of the Working Paper are inexplicably absent when the Commission comes to consider the enforcement of penal or revenue judgments. This review is not the place for a lengthy analysis of this issue, but I suggest that if the Law Reform Commission had approached that question in the same manner as it approached the other issues it dealt with the Working Paper would have recommended that the bar to enforcement of foreign tax and penal judgments be dropped.

My second source of disagreement concerns an area in which the proposals offered in the Working Paper may have gone too far, or at least where the Commission may not have sufficiently considered the consequences of its recommendations. In suggesting that virtually any civil judgment from one Canadian province be enforceable as of right in British Columbia the Commission may have been seeking to place Canadian provinces in a position similar to American or Australian states or the member nations of the European Economic Community: civil judgments from one constituent jurisdiction would be enforceable in another regardless of whether the defendant submitted to the original proceeding. However, due to the scope of the judicial jurisdiction of the superior courts of the Canadian provinces, the Working Paper's proposals may go further. As I have argued elsewhere,[18] the United States, Australia and the European Economic Community are prepared to live with "automatic" enforcement of sister-state judgments only because the judicial jurisdiction of the original rendering courts is significantly restrained. In the United States the source of this restraint is the due process clause of the 14th amendment to the federal constitution.[19] It permits a state court to exercise jurisdiction over a non-resident defendant only when there are significant contacts between the defendant and the forum, and consequently constitutes a check on the judicial jurisdiction of the rendering court. American states can live with a situation in which sister-state judgments are "automatically" enforceable, because they know that the due process clause has served to ensure that the rendering court's exercise of jurisdiction was appropriate. Both Australia and the European Economic Community permit generous internal enforcement among their constituent jurisdictions only in conjunction with comparable restraints on the geographic jurisdiction of the original court.[20]

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[18] Black, *loc. cit.*, footnote 4.

[19] This reads, in part, "nor shall any state deprive any person of life, liberty, or property, without due process of law . . .".

[20] In the EEC the same treaty which provides for "automatic" enforcement provides significant limits on the judicial jurisdiction of the rendering court. See *supra*, footnote 11. In Australia the limits on judicial jurisdiction are found in Part II of the Service and Execution of Process Act 1901 (Cth.).

In Canada the fact that judicial jurisdiction has not in the past been linked with automatic enforcement has permitted some provinces to enact extremely wide service *ex juris* provisions, wider than those permitted to American states by the federal constitution. To step in at this stage and link enforcement to jurisdiction without simultaneously reconsidering the breadth of that jurisdiction may be unfair to defendants. While formerly some defendants could deal with the over-broad judicial jurisdiction of some Canadian provinces by simply ignoring the judicial process of those provinces (confident that any resulting judgment would be unenforceable in their home province), the adoption of the Working Paper's proposals would not permit this. If the Working Paper's proposals were adopted by all provinces then judgments of any Canadian province would be enforceable in other provinces without the comfort of any check on the territorial propriety of the jurisdiction of the initial court.[21]

This is not to suggest that the Working Paper's core proposal is misguided. Automatic enforcement of sister-province judgments does seem appropriate within the Canadian federation. Nevertheless it should be accompanied by some mechanism to insure that the territorial jurisdiction of the rendering court is fair to the defendant. The Working Paper's initiative is to be applauded and it is to be hoped that all Canadian provinces will take up its call to action. If they do, however, they should note that the issue of enforcement of judgments cannot be considered in isolation from the question of judicial jurisdiction.

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The Charter and Criminal Procedure.
The Application of Sections 7 and 11.

JEROME ATRENS.
Toronto and Vancouver: Butterworths Canada Ltd. 1989. Pp. xlviii, 295. ($99.00)

Reviewed by Bruce P. Archibald*

This book is a positive embodiment of the admirable maxim that "there is nothing so practical as good theory". Criminal procedure constitutes probably the most important legal interface between citizens and the state (with the possible exception of income tax procedure!). Criminal procedure

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[21] Forum *non conveniens* does not sufficiently guard against the over-broad territorial jurisdiction of the original court. See, for example, *Robinson* v. *Warren* (1982), 55 N.S.R. (2d) 147 (N.S.C.A.), where the Nova Scotia court's assertion of jurisdiction would have been unconstitutional had it been an American state.

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demonstrates, in practical terms, a society's attitudes toward human rights and its views on how "law and order" must be reconciled with principles of fairness. Criminal procedure ought therefore to be assessed not merely from a technical perspective, but by an analysis of the principles which the procedural system embodies or ought to embody. Jerome Atrens has provided an excellent text which subjects the prosecution process and the procedures found in the Criminal Code[1] to measurement by the yardstick of the Charter of Rights and Freedoms.[2] In doing so, Professor Atrens evaluates the practical impact that the Charter has already had on the exercise of prosecutorial discretion and the procedures found in the Criminal Code for trying accused persons. More importantly, he provides a structure for analysis and reasoned opinions which should help observers to predict what may be (and what ought to be) the outcome of many future Charter challenges to aspects of our criminal procedure. Professor Atrens thus grasps the opportunity to unite theory and practice in a challenging but pragmatic assessment of our Criminal Code procedure.

The book is not as broad as the main title might lead a prospective purchaser to expect. The author acknowledges that the impact of the Charter upon such important topics as police powers and the law of evidence has been omitted. This, of course, flows naturally from his decision to concentrate on Charter section 7 dealing with the rights to life, liberty and security of the person in the context of the principles of fundamental justice, and on Charter section 11 providing constitutionally entrenched procedural rights to persons already at the point of having been charged with an offence. Even on section 11, Professor Atrens has omitted from consideration sub-sections 11(g) (the principles of legality and non-retractivity), 11(i) (the benefit of lesser punishments), 11(c) (the right not to be compelled to testify against oneself) and s. 11(e) (the right not to be denied reasonable bail without just cause). Also excluded is any lengthy consideration of the impact of the Charter on sentencing. Thus, one can only hope that Professor Atrens will consider writing a companion volume of comparable theoretical acumen and practical insight assessing the impact of sections 8, 9, 10, 12 and 13 of the Charter on our criminal procedure.

It is only fair to point out that the book does provide more than its sub-title promises in its focus on Charter sections 7 and 11. There is some consideration of freedom of expression, including freedom of the press and other media of communication, in relation to the right to a fair trial. The equality rights of section 15 are brought into the book's assessment of the application of the Charter to the exercise of prosecutorial discretion. Chapter 1 provides a concise presentation of the general application of the Charter to criminal procedure, including consideration of Charter sections 26, 32 and 33. In addition, the general discussion of

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[1] R.S.C. 1985, c. C-46.

[2] Constitution Act, 1982, Part I.

approaches to interpretation of the Charter, and of the potential impact of the reasonable limits clause in Charter section 1, provide an excellent primer on these topics. Similarly, the overview in Chapter 2 of which courts are of competent jurisdiction to provide Charter remedies, and of what remedies are open under Charter section 24(1), is succinctly expressed general background, necessary to an understanding of Professor Atrens' discussion of the application of sections 7 and 11 to criminal proceedings. The discussion of sections 7 and 11 of the Charter is thus given an interpretive context in expert fashion.

Chapter 4 addresses the right of a person charged to be informed without unreasonable delay of the specific offence. Here Professor Atrens, after stressing the importance of the Charter right, analyses the Criminal Code provisions on informations and indictments, including the problems of laying new charges and of duplicity rules. Perhaps of greatest interest is Professor Atrens' conclusion that "... the courts so far have taken the view that s. 11(a) is to be interpreted in the light of existing law. The constitutional status of s. 11(a) is unlikely, therefore, to produce major changes in law or practice".[3]

The right to trial within a reasonable time, under Charter section 11(b), is the focus of Chapter 5. The complex interplay of the Supreme Court of Canada decisions in *R.* v. *Mills*[4] and *R.* v. *Rahey*[5] is handled very skilfully. The factors to be considered prejudicial to the accused (restrictions on liberty and security of the person, impact of delay on the fairness of the trial), length of the delay, and reasons for the delay (institutional resources, judicial conduct, and conduct or waiver by an accused), as well as the relevant time period, and the nature of appropriate remedies, are structured in such a way as to give pragmatic guidance in applying those principles to new situations. Of course, the whole discussion is prefaced with the observation that while "[t]he accused may not wish to 'enjoy' this right", the right is, in the words of Lamer J. in *Mills* "in its nature an individual right, and has no collective rights dimension".[6] In other words, the accused has the right to a trial within a reasonable time, not the Crown!

The discussion of Charter section 11(d) in Chapter 6 de-emphasizes the well-litigated area of the presumption of innocence, and ventures into the less well chartered waters of the requirements for a fair hearing and an independent and impartial tribunal. In examining the cases dealing with problems of "fair trial", Professor Atrens concludes:[7]

> Indirectly, the decisions upholding existing, traditional procedures are sending the message that the courts will not be receptive to any radical changes in trial

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[3] P. 4-4.

[4] [1986] 1 S.C.R. 863.

[5] [1987] 1 S.C.R. 588.

[6] P. 5-3.

[7] P. 6-14 to 6-15.

> procedure. Although courts are likely to be flexible in entertaining new approaches to regulatory offences, they are unlikely to accept in ordinary criminal cases any significant departures from the adversary trial and the reliance on the traditional process of examination and cross-examination of witnesses.

To those keen on alternative dispute resolution in the criminal process, or perhaps to those seeking greater flexibility in implementation of criminal justice in aboriginal communities, this conservative stability may not be welcome news. On the other hand, Professor Atrens' discussion of the requirement for "independent and impartial tribunals" may indicate constitutional problems with the justice of the peace system in some provinces which could "destabilize" important aspects of criminal procedure, notably the issuance of process and search warrants.

Chapter 7, devoted to the right to trial by jury where maximum punishment is five years or more severe punishment, is particularly well done. Professor Atrens champions the importance of the jury "... as the ultimate protection against arbitrary law enforcement and oppression by Government",[8] even though, as he says, section 11(f) "by its carefully guarded, precise language, conveys no enthusiasm for the right to a trial by jury".[9] The discussion of waivers by the accused of the right to trial by jury, and of limitations on re-election of jury trials, highlights important issues which are currently being litigated. Judicial rulings denying a right to a jury trial under section 11(f) in contempt of court proceedings is pointed to as both noteworthy and perhaps anomalous. Other important interpretive questions shown yet to be resolved are the extent to which section 11(f) might "freeze" the present system by inhibiting reform to our system of verdicts, and the extent to which sections 11(f) and 15 of the Charter might inter-relate in matters of jury selection and juror qualification in relation to race, gender and age. This chapter raises more questions than it answers, but it greatly helps to structure analysis and is very thought provoking.

In Chapter 8, the book moves to examine the extraordinary impact that section 7 of the Charter is having on Canadian criminal procedure. While many might argue that the open-ended nature of the "right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice" may be a source of radical departures, Professor Atrens warns of potential atrophy. He says:

> The danger in the field of criminal procedure is that the attempt in *Reference re s. 94(2) of the Motor Vehicle Act* to avoid the broader realm of general public policy will point courts backward to common law traditions, rather than forward

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[8] P. 7-2, quoting Law Reform Commission of Canada, Working Paper 27, The Jury in Criminal Trials (1980), p. 2.

[9] P. 7-2.

> to the purposive development of principles of fundamental justice. The common law has not always been in the forefront of promoting principles of justice.[10]
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> * * * *
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> The common law tradition of reliance on precedent will guarantee respect for the traditions of our legal system, but this must not be permitted to inhibit the development of the principles of fundamental justice. The constitutional status of the Charter and its purposive interpretation demand that the courts build upon, not duplicate, the past.[11]

These unsettling remarks appear at the conclusion of a masterful, if brief, presentation of the importance of section 7, its history, purpose and scope, its interpretation by the Supreme Court of Canada, and its relationship to the limitation provisions of section 1. It is yet too early in the history of the Charter to determine whether Professor Atrens' fears will be borne out in practice.

From those initial generalizations about section 7, Chapter 9 turns to an elaboration of the meaning of the "principles of fundamental justice" in the context of criminal procedure. Particular topics chosen to illustrate the application of section 7 to criminal procedure include the right to counsel at trial, fairness in bail hearings, procedure at preliminary inquiries, contempt of court proceedings, and appeal procedures. While review of these discussions in detail cannot be undertaken here, it must be said that the topics are canvassed with Professor Atrens' accustomed theoretical acumen and eye for practical detail. Moreover, it is the careful analysis in this kind of chapter which distinguishes this text on criminal procedure from becoming "just another book on the Charter".

Professor Atrens prefaces his remarks on "fundamental justice and prosecutorial discretion" in Chapter 10 with a first-rate, three page, condensed discussion of the powers of the Attorney General and the attorney's agents. He then discusses pre-Charter judicial attitudes to judicial review of executive action, before assessing the impact of the Supreme Court of Canada's decision in *Operation Dismantle*.[12] He concludes:[13]

> The authority of the courts under the Charter is restricted to determining whether or not there has been a violation of the Charter in the law governing the prosecutorial discretion or in the manner it has been exercised. The principles of fundamental justice do not mandate or permit judicial exercise of prosecutorial discretion.

While expressing the view that "courts have shown no eagerness to find Charter violations in the exercise of prosecutorial discretion",[14] Professor Atrens details developments which have occurred through Charter litigation in abuse of process, under the headings entrapment, multiple proceedings, delay, circumventing judicial rulings, and unfairness.

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[10] Pp. 8-25 to 8-26.

[11] P. 8-26.

[12] *Operation Dismantle Inc.* v. *The Queen*, [1985] 1 S.C.R. 441.

[13] P. 10-7.

[14] *Ibid.*

Professor Atrens reserves some of his most interesting commentary for the final chapter, entitled "Reviewing Specific Prosecutorial Powers". There is an excellent survey of certain problems: the singling out of certain categories of cases or persons for special prosecutorial treatment, the constitutionality of the direct indictment, and modes of staying or withdrawing prosecutions, the extent of a constitutional right to discovery in criminal cases, and the potential for applying section 7 to sort out issues of multiple prosecutions. However, the most striking part of the chapter is Professor Atrens' sustained and vigorous propositions on the "unconstitutionality" of the system of hybrid or Crown option offences. As he states at the outset:[15]

> Given the importance of the decision of how a hybrid offence will be prosecuted, it is remarkable that Parliament seldom imposes any guidelines or standards for the exercise of this Crown discretion.

He continues:[16]

> The trouble with hybrid offences is not that the discretion they give escapes judicial review under the common law and under the Charter. The trouble is that they exist. It violates the principles of fundamental justice to permit the Crown to classify an offence. It facilitates discriminatory enforcement in violation of s. 15. As indicated above, judicial review of the exercise of the discretion is not practical and in many instances may be incompatible with judicial impartiality. Even when the discretion is exercised in an even-handed manner, it is objectionable.

It will be interesting to see whether the Supreme Court of Canada can be convinced of the validity of these arguments as the Law Reform Commission of Canada seems to have been. If so, the impact on criminal procedure could be phenomenal.

In conclusion, it should be said that this excellent book should be read by any serious criminal law practitioner, or any non-specialist with an interest in how our criminal justice system must operate in the post-Charter era. The text is well researched, well organized and extremely sound from the "black letter law" point of view. Moreover, it is particularly enjoyable in comparison to much of the professional literature on the topic, because of Professor Atrens' willingness to make general predictions as to how the Charter jurisprudence on criminal procedure may evolve in the future, and to share his reasoned views on how it *ought* to evolve. Professor Atrens turns what might be thought a narrow technical topic into a stimulating analysis going to the core of understanding procedural fairness in Canadian society.

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[15] P. 11-2.

[16] P. 11-7.

Survival of the Sanest:
Order and Disorder in a Pre-Trial Psychiatric Clinic.

By ROBERT J. MENZIES.
Toronto: University of Toronto Press. 1989. Pp. xxii, 310.
(cloth: $40.00; paper: $18.95)

Reviewed by Dianne L. Martin*

The relationship of the medical world of mental illness to the criminal justice system is a complex one, marked by mutual need and mutual distrust. Whether the encounter occurs around the defence of insanity to a serious criminal offence, or on the street between the police and an individual likely to attract the attention of psychiatry, it engages two powerful ideologies, two ways of "seeing", as law and medicine meet and compete in the construction of reality. Robert Menzies' study of the first year that the Brief Assessment Unit of the Metropolitan Toronto Forensic Service provided criminal court judges with psychiatric assessments of people accused of criminal offences, presents a stringently reasoned and much needed challenge to the assumptions behind these assessments; assumptions which misleadingly are defined and justified as a humane and civil response to the vexing question of how the criminal courts should deal with mentally disordered criminal offenders. The work is timely, as legal writing in this area is usually limited to doctrinal analysis of issues such as the defence of insanity, and psychiatric writing, when it does touch on medico-legal issues, is equally limited.[1]

This thorough and insightful analysis of the files of the 592 people assessed during the Metropolitan Toronto Forensic Service and the Brief Assessment Unit's first year of operation, along with the results of the follow-up done on them two years later, reveals that neither the "due process" rhetoric of the law's justification for the use of the "pyschiatric remand" power,[2] nor the "helping profession" rhetoric of the medically modelled psychiatric justification for this type of intervention,[3] can be sustained. Indeed, Menzies demonstrates that this practice does not bring humanity and compassion for the ill to mitigate the strictures of the criminal justice system, but rather serves to use the medical model as a legitimating

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[1] In a study written by psychiatrists on the same subject group, the persons confined in the Metropolitan Toronto Forensic Service Brief Assessment Unit, the authors point out that little or no research effort had been expended on the decision-making process in the medico-legal context of pre-trial psychiatric assessments; C.D. Webster, R.J. Menzies and M.A. Jackson, Clinical Assessment Before Trial (1982), p. 66.

[2] Found generally in section 537(10)(b)(ii) of the Criminal Code, R.S.C. 1985, c. c-46.

[3] Webster, Menzies and Jackson, *op. cit.*, footnote 1, pp. 66, 78.

ideology for primarily legalistic and moralistic crime control requirements.[4] The great weight and respect accorded to "expert" psychiatric opinion in court is harnessed by the equally powerful forces shaping legal decision making, so that:[5]

> The apparently coherent, comprehensive, and expert formulations sent to criminal court judges ... are in practice a carefully crafted set of images, invoked to justify the commonsense interpretive work of forensic clinicians.

Menzies identifies eight substantial criticisms that were widely made at the inception of the Metropolitan Toronto Forensic Service project, which largely remain valid today, both in regard to the Metropolitan Toronto Forensic Service, and to all court ordered assessment programs operating throughout Canada. Concerns were expressed at the time, and are reiterated by Menzies about the doubtful statutory authority for the remands;[6] the lack of protection against self incrimination on the grounds that psychiatrists are not "persons in authority" for purposes of determining the admissibility of any statement given during an assessment;[7] the highly questionable nature of any "consent" to the assessment or any aspect of it, particularly as the majority of those being ordered for assessment were unrepresented; and the high degree of judicial compliance with the recommendations contained in the assessments which removed any real judicial "review" of the process or its validity. As Menzies argues, because of the psychiatric

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[4] Pp. 5-8.

[5] P. 7. His analysis is reminiscent of Doreen McBarnet's work, Conviction: Law, The State and the Construction of Justice (1981), on the powerful impact of the law *per se* (as compared to the actors in the legal system) on the creation of "legal" versus "actual" realities through the use of presumptions, doctrines, and the power of persuasion and manipulation which is inherent in the adversarial system.

[6] Pp. 25, 26. Section 537(1)(b)(ii) of the Criminal Code, *supra*, footnote 2, speaks to a remand in custody for observation on the consent of both the prosecutor and the accused or on medical evidence by a judge at the commencement of a preliminary inquiry. At the very least, this leaves the jurisdiction of the court in a summary conviction matter highly questionable, as the other remand sections all relate to appellate courts or indictable offences.

[7] P. 25. Menzies, in one of the few errors he makes in the substantive law, suggests that this is still the case. The Supreme Court of Canada split on the issue in 1973, in *Perras* v. *The Queen* (1973), 11 C.C.C. (2d) 449, with the majority declining to decide the question as the psychiatrist was being called as an expert, not as a witness to facts, or to the truth of an utterance made by the accused. This appears to be still the law, when the issue is one relevant to post-conviction proceedings, such as the determination of future dangerousness pursuant to s. 753 of the Criminal Code, *supra*, footnote 2; see, *R.* v. *Langevin* (1984), 11 C.C.C. (3d) 336 (Ont. C.A.). However, the admissibility of statements to psychiatrists, for the truth of their contents, made in the course of a court-ordered assessment, has been recognized for some time as requiring a *voir dire* on the basis that the psychiatrist is a person in authority. The Alberta Court of Appeal ordered a new trial on this basis in 1978 in *R.* v. *Conkie* (1978), 3 C.R. (3d) 7, at p. 14. More recently the Newfoundland Court of Appeal's extensive ruling on the issue (holding that psychiatrists and psychiatric nurses in charge of accused persons on remand were persons in authority) was implicitly upheld when the Supreme Court of Canada refused the Crown application for leave to appeal: *R.* v. *Fowler* (1982), 4 C.C.C. (3d) 181.

interest in providing a useful service, the exercise soon became a closed, self-validating circle. At the same time, the scope of the assessments grew increasingly wide. Although "fitness to stand trial" (because of mental illness) is the determination which gives jurisdiction for these remands, much wider issues, including suitability for bail, appropriate sentence, and dangerousness are routinely addressed in the assessments, and, as noted above, acted upon by the courts.

Against these overlapping and compounding structural flaws, Menzies develops and details a chilling picture of the psychiatric remand as a self-fulfilling and self-satisfied tool of social control. It is a tool that justifies itself as more humane and civil than that common in "the bad old days" when mentally disordered individuals in conflict with the law were simply punished, not treated and "cured". It is exposed by Menzies as false as he proves his major premise that the nature and quality of the psychiatric activities involved are framed by the expectations of legal officials with whom clinical classifiers interact, and not by any therapeutic, or even scientific, goals.[8]

The cycle commences with the involvement of the police, a profession as prone to self-justification as any other,[9] although perhaps less prone than most to admit it, as they encounter someone doing something that is to them both criminal and "crazy". The police are then faced with dilemma posed by the limited therapeutic resources available, no hospital has room for the individual who has now become a police responsibility. Occupational pride and responsibility mandate that something be done, even when the conduct is trivial. The initial reluctance to engage actively in psychiatric "do-gooding" demonstrated at the commencement of the Metropolitan Toronto Forensic Service project quickly passed as police encountered a group of psychiatrists anxious to garner "satisfied customers" and who thus were sympathetic and responsive to police needs. In this climate, the police quickly learned psychiatric jargon, and how best to describe the offence and the offender in order to achieve their goal—generally to get the person off the street ("treated") and labelled as "dangerous" (and thus a worthwhile object of police attention).[10]

The criminal justice system has learned a modicum of caution about the completeness of the picture painted by a police officer. The rhetoric and practice of a criminal trial at least permits it to be challenged, however ineffectually.[11] That is not the case, however, with psychiatric assessments

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[8] Pp. 5-8.

[9] Generally, see Richard V. Ericson, Making Crime: A Study of Detective Work (1981); Reproducing Order: A Study of Police Patrol Work (1982).

[10] Pp. 54, 55, 58, 71, 78.

[11] In the face of overwhelmingly high rates of conviction, the efficacy of any such challenge is doubtful, except in individual cases. Indeed, that is the premise convincingly set out in McBarnet, *op. cit.*, footnote 5.

presented to criminal courts. These reports are enhanced by the powerful aura that surrounds the twin gods of science and medicine. To challenge the reports is to challenge these gods. Menzies illustrates that judges, already inclined to concur with the wishes of the police and the prosecution, and tasked with a crime control function, soon became more than happy with the Metropolitan Toronto Forensic Services' "product",[12] which very closely complied with the presenting police drafted information, and anticipated "common sense" result. He identifies eight discretionary practices used by the staff at the Metropolitan Toronto Forensic Service to produce what he describes as pseudo-scientific reports designed to satisfy a crime control function by means of an apparently humane and medically informed method. The description he paints depicts anyone's worst nightmare of being caught up in a "One Flew Over the Cuckoo's Nest" world; a world where resistance and explanation are interpreted as signs of mental illness, where contrary opinions are edited out so that a "united front" is presented to the court, and where both mental illness and criminality are presumed to exist, the task simply being to find the best stereotypical label to affix.[13] The duty to determine fitness to stand trial fades in significance as reports are written advising the courts on everything from the efficacy of punishment to the value of imprisonment in a particular case. Despite the fact that it is impossible to predict future dangerousness with any degree of scientific accuracy, the assessments routinely purport to answer this question, which is, of course, of urgent interest to the courts.[14]

The incredible power of the process lies in its grounding in unbreachable, unchallengeable expertise. No one in the legal system really knows what to do with someone who hears voices the rest of us do not hear. We look to the experts to tell us what to do, to solve the problem, and they comply. Short of calling contrary expert opinion, usually unavailable to unrepresented accused, particularly on minor charges or early in the process, we gladly abdicate responsibility for the problem to psychiatry, and congratulate ourselves on a humane response to madness. When those voices order arson, or murder, the compulsion to act as the experts mandate is substantial. As ever when ends are permitted to justify means, however, it is a short step to similar compliance when the voices merely mandate eccentric, or rude, or anti-social behaviour.[15] And of course, once a person is labelled as dangerous, or, potentially so, the compulsion to intervene is even stronger, as is the need to justify the intervention.

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[12] Pp. 24-25.

[13] Pp. 93-94.

[14] Pp. 94-137.

[15] P. 71.

Menzies concludes with a strong caution, which should guide anyone engaged in the criminal justice system:[16]

> The medico-legal complex has itself become a truly Darwinian world in which only the sane can survive, at least as survival happens to be defined by those in power.

This is a powerful book, important to all who work in the criminal justice system, and to all who wish to understand the role of experts and expertise in legal decision making.

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The Law of Nations and the New World.

By L.C. GREEN and OLIVE P. DICKASON.
Edmonton: University of Alberta Press. 1989. Pp. xiii, 303. ($30.00)

International Law and Aboriginal Human Rights.

Editor: B. HOCKING.
Sydney, Australia: Law Book Company. 1989. Pp. xxii, 195 ($29.50)

The Rights of Peoples.

Editor: J. CRAWFORD.
New York: Oxford University Press. 1988. Pp. x, 236. ($55.00)

Reviewed by Mary Ellen Turpel*

Apart from a few marginalized theories, law is conventionally seen to play a universalising role, with an ideology that is neutral or indeed absent all together. International law is no exception here, as the contemporary discipline of international law is not one which seriously entertains matters of ideology, history or culture. For the most part, it has not been colonized by the critical reflections of other disciplines such as history's critique of progressivism, literary theory's sensitivity to interpretation and the social construction of meaning, or political theory's debate about modernity and community.

Nonetheless, complex and paroxysmal issues for international law and theory, having been around since the dawn of the discipline, are in need of scholarly attention that exposes itself to the light of wider intellectual developments. One key issue for international law (and national law as well) is the relationship between so-called "civilized", or European peoples, and so-called "uncivilized", or indigenous, peoples. The logic of the civilized

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[16] P. 231.

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and the primitive drove colonization and propelled the settlement of the "New World". It has haunted relations among indigenous peoples and dominant nation-states since first contact.

Three new books address the status of indigenous peoples within the international legal order, and indigenous claims to territorial or political sovereignty. The texts assess the claims of indigenous peoples within the context of both national and international law. Together they comprise an interesting study of both the questions surrounding the last vestiges of global colonization (indigenous peoples enclaved in nation-states), and the difficulties within the current conceptual framework of the discipline of international law in coming to terms with the contemporary predicament of indigenous peoples.

For the past few decades the position of indigenous peoples in the international legal order has been considered generally in the context of discrimination and human rights.[1] In 1983, following a laborious study of the problem of discrimination against indigenous peoples, the United Nations Special Rapporteur Martinez Cobo concluded the following about the plight of indigenous peoples in his Final Report:[2]

> Much of their land has been taken away and whatever land is left to them is subject to encroachment. Their culture and their social and legal institutions and systems have been constantly under attack at all levels, through the media, the law and the public education systems. It is only natural, therefore, that there should be resistance to further loss of their land and rejection of the distortion or denial of their history and culture and defensive/offensive reaction to the continual linguistic and cultural aggressions and attacks on their way of life, their social and cultural integrity and their very physical existence. They have a right to continue to exist, to defend their lands, to keep and to transmit their culture, their language, their social and legal institutions and systems and their ways of life, which have been illegally and unjustifiably attacked.

With the involvement of representatives of indigenous organizations from around the globe, a special Working Group of the United Nations has been meeting since 1984 to examine the human rights situation of indigenous peoples with a view to the development of one, or a series of, international declarations on the subject. At the 1989 session of the Working Group on Indigenous Peoples, a Draft Declaration of Indigenous Rights was developed and debated. The Draft instrument includes many interesting provisions, especially from a Canadian perspective, including several articles providing for limited "autonomy" for indigenous peoples.[3]

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[1] See, M. Davies, Aboriginal Rights in International Law: Human Rights, in B. Morse (ed.), Aboriginal Peoples and the Law (1985), p. 745; R. Barsh, Indigenous Peoples: An Emerging Object of International Law (1986), 80 AJIL 369.

[2] Problems of Discrimination against Indigenous Peoples, United Nations E/CN.4/Sub.2/1983/21/add. 8, p. 49.

[3] See the Report of the Working Group on Indigenous Peoples, Seventh Session E/CN.4/Sub.2/1989/36, p. 26.

These recent international developments should be of interest to Canadian lawyers working on aboriginal claims, and to those curious about the content of constitutionally guaranteed rights in section 35 of the Constitution Act, 1982. They should also underscore the extent to which aboriginal claims against the state cannot be confined to an exclusively national context. Indeed the breakdown of political mechanisms within the state has led many indigenous peoples to assert themselves on an international level for redress of their political, social, cultural and economic problems. In some cases this has followed exhaustion of domestic remedies (or at least a state of "being exhausted" by domestic remedies). More frequently it is being viewed as the only appropriate avenue of pursuit.

Nagging fundamental questions of legal theory, cultural anthropology, and history plague both the national and international legal dimension of indigenous-state relations. It is clear that the concerns of indigenous peoples do not fit easily into the conception of individual human rights central to virtually all national and international instruments. Indeed, it has been suggested that the whole area of international human rights law reflects a relative philosophy:

> It is becoming increasingly evident that the Western political philosophy upon which the [United Nations] Charter and the Declaration are based provides only one particular interpretation of human rights, and that this Western notion may not be successfully applicable to non-Western areas for several reasons: ideological differences whereby economic rights are given priority over individual civil and political rights and cultural differences whereby the philosophic underpinnings defining human nature and the relationship of individuals to others and to society are markedly at variance with Western individualism ... it is evident that in most states in the world, human rights as defined by the West are rejected or, more accurately, are meaningless. Most states do not have a cultural heritage of individualism, and the doctrines of inalienable human rights have been neither disseminated nor assimilated.[4]

In this context, it is important to note that indigenous claims are not individual human rights claims against the state. They are the longstanding claims of collectivities or "peoples", frequently coupled with political claims for distinct status. This should be evident to Canadian lawyers in light of the rhetoric surrounding the situation with the Mohawks in Oka, Quebec, in the summer of 1990. However, indigenous claims have been downgraded historically because most indigenous peoples were seen as uncivilized, savage, or indeed incapable of putting forth claims on an equal footing with European colonisers. Today they are asserted as the international rights of "peoples" to self-determination, or the rights of collectivities to cultural, social and political distinctiveness.

This whole area of study and ongoing conflict now raises many dilemmas for international lawyers and historians who are retracing colonisation. What are the rights of "peoples"? What authority does early

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[4] A. Pollis and P. Schwab (eds.), Human Rights: Cultural and Ideological Perspectives (1980), pp. 1, 13.

international legal literature have, especially when it presumes that indigenous people are inferior and in need of protection? How can/does contemporary international law respond to these claims? How can/do national legal systems respond to these claims? What is the relationship between international and national law in this area? Quite apart from a scholarly interest in these questions, how do we assess current court conflicts between aboriginal peoples and the Canadian state as witnessed in Alberta with the Lubicons, in Quebec with the Mohawks and elsewhere?

In 1988, when the Manitoba Court of Appeal considered the justiciability of the Manitoba Métis action for a declaration regarding land promises to them in the Manitoba Act, 1870, O'Sullivan J.A. suggested that:[5]

> I add some comments on the need to develop the rule of law so as to make possible a legal solution to minority claims.... It is evident that since the advent of the age of nationalism and democracy world society has failed to develop satisfactory rules for recognition of communal minority rights and for the balancing of such rights with the common good of society as a whole. The failure to develop a law of minorities has led to wars, unrest and turbulence. For many years it was thought that international treaties might be an effective way to protect minorities, but experience has shown this method to be ineffective and even war-provoking. Constitutional protections have been largely ineffective because of our failure to develop a jurisprudence capable of dealing adequately with the issues.

Even national courts are struggling with how to "make possible a legal solution" to indigenous claims. However, we do not yet have a methodology or rule of law within which we can manage these claims. With differing versions of "discovery" and post-settlement relations, even precedent and early literature cannot be seen as authoritative. The three new texts provide some insight into the perspectives and methodologies international lawyers and scholars are employing to develop a framework within which to consider indigenous-state conflicts.

The first of these, The Law of Nations and the New World, is most problematic. It consists of two essays brought together under the rubric of exploring the European ideology of colonial expansion in America. The first essay, by L.C. Green, entitled "Claims to Territory in Colonial America", is ostensibly a survey of legal history, evaluating the legality of the settlement of the New World and the international legal basis of European claims to territory and sovereignty in the New World. The essay is framed as a lesson to "Aboriginal groups and their sympathizers" that "in the modern world title to statehood depends not on local custom or morality, but on international law".[6] Green seeks to analyze the legal position of the Europeans and, through that analysis, to consider any leftover rights for the indigenous occupants of the New World. He does so not from a critical contemporary scholarly perspective, but rather in the light of "the principles

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[5] Dissenting, *Dumont* v. *Canada (A.-G.)* (1988), 52 D.L.R. (4th) 25, at p. 33 (Man. C.A.).

[6] P. 3.

and customs that were valid at the time when the title was claimed to have been established, and not now when its validity may be challenged".[7]

Given that there was, strictly speaking, no "international law" at the time of contact and early settlement, this is no easy task. Green seeks to unravel what the scholars of the day, rather, theologians of the day, thought about indigenous claims, as a method of considering their legitimacy. He is not troubled by the vicissitudes of interpreting the sentiments of fifteenth or sixteenth century scholars from a position of temporal alienation. His is a straightforward and unself-conscious methodology. This is unfortunate, as some international lawyers at least have begun to pay heed to legal history, trying to be sensitive in their literature to the intellectual preoccupations and aporias of the day of particular thinkers.[8] Piecing together quotations ranging from Papal Bulls in 1493 to a Canadian Supreme Court decision in 1973, Green argues that indigenous sovereignty or territorial claims are unfounded in law: the territorial acquisition of the New World was legal and Anglo-European governments, or, in Canada, the Crown, can "extinguish whatever title remains to the Indians".[9]

The methodological problems here, of treating this as all a matter of simple international law and history, are apparent. As Hall J. of the Supreme Court of Canada noted back in 1973, in *Calder* v. *Attorney-General of British Columbia*:[10]

> The assessment and interpretation of the historical documents and enactments tendered in evidence must be approached in the light of present-day research and knowledge disregarding ancient concepts formulated when understanding of the customs and culture of our original people was rudimentary and incomplete and when they were thought to be wholly without cohesion, laws or culture, in effect a subhuman species.

Green's essay reads like a patchwork of ancient concepts sewn together by severely frayed epistemological threads in an attempt to quilt an authority covering a very contemporary political point. That point is that to give indigenous peoples (within Canada or elsewhere) "even the rights of local self-government ... would be to threaten the security and integrity of the state, which would be contrary to principles of customary international law as well as specific provisions of the Charter of the United Nations".[11]

Where the scholarly historical literature reads in favour of indigenous rights during the settlement period, Green discounts the scholarship as being that of theologians who had no control over the actions of states in acquiring

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[7] *Ibid.*

[8] See, D. Kennedy, Primitive Legal Scholarship (1986), 27 Harv. Int'l L.J. 1.

[9] P. 125.

[10] [1973] S.C.R. 313, at p. 346 (dissenting).

[11] P. 127.

new territories. Needless to say, it is a pick-and-choose your authorities type of analysis which Green advances to illustrate his basic point that:[12]

> Insofar as international law is concerned, there can be no doubt that the title to the land belonged, in the first instance, to the country of those who first *discovered and settled thereon*.... Insofar as settlement itself was concerned, international law has never required that every inch of the land claimed needs to be occupied, in the sense of someone being actually present thereon. It was sufficient that the ruler claiming sovereignty was able to prevent any other ruler from contesting his title. Moreover, international law did not recognise the aboriginal inhabitants of such newly discovered territories as having any legal rights that were good as against those who "discovered" and settled in their territories.

Green's very confident conclusions about the international status of indigenous claims are seriously undermined by the two other recent texts reviewed below.

The second essay in The Law of Nations and the New World, O.P. Dickason's "Concepts of Sovereignty at the Time of First Contacts", is ostensibly a "theological and philosophical"[13] perspective on the matter of sovereignty. Dickason's essay is not so much a lesson in international law as it is a reading of a set of theological and legal works with a view to evaluating what indigenous collective integrity, if any, survived the discovery, settlement, and consolidation of power in the New World. She too accepts the methodology of assessing current legal relations based on the "meaning" or context of fifteenth to eighteenth century works. However, she is much more modest in her conclusions and self-conscious of her methodology than is Green. Indeed, at many points in her analysis, conclusions are reached which undermine Green's confident assertions in the first part of the text.[14] Her essay is, at once, too brief and too ambitious in its analysis of several centuries of literature to substantiate any dogmatic claims.

The second book on this general theme, International Law and Aboriginal Human Rights, represents a different methodology and, consequently, conclusions. This collection of essays, edited by B. Hocking, developed out of a conference on the rights of indigenous peoples in international and Australian law held in Canberra at the Australian National University in late 1983. While the focus in these essays tends to be placed

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[12] P. 125.

[13] P. x.

[14] Dickason (pp. 248-249) views the authorities as going both ways:

> For every law or recognized practice claimed on the part of a colonizing nation seeking to legitimate its position, there was a challenge or counterclaim solidly based in legal precedent.... Even the advocates of that position [that indigenous peoples are not sovereign], however, have acknowledged that Amerindians, as well as aboriginal peoples in general, are entitled to enough land for subsistence, in accordance with the principle of natural law that the earth was intended to provide for all mankind. Seen in the light of these considerations, the American colonial conquests are in the highest possible degree a living past.

on relations between indigenous peoples and Australia, it will undoubtedly be of interest to comparativists. Several general essays, such as James Crawford's "International Law and the Recognition of Aboriginal Customary Laws", make this a relevant text for the Canadian political and legal context of indigenous-state relations.

The general orientation of these essays is revisionist in character. The conceptual framework of early international legal or theological scholars, so axiomatic to Green and Dickason, is challenged and criticized in light of the often "antiquated views of international law [which] are obsolete even before they are announced ... indigenous policy settles very little at all unless geared to the norms likely to be in force a generation hence—not those that disappared a generation ago".[15] The direction in these essays is forward-looking.

While historical concerns are treated briefly, these are more factual concerns than legal histories. For example, the question of aboriginal occupation of property or land title in Australia prior to 1788 is explored in factual terms, and then a consideration of how the international and common law would view this title is set out.[16] Unfortunately, neither the factual nor legal analysis in these essays is developed to a satisfactory level. Consequently, while provocative, the essays here unwittingly raise more questions than they can answer. This is not to fault International Law and Aboriginal Human Rights; as with many such collections of conference papers, this seems to be the major drawback: a few ideas are sketchily developed, and notations are added later. The book is helpful in its framing of the international law dimension of aboriginal claims, especially juxtaposed with Green, but not in terms of how it analyzes specific situations in Australia or elsewhere.

B. Hocking's chapter, "Colonial Laws and Indigenous Peoples", examines the matter of prior land title and sovereignty under international and common law. In sharp distinction to Green, Hocking suggests that "[i]t follows that the acquisition of sovereignty over territory that is not *terra nullius* can only be by derivation from the prior existing sovereign or sovereigns".[17] There is no agreement in this essay with Green's conclusion that title vested with the "discovering" or settling country. Another of the essays in the collection, "International Law and Sovereign Rights of Indigenous Peoples", by R. Balkin, is a twenty-three page commentary on essentially the same subject as Green's essay, although specific to the context of Australian political history. Balkin is not overly concerned with the authority of fifteenth to eighteenth century international legal conceptions of sovereignty. She recognizes that sovereignty, from a modern political

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[15] R. Barsh, Indigenous Peoples and the Right to Self-Determination in International Law, in the volume under review, p. 68.

[16] Pp. 9-13.

[17] P. 7.

and therefore legal perspective, is imagined as a "singular and exclusive power in any one state and, as a corollary to this, there is no legal prospect for recognising competing sovereign claims within that state".[18] Consequently, she surmises that, in the contemporary sense, "no municipal court which derives its authority from the sovereign [Crown], would entertain the possibility of casting aspersions on the validity of that authority".[19] Her own analysis of the issue of political or territorial sovereignty is not encumbered by any similar presupposition.

Balkin is sensitive to the fact that a conception of sovereignty such as that advanced by Green is difficult to reconcile with the fact that treaties or agreements were entered into which seemed to acknowledge the sovereignty of the original inhabitants of the colonies. She argues that:[20]

> This legal theory [of sovereignty] did not sit very comfortably with the reality of colonial expansionism. On the one hand colonial possessions were regarded as being based on some pre-existing vacuum filled by the territorial sovereignty of the colonial power. However, this left unexplained or even contradicted, in legal terms, the dealings and relationships between nationals of the claimant state and the local chiefs and elders of the region. Many claims to land originated in, or were dependent upon, agreements between such parties (in which, very often, the local chiefs could have had little conception of what he or his tribe was giving in return for trinkets, weapons or other alluring paraphernalia of European civilization). Furthermore, agreements of this type were not only ratified by the colonial power whose national had secured the treaty of protection in question, but were solemnly advanced in support of demands that such areas of influence or 'protectorates' should be recognized by other states.

The essay then surveys modes of territorial acquisition in customary international law and the possibility of eventual resolution of the sovereignty question before the International Court of Justice, offering no guiding conclusions except to say that given the distortions of legal doctrine, legal theories of sovereignty should not be interpreted or applied so "that inaccurate perceptions of historical facts cannot be corrected".[21]

Another essay in the text, "Indigenous Peoples and the Right to Self-Determination", by R. Barsh, discusses the right of indigenous peoples to self-determination in international law and is a thought-provoking description of the legal and political issues that have evolved in the present United Nations context. Barsh suggests that:[22]

> The most dynamic issue in international law today is the right to self-determination. All other human rights are considered to flow from this one, because the protection of human rights against government abuses depends entirely on who governs. It follows that you can assure the protection of human rights and individual freedoms if you have your own government.

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[18] P. 21.

[19] P. 20.

[20] P. 22.

[21] P. 36.

[22] P. 69.

He then continues by tying this perspective into the international legal norms evolving at the United Nations, referring to the source of such norms in the United Nations Charter and the International Covenants. His analysis is not historical in character, as Barsh argues such analysis is "entirely inappropriate and irrelevant under international law today, because the issue is not whether indigenous peoples once were sovereign or independent, but whether they have a right to become independent today—or to choose freely some form of political association with existing powers. The international issue is not historical status, but the existence and exercise of free choice today".[23]

This analytical perspective is fundamentally different from that advanced by writers previously examined. Barsh is actively involved in the development of international norms for indigenous peoples and sees an international political context for the rise of this concern. He suggests that in the political movement for decolonization, it was easier and more expedient to deal first with Africa and Asia. However, now that the United Nations has nearly run out of overseas colonies to deal with, "it can no longer avoid dealing with colonised enclaves of indigenous peoples".[24]

Barsh argues that the international system which has recognized group rights in a three-tiered fashion (peoples, minorities, individuals) must recognize peoples not traditionally considered actors or legal persons within the system as possessing the right to self-determination. In his view, self-determination is not a static or settled concept, but requires that:[25]

> ... every culturally and historically distinct people should have the right to choose its political status by democratic means under international supervision. Its options must include the entire range of political arrangements from complete independence as a separate state, to some form of association with an existing state, to participation in a federal system of partly self-governing regions or provinces, to complete political integration or assimilation. The basic requirement is that it must be a matter of choice.

Barsh's chapter should be of particular interest to Canadian lawyers seeking to understand the claims indigenous peoples are currently advancing in international fora.

The positions taken in the essays in International Law and Aboriginal Human Rights are critical and revisionist in character. With a sensitivity to the political and culturally hegemonic presumptions that have enabled national and international legal structures to discount indigenous claims as invalid or as moral claims only, these essays view existing international norms as ambiguous and those evolving as permitting a reconsideration of the "strategies by which their [indigenous peoples'] campaign [for justice]

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[23] Pp. 71-72.

[24] P. 72.

[25] P. 71.

would be guided".[26] Clearly these essays, given their brevity, do not come close to developing new strategies out of the corpus of international legal history or doctrine. However, they are instructive for framing questions which, juxtaposed with The Law of Nations and the New World, seem to call into question the more conservative political tendency to exclude ideology, culture, and historical contexts from an analysis of the "law" or legal history. To the extent that they achieve this, they may be viewed as restatements of longstanding claims voiced by aboriginal peoples but unheard through the thickness of cultural difference and patronage.

The different approaches of The Law of Nations and the New World and International Law and Aboriginal Human Rights illustrate a certain crisis of authority in international legal analysis. While the former is confident, upon its reading of international legal history, that indigenous claims are exaggerated and unfounded at law, the latter suggests there is ample scope in international law for these claims to be developed, offering a different interpretation of the historical literature. Why is it that international lawyers are so far apart in their views on this matter? Is the blatant discrepancy here indicative of the state of international law more generally? Perhaps a clue to the magnitude of the situation is found in the fact that indigenous claims have been addressed in the third text, Rights of Peoples, edited by T. Crawford, in two interesting essays by J. Brownlie and R. Falk, noted British and American professors of international law. Clearly, something important and serious is developing in this realm of international law and legal theory to attract such attention.

Brownlie's essay, "The Rights of Peoples in Modern International Law", examines a "process already in being" internationally; that is, formulations of rights to come with "claims to positive action to maintain the cultural and linguistic identity of communities".[27] He isolates three characteristics of these evolving claims (which include indigenous peoples' claims), namely, (i) the claim to positive action, (ii) the claim to have adequate protection of land rights in traditional territories, and (iii) claims based on the legal and political principle of self-determination. Brownlie is particularly interested in the last of these and suggests that group rights, and the recognition thereof, are an "internal application of the concept of self-determination".[28] Brownlie is cautious about the development of group or indigenous rights in international law, suggesting that over-zealousness in the legal literature should be foregrounded by specific studies on the concept of "peoples", and informed by a sensitivity to the entire international legal fabric. Moreover, he calls upon the international legal

[26] *Ibid.*

[27] Pp. 1, 3.

[28] P. 6.

system (and, by extension, national systems) to be sensitive to these new claims:[29]

> In the case of the protection of group rights, precisely because a very delicate balance of interests is called for, the existence of an efficient and sensitive legal system is immensely important. When the problems themselves are approached they are seen to be in many cases essentially difficult. The legal preservation, especially by positive action, of cultural identity may run the risk of appearing to erect principles of discrimination and the problem then becomes, when is discrimination tolerable on grounds of special need?

Clearly, new categories or ways of thinking about discrimination will have to follow these types of group claims. Unfortunately, while acknowledging their legitimacy, Brownlie does not suggest new methods of conceptualizing these claims.

By contrast, Falk, in his essay, "The Rights of Peoples (In Particular Indigenous Peoples)", carries Brownlie's arguments much further. He accepts the legitimacy of indigenous claims and explains why, in his view, these claims have been so contested and undermined. He argues that the "jurisprudential starting point of the rights of peoples is a direct assault upon positivist and neo-positivist views of international law as dependent upon State practice and acknowledgment".[30] Perhaps this explains why international lawyers can so sharply disagree on the legitimacy of indigenous claims. Falk advocates several measures of response to indigenous peoples' struggles, including the recognition of international legal personality, a special regime of rights and enforcement, and the exercise of self-determination. He argues that the obstacle for the development and application of international norms in this area is not conceptual or historical, but simply that indigenous peoples are restricted in the state-dominated legal and political system from exercising their rights. Indigenous claims, he suggests:[31]

> ... to the extent that they centre their grievances around encroachments upon their collective identity, represent a competing nationalism within the boundaries of the State. Such claims, posited in a variety of forms, challenge two fundamental statist notions—that of territorial sovereignty, and that of a unified 'nationality' juridically administered by governmental organs.

He wants to connect indigenous claims to a broader international movement to displace states as the key actors on the international scene, replacing them with more "natural" entities, or peoples. Falk sees that this requires a new conceptual framework:[32]

> ... a kind of meta-law and meta-framework that takes account of conflicting viewpoints, claims, traditions. At this stage it is not realistic, or even necessarily ethical and equitable, to formulate a special regime for the sake of indigenous peoples in a historical vacuum. The rights of non-indigenous peoples, and the relations between

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[29] P. 7.

[30] P. 19.

[31] P. 18.

[32] P. 34.

> communities with distinct national and cultural identities, must be considered. Little effort in this direction of mutual reconciliation of group rights has so far been attempted.

Falk wants to mount an effort to reconstruct the international order. This is required, not only for the sake of indigenous peoples, but also for a better, more humane world. He wants to do so with the participation of peoples, and in the interest of an international society, not simply a community of nation-states.

The other essays in the text edited by Crawford are equally interesting and ambitious, particularly G. Nettheim's "'Peoples' and 'Populations'—Indigenous Peoples and the Rights of Peoples", which has a special focus on Australia and Canada. The text also includes a useful appendix of "Selected Treaties, Resolutions, and Other Documents on the Rights of Peoples", along with an indexed select bibliography, helpful for research purposes.

If anything is clear from these three texts, it is that a new methodology of international law, "taking account of conflicting viewpoints, claims, traditions", is necessary but needs development and critical grounding. How we develop this meta-framework, if it can be developed, is matter for diligent endeavour, especially when the status of indigenous peoples within or outside international or national legal structures is the topic of analysis. Certainly some theory of culture, or sensitivity to the cultural context of normativity, is *sine qua non* for a workable international legal theory.

There is no scholarly credibility to an analysis of indigenous claims and "sovereignty" when authority is blindly placed on contemporary interpretations of historical texts, often based on clearly outmoded and socially or culturally insensitive presuppositions. Nevertheless, it is not possible to brush history aside and chart new directions for international society without considering how one can go about taking account of different traditions and cultures. Neither Falk's essay, nor the others reviewed here, move us toward a cultural theory which could provide a framework for analyzing indigenous claims. However, they do cast doubt on the existing one and underscore the need for an analysis of how indigenous claims will be assessed. This alone should make these texts, in tandem, required readings for Canadian lawyers involved in aboriginal peoples' claims.

The range of perspectives offered on this dilemma must be integrated with the full consultation and participation of aboriginal peoples. As Falk argues, the legal solutions to these claims must ideally:[33]

> ... be a joint creation, something that is the product of participation at all stages. Ideally, indigenous peoples would have a central role in defining the framework of the rights of indigenous peoples, because in one sense the content of rights is the projection of human needs in relation to a particular circumstance in society.

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[33] P. 33.

Clearly, it is a creation that has (once again) only just begun, as these texts underscore. With recent political events in Canada, including the aboriginal-induced demise of the Meech Lake Accord, and the siege at Oka, Quebec, it is a creation urgently required nationally and internationally.

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Élections municipales.

Par LOUIS BEAUREGARD.
Montréal: Wilson et Lafleur (Collection Aide-mémoire). 1989. Pp. xxi, 144. ($19.95)

Compte rendu de Geneviève Cartier*

Inscrit dans la collection *Aide-mémoire,* le livre de Me Louis Beauregard, *Élections municipales,* traite de la procédure d'une élection municipale telle qu'édictée par la *Loi sur les élections et les référendums dans les municipalités.*[1] *Aide-mémoire* est une collection qui réunit des ouvrages à caractère pratique dont l'objectif est de présenter une synthèse de toutes les informations nécessaires à la résolution de problèmes concrets relatifs à un secteur particulier du droit.[2]

Sanctionnée le 23 juin 1987 et entrée en vigueur le 1er janvier 1988,[3] la *Loi sur les élections et les référendums dans les municipalités*[4] (ci-après désignée "la Loi") constitue la première étape de la refonte des lois municipales québécoises. Elle unifie la procédure que la *Loi sur les cités et villes*[5] et le *Code municipal*[6] traitaient parfois différemment, abroge deux lois[7] et en modifie plusieurs.[8] Le texte du livre de Me Beauregard se concentre sur les dispositions de la Loi qui traitent des parties à une élection et

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[1] L.R.Q., c. E-2.2.

[2] P. iii.

[3] À l'exception des articles 867 et 881 et des paragraphes 697(2) et 736(2) qui sont entrés en vigueur le 23 juin 1987.

[4] *Supra,* note 1.

[5] L.R.Q., c. C-19.

[6] L.R.Q., c. C-27.1.

[7] *La Loi sur les élections dans certaines municipalités,* L.R.Q., c. E-2.1, et la *Loi sur la fraude et la corruption dans les affaires municipales,* L.R.Q., c. F-6 (L.R.Q., c. E-2.2., arts 795 et 800).

[8] *Supra,* note 1, arts 660 à 859.

des procédures électorales.[9] La déontologie électorale,[10] la contestation de l'élection,[11] les inhabilités et les droits et obligations connexes comme les congés sans rémunération et la divulgation des intérêts pécuniaires des conseillers[12] sont également abordés. Le livre mentionne le financement des partis politiques et des candidats indépendants ainsi que le contrôle des dépenses électorales dans les municipalités plus populeuses (celles de 20 000 habitants ou plus)[13] mais sans traiter de la question d'une manière exhaustive. De même, il ne fait qu'allusion à la division du territoire aux fins électorales.[14] Sont reproduits en annexe les textes de règlements relatifs à la rémunération payable lors d'élections municipales[15] et à la forme des bulletins de vote.[16]

Très schématique (la table des matières, qui reprend toutes les divisions du livre, s'étend sur quatorze pages), le texte redispose et reformule les articles pertinents de la Loi. Alors que cette dernière aborde la procédure de façon chronologique, le livre nous la présente de la perspective des divers acteurs d'une élection: l'électeur, le personnel électoral, le candidat et ses mandataires, l'équipe reconnue et le parti politique, et les tiers. À cette structure de base se greffent des références à la jurisprudence et à la doctrine (relativement rares en la matière) ainsi qu'à des lois applicables de façon incidente,[17] quelques suggestions sur le contenu de procédures et d'avis[18] et de multiples conseils pratiques qui vont du numéro de téléphone du Directeur général des élections[19] à la disposition d'un bureau de vote le jour du scrutin.[20]

L'ouvrage recèle un nombre appréciable d'erreurs de disposition[21] (crucial dans un tel type de publication), d'orthographe ou de typographie.[22]

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[9] *Ibid.*, arts 47 à 278 et 300 à 329.

[10] *Ibid.*, arts 279 à 285.

[11] *Ibid.*, arts 286 à 299.

[12] *Ibid.*, arts 347 à 363.

[13] *Ibid.*, arts 364 à 513.

[14] *Ibid.*, arts 4 à 41.

[15] *Règlement sur le tarif des rémunérations payables lors d'élections et de référendums municipaux,* A.M., 88-10-13 (1988), 120 G.O. 2, à la p. 5422.

[16] *Règlement sur les modèles de bulletins de vote et la forme du gabarit lors d'élections et de référendums municipaux,* A.M., 88-06-09 (1988), 120 G.O. 2, à la p. 3322.

[17] Comme par exemple, la *Loi sur l'accès aux documents des organismes publics et sur la protection des renseignements personnels,* L.R.Q., c. A-2.1, et la *Charte des droits et libertés de la personne,* L.R.Q., c. C-12.

[18] *Supra,* note 2, pp. 23 et 59.

[19] *Ibid.*, p. 19.

[20] *Ibid.*, p. 82.

[21] Comme par exemple, à la section 1.1.1. de la p. 1 et à la section 1.3.3.9 de la p. 30.

[22] Comme par exemple à la section 1.4.4.3 de la p. 113 et à la section 2.1.5 de la p. 13.

L'auteur utilise également certaines expressions dans un sens discutable[23] ou carrément incorrect.[24]

Il eut été intéressant d'avoir quelques commentaires sur certaines des dispositions de la Loi dont l'application se révèle délicate. Ainsi, la signification du terme "sciemment" utilisé à l'article 304 et les moyens de défense acceptables dans ce cas sont une source de difficultés[25] tout comme l'application de l'article 300 de la Loi. L'auteur ne s'y est pas aventuré, visiblement à cause des objectifs fixés par la collection dans laquelle s'inscrit sa publication. On ne peut donc lui en tenir rigueur.

Pour Me Jacques Viau, qui signe la préface du livre, cette publication est "appelée à rendre de précieux services aux *conseillers juridiques*, aux officiers municipaux, aux membres des conseils sans oublier les candidats aux élections".[26] À notre avis, ce livre s'adresse d'abord et avant tout à une clientèle qui désire connaître les rouages et la réalité pratique de la procédure électorale municipale. Elle s'adresse ensuite à une clientèle qui est peu familière avec la lecture de textes législatifs et qui a besoin d'un intermédiaire pour comprendre la Loi. Elle ne s'adresse aux conseillers juridiques que s'ils désirent avoir un éclairage très concret du sujet ou s'ils veulent avoir accès rapidement à certaines décisions de jurisprudence, non pour obtenir des informations de base: ils peuvent en effet les tirer directement de la Loi, sans intermédiaire.

Selon la clientièle à laquelle appartient le lecteur et les besoins qu'il cherche à combler, le livre de Me Beauregard constituera donc, soit un ouvrage de base, soit un simple outil parmi tous ceux qui sont mis à la disposition de la communauté juridique.

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[23] "Conseil juridique" pour "conseiller juridique" (section 6, p. 123).

[24] "Éligibilité de l'électeur" pour les "qualités requises pour voter" (section 4.2.1, p. 68).

[25] Voir, par exemple, J. L'Heureux, *Droit municipal québécois*, t. 1 (1981), pp. 105 et s., et l'affaire *Néron* c. *Bilodeau*, C.A. Québec, 200-09-000143-872, le 2 septembre 1988, J.E. 88-1187.

[26] *Supra*, note 2, p. v. (Italiques mises par l'auteur du compte rendu).

Australian Dispute Resolution Journal.

Editors: M. DEWDNEY and R. CHARLTON.
New South Wales: Law Book Company Limited. 1990. Pp. 56. Published Four Times Annually. (Aus. $75.00)

Reviewed by Bonita J. Thompson, Q.C.*

The possibilities of "ADR" have captured the imagination of our Australian colleagues in the same way as they have captured our imagination here in Canada. The first volume of the Australian Dispute Resolution Journal, published in association with the Australian Dispute Resolution Association, appeared in February, 1990. Although it is often difficult to judge the quality of a journal of this kind by its first issue alone, the prospects look excellent.

The journal is stated in its advertising material to be "devoted to the publication of articles which advance the theory, analysis and practice of dispute resolution in Australia, New Zealand and overseas". The Foreword prepared by Sir Laurence Street, AC, KCMG, formerly Chief Justice of New South Wales and a well known proponent of alternate dispute resolution processes, indicates that it is intended to be of value to lawyers and non-lawyers, but he clearly views the issues from a legal perspective.

True to its marketing material, the first issue contains two articles addressing the definition of the subject matter of the journal—what ADR is and what it is not, an article on the issues arising out of dispute resolution in AIDS-related conflict, an article discussing issues such as "quality assurance" in community mediation program and an article on the use of ADR in Australian commercial disputes. The promise of both practical and theoretical discussions on topics of interest to lawyers and non-lawyers was certainly met.

The Canadian legal profession would, I am sure, be very interested to read Sir Laurence's analysis of the relationship between ADR and the courts:

> The theme developed so far is the proposition that ADR processes are not in their essence alternative to the exercise of sovereign judicial power as a means of resolving domestic disputes, nor do they present any threat, comparative or otherwise, to the stature and authority of our judicial institutions. They are in truth to be seen as no more than contractual arrangements chosen by the parties of their own free will as the way in which they wish to resolve their disputes. If the choice is for arbitration, the court, so far from regarding that as an alternative, will lend its aid to the enforcement of the arbitration contract. If the choice is for mediation, nothing more significant is happening in that the parties are seeking to settle their differences by agreement.

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> There cannot be the slightest justification for public concern in encouraging parties to attempt to achieve amicable resolution. Nor does any question of competition with the sovereign judicial power arise for consideration.[1]

> The concern and lack of understanding about the role of ADR procedures characteristic of the field of domestic disputes should be dispelled. Increasing resort to arbitration, use of expert appraisals, references sent out by the courts and above all properly structured mediation are part of society's overall resources for resolving disputes. We must understand the symbiosis of their relationship with the court system, we must study their techniques, and we must be ready to practise them where appropriate if we lawyers are to discharge to the full our obligation to serve the peace, order and good government of our nation through the administration of justice.[2]

What I found most intriguing was that the observations made by the Australian writers could have been made just as easily in Canada. By way of example, the Canadian Bar Association Task Force on ADR noted in its Report that there was concern that the legal profession may not be receptive to other professionals and individuals as active participants in the dispute resolution field. A non-lawyer author of an article describing the perils of community mediation programs in Australia noted:[3]

> While the professional therapists have been reserving their opinions, sections of the legal profession have voiced skepticism and harsh judgment concerning the failure of mediation (and counselling) to adequately address the needs of the powerless and the disadvantaged within the family. Because neighbourhood mediation services have led the field in Australia, it is important to note that community mediators bear the brunt of such criticism and to some extent are in danger of becoming scapegoats of the professions as the debate intensifies.

The stage of development in this field appears to be almost identical to that in Canada today. Australians seem to be grappling with the same issues and concerns—accreditation, education and interaction with the courts. Accordingly, I suspect that the articles appearing in this journal, particularly as they are delivered by individuals who are operating in a similar legal environment to ours, may be of greater comparative value than the writings and research emanating from our American friends.

The journal has a Letter to the Editor feature and a schedule of conferences and seminars around the country.

I was most interested to read the brief summaries of actual disputes resolved under the auspices of the Australian Commercial Disputes Centre (ACDC). These summaries were very useful and provide vivid, real life examples of how ADR works, notwithstanding that they also gave the ACDC the opportunity "to show its stuff".

The journal is well designed and easy to read. At first I was put off by the feel of the paper used but was quickly reminded of everyone's environmental responsibilities by Sir Laurence Street who stated in his

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[1] P. 10.

[2] P. 11.

[3] P. 35.

Foreword: "... I would like to say how gratifying it is to be associated with a journal that prides itself on being printed on recycled paper."[4]

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Honorable Justice: The Life of Oliver Wendell Holmes.

By SHELDON M. NOVICK.
Toronto: Little, Brown. 1989. Pp. xxi, 522. ($31.95)

Reviewed by Gavin MacKenzie*

By the time he died in 1935 Oliver Wendell Holmes was one of the most revered figures in America. Son of a famous father, hero of the Civil War, author of the most celebrated book on legal thought ever written by an American, and jurist ranking with only John Marshall as the most influential architect of American jurisprudence, Holmes had taken on the dimensions of myth.

Edmund Wilson placed him among the most eminent literary figures of his generation. Dean Roscoe Pound of Harvard Law School wrote that the world moved to the measure of his thought.[1]

The scope and richness of his life arouse wonder. The neighbours and house guests of his youth included Nathaniel Hawthorne, Herman Melville, and Ralph Waldo Emerson (Emerson became "Uncle Waldo" to Holmes, who later told him that he, more than anyone else, had "first started the philosophical ferment in my mind").[2] After he completed his formal education he travelled to Europe to be introduced to polite society. He met William Gladstone, Robert Browning, and John Stuart Mill. He was appointed to the Supreme Court by Theodore Roosevelt, with whom he dined frequently at the White House. He befriended young scholars, many of whom—including Louis Brandeis, Felix Frankfurter, and Walter Lippman—became protegés. During his last years on the Court one of his secretaries was Alger Hiss. The newly elected President Franklin Roosevelt came calling on him on his ninety-first birthday, shortly after Holmes retired from the bench, having served as a judge for only a few months less than half a century.

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[4] P. 4.

* Gavin MacKenzie, of the Ontario Bar, Toronto, Ontario.

[1] Roscoe Pound, Judge Holmes' Contributions to the Science of Law (1920-21), 34 Harv. L. Rev. 449.

[2] Letters from Holmes to Emerson, Oliver Wendell Holmes Papers, Harvard Law School, B42, F20.

The adjective "long awaited" has never so aptly modified the noun "biography"; for, remarkably, no full biography of Holmes has previously been published.[3] Two authorized biographers died before completing the daunting task and a third, Frankfurter, abandoned the project when he was himself appointed to the United States Supreme Court.

Sheldon Novick, who is at present Scholar in Residence at the Vermont Law School, has produced a readable and original work. The text of 376 pages is supplemented by seventy-five pages of notes and a twenty-one page bibliography. His principal sources were Holmes' published and unpublished writings, including his private correspondence.

When he was a law student, Novick was mesmerized by Holmes' legal writings. He has been quoted as saying that reading Holmes was, for him, "like Salieri hearing Mozart's music".[4] But though his portrayal is admiring, it is never uncritical. He treats with candour such unflattering interludes as Holmes' majority opinion in 1927, in which the Supreme Court upheld a Virginia statute requiring sterilization for mental defectives ("three generations of imbeciles are enough", Holmes wrote[5]).

The abiding virtue of Novick's life of Holmes is that the author has the wisdom to allow Holmes to speak for himself—and the reader is as mesmerized as the author was. A few famous examples:

From his great book The Common Law:[6]

> The life of the law has not been logic: it has been experience.

From The Soldier's Faith,[7] his Memorial Day speech to Harvard's graduating class in 1895:

> Who of us could endure a world ... without the divine folly of honor, without the senseless passion for knowledge out-reaching the flaming bounds of the possible, without ideals the essence of which is that they never can be achieved?

From his judgment on behalf of a unanimous Supreme Court in *Schenck* v. *United States*:[8]

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater, and causing a panic.... The question in every case is whether the words are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.

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[3] See however, a fictionalized account of Holmes and his family, Catherine Drinker Bowen, Yankee from Olympus: Justice Holmes and His Family (1944).

[4] E.R. Shipp, "Holmes: Awfully Good Company", New York Times, August 20, 1989, Section 7, page 3.

[5] *Buck* v. *Bell*, 274 U.S. 200, at p. 207 (1927).

[6] O.W. Holmes, The Common Law, p. 1 (1881).

[7] Mark De Wolfe Howe, The Occasional Speeches of Justice Oliver Wendell Holmes (1962), p. 73.

[8] 249 U.S. 47, at p. 52 (1919).

From his dissenting judgment in *Abrams* v. *United States*:[9]

> ... the ultimate good desired is better reached by free trade in ideas ... the best test of truth is the power of the thought to get itself accepted in the competition of the market.

From his dissenting judgment in *United States* v. *Schwimmer*:[10]

> ... if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us but freedom for the thought that we hate.

And finally, from his dissenting judgment in *Olmstead* v. *United States*:[11]

> ... I think it a less evil that some criminals should escape than that the government should play an ignoble part.

Few have been blessed with the good fortune that befell Holmes. School, for him, was only an opportunity to be among other children; his education was in books and conversation—conversation chiefly with his father. A nephew remembered them years later: "I used to see both of them, sometimes together and sometimes separately, at least once a week, and heard the most brilliant conversation that I have ever heard or expect to hear, with absolutely fair give and take."[12]

Oliver Wendell Holmes Senior, once Dean of Harvard Medical School, became famous when his elder son and namesake was fourteen years old. That year he published a paper which seemed to prove that puerperal fever—childbed fever—which killed many women after childbirth, and had a mortality rate which would sometimes rise as high as 100 per cent, was a contagious disease, carried from bed to bed on doctors' unwashed hands and bloody instruments.

Two years later the doctor and a few other Bostonians founded the Atlantic Monthly, and he became one of the magazine's contributors, writing essays under the title "The Autocrat of the Breakfast Table". He invented a boarding house breakfast table surrounded by friends and family, among whom was an earnest, slender, and idealistic young man bearing a strong resemblance to the author's elder son. What Dr. Holmes expected to be a modest sideline became an immense transatlantic success that earned him worldwide fame. By then he had given up the practice of medicine. The young Wendell remembered the day his father brought in the shingle that hung outside their house and sawed off the word "Dr." so that it read only "O.W. Holmes".

The day before Holmes' sixteenth birthday the Supreme Court decided that Dred Scott, who was then living in Illinois, was the property of a

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[9] 250 U.S. 616, at p. 630 (1919).

[10] 279 U.S. 644, at p. 655 (1929).

[11] 277 U.S. 438, at p. 470 (1928).

[12] Mark De Wolfe Howe, Justice Oliver Wendell Holmes: The Shaping Years, 1841-1870 (1957).

man in Missouri, to whom he was returned. New England's radical abolitionists prepared for war.

After three years at Harvard College, Holmes enlisted. His first engagement was in the Battle of Ball's Bluff. He was knocked down by a spent ball which struck him in the pit of his stomach. After staggering a few steps to the rear he caught his breath and rejoined the attack. He waved his sword above his head and cried out: "Will no one follow me?" Then a second bullet struck him in the chest and he fell.

The Battle of Ball's Bluff aroused shock in Boston because of the extent of the Northern losses. The heroism of the combatants was enhanced by the hopelessness of the struggle. When young Holmes returned to Boston to recover from his wounds he found himself the hero of a celebrated battle.

He was seriously wounded again at Antietam, where he was struck in the back of his neck with a bullet, and at Chancellorsville, where he was struck in the bone of his heel. He attained the rank of lieutenant colonel. When his three-year enlistment ran out he decided to resign his commission and attend Harvard Law School rather than re-enlisting.

As a lawyer Holmes drafted documents, argued appeals, and appeared at trials at which judges presided without juries. His formal bearing and erudition nicely complemented the physical presence and ease with juries with which his senior partner George Shattuck was blessed. But Holmes' heart was in his scholarly writing and editing; he was not well-suited to the practice of law. He wrote resentfully of the burden of law practice, the meanness of business-getting, and the "suicidal race for fortune"[13] that had broken down Shattuck's health and threatened his own.

During his astonishing fifty years as a judge (from 1882 until 1902 as a member of the Massachusetts Supreme Judicial Court and from 1902 until 1932 as a member of the United States Supreme Court) Holmes eclipsed the promise of his youth. He was unfailingly courteous, yet counsel of the day considered it an ordeal to appear before him, as his mind was so extraordinarily quick and incisive that before the argument was one-third finished he would see the entire course of reasoning and would be wondering whether it was sound. In time the great judge grew impatient with long-winded arguments and wrote letters while listening with half his attention: "you throw in an attentive manner calculated to make counsel think you are taking notes of the argument",[14] he wrote.

When he was appointed to the Supreme Court Holmes was not well known outside of Massachusetts. Editorial writers filled up their columns

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[13] Letter from Holmes to Shattuck, April 2, 1881, Oliver Wendell Holmes Papers, Harvard Law School.

[14] Letter from Holmes to Lady Castletown, January 15, 1887, Oliver Wendell Holmes Papers, Harvard Law School, B39, Fl.

with amused remarks on his supposed resemblance to his father. The Nation and the New York Evening Post commented that he was too literary, more brilliant than sound, a remark that stung. Others speculated about whether, at sixty-one, he was too old for the post, and whether he might die before serving an adequate term.

Novick's biography falls short in only one respect: its analysis of Holmes' legacy to the law is disappointingly thin. Another book of equal length could—and should—be devoted to a study of Holmes' enduring contributions to the law. Novick's life of Holmes is nevertheless the work of a biographer who knows that one cannot sever the life of such a subject from the product of his intellect; he quotes liberally from Holmes' judicial and extra-judicial writings.

Holmes' life tells a story with a moral: that inspiration may be drawn not only from those who overcome adversity, but also from those who overcome unimaginable good fortune. Oliver Wendell Holmes was a man who had every conceivable advantage in life. He was tall and handsome, charming and intelligent, well-bred and well educated. He was an authentic hero of the Civil War. He had the beneficial example of a brilliant father of inexhaustible energy who was devoted to the task of raising his promising elder son.

One of the story's most vivid images is of the eighty-seven year old Holmes, by then the oldest person ever to sit as a Supreme Court judge, with his thick white hair and moustache, nodding off during a Saturday morning conference, then, after the arguments of his colleagues have sputtered out, opening his eyes and launching into the debate with a summary of the issues so lucid and convincing as to carry the court with him.

For all of his advantages the most crucial was the strength of his resolve to regard his great good fortune as something to be transcended.

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