Essays in the History of Canadian Law. Volume III: Nova Scotia.

Edited by P. GIRARD and J. PHILLIPS.
Toronto: The Osgoode Society and University of Toronto Press. 1990. Pp. xii, 369. ($50.00)

Reviewed by Mary Jane Mossman*

Essays in the History of Canadian Law, Volume III is a wonderful addition to the growing collection of essays on Canadian legal history published by the Osgoode Society.[1] Two earlier volumes edited by David H. Flaherty, which appeared in 1981[2] and 1983[3] respectively, included essays on a variety of topics focusing mainly but not exclusively on Upper Canada. The appearance of Volume III with its focus on the legal history of Nova Scotia represents an important new contribution, both because of its differing perspectives from eastern Canada and because the new volume aptly demonstrates the increasing scope of legal history which has occurred over the past decade in Canada.

The two earlier (and connected) volumes edited by David Flaherty contained some excellent essays on a great variety of topics. As a collection, they offered excellence of analysis and enthusiastic examination of "the interaction between law and society", two of the essential objectives identified by David Flaherty in his introductory essay in Volume I.[4] The introductory essay in Volume I and the corresponding preface in Volume II provided both a cogent analysis of the nature and role of legal history in Canada—and of the roles for both historians and lawyers in such an enterprise—and a research agenda which is as challenging as it is interesting. In David Flaherty's words "... no one can complain that the field of Canadian legal history lacks opportunities for significant research".[5]

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[1] The Osgoode Society, founded in 1979, was established to encourage research and writing in the history of Canadian law. Its efforts to stimulate legal history in Canada include a fellowship, an annual lectureship, research support programs, and an oral history project. The Society publishes annually volumes which contribute to legal-historical scholarship in Canada.

[2] David H. Flaherty (ed.), Essays in the History of Canadian Law, Volume I (1981).

[3] David H. Flaherty (ed.), Essays in the History of Canadian Law, Volume II (1983).

[4] *Op. cit.*, footnote 2, p. 3.

[5] *Op. cit.*, footnote 3, p. x.

Volume III, edited by lawyer-historians Philip Girard and Jim Phillips, responds to this challenge with vigour and insight. This volume is divided into four parts, each of which contains essays on similar themes: an overview of the legal system; the criminal law in society; women, the family and law; and law and economy. The arrangement is useful in bringing together thematically the work of different scholars and in providing a more complex and textured account of the interaction between law and society in these areas. There are interesting comparisons as well to essays in the earlier two volumes and opportunities for important connections and contrasts in the use of law and its impact.

In the overview section, Thomas Garden Barnes' essay on the Annapolis Royal Regime (1713-1749) offers a thought-provoking account of the efforts (and failures) of English imperialism in Acadian communities after the Treaty of Utrecht, efforts which demonstrated "no policy commitment to the role of law-making and law-doing in governing a conquered people".[6] In addition to the problems of oath-taking which have been generally recognized as critical to "les Grands Dérangements" of 1755, the author argues persuasively that it was the juridical failure to extend British law within the French communities which was a more fundamental shortcoming of the British imperial governance, and one which ultimately led to the political failure concerning the oath-taking. Such a perspective on the positive values of juridical imperialism raises many questions even two centuries later in Canada, of course, but the account of the Annapolis Royal Regime, the ways in which Acadian customary laws flourished after 1713, and the strong links between legal regimes and political actions clearly underline the significance of this work and the interaction between law and society. By contrast, Philip Girard's essay on three law reform efforts in the nineteenth century (married women's property, the abolition of the Chancery jurisdiction, and insolvency laws) shows Nova Scotia legislators at a different moment in history, sometimes creating indigenous legal solutions, sometimes reflecting or reacting to the British colonial government, and sometimes borrowing from the American states. His essay also aptly demonstrates the difficulty of labelling legal changes as progressive or otherwise, and the need to take careful account of the layers of meanings inherent in law reform initiatives:[7]

> ... Nova Scotia's legal history reveals a genuine clash of ideologies—broadly speaking, eighteenth-century paternalism versus nineteenth-century liberalism ... S.F. Wise's observation that the English-Canadian style arises out of a "contradictory heritage" best understood "in terms of muted conservatism and ambivalent liberalism, of contradiction, paradox and complexity" accurately captures my meaning.

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[6] Pp. 10-11.

[7] P. 116; quoting S.F. Wise, Liberal Consensus or Ideological Battleground: Some Reflections on the Hartz Thesis, in Can. Hist. Assoc., Historical Papers 1974 1, at p. 13.

In the overview section, there is also an informative biographical essay by Clara Greco on judges of the Superior Court of Nova Scotia from 1754 to 1900, a collective portrait which shows both similarities over this period (for example, most appointees were Protestant, many were Anglican and many had been active politicians) as well as changes as the bar itself became more diverse in the nineteenth century. Even so, "Acadians and Irish are notable for their absence, to say nothing of blacks or natives. Women remained absent because they were formally excluded from the bar".[8] This study offers an excellent starting point for further research on possible relationships between the judges and their decisions.

The second section of this volume presents a striking portrait of the criminal justice system and the prisons—and the faces of those, mainly the poor, who experienced them. Jim Phillips' essay on poverty and the criminal law, in the context of vagrancy laws, provides an excellent account of the relationship between economic conditions and the legal system in the period 1864 to 1890, and even more significantly, the use of vagrancy laws as "an important tool in the control of the non-conformist and the unemployed".[9] A similar theme is evident in an essay by B. Jane Price on female petty criminals, most of whom were vagrants or prostitutes or both. During the period 1864 to 1890,[10]

> Victorian Halifax had its own female criminal class, a caste of women who were repeatedly convicted of petty offences. They were poor, and vagrancy laws criminalized their poverty; they 'chose' prostitution because few jobs were open to them and those that were paid desperately low wages ...

The end of the line in the criminal justice system, the prisons, is also very well documented in the essay by Rainer Baehre. As the author points out, the Halifax penitentiary was one of three in existence at the time of Canadian confederation and was replaced in 1881 by that now in Dorchester. Baehre's history of prisons in Halifax in the nineteenth century[11] raises important questions about administrative decision-making, legislative actions, and the use of law as a means of social control. In this way, all three essays provide rich material for further research about the history of criminal justice in Nova Scotia and its contrasting history in other parts of Canada.

The third section of this volume focuses on women and family life. Kimberley Smith Maynard's essay on divorce is an interesting account of divorce decrees granted in sixty petitions for judicial divorce before 1890.[12] As the author demonstrates, divorce law in Nova Scotia differed from that in England as early as 1750 in a number of respects: a more

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[8] Pp. 65-66.

[9] P. 153.

[10] P. 200.

[11] P. 163.

[12] P. 232.

lenient test for divorce *a vinculo matrimonii* and the absence of a requirement of a "crim. con." action at the same time.[13] On several occasions, moreover, legislative reforms in Nova Scotia were disapproved by the Colonial Office because of inconsistency with English law, although the Nova Scotia authorities firmly maintained their divorce law "in spite of imperial displeasure",[14] apparently with some success. Moreover, the Nova Scotia model (including its recognition of equality between the sexes in cases of adultery, for example) became an important model at the time of the reform of Canadian divorce law in the twentieth century.

Interestingly, this study of divorce law revealed that "the most obvious characteristic distinguishing successful from unsuccessful petitions [was] the absence of children: none of the successful petitioners had children and all of the unsuccessful petitioners had at least one".[15] This comment is a useful backdrop to a complementary study of child custody and divorce in the period 1866 to 1910. Rebecca Veinott[16] has provided a well documented account of the cases and added considerable insight to the questions about women's custodial rights in relation to their children raised by Constance Backhouse in an earlier volume published by the Osgoode Society.[17] Unlike England and other parts of Canada, Veinott has suggested that Nova Scotia custody law was gender neutral, both in theory and often in practice, although it did not adopt the American idea of "maternal presumption". Thus, Nova Scotia's contribution in the context of family laws generally provides rich comparative material for those interested in the roles of men and women in nineteenth century Canada.

The final section focusing on law and economy includes two essays, one, by Margaret McCallum, on the innovative Mines Arbitration Act of 1888,[18] and the other, by Jennifer Nedelsky, on the Water Act of 1919 which "expropriated basic riparian rights" in the province.[19] In these essays about late nineteenth/early twentieth century developments, there is interesting evidence of Nova Scotia's particular responses to rising industrialization and the post-Confederation economy. Margaret McCallum's examination of the history of coal mining and the strategic support for arbitration on the part of the union (the Provincial Workmen's Association) and its leader, Robert Drummond, in the 1880s is a remarkable testament to the perseverance and solidarity of coal miners to maintain their families

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[13] P. 234.

[14] P. 239.

[15] P. 254.

[16] P. 273.

[17] Constance Backhouse, Shifting Patterns in Nineteenth-Century Canadian Custody Law, in Flaherty, *op. cit.*, footnote 3, p. 212. See also Constance Backhouse, Petticoats and Prejudice (The Osgoode Society: 1991).

[18] P. 303.

[19] P. 326.

and communities in the face of dire economic changes. "In the face of the miners' commitment to their communities and way of life, the [mining] industry in the twentieth century looked to government subsidies [to permit competitive mining operations]."[20] Perhaps significantly, Jennifer Nedelsky's essay explains the decision-making which enabled another resource, water, to be transformed from private property to a public commodity, and the subsequent interplay between the legislature, the courts and the Power Commission in the determination of policies, rights and responsibilities. In such a context, there is ample opportunity for comparisons about the roles of the government and the market in the mediation of competing interests. As well, there are obvious comparisons between Nova Scotia and New England: "from an American perspective, the ease with which the Nova Scotia legislature accomplished the abolition of a whole class of private property rights is astonishing."[21]

Thus, while this volume of essays begins in the mid-eighteenth century with questions about "imperialist" laws in the context of the Annapolis Royal Regime, it ends with early twentieth century questions about resources and economic power, both questions which remain central to Nova Scotia's identity and well-being and questions which continue to be addressed, in constitution-making and in relation to economic decisions, throughout Canada in the 1990s. As a series of essays on the regional legal history of Nova Scotia, this volume is exceptional; as a microcosm of the issues which need to be researched and analyzed—questions about law "reform", about criminal laws and punishment, about families and family life, and about law and the economy—this volume is a contribution to a more textured understanding of Canadian legal history as a whole. This volume, which suggests that "Nova Scotia [is] a novel challenge",[22] is a model for further work exploring the special nuances of regional history as well as the ways in which regional variations have been blended to shape the broader picture of Canadian legal history as a whole.

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[20] P. 319.

[21] P. 344.

[22] Thomas Garden Barnes, p. 11, referring to the fact that Britain had little previous experience in governing "conquered territories" in 1713 when Nova Scotia was acquired.

Indian Reserves and Aboriginal Lands in Canada: A Homeland.

By RICHARD H. BARTLETT.
Saskatoon: University of Saskatchewan Native Law Centre. 1990. Pp. xxii, 218. ($60.00)

Reviewed by Constance D. Hunt*

This book has arrived on bookshelves during a period in our history when the federal government has established a Royal Commission on aboriginal issues; the election of a new leader by the Assembly of First Nations has occupied the front and editorial pages of newspapers for days on end; and several proposals concerning the renewal of our federation have emphasized the need to come to grips with aboriginal grievances. It has also been published in the wake of the Oka, Quebec crisis of the summer of 1990 and during a time when violence is again threatening to erupt in northern Quebec over proposals for new hydro-electric projects. To say that it is timely is thus an understatement; it is a welcome addition to the small but thankfully growing literature on aboriginal legal issues, to which its publisher, the University of Saskatchewan's Native Law Centre, has been a steady contributor.

The short introduction tells us that the purpose of the book is to "consider the nature and degree of the rights to the land retained by the aboriginal peoples following the incursions of the Europeans".[1] The book is organized into four main parts, each of which is accompanied by brief but helpful summaries at the beginning and end. A detailed Table of Contents, a Table of Cases, and Table of Selected Authorities aid the reader in approaching this work; given the book's density and complexity, an in-depth index could have greatly improved its accessibility, especially to non-lawyers. Careful referencing, including many less well-known sources (such as unpublished reports, graduate theses and a wealth of historical material), will make it something of a gold mine for those who wish to pursue certain themes in greater depth. It is a little disappointing that there are but few references to the admittedly scant literature concerning contemporary land claims agreements. Much of this literature is not found in mainstream legal sources, and some of it (particularly as concerns the James Bay and Northern Quebec Agreement) has been authored by non-lawyers; these factors make it all the more desirable that a book of this nature should provide as comprehensive a listing of references as possible.

It is almost impossible (and certainly unwise) to begin any discussion of aboriginal issues in this country without some consideration of the

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[1] P. 1.

historical context. Part I, which provides a backdrop for what follows, begins with a chilling account of the extermination of the Beothuk of Newfoundland. This oft forgotten chapter of our past should remind us that we have much to account for, despite our illusions to the contrary when we compare ourselves to others such as the Americans or the Australians. These opening four chapters provide a concise but clear and fairly detailed picture of the key policy and legal events that have occurred since European contact with the aboriginal people of Canada. In many respects, it seems to be a case of history constantly repeating itself. For example, one cannot but be struck by the number of Royal Commissions and other inquiries and investigations that have taken place in regard to aboriginal issues since the mid-1800s. Notably, we are told that one of the first of these occurred following an attack upon a mining location by Indian bands who opposed the activities of miners and prospectors in Northern Ontario.[2] Another familiar and contemporary theme is the interaction between federal and provincial policies, often to the detriment of the aboriginal people. These chapters elucidate the little-appreciated point that the historical circumstances of aboriginal groups vary considerably throughout the country and provide an excellent introduction to the history of some areas (such as Atlantic Canada) that have received little attention, at least until recently.

The three chapters comprising Part II examine the nature of the ownership of Indian reserves and aboriginal lands. They build upon the argument, introduced in Part I and developed throughout the book, that lands set apart for aboriginals as a result of treaty or agreement (in contrast to lands set apart by executive action) were intended to provide a "homeland" for their occupants, that is, areas where they could both maintain traditional ways of life and pursue more contemporary forms of economic development. According to Bartlett, such a "homelands policy" requires the provision of sufficient land and resources to sustain the aboriginal people, as well as security of title to their land; this view leads to the conclusion that the aboriginal occupants should be afforded full beneficial ownership (including, for example, rights to minerals). In Chapter 5 it is asserted (and demonstrated through an analysis of the jurisprudence) that the courts have largely failed to recognize the fact that treaty/agreement lands were set aside with different, broader aims than were executive action lands. Bartlett attempts to turn this judicial reality to the benefit of aboriginal people by advocating that the courts should also extend the notion of full beneficial ownership to the executive action lands.[3]

Whatever the merit of the outlined theory, Bartlett's analysis and closely reasoned argument will undoubtedly be of interest to aboriginal people and their lawyers who are trying to argue for an expanded view of their

[2] P. 12.

[3] P. 129.

land rights. One cannot help but conclude from these three chapters that the definition of aboriginal land rights has been one of the greatest conceptual challenges ever to confront our courts; this as yet largely unmet challenge has driven as impressive a jurist as former Chief Justice Dickson to describe the aboriginal interest as *sui generis*.[4]

In the summary to Part II,[5] the author offers certain generalizations about the ownership of aboriginal lands and reserves. One is that lands set aside for aboriginal people as a result of treaty or agreement tend to be larger in size than those set aside by executive action. While the statistics provided bear out this observation, there are other explanations for the differences than (as the author seems to suggest) the process by which the lands were set aside. For example, in the negotiations surrounding the Inuvialuit Final Agreement in the Western Arctic (IFA), one influencing factor may have been the size of the area originally used and occupied by the Inuvialuit, evidence of which had been carefully documented through a comprehensive study of local land use patterns.[6] Moreover, the low rate of productivity of Arctic lands seems likely to have been taken into account.

In the Part II summary, Bartlett also emphasizes that the degree of control held by provinces under public lands has affected the Indian interest; again, some evidence is provided for this assertion but the generalization is not entirely convincing, a point also demonstrated by the IFA. Bartlett claims that, because the local government (the Government of the Northwest Territories) had no control of the public land involved, full beneficial ownership was accorded to the Inuvialuit. It should not be ignored that the IFA was negotiated during a period of considerably changed federal policy (in comparison to earlier agreements). The Government of the Northwest Territories (which was also a signatory to the IFA), moreover, was not without its vested interest in the outcome of the negotiations: although it controlled very little of the land at issue, the federal government was already committed to a policy of devolving authority to the territorial government, a point specifically accommodated in the IFA's provisions. In fact, the Northwest Territories Government may have been supportive of the Inuvialuit position in negotiations because a majority of its citizens are of aboriginal descent, a reality that has been increasingly reflected in the composition of the Government.

The three chapters making up Part III, which consider the extent of government control and management of aboriginal lands and resources, are based on the overarching themes that "[f]ollowing conquest and

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[4] *Guerin* v. *R.*, [1984] 2 S.C.R. 335, at p. 382.

[5] Pp. 129-130.

[6] Indian and Northern Affairs, Inuit Land Use and Occupancy Project (1976). This three-volume study, overseen by anthropologist Milton Freeman, documented Inuit land use and occupancy throughout the Northwest Territories and has provided a pattern for subsequent studies that have helped to demonstrate the basis of land claims elsewhere.

settlement, the aboriginal peoples, their land and resources were subjugated. The federal and provincial governments ... assume[d] total control over aboriginal lands and resources and ... den[ied] any power to aboriginal communities".[7] Chapter 8 outlines the techniques for accomplishing such control under the Indian Act; it makes a particularly useful contribution through its discussion of recent proposals for, and changes in, the administration of such resources on Indian reserves as timber, oil and gas, and minerals, changes intended to give local bands more control over resource disposition and use. Chapter 9 explores the extent of provincial assertion of authority over Indian lands and resources as a result of federal-provincial agreements that vary throughout the country. Chapter 10 looks at contemporary arrangements, including those in northern Quebec and the Northwest Territories and those affecting Metis lands in provinces. This chapter leads to the conclusion that the more recent initiatives reveal an emerging pattern of self-management and government. Bartlett suggests that, as a result of this strengthening of the "homelands" concept, the aboriginal people may have a greater likelihood of surviving and developing on their lands.

The final and shortest part examines the extent to which the Crown is accountable to aboriginal owners as a result of its exercise of the discretion or power over their lands discussed in Part III. Tracing the development, in both Canadian and American jurisprudence, of the fiduciary duty concept, this part logically contains a detailed analysis of the Supreme Court of Canada's decision in *Guerin* v. *R.*[8] and subsequent cases. It underscores the many resulting legal uncertainties and points to the fact that aboriginal desires for more control over their resources will likely have to be achieved at the expense of the potential benefits that can flow to them as a result of the Crown's fiduciary obligations.

One arguable weakness of the book is inadequate cross-referencing and linkage between some of the sections. This problem is especially apparent in regard to the discussions (found in each of the first three parts) of modern land claims agreements and related arrangements. Given the organization of the book, these separate discussions are required; especially for the uninitiated reader, however, references both forward and backward in the text and the footnotes would have been helpful.

This is legal scholarship that professes a particular point of view, but a strongly justified point of view. It is an important source book for lawyers and others involved in aboriginal land issues, containing solid research as well as some original approaches to a number of legal issues that will require our attention into the future.

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[7] P. 131.

[8] *Supra*, footnote 4.

Traité de droit civil—Les successions.

Par GERMAIN BRIÈRE.
Cowansville: Les Éditions Yvon Blais Inc. 1990. Pp. l, 1134. ($85.00)

Compte rendu de M.-D. Castelli*

Le traité de droit civil vient de s'enrichir du volume portant sur les successions préparé par le professeur Germain Brière, grand spécialiste de ce domaine.

Il a choisi, à juste titre, de suivre pour l'essentiel le plan du projet de réforme: ce plan est conforme à la logique des mécanismes mis en oeuvre par le droit des successions et a de plus l'avantage de faciliter le lien entre l'étude approfondie présentée ici et la future loi, même si les titres donnés à certaines parties diffèrent de ceux donnés dans le projet.

Après une introduction présentant des notions générales (transmission héréditaire, problème du fondement du droit de succession et évolution historique du droit successoral), le traité est divisé en six titres qui suivent l'ordre du projet: l'ouverture des successions et les qualités requises pour succéder; la transmission de la succession (qui correspond au titre deux du projet, nommé "de certains droits successoraux"); la dévolution légale des successions; les testaments; l'administration de la succession et la liquidation du passif; la liquidation de l'actif, titre subdivisé en indivision successorale et partage des successions.

L'auteur sait cependant s'écarter de l'ordre du projet de code lorsque la chose est nécessaire pour présenter l'ensemble des règles concernant une question et pouvoir donner au lecteur une vision complète et cohérente du problème traité: ainsi, la capacité de recevoir par testament est traitée dans les qualités requises pour succéder alors que le législateur—pour des raisons techniques—en traite dans les testaments; dans la liquidation de l'actif, l'auteur s'écarte assez notablement de l'ordre suivi par le législateur, en traitant des rapports dès le début du sous-titre sur le partage, et non après la question de la composition des lots ainsi que l'a fait le législateur, ce qui est logique dans le cadre d'un tel ouvrage puisque, pour former valablement les lots, il convient de savoir à partir de quelle valeur on doit les calculer ou comment les former.

Mais si la présentation formelle suit le plus fidèlement possible l'ordre du législateur, les développements, eux, vont bien au-delà de la simple explication du contenu des textes. Les problèmes de fond, sous-tendant les solutions expresses, et donc la résolution des situations non expressément prévues, sont abordés, et ce, de manière approfondie et détaillée: de là d'ailleurs, soit la modification des titres de certaines subdivisions par rapport au texte législatif, soit la présence de développements sur des règles présentes

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dans le texte, soit enfin la présentation de notions non explicitées dans le projet de code et cependant nécessaires et sous-entendues dans la loi.

Ainsi en est-il de la deuxième partie, présentée par l'auteur sous le titre "la transmission de la succession", plutôt que sous le titre fort imprécis du projet "de certains droits successoraux", et qui aborde les questions fondamentales, mais très théoriques, concernant le mode de la transmission (automatisme de l'acquisition, objet de la transmission, problème du fondement de la saisine).

On voit très clairement cette différence (découlant de la différence des buts) entre les textes légaux et la présentation doctrinale au niveau de la détermination des héritiers, où l'auteur explique précisément les principes directeurs qui sous-tendent toutes les solutions choisies: ainsi, l'auteur parle de la fente alors que le terme n'apparaît même pas dans la loi; il explique la règle des degrés laquelle n'est pas non plus (et à tort cette fois) expressément indiquée dans le projet.

Il en est de même dans les testaments où toute une partie est consacrée à l'étude de l'ensemble des conditions de fond du testament, alors que le projet de loi se contente de consacrer quelques articles à la question de la capacité de tester. L'auteur, au contraire, aborde de manière systématique toutes les règles de fond jouant pour les testaments, quelle que soit leur place dans le code, qu'il s'agisse des règles générales concernant la capacité ou de la cause, à laquelle se rattachent les règles plus spécifiques prévues pour les testaments, telles celles concernant les conditions et placées par le législateur dans la section ayant trait à la caducité et à la nullité des legs.

De même, l'auteur étudie les règles ayant trait à la sanction des règles de forme après avoir présenté ces formes et non avant, ainsi que le fait le projet.

Dans l'administration de la succession et la liquidation du passif, l'auteur rattache à la question de la séparation des patrimoines, dans une subdivision portant sur l'extinction de la séparation des patrimoines, la question des sanctions du non-respect de cette séparation par les héritiers, alors que le législateur l'a rattachée à l'inventaire des biens.

Il présente par contre la question de la détermination des obligations constituant le passif successoral avant d'aborder la question du paiement de ce dernier, question omise par le législateur. La détermination de ce passif offre pourtant un certain nombre de problèmes importants et dont les solutions sont influencées par la nouvelle organisation de la liquidation de la succession (dettes antérieures au décès, dettes découlant du décès, legs, *etc.*).

Mais l'auteur ne se contente pas d'améliorer l'étude faite par une modification de l'ordre de présentation de certains points. Il aborde, à juste titre, des législations qui, tout en ayant un impact sur le droit des

successions, n'y sont pas directement rattachées (indivision, administration du bien d'autrui, *etc.*).

L'ouvrage qui est, rappelons-le, un traité, présente de façon développée et complète les problèmes soulevés par des notions controversées ou présentant des difficultés même si elles ne sont pas l'objet du droit des successions, mais qui ont sur lui un impact important (voir, par exemple, la question de la définition de la mort, la question de la preuve du décès avec les questions des problèmes résultant des cas consécutifs à l'évolution des moeurs qui échappent à la rédaction des actes de sépulture—crémation—, portée de la présomption de date de la conception du droit de la filiation par rapport au droit des successions).

Les nombreux développements—tels celui portant sur les conditions illicites dans les testaments et qui discute l'impact des Chartes, celui de la signature du testament devant témoins, celui portant sur les cas de maintien de l'indivision, *etc.*—sont présentés de manière claire, généralement complète, et toujours très cohérente.

L'étude des diverses institutions est généralement précédée de très intéressantes présentations historiques (tels sur le principe de la continuation du défunt, du droit de l'adopté, du conjoint, l'origine de la fente).

Enfin, l'auteur a inséré dans le traité les modifications les plus récentes apportées par le législateur juste avant sa parution: création du patrimoine familial et survie de l'obligation alimentaire notamment.

Si cet ouvrage, qui constitue un document de base d'une importance capitale, est généralement bien composé et d'une grande richesse dans ses développements, il n'en présente pas moins (tout au moins de notre point de vue) certains défauts, tant au niveau du plan que parfois du fond.

Au niveau du plan, certains passages auraient, semble-t-il, été mieux placés à d'autres endroits qu'à ceux où ils sont abordés.

Ainsi, si l'auteur signale, à juste titre, dans la partie ayant trait à la liberté de tester la limitation indirecte introduite par la survie de l'obligation alimentaire, dont il fait l'étude détaillée dans le passif de la succession, il rattache à cette même liberté l'étude du partage du patrimoine familial. La place semble curieuse pour ne pas dire tendancieuse. Certes, il est certain que, s'il y a partage du patrimoine familial, le patrimoine objet de la succession va se voir modifié, et que la valeur même de la succession va en dépendre directement. Mais présenter cette institution comme entraînant de manière systématique une diminution du patrimoine (puisque l'auteur place l'étude sous la rubrique "liberté de tester") semble à la fois tendancieux et erroné; le partage du patrimoine familial peut en effet aussi bien augmenter que diminuer la valeur du patrimoine transmis; de plus, sauf exception, cette institution ne pourra modifier la composition du patrimoine transmis puisque le partage du patrimoine familial est fait, sauf exception, en valeur. Ainsi, l'application du patrimoine familial, même si elle devait dans certains cas conduire à une diminution de la valeur du

patrimoine transmis, ne pourrait porter atteinte au legs particulier d'une chose certaine faisant partie de ce patrimoine.

Il aurait donc semblé plus opportun et plus objectif d'insérer cette étude dans une partie portant sur la détermination du patrimoine transmis, détermination capitale et qui, curieusement, n'apparaît pas en tant que telle mais seulement à propos de l'étude de la "masse indivise" (subdivision de la liquidation de l'actif successoral). Sans doute faut-il voir là une erreur résultant de la volonté de l'auteur de suivre le plus possible la présentation du législateur, lequel n'aborde pas la question de la constitution de l'actif de la succession.

Par contre, la question des dettes souscrites au profit de la masse successorale après le décès n'est abordée qu'à propos des conséquences de l'effet déclaratif du partage et n'est même pas évoquée lors de l'exposé relatif à la constitution du passif de la succession, ce qui donne donc une idée tronquée et incomplète de la question.

Il est regrettable aussi que certaines modifications majeures n'aient pas été plus clairement soulignées: glissement de la fente de la logique du droit coutumier vers la parentèle du droit allemand (droit dont l'influence est pourtant soulignée relativement à l'obligation des héritiers au passif) et surtout logique nouvelle de l'obligation *intra vires successionnis* des héritiers, d'où découlent de nombreuses règles ou institutions nouvelles, dont, notamment, la création du liquidateur successoral.

La portée des nouvelles règles de l'administration des biens indivis semble sous-estimée et pour cette raison même l'étude de leurs effets en est cantonnée dans l'effet déclaratif du partage, alors qu'elles auraient dû être évoquées, en raison de leur effets potentiels, aussi bien à propos de la constitution du passif, ainsi que nous l'avons déjà évoqué, que, éventuellement, de l'actif à partager ou de l'étendue des biens soumis à l'administration du liquidateur.

Trop imprégné de ses connaissances, l'auteur omet parfois d'énoncer expressément certains des arguments en présence relativement à une question controversée, comme si le lecteur les connaissait déjà (par exemple, à propos de la représentation de l'indigne). Si une telle supposition peut éventuellement se soutenir dans un article destiné à des spécialistes, tel ne doit pas être le cas dans un traité constituant un ouvrage de référence où l'on s'attend à trouver l'ensemble des questions clairement expliqué (que ce soit dans le texte ou dans les notes infrapaginales selon l'importance du point abordé).

Le plus gros inconvénient de l'ouvrage tient cependant, non à l'auteur, mais au législateur qui, avant même d'avoir mis en vigueur le Projet de Loi 20 sanctionné par lui en 1987, et dont l'auteur fait l'étude, vient de présenter par le Projet de Loi 125 un nouveau projet de code civil, global cette fois, mais qui introduit plusieurs modifications par rapport au texte étudié par l'ouvrage.

Les modifications, relativement nombreuses, sont, la plupart du temps, sans grand inconvénients, car il s'agit de modifications de formulation destinées à alléger le texte, soit par une rédaction plus élégante, soit par une référence à des règles générales, objet d'autres parties du code. Mais tel n'est pas toujours le cas.

La numérotation des articles elle-même n'est plus la même, ce qui, en soi, constitue un inconvénient majeur. Mais, qui plus est, des modifications de fond ont été apportées, et cela, même par rapport aux plus récents textes législatifs (le patrimoine familial et la survie de l'obligation alimentaire). Ces modifications sont parfois majeures: modification du fondement du droit de l'État, dont il est précisé dans le nouveau texte qu'il n'est pas héritier, modification de la quotité attribuée au conjoint face aux descendants (sa part passant de la moitié dans le Projet de Loi 20 au tiers dans le Projet de Code civil présenté par le Projet de Loi 125); modification des délais pour faire reconnaître sa qualité d'héritier ou revenir sur sa renonciation, qui passe de sept ans à dix ans, *etc.*

Dans l'ensemble toutefois, il s'agit d'un ouvrage de base fort bien fait, clair, présentant des développements complets et très intéressants relativement à toutes les questions pouvant faire l'objet de discussions ou présentant une difficulté. Il vient combler une lacune puisqu'aucun traité n'existe encore sur le sujet en droit québécois, mais on ne peut que regretter que ce document ne soit déjà plus entièrement fiable et que déjà on doive vérifier en le lisant si les points traités ou les arguments utilisés sont encore valables en raison des modifications proposées par le Projet de Loi 125.

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Précis de droit des sûretés.

Par JACQUES DESLAURIERS.
Montréal: Wilson & Lafleur Ltée. 1990. Pp. xxviii, 426. ($49.00)

Compte rendu de Denise Pratte*

Le professeur Jacques Deslauriers nous offre un livre traitant des sûretés réelles et personnelles en droit québécois. À l'heure de la réforme du Code civil du Bas-Canada, certains pourraient s'interroger sur la pertinence de publier un tel ouvrage. Face à l'immense vide qui existait avant cette publication, nous sommes convaincue de l'opportunité de mettre ce précis à la disposition des étudiants et des juristes. De plus, nous partageons les vues de l'auteur lorsqu'il souligne que son texte pourra certainement

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être utile même pendant et après la réforme.[1] La forme du précis, c'est-à-dire un ouvrage qui expose brièvement les points essentiels, a été retenue pour cette publication, visant d'abord une clientèle étudiante. Toutefois, nous sommes persuadée que ce livre trouvera un auditoire beaucoup plus vaste dans la communauté juridique, compte tenu de la richesse des références doctrinales et jurisprudentielles qu'il offre au lecteur.

Le droit québécois des sûretés trouve sa source non seulement au Code civil du Bas-Canada, mais également dans des lois particulières. L'ouvrage du professeur Deslauriers est le premier dans son genre[2] à traiter l'ensemble du sujet. Il débute par une introduction générale, où il situe le droit des sûretés dans son contexte historique et où il énonce la définition, le rôle, les classifications et les principes généraux des sûretés. Nous accueillons très favorablement ce souci civiliste de l'auteur de bien jeter les ponts avec le système plus général du droit civil québécois. Le plan se divise par la suite en six titres touchant respectivement le cautionnement, les nantissements, le droit de rétention, les privilèges, les hypothèques et l'acte de fiducie. L'ordre retenu pour traiter le sujet, bien que n'étant pas le seul possible, nous semble répondre à un souci de clarté et de cohérence.

Le premier titre, traitant du cautionnement, est longuement élaboré. Il débute par un rappel historique instructif. Nous avons remarqué à regret que ce traitement historique n'a pas été repris systématiquement pour toutes les sûretés traitées. Le deuxième titre sur les nantissements couvre ceux prévus au Code civil du Bas-Canada, ainsi que les nantissements prévus aux articles 178 *et seq.* de la *Loi sur les banques*[3] et à la *Loi sur les connaissements, les reçus et les cessions de biens en stock*.[4] Toutefois, quant au nantissement prévu à la *Loi sur les pouvoirs spéciaux des corporations*,[5] l'auteur a préféré en traiter au dernier titre, soit le sixième, en abordant l'acte de fiducie dans son ensemble. Le titre troisième a été avantageusement réservé au droit de rétention, puisque ce droit est de nature particulière et qu'il ne peut être assimilé à aucune autre sûreté.

Les titres quatrième et cinquième traitent des privilèges et des hypothèques. En ce qui concerne les premiers, le développement porte principalement sur les privilèges mobiliers et immobiliers du Code civil du Bas-Canada. Le titre sur les hypothèques a été développé un peu succinctement, à notre avis. Dans la perspective de réforme à laquelle nous faisons face, l'hypothèque deviendra le concept clé de demain. Ainsi, bien que plusieurs pages soient allouées à cette sûreté, nous pouvons constater

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[1] P. v de l'avant-propos.

[2] Dans un style différent, voir le mémento de Pierre Ciotola, Droit des sûretés (2e éd., 1987).

[3] L.R.C. 1985, c. B-1.

[4] L.R.Q., c. C-53.

[5] L.R.Q., c. P-16.

qu'elles recouvrent plusieurs notions qui sont indépendantes de l'hypothèque, telles la clause de dation en paiement et la clause de transport de loyers. De plus, on regroupe sous ce titre les questions relatives à la fois aux rangs et à l'extinction des privilèges et des hypothèques. Nous comprenons les contraintes que s'est imposées l'auteur, par souci de concision, mais nous constatons à regret l'absence de développement concernant, par exemple, l'hypothèque consentie par un propriétaire apparent et les impacts d'une hypothèque consentie par un indivisaire.

D'une façon générale, on constate qu'il a dû faire face à des choix difficiles, étant en présence d'un domaine du droit toujours en expansion. Ainsi, traiter du nantissement de la *Loi sur les connaissements, les reçus et les cessions de biens en stock* en six pages ne fut certainement pas un exercice facile. Le professeur Deslauriers précise d'ailleurs dans son avant-propos que cet ouvrage ne saurait prétendre à l'exhaustivité. Il n'aspire pas à répondre à toutes les questions que se poseront les juristes. Pourtant, nous avons parfois regretté de ne pas le voir préciser davantage certains concepts, signaler certaines controverses ou nuancer certaines affirmations. Par exemple, nous aurions apprécié retrouver une référence à la position divergente de certains auteurs sur des questions telles que le droit de suite en matière de nantissement commercial, la possibilité de nantir des immeubles par destination ou les droits des banques sur les créances provenant de la vente des biens donnés en garantie en vertu des articles 178 *et seq.* de la *Loi sur les banques*.

En ce qui a trait à la réforme du droit des sûretés, l'auteur a choisi de ne faire que quelques allusions à l'avant-projet de loi présenté en 1986,[6] considérant que celui-ci ne représentait probablement pas l'état définitif du droit de demain. Au moment de publier cet ouvrage, le projet de loi 125 portant réforme au Code civil du Bas-Canada[7] n'avait pas été présenté. Il aurait donc été téméraire de traiter du droit futur. Toutefois, nous constatons que les modifications apportées au droit des sûretés par la *Loi sur le curateur public et modifiant le Code civil et d'autres dispositions législatives*[8] n'ont pas été considérées dans le précis.

La communauté juridique dispose donc maintenant d'un outil très utile dans le domaine des sûretés réelles et personnelles. Bien que nous ayons fait mention de l'absence de certains développements, nous convenons qu'un précis ne peut tout contenir sur un sujet donné. Il ne peut relever un juriste de son obligation de pousser ses recherches plus à fond. Cela dit, cet ouvrage pourra certainement servir de base à plusieurs recherches. Pour ce faire, la table des matières très détaillée, l'index, la table de doctrine

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[6] *Loi portant réforme au Code civil du Québec du droit des sûretés réelles et de la publicité des droits*, Avant-projet de loi, 1re session, 33e législature (Québec).

[7] *Code civil du Québec*, Projet de loi 125, 1re session, 34e législature (Québec).

[8] L.Q. 1989, c. 54.

et la table de jurisprudence seront d'un précieux secours. Bref, ce livre devrait figurer dans la bibliothèque de tout juriste qui s'intéresse au droit des sûretés.

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Corporate Directors on the Firing Line.

Insight Press. 1991. Pp. xiv, 374. ($199.99 softcover)

Reviewed by R. Lynn Campbell*

Do you really want to be a director? Is there not an increased possibility of personal liability suits and even jail terms? Is life too short to endure the stress and dangers of such a position? How can anyone keep abreast with the multitude of changes in responsibilities?

If anyone is interested in exploring responses to these questions, then Corporate Directors on the Firing Line is enlightened reading. This book is a collection of papers presented at a major conference on the personal liability of corporate directors. The papers deal with current areas of interest in which directors' duties have been either imposed or extended by recent legislation. The authors are experts, primarily from larger law firms, senior level Ministry or corporate employees.

The first group of papers deals with corporate action which has recently become regulated by legislation. The purpose of this legislation is to change corporate behaviour in relation to specific areas of corporate activity such as the environment and the workplace. The best way of ensuring compliance with the relevant legislation is to provide for personal liability of directors who could have prevented the breach.

The papers dealing with environmental prosecutions are particularly interesting and informative. The regulatory framework for personal liability is canvassed in a very straightforward manner. The high level of due diligence required to avoid liability is discussed by an analysis of recent Canadian and United States cases. It is suggested that the level of due diligence required will increase the overall investment in organizational and environmental areas. In addition, the policy of compliance through prosecution is thoroughly discussed and well documented with seminal survey work. The critical comments with respect to the Ontario Ministry of Environment's present approach to prosecution are very interesting and helpful to any current or future director and corporate counsel.

Another group of papers deals with the liability of directors for dealings in relation to financial matters. The paper dealing with liability arising from breaching the securities legislation clearly makes the distinction between

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criminal, administrative and civil liabilities. The move of the Ontario Securities Commission away from quasi-criminal action to administrative, tribunal and civil court proceedings to avoid Charter of Rights and Freedoms' protection is a noteworthy development.

Two papers deal with the seemingly endless net of claims by the Crown in relation to unremitted employee tax deductions, Canada Pension Plan and Unemployment Insurance premiums, as well as unremitted Retail Sales and net Goods and Services tax. These claims are primarily made when the corporation is either in financial difficulties or insolvent. Adequate procedures to invoke the due diligence defence are discussed at length, the best measure, of course, being segregation of funds into a separate trust account. Other claims against directors, such as employee wages and creditors' oppression remedies for preference of one creditor over another, are referred to. Measures to be taken to avoid personal liability, including resignation and shareholder agreements, are canvassed.

The duties of directors are greatly expanded in Canadian financial institutions under the proposed Loan and Trust Corporations Act and Banks and Banking Act. The paper dealing with these new developments has a good discussion of the role of the new independent director as a watchdog of board members. Under a policy of self-regulation, the new audit and conduct review committees will be the monitors of management performance.

The paper dealing with the key Ontario "players" in the regulatory setting is most helpful for any Ontario corporate counsel in the midst of a prosecution. The Civil Law Division of the Ministry of the Attorney General, Crown Law Office and legal Services Branch all have functions in the prosecutorial process, but their individual involvement in any particular prosecution will vary from statute to statute. The listing of prosecutorial policy and disclosure considerations is vital to corporate counsel.

It is appropriate that the final paper deals with director liability insurance. Instead of reviewing all the intricacies of liability policies, the paper deals with the larger question of risk management as a process of balancing between risk transfer and insurance. Many practical considerations for directors looking for liability insurance are noted.

On the whole each paper is well researched, organized and very current. For each area there is an acceptable balance between a description of the regulatory framework and jurisprudential analysis. Most authors offer their own thoughts on future developments. Collectively the papers cover most of the areas of present concern to directors. Thus the book provides enlightened reading for anyone who is interested in director liability.

However, Corporate Directors on the Firing Line does require further comment. One of the major criticisms of the book is the lack of effective editorship. Certain cases are fully discussed several times resulting in unnecessary repetition. There is no uniform typesetting nor margining. It

appears that these papers may have been photocopied in their original form. Certain papers, such as the one dealing with the Audit Committees, should have been omitted or supplemented by the editor. This paper appears to be simply in point form. Overhead projections should be either omitted from the book or relegated to an appendix.

The considerable discussion flowing from the presentation of each paper has been left out. One of the integral parts of a conference is not just the presentation of papers, but the frank and informed discussion that follows. A presentor may have made an omission. Or, a member of the audience may have an alternative view from the presentor. Inclusion of these comments in capsule form provides an essential balance to the papers. Such comments should have been included after each paper by the editor.

Corporate Directors on the Firing Line lacks a thematic tie to bring all the papers together. The paper dealing with the expanding range of business liabilities in the regulatory setting briefly poses the problem, but without any substantive discussion. This paper notes that there are new public interest obligations imposed on directors which go beyond the normal duties. According to the author, these obligations really arise in the broad public policy agenda of governments. These passing observations should have been expanded upon because they provide the necessary thematic tie for the whole book, and probably should have been at the beginning. How does one reconcile the traditional duties of directors, namely exercising corporate powers in good faith in the best interest of the corporation, with the expanding duties inherent in a company being a tool for implementing government policy? Is it time to recognize the social responsibility of the corporation as a legitimate corporate consideration by the directors? If such were the case, then would the preferred course of corporate action relieve the director from personal compromise between profit performance and conscience? Also, how is the self-regulation approach as proposed in the new legislation dealing with financial institutions compatible with traditional duties? This is important for the newly created independent director or watchdog committees of directors.

These questions go to the root of the director's position and duties. Discussion of the feasibility of these new or expanded duties in the modern corporate environment is important to all directors. Their willingness and capability to serve will be more informed and enlightened, and the need for training to serve in a particular directorship can be better assessed. In addition, counsel may be more able to assess the needs of the office if consulted with respect to a vacancy on the Board.

The final concern of the reviewer is the exhorbitant cost of the book. One can easily state that the consumer does not get his or her money's worth. The problem with this approach, however, is that there is a wealth of information contained in the papers which is valuable to corporate counsel and directors and senior management of corporations of all sizes. It would

be a pity if the cost of acquisition formed the basis of whether or not to purchase.

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The Guilty Plea and Summary Justice—A Guide for Practitioners.

By OONAGH E. FITZGERALD.
Toronto and Vancouver: Carswell. 1990. Pp. xx, 253. ($59.00)

Reviewed by Bruce P. Archibald*

Oonagh Fitzgerald makes an outstanding contribution to Canadian debates concerning criminal justice in this excellent book on the guilty plea. Its title is not mere publisher's puffery—it is a complete, in-depth guide for practitioners on the Canadian law governing all aspects of the guilty plea. However, it goes much further than that. The analysis presents a profound challenge to the complacent continuance of the guilty plea mechanism at the pragmatic core of the criminal justice system. Even experts in the field owe it to themselves to read this book, as it forces a fundamental rethinking of generally accepted practice. On the other hand, the book is written in an easily understandable fashion which will spark the interest of the neophyte who has only a passing familiarity with criminal justice issues.

The author states that she embarked upon this project because she was "perplexed by the apparent inconsistency between practice and theory in criminal procedure".[1] The inconsistency results from the fact that "... for all its virtues, the trial process is now a relatively rare occurrence and that 70 to 95 per cent of cases today are resolved through guilty pleas and a summary process lacking *all* the vaunted checks and balances of the criminal trial".[2] Professional participants in the criminal justice system who might be tempted to dismiss such a critical statement as ignorant hyperbole, would be well advised to follow through Fitzgerald's arguments in Part I of the book where she sets out the juridical nature of the guilty plea with consummate professional skill. Then they will be better equipped to assess her critique of the summary process by guilty plea which is found in Part II.

Part I begins with an informative chapter on the historical development of the guilty plea process at common law, and includes a fascinating comparative glimpse at the contrasting historical development of continental

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[1] P. v.

[2] P. 1. (Emphasis added).

criminal procedure. Following J.H. Langbein,[3] Fitzgerald takes the view that "... whenever criminal procedure and the laws of proof become too complex and demanding, something akin to guilty pleas and plea bargaining will insinuate itself into the system to facilitate the resolution of criminal matters".[4] Needless to say, Canada has reached this exalted stage of historical development.

Central to Fitzgerald's analysis in the following three chapters is that the guilty plea has two distinct functions in Canadian criminal procedure: it operates (1) as a waiver of procedural rights, and (2) as an evidentiary device whereby the accused admits the essential elements of the offence. She concludes:[5]

> The case law on the acceptability of a guilty plea has never been synthesized into a coherent theory. Sometimes the courts have viewed the guilty plea as a matter strictly within the accused's prerogative, to waive the right to trial and be convicted on the admission. At other times the courts have been more concerned about the accused's factual guilt than about procedural defects. That two such diametrically opposed approaches have been tolerated demonstrates the absolute failure of the jurisprudence to come to terms with the real nature of the guilty plea. One cannot but remark upon the fact that an institution of such overwhelming importance to the functioning of our criminal justice system as the guilty plea should be so utterly lacking in theory and rationale.
>
> There is only so far that a careful review of the case law can take us. The effort to tease strands of theory from the confusion of the case law only serves to point out that there are these two fundamentally different approaches to the acceptability of the guilty plea which have not been reconciled.

This perspective informs the whole of the discussion of critical issues in the book.

In Part I Fitzgerald examines a host of technical matters concerning the juridical nature of the guilty plea. Under the procedural heading, these include: the roles of counsel and presiding judge in the guilty plea process; the rule against equivocal pleas; pleading guilty to lesser or included offences; the impact of the guilty plea on sentencing; and withdrawal of guilty pleas. Under the evidentiary heading, Fitzgerald deals with: the guilty plea as an admission; problems posed by the guilty plea of a co-accused; the admissibility of rejected and withdrawn guilty pleas; and the admissibility of guilty pleas in civil proceedings. As an aside, it is fascinating to note that in the United States, where qualified guilty pleas and/or the plea of *nolo contendere* are acceptable, a more flexible approach to the nature and functions of the guilty plea has evolved. Fitzgerald chronicles this contrast deftly but thoroughly.

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[3] J.H. Langbein, Torture and the Law of Proof (1977).

[4] P. 7.

[5] P. 131.

It is in Part II, the critique of summary process by guilty plea, that Fitzgerald's book becomes most interesting and most controversial. She states:[6]

> The trial court's discretion to reject a guilty plea theoretically permits it to ensure that justice and fairness govern the guilty plea process. However, one finds that Canadian courts, while acknowledging the values of understanding, voluntariness and accuracy, treat these as relatively flexible indicia of the acceptability of a guilty plea rather than as imposing a definite standard which must be met in every case. They have been inclined to rely on the presence of defence counsel to cure any apparent deficiencies instead of embarking on a judicial enquiry into the circumstances of the plea. Appellate courts, for their part, have been reluctant to fetter the trial court's discretion to accept or reject a guilty plea.

It is critical to understand, however, that the guilty plea is most often taken after a plea bargain.

Fitzgerald claims not to be an opponent of plea bargaining *per se*. But key to her approach is the conviction that plea bargaining, as presently conducted in Canada, contravenes two essential principles of justice: (1) the substantive principle that there ought to be a proportional relationship between the nature of the crime committed and the severity of the sanction imposed; and (2) the procedural principle that punishment ought only to be imposed pursuant to procedures characterized by due process or fundamental fairness.[7] Fitzgerald supports her concerns about plea bargaining by reference to empirical studies in Canada, England and the United States which indicate that accused persons, whose procedural rights are waived in the bargained guilty plea, often believe themselves innocent and may have a statistically high probability of obtaining an acquittal if they go to trial.[8] Little wonder the present unregulated system of plea bargaining tends to bring the administration of justice into disrepute among members of the general public.

Perhaps the most important part of this book for those involved in criminal litigation is found in chapter 6 entitled: The Constitutionalization of the Guilty Plea. Fitzgerald notes that:[9]

> ... American courts have already explored, in considerable depth, the constitutional requirements for the acceptability of a guilty plea, whereas the Canadian courts have barely broached the topic to date. The American jurisprudence may foreshadow what can be expected in Canada once the constitutional impact of the guilty plea is recognized.

The American developments are described, showing how courts have imposed constitutional standards for the acceptance of guilty pleas which include protections to ensure the voluntariness and accuracy of the plea, and how statutory regimes, such as Rule 11 of the Federal Rules of Criminal

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[6] P. 150.

[7] P. 164.

[8] P. 160.

[9] P. 211.

Procedure, have been put into place to embody the constitutional standards. Fitzgerald then analyzes the pre-Charter leading cases from the Supreme Court of Canada on plea bargaining, such as *Brosseau* v. *R.*[10] and *Adgey* v. *R.*,[11] and concludes they may not pass constitutional muster. Looking to the few Charter cases thus far dealing with waiver of constitutional rights, she says:[12]

> It would seem then, that in order for the principles of fundamental justice to have any practical application to the guilty plea process, there would have to be a constitutional adjudication of this crucial act of waiver.

Those interested in the details of these constitutional arguments which could have a crucial impact on the course of our criminal justice system would be well-advised to read the book.

While Fitzgerald flirts with continental models as hypothetical alternatives in her concluding chapter on re-evaluation and reform of the guilty plea process, her ultimate recommendations for change are far less radical. She canvasses the potential of pre-trial conferences, greater pre-trial disclosure, and closer judicial control over the guilty plea process as elements of a possible solution to the problems of summary justice by guilty plea. The far-reaching analysis of the preceding chapters prepares the reader for more comprehensive reform proposals, but it is clear that this work will be of great assistance to federal and provincial policy makers as they assess the Law Reform Commission of Canada's proposals for reform in this area,[13] as well as those coming from bodies like the Marshall inquiry.[14]

A final word is in order concerning the methodology of this volume. It is essentially a doctrinal work, but exemplifies the breadth of scholarly capacity which is necessary to make an effective contribution to legal research in modern Canada. As Fitzgerald correctly points out, the Charter has transformed our modes of legal analysis:[15]

> The advent of the *Canadian Charter of Rights and Freedoms* has resulted in a broadening and a constitutionalization of both the procedural and evidentiary safeguards that previously existed in criminal law. This may elevate the level of analysis applicable to the guilty plea process. The *Charter* may provide a crucial new element to the theory of the guilty plea. The *Charter* may provide the means to transform the long standing notions of the limitations of law and to resolve and reunify the weak strands of conflicting theory on the nature of the guilty plea. Unlike the usual incremental changes made to statute or case law, the *Charter* permits

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[10] [1968] S.C.R. 181.

[11] [1975] 2 S.C.R. 426.

[12] P. 190.

[13] Law Reform Commission of Canada, Working Paper No. 60, Plea Discussions and Agreements (1989).

[14] T. Alexander Hickman, Lawrence A. Poitras and Gregory T. Evans, Royal Commission on the Donald Marshall Jr. Prosecution, Vol. 1, Findings and Recommendations, pp. 238-246.

[15] P. 131.

> a profound systemic modification, affecting even the rule-making matrix. By providing a set of basic principles against which all specific rules must be measured, the *Charter* completely inverts the traditional inductive and analogic method of legal analysis.

True to this understanding, the book provides a creative approach to Charter jurisprudence. However, it also shows how socio-empirical data and comparative law insights become critical for basic legal analysis in order to demonstrate what is justifiable policy in a free and democratic society. While this book is classic legal scholarship in the sense that it relies on previously published sources, it is a skilful synthesis of doctrinal, socio-empirical, historical, and comparative information—the stuff of sophisticated legal argument.

This book was a joy to read and will handsomely repay those who give it their diligent attention. Even those who disagree with Fitzgerald's conclusions will be stimulated by the analysis. Moreover, it is a model of modern Canadian legal scholarship which deserves to be emulated.

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Property Law: Cases, Text and Materials. Second Edition.

By EILEEN E. GILLESE.
Toronto: Emond Montgomery. 1990. Pp. xxix, 875. ($105.00)

Reviewed by S. Bryant Smith*

Traditionally, Canadian law schools have concentrated on preparing students for the practice of law. This preparation has required a sturdy knowledge of legal rules, a tuition gleaned usually through the reading of reported cases often organized into case books. A corollary of the case study method has been the incidental development of skills important to achieving a descriptive command of law. Recently, for a variety of reasons, some law teaching has sought to move beyond the descriptive function to engage normative evaluation. The first edition of Property Law: Cases, Text and Materials[1] by Mendes da Costa and Balfour was from the traditional mould; a descriptive work out of which analytical skills are learned inferentially. The second edition of Property Law: Cases, Texts and Materials by Gillese is also chiefly descriptive in its aims. However, it is more clear in its elaboration of rules, it consciously expresses an interest in skills development and it takes an important, albeit timid, step down the avenue of normative evaluation.

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[1] D. Mendes da Costa and R.J. Balfour, Property Law: Cases, Text and Materials (1982).

A comparison of the first and second editions will best reveal the improvements Gillese has brought to Property Law. With respect to rule elaboration she makes several significant contributions. The best of these are her numerous section introductions which often elucidate principles expressly, allowing a student to come away from the ensuing cases with a definite, as opposed to an amorphous, sense of their message. Further, the introductions briefly and precisely set the conceptual stage upon which a student may unerringly place a synthesized statement of the law. The superb quality of these introductions has implications for skills development. Gillese is not prepared to leave the student's understanding of the cases to chance. Express introductory direction reduces the role of inference in law learning while encouraging contextual thought.[2]

A second improvement in terms of descriptive function is the second edition's use of headings. Gillese tends to sub-divide her general topics more than was seen in the first edition. Accepting that wisdom is in distinctions, this more acute use of headings serves to give express direction to discussions which, in the first edition, tended to get lost in generalities. For example, in the first edition *The "Tubantia"*[3] and *Keron* v. *Cashman*[4] appear under the heading The Concept of Possession while in the second edition *The Tubantia* appears under Physical Control or Holding while *Keron* falls beneath The Intent to Appropriate. In re-dedicating cases to more precisely stated categories, Gillese shows that she has worked to identify a framework into which her material may be placed. This again encourages students to view the cases in context, and assists them in doing so.

Gillese achieves another enhancement of Property Law's descriptive power through judicious editing. She has pared the first edition's arm-stretching bulk by some 500 pages without compromising the essential comprehensiveness of the work. This has been done by dropping the chapter on Landlord and Tenant Law, deleting entire topics which are more appropriately covered in other courses,[5] excising cases which illustrated only tangentially the principle under pursuit, and condensing cases to be found now in the notes at the end of most sections. This reduction in the size of the work has at least two important effects. First, it rids the book of poor cases which had been included in the first edition for the sake of including cases. In the first edition the chapters on future interests

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[2] In her introduction to Chapter 17, The Rule Against Perpetuities, Gillese states her interest in skills development when placating the anticipated anxiety of her reader by saying, p. 17:1: "Mastering future interests and perpetuities will enhance your analytical skills, logic and problem-solving abilities with obvious spill over effects in your other courses."

[3] [1924] P. 78 (P.D.A.).

[4] 33 A. 1055 (N.J. Ch., 1896).

[5] *E.g.*, the doctrine of fundamental breach which, although significant to exculpatory clauses in bailment contracts, is best left to a course in contracts law.

were grated with chattering case reports which did more to disrupt than define. In her edition Gillese wisely omitted these cases, allowing her narrative to speak without being heckled. The second advantage of the smaller case book is that it leaves the student with more time to read, digest and synthesize the material. In this sense Gillese presents a more thought-provoking edition (and likely makes a statement as to the role legal studies should play in one's life).

Skilful editing has also allowed Gillese to present an edition upon which a first year property course may be managed readily, a use frustrated by the predecessor's volume.[6] Further, she has included considerable statutory material from jurisdictions other than Ontario (to which the first edition restricted itself), while cutting cases which interpreted Ontario statutes, thereby giving her edition broader appeal.

The first edition contains no obvious basis for normative evaluation. In the second edition Gillese has added a section on Native Lands[7] in which is included *Guerin* v. *R.*[8] The addition of Native Lands draws one's attention to a contrast of justifications. The tenurial system of Great Britain, cultivated so successfully by William the Conqueror, is attributable largely to the exercise of military power. This "might makes right" mentality continues to inform property law, more so now from the stance of financial, not military, power. Aboriginal title has completely different antecedents, drawing its justification from long standing occupation, not the tenurial system. At the root of each of these justifications are entirely different normative schemes. Gillese is asking the reader to contrast and compare these competing beliefs; to move from the descriptive to the evaluative.

By including *Guerin* Gillese sends the message that the Supreme Court considers normative evaluation to be desirable. She also confirms that the time has come for learning in property law to move beyond the descriptive to the normative, a realm which inspires much law reform. To be sure, in terms of normative evaluation the inclusion of *Guerin* is a modest contribution. However, it is an important step in a new direction for property teaching which has traditionally interested itself exclusively in descriptions of law. As property scholarship attempts to keep pace with contemporary social developments, one can expect to see more and more teaching material attempt to stimulate evaluative thinking.

While the improvements to the second edition of Property Law are significant, there is much yet to be done. Unfortunately, Gillese leaves unchanged Chapter One of the first edition, The Idea of Property. Most lawyers continue to think incorrectly of property as a noun which points to a thing and not an adjective which identifies a particular class of rights.

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[6] The first edition ran to 1363 pages, the second edition to 875 pages.

[7] Chapter 7, Land Law and Tenure in Common Law Canada.

[8] [1984] 2 S.C.R. 335.

This misapprehension could be spurned by beginning a property case book with a basic discussion of the concept of rights. From such a discussion would emerge a realization that the law's description of property responds elastically to different stimuli at different times.

Gillese also leaves untouched Chapter 6, The Anglo-Canadian System of Landholding: A Historical Introduction. A proper appreciation of the archaic rules of estates, future interests and perpetuities requires a good knowledge of English legal history. This introductory chapter has so many gaps that the reader is left in puzzlement. Property teaching continues to await an informative, thorough and precise explanation of land law antecedents.

Another area for improvement relates to the conceptualization of property issues. In organizing her edition Gillese relates well to traditionally defined categories of property law. The time has come, however, to consider whether more contemporary organizing themes exist. For example, it would be helpful to see brief sections on matrimonial property law, intellectual property law and environmental property law.[9] These might all be included beneath the rubric Applied Property Law.

Finally, the second edition stumbles as a case book by omitting to make itself as useful as possible to students. The absence of an index leaves one flipping through chapters in search of specific topics. An even greater limitation for students is the table of contents which merely gives headings without listing the cases which fall thereunder. Specifically locating the cases in the table of contents is vitally important to students preparing for exams because a mental reference to the table will allow them to place a particular case readily against the issue to which it is relevant.

In conclusion it may be said that the Gillese edition of Property Law provides a more accessible and manageable description of the law of property. It also takes an important step down the avenue to better legal analysis by emphasizing skills development and by introducing normative evaluation. In context, the second edition of Property Law may be seen as occupying a position between traditional law teaching, which focuses on the descriptive, and contemporary law teaching, which places increasing emphasis on skills building, and normative considerations.

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[9] A surprising deletion from the second edition, given the current interest in the environment, involved the cases on riparian rights.

The Law of Restitution.

By PETER D. MADDAUGH and JOHN D. MCCAMUS.
Aurora: Canada Law Book Inc. 1990. Pp. cv, 791. ($125.00)

Reviewed by Peter Birks*

This is a very long book on a very difficult subject. It is easy to say, with the sincerity of fellow-feeling, that the authors are to be congratulated on completing a daunting task. Yet their book elicits a mixed reaction. It is packed with information, and the discussion of particular topics is as detailed as any that can be found. As a work of reference it is invaluable, and practitioners will certainly take warmly to it. But if we ask, at almost the eight hundredth page, whether we now understand more of what is going on in the law of restitution, what its principles are and how its parts cohere, the answer is disappointing. We do not.

The reasons for this appear to grow from two fundamental failures. As the authors declare,[1] the Canadian courts have been in the vanguard in recognizing that the law of restitution must be understood in terms of the principle against unjust enrichment. But that perception must be rigorously carried through into the analysis of the cases, and it may be that it must be carried through in terms rather different than those currently preferred by the Canadian judges. This book does little to harness the analytical power of the principle against unjust enrichment.

The second shortcoming will sound trivial. It is the failure to emancipate the law from the long-standing, indiscriminate and bewildering use of the word "remedy". The unexplained but prominent use of "remedy" destabilizes the almost equally prominent "right", with the consequence, anything but trivial, that the vocabulary which determines the very structure of the book is not clear.

Remedy and Right

After the introduction, the book has two principal parts, called "Remedies"[2] and "The Right to Restitution".[3] This is instantly difficult, because in this context "remedy" and "right" are for all practical purposes synonymous. I pay you money by mistake and am entitled to restitution. That to which I am entitled can be called a restitutionary remedy or a right to restitution. It makes no difference. If the words are to be used in contrasting senses, help must be given to the reader. It takes an effort to work out that "The Right to Restitution" is really a study of causes

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[1] Pp. 27-29.

[2] Pp. 67-203.

[3] Pp. 205-773.

of action. It deals with the facts which generate a right to restitution, such as mistaken transfer, transfers made under duress, compulsion by legal process to discharge another's debt, acquisitions in breach of duty, and so on. "Unjust enrichment" is the generic description of all these particular facts, and the "right to restitution" is the response to them—or, one might say, the remedy for them.

Unfortunately, however, the reader's problems are not entirely solved when "right" has been translated as "cause of action". For, in the midst of their series, after mistake, the authors switch to a more contextual approach. They prefer to use the heading "ineffective transactions", which is not a restitutionary cause of action so much as a context within which specific restitutionary causes of action such as mistake and failure of consideration operate. Also, the discussion of defences has no separate section. Defences are discussed as they are encountered. The authors' views on *bona fide* purchase, for example, have to be collected from eight different places.

If the long section on the right to restitution is, broadly, about causes of action, what is the earlier part called "Remedies" actually concerned with? It is a mixed bag.

The two chapters on tracing ought to have been put under a different heading. Under the rubric "remedies", these chapters refer repeatedly to "the right to trace", a slip which merely reflects the fact that the two words are indeed synonymous. But that is not why the chapters on tracing are out of place. The authors themselves give the reason. Their crucial and correct analysis actually comes down against "remedy" and, by implication, against "right" as well:[4]

> Hence, as with the case of following property at law, tracing in equity is, in reality, a means to a remedy rather than being a remedy in and of itself.

The authors should have made sure that their presentation reflected their perception of that important truth. Tracing is indeed neither remedy nor right. It is no more than the exercise of finding the location of value at any given moment. Anyone can play the game of identification. The difficult question only arises once the tracing is done. At that point it has to be asked what kind of right (or remedy) is exigible in respect of the assets into which the value in issue has been successfully traced. That question is asked,[5] but the discussion is then forced to double back to the treatment of constructive trusts and equitable liens, which have already been considered.[6]

Having taken out the chapters on tracing, it being a process, like the taking of an account, ancillary to the assertion of the right to restitution,

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[4] P. 127.

[5] Pp. 148-158.

[6] Pp. 77-102.

what else remains under "remedies"? Some of the discussion turns out to be about old-fashioned ways of describing the causes of action. So "money had and received to the use of the plaintiff" and "money paid to the use of the defendant" describe, at a particular level of generality and abstraction, sub-sets of the facts which are nowadays called "unjust enrichment"; and "quasi-contract" is a failed attempt to do the same.

The problems of "remedy" are given a further and all too familiar twist in the discussion of the constructive trust.[7] There is a straightforward question to be asked: in relation to any given cause of action for restitution can the plaintiff assert an equitable proprietary interest in the enrichment traceably surviving in the defendant's hands? An equally intelligible sub-question is whether, if yes, that proprietary right should be seen as created by the facts when they happened, by subsequent action taken by the plaintiff, or by the judgment of the court. Some have buried these questions in discussion of a bogus contrast between a "substantive" and a "remedial" constructive trust. Sadly the authors succumb. But it is quite impossible to work out from their text what is meant by the evidently much superior remedial constructive trust, and it was always impossible to do so in the writers, however distinguished, whom they follow.

On occasion,[8] the authors seem to see that the verbiage with which their section on "remedies" is obliged to struggle needs nothing so much as to be cut back. But they do little to sustain the argument for the more economical system which they evidently know to be the way of the future. The modern Canadian law student and lawyer would have been grateful to be told that the right to (or remedy of) restitution really comes in very few forms. The plaintiff either claims the value received by the defendant or the value retained in the defendant's hands; and claims of the former kind are always personal, while those of the latter kind are usually proprietary. These structural simplifications are essential to understanding, but they are hard to find in this book.

Legitimate Use of Remedial Language

There are two very important matters which can be satisfactorily handled in the language of remedies, provided great care is taken to specify the sense in which it is being used. As it happens, the authors eschew both.

(1) *Is there a "remedial" part of the law of restitution?*

Most of the law of restitution is concerned with identifying the causes of action in unjust enrichment. For example, a chapter on mistaken transfers is concerned with the precise nature of that sub-form of the cause of action,

[7] Pp. 78-100.

[8] Pp. 74-75.

and it takes the right to restitution (or the remedy) more or less for granted, as stable and uncontroversial. However, there is one area in which the emphasis is inverted. The cause of action is taken for granted and the inquiry is solely as to the availability and range of restitution. This happens when the plaintiff is seen as the victim of a wrong. It is not the business of the law of restitution to say what facts precisely amount to, say, the tort of conversion or to a breach of fiduciary duty, but it is its business to ask whether any such wrong, defined elsewhere, gives rise to a restitutionary remedy or, in other words, to a right to claim the defendant's gains. And it is its business, if yes, to face up to the problems of remoteness of gain which parallel remoteness of loss in claims to compensation.

In restitution for wrongs, therefore, the focus of the inquiry moves away from the substantive (where that word, not lucid in itself, refers to the facts which make up causes of action) and towards the remedial (where that word, no more lucid in itself than "substantive", refers to the question of the availability of restitution and its quantum). Here "remedial" takes its meaning only from the contrast with "substantive", in the sense with which, for the purpose of this contrast, "substantive" is artificially endowed. So, to say that the subject of restitution for torts and other wrongs is a purely remedial study is only to assert that it does not and should not seek to define the wrongs which are the causes of action, which would be to duplicate the work of the law of civil wrongs.

The authors of this book, despite early awareness of the materiality of this distinction,[9] nevertheless run together the remedial and the substantive parts of the law of restitution. The cause of action, unjust enrichment, does not stand out from the remedial debate about the legal consequences of wrongs.[10]

(2) *Can restitution fulfil expectations?*

The second matter which might legitimately be discussed in remedial terms is not unrelated to the first. Is it possible, in the name of restitution or unjust enrichment, to do any more than compel the defendant to surrender to the plaintiff the enrichment received at the plaintiff's expense and, in particular, is it possible for the courts to move into the business of fulfilling disappointed expectations? This is important in Canada because some of the cases which have most enthusiastically embraced unjust enrichment

[9] Pp. ix, 33-35, 45.

[10] It is true that there is a sub-section entitled "Profit from Wrongdoing" within "The Right to Restitution", but, as we shall see, it both includes some matter which belongs in the substantive part and intervenes between two sections which indubitably do belong in the substantive part of the subject. The result is that the most important division of the subject is obscured.

have been cases in which expectations have been fulfilled,[11] so much so that in New Zealand the Canadian jurisprudence has been integrated into an interpretation explicitly based on the realization of legitimate expectations.[12]

The authors discuss these cases in detail under the heading of "equitable wrongdoing".[13] Although they reveal signs of underlying puzzlement, they do not bring to the surface the crucial "remedial" question. This discussion can best be approached through alternative hypotheses. Suppose, first, that the plaintiff appeals to the substantive law of unjust enrichment not as the victim of a wrong, but simply as one who has suffered the minus which accounts for the defendant's plus—in Canadian terms, the "corresponding deprivation". A plaintiff whose cause of action depends on that subtractive nexus is logically tied to a measure of recovery which does not exceed the gain so subtracted.

Imagine (leaving matrimonial property régimes out of account) that I pour £100,000 into my wife's land, raising its value from £350,000 to £500,000. The circumstances are such that a court will uphold as reasonable and legitimate my confident expectation of a half-share of her equity. There is no way that a cause of action in subtractive unjust enrichment could possibly give me that share. There may be more than one way of calculating her enrichment at my expense and more than one time for doing it, but none will yield me that which I expected or its value. In actions based on subtractive unjust enrichment, therefore, it cannot be right to suggest, as the New Zealand Court of Appeal allows itself to do, that it makes no difference whether one thinks in terms of making good expectations or restoring unjust enrichment.

Suppose, instead, as the authors' heading implies albeit without much warrant from the words of the judges, that the plaintiff is seen as the victim of a wrong. Subject to principles of remoteness of gain, the plaintiff can now reach any profit which the defendant has derived from the wrong. This is the one way in which, in theory, restitution might indeed reach the expectation interest. That is as much as to say, moreover, that this is the only way the *Pettkus—Sorochan* trust can be defended as restitutionary and based on unjust enrichment. Despite the extended discussion, this point, for all that it is implied in the authors' heading, escapes examination.

The difficulty on this hypothesis as to the plaintiff's cause of action is different. There must be a wrong and (this being the remedial part of the law of restitution) it must be a wrong for which the gain-based remedy lies. Even supposing it possible on the facts to establish the wrong

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[11] *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834, (1980), 117 D.L.R. (3d) 257; *Sorochan* v. *Sorochan*, [1986] 2 S.C.R. 38, (1986), 29 D.L.R. (4th) 1.

[12] *Gillies* v. *Keogh*, [1989] 2 N.Z.L.R. 327.

[13] Pp. 660-670.

of failure to honour an expectation, its closest relative would be breach of contract, not a wrong for which restitution is commonly thought to lie. One might indeed have expected the authors to make a link between the *Pettkus—Sorochan* type of situation and their discussion of the restitution of the profits of breach of contract. But the nature of their exposition separates the two. The discussion of restitutionary damages for breach of contract is not under "profits of wrongdoing" at all but, contextually, under ineffective transactions.[14]

Unjust Enrichment at the Plaintiff's Expense

This section recurs to the role of the principle against unjust enrichment. If the heap of good learning which has been the law of restitution is to be sorted, the work must largely be done through sustained exposition of the terms of that principle.

First, the terms of the principle must be got right. A Canadian book is bound to rely heavily on Dickson J.'s statement in *Rathwell* v. *Rathwell*:[15] "for the principle to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason—such a as contract or disposition of law—for the enrichment." The authors see this is not satisfactory, but they deal with the difficulties too reticently.[16] The restatement of "at the expense of" as "corresponding deprivation" covers one sense of the phrase but not the other. It leaves no room for the cases in which the plaintiff is the victim of a wrong, "unjust enrichment *by doing wrong to* the plaintiff". This merely underlines the natural distinctness of what in the discussion above we called the remedial part of the law of restitution.

Even more dangerous is the restatement of "unjust" as the civilian *sine causa* or *sans cause*, rendered as "the absence of any juristic reason for the enrichment". This is unhelpful. For an already dangerous abstraction, "unjust", it merely substitutes an unintelligble legal construction. Almost anything can be made to add up to insufficient *cause*. This encourages intuitive decision-making, with *ex post facto* labelling of the results. It will be better to go straight from unjust to the cases, to see on what facts the courts have actually awarded restitution.

Leaving on one side the remedial inquiry into restitution for torts and other wrongs, the mission of the law of restitution must be to build up from the cases a complete typology of the cause of action which is generically "unjust enrichment at the expense of the plaintiff" (in a subtractive sense). This means separating these questions: (1) Was the defendant enriched? (2) Was it at the expense of the plaintiff? (3) Was it actionably

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[14] Pp. 432-438.

[15] [1978] 2 S.C.R. 436, at p. 455, (1978), 83 D.L.R. (3d) 289, at p. 306.

[16] Pp. 32-34.

unjust? (4) Is there nevertheless some defence or other bar to restitution? The main thrust is always going to be in the list of unjust factors: the facts which render an enrichment at the expense of the plaintiff actionable for restitution.

Taking the principle against unjust enrichment seriously means allowing it to provide the structure of textbook exposition and to control the analysis of individual cases. In this book this does not happen. After the introduction, the four inquiries are not properly separated. For example, as we have already observed, there is no separate section on defences at all. Moreover, though there is a good discussion of enrichment in the introduction[17] it is too short to allow the consideration of the unjust factors to be unified: within the chapter on mistake, for instance, the authors still have separate discussions of money[18] and non-money benefits.[19] Yet if the concept of an enrichment is properly understood—that is, if the first question is answered fully—the law as to causes of action must be the same in whatever form the enrichment is received.

The main burden must be carried by question three. The unjust factors need to be clearly identified and coherently grouped. The grouping matters, for otherwise a new but in principle acceptable unjust factor will never find a home. In other words, in the absence of a rational sequence of the unjust factors orderly growth, or for that matter orderly contraction, will not be possible. The grouping in this book is not convincing. The difficulty is partly the refusal to separate restitution for wrongdoing. That is aggravated by the switch to the contextual category of "ineffective transactions" which has already been noticed.

The pattern is further broken up by the authors' treatment of compulsion. Compulsion itself is split up. Much of it is dealt with under wrongdoing.[20] But far away, towards the end, compulsion of law causing one person to discharge another's obligation finds a separate home.[21] This breaks up what should be one topic, but, more seriously, it also breaks the relation between compulsion and mistake. Both the mistaken and the compelled party can say that their decision to transfer was distorted, and it is for that reason that, subject to all the necessary fine tuning, both can have restitution without having to present themselves as the victims of a wrong. In other words they can both rely on a cause of action in subtractive unjust enrichment. It may be that both can on some facts also make out a cause of action based on wrongdoing, as where the mistake is induced by fraud or the compulsion amounts to actionable intimidation.

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[17] Pp. 38-40.

[18] Pp. 207-280.

[19] Pp. 281-306.

[20] Pp. 531-573.

[21] Pp. 713-740.

But to present duress and other forms of compulsion under "profits from wrongdoing" is to eliminate one theory of recovery entirely, implying that the plaintiff must base himself on a wrong or fail. More difficult still is the fact that it is not, on closer analysis, wholly clear which of the two causes of action is being suppressed. Despite the heading under which compulsion is considered and the immediate congeners with which it is placed, there are passages which come close to denying the need for the plaintiff to point to any wrong.[22]

There are practical reasons for taking care to preserve the distinction between seeking restitution for a wrong and framing a cause of action for restitution in autonomous unjust enrichment. One is that the constraints on the measure of recovery are much narrower in the latter, as we have seen in the discussion of the *Pettkus—Sorochan* situations. Another is that statutes which regulate litigation, most obviously statutes of limitation, are likely to bear differently on each. It is indeed rather obvious that there are all sorts of contexts—the conflict of laws is another—where it will be essential to know exactly how many causes of action the plaintiff has and how to characterize each.

Conclusion

Nobody who lives with this book for a period of months can fail to learn a great deal from it. If this now seems an ungrateful review, it must be admitted that it takes its character from the reviewer's own obsessions. The authors are not drawn to the kind of structural understanding which happens to rank high on the reviewer's list of priorities. They do other things much better. They can reasonably assert that a work of reference must be conservative and must abide by the language which is found in the cases, that the penalty of innovation is loss of accessibility to the practitioner. What the authors do superbly well is to document each topic in great detail, and what they have done is to produce a Canadian work of reference to stand besides Goff and Jones.[23] That book, now in its twenty-fifth year, is its obvious intellectual forbear, more so than the American works on which it also draws. Practitioners on both sides of the Atlantic will be grateful, as also will all who find themselves having to research a restitutionary problem.

All the same the reviewer ventures one wish, which is that, when it comes to the second edition, the principal parts of the book will no longer be called "Remedies" and "The Right to Restitution" but "Unjust Enrichment" and "Restitution for Wrongs". It would be better still if these parts were in separate volumes. The latter, the purely remedial part of the law of restitution, belongs to the law of civil wrongs. The former

[22] See especially n.10, p. 533.

[23] Lord Goff and G. Jones, The Law of Restitution (3d ed., 1986).

has no other home. There is the strongest possible distinction between the case in which the plaintiff makes out his title to sue as the victim of a wrong and then argues about the legal consequences of that wrong, and the case where all he says is that, in the Canadian terminology, he is the person who has suffered the corresponding deprivation which accounts for the defendant's enrichment and then goes on to show that there is an unjust factor by reason of which the law requires that there be restitution.

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Eunomia: New Order for a New World.

By PHILIP ALLOTT.
Oxford: Oxford University Press. 1990. Pp. xxiii, 420. (£16.95)

Reviewed by R. St. J. Macdonald*

Eunomia, a Greek word meaning the good order of a self-ordering society, is an unusual, stimulating and challenging book. Written over a period of fifteen years, and born from the impressive diplomatic and international law experience of the author, it is a striking departure from standard works on international law, especially those from Great Britain where the influence of positivism continues to be widely felt in professional circles.

Eunomia contains no footnotes, no endnotes, no references to treaties, cases, statutes, or scholarly writings. The author states that the unusual form of the book was dictated by its overall intention: to propose a theory for a new and better ordering of international society.[1] Allott's vision of the world is one in which "human societies and human beings everywhere at last begin to take moral and social responsibility for the survival and prospering of the whole of humanity".[2] To achieve this goal we must reconceive, first, ourselves, then the societies to which we belong and, ultimately, the society of societies, the international society of humanity. Explaining the reconceiving of international society is also a challenge to the reader to reconceive himself or herself. Eunomia is a theory of re-conception.[3]

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[1] P. xvii.

[2] P. xxiii.

[3] P. 410.

Eunomia is not just another rambling account of a distant utopia. It sets out a theory meticulously formulated and carefully developed. Within a rigid structure, the writing itself is at times almost poetic; there is an internal rhythm to the work, a sense of cycle and process. Devices of repetition and reiteration are used, creating a rather liturgical effect. This may be unsettling to longtime readers of straightforward legal writing, and it may make the book less immediately accessible. Yet style is an important part of the book as a whole.

The three main headings of the book are society, constitution, and well-being. In the comments that follow, I will try to give a sense of the content of Allott's theory, using his main headings as guideposts.

I. *Society*

In this, the broadest, most general section of the book, Allott seeks to define human beings and their societies in a complete and organic way. Laws and structures are, for him, less important than the urges, needs and desires which prompt human beings to create them. It is this power to create, to imagine and to will which is both the source of all society and the hope for the realisation of eunomia.

In his opening chapter, Allott sets forth the following premises: (i) society is the collective self-creating of human beings; (ii) international society is the society of the whole human race and the society of all societies; (iii) law is the continuing structure-system of human socializing; (iv) international law is the law of international society.[4] These premises, which represent the basis for "a form of human self-discovery which will be both a rediscovery and a new departure",[5] are the fundamental principles of eunomia. They place the individual squarely at the heart of society. The power of human beings to think, to reason, to imagine, is that which enables them to conceive of themselves as members of a society.

For Allott, society has a meaning that encompasses a wealth of possible human communities. For example, the family is a form of society, as are business corporations, professional associations, states and nations. It is through societies that we find our identity, that we form our relationships with others, that we develop our values, and channel our energies and drives. But societies are also in a constant state of flux, which the author describes as a process of social self-creating "as energetic and complex and dense and continuous as the process of life itself".[6]

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[4] P. 3.

[5] *Ibid.*

[6] P. 52.

The ultimate society is the society of humankind. Differences between individuals and societies are trivialised by the wealth of what is shared by all human beings:[7]

> Humanity shares the human condition. Humanity shares human consciousness. Humanity shares the world-made-by-consciousness. Humanity shares desire and obligation, imagination and reason, willing and acting. Humanity shares the capacity to make words, ideas, theories, values. Humanity shares the planet Earth, its abundant and finite resources. Humanity shares the strange, mind-surpassing universe. Humanity shares the unalterable necessity of the physical universe and the inexhaustible impulse of life.

This shared heritage, shared humanity, and shared destiny are what underlie the need to conceive of an international society of all humanity. International law, ideally, should be the means by which the society of all humanity is structured, governed, and ordered. Yet it is the society of humanity which, among all human societies, is, according to Allott, the most poorly developed. And it is precisely this society which forms the ultimate focus for Eunomia: how, asks the author, must international law and international society be re-conceived to best promote the well-being and ultimate survival of the society of humanity?

For Allott, part of the problem of conceiving a new world order is to be able to step outside the constraints that our words and language place upon our imaginations. Words have a power to form reality: "Our words make our worlds. To choose our words is to choose a form of life. To choose our words is to choose a world".[8] One of the purposes of this book, and according to Allott the key to our future, is to give new content and meaning to old words, such as state, law, constitution, citizen, society and humanity.[9]

In Allott's theory, societies, including the society of societies, are formed in response to what he describes as a series of dilemmas "in which the ambiguous duality of the human condition is lived socially".[10] Our responses to these dilemmas determine the nature of the society in question.

The dilemma of the self and the other is the dilemma of identity, where identity is in part given by the society to the individual, in part by the individual to society. The dilemma of the one and the many is the dilemma of power, referring to the attempt to create a relationship between a single individual and a society. It is also the attempt to create relationships between different societies. The dilemma of will arises where

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[7] P. 117.

[8] P. 6.

[9] *Ibid.*

[10] P. 56.

the creative power of imagination and the ordering power of reason combine in human beings and in societies to generate conflicting values. In the dilemma of order, society is constantly attempting to bring into harmony its own self-ordering with the order of the principles which transcend it. Finally, the dilemma of becoming is the attempt of society to survive through the chain of past-present-future. Religion, art, mythology, history, natural science, morality, economy, and law are all phenomena which seek to establish a continuity between the past and the present, and to create the possibility of a future along the same continuum.

These dilemmas lie at the root of all societies. The resolution of the tensions they create is a fundamental part of the process of constituting of society. The way in which a society defines itself in relation to others, the way in which it reconciles or integrates its past, the values it establishes, and the position it sets for itself in relation to those values are fundamental aspects of its self-constituting process. Thus these dilemmas contain that which is shared by all societies and that which gives them a never ending potential for difference, for uniqueness.

II. *Constitution*

Allott defines a constitution as, and here we see the artist in the lawyer, "the fruit of a society's contemplation of itself in time and space. In the constitution society takes responsibility for making its future by making its past, takes responsibility for making its past by making its future."[11] A constitution has three aspects: legal, ideal, and real. The legal aspect is the structure and system of the constitution, that which is generally recognized by lawyers as being law. The ideal constitution is the potential of a society, the collection of possibilities conceived of by a society for itself. The real constitution lies somewhere between the legal and the ideal. It is the constitution in present, day-to-day life; it represents the way things are, the way persons exercise the power made available to them by the constitution.

After discussing the nature of societies and constitutions, the author turns his attention to whether a true international society can be said to exist. This question works on two levels: is what we currently call the international community a society within Allott's definition?; and, if not, how can the community of humanity be constituted properly as an international society? This leads to a critique of our current international legal and political community and to a description of a potential constitution for a true international society.

[11] P. 133.

The concept of sovereignty receives, as might be expected, a great deal of attention. This authority-based theory of society limits our ability to think of society in non-authoritarian terms. In particular, Allott argues, quite rightly, that the theory of state sovereignty has had grave consequences for the formation of a true international society of humanity, because the ultimate authority theoretical basis of state-sovereignty is incompatible with a higher society based on democratic participation. "Sovereignty has provided a theoretical explanation of social power by suggesting that the source of all social power is a social power which is not itself derived from social power".[12] Allott's critique of state sovereignty remains part of his critique of international law and the present-day concept of constituting international society.

If sovereignty is characterized as a throw-back principle, democracy is seen by Allott as a concept of fundamental importance to human society. State-societies have gradually moved from authoritarian sovereignty to various forms of democracy. By contrast, international society has continued to conceive of itself on the basis of sovereignty. Of this misconceived international society, he writes: "It is an unsociety ruled by a collective of self-conceived sovereigns whose authority is derived neither from the totality of international society nor from the people but from the inter-mediating state-systems".[13] The undemocratic and sovereign-authority-based structure of international law creates the same kinds of dangers for the human community as a whole which undemocratic sovereignty-based state societies created for their own citizens over past centuries. The author groups these problems into three broad categories: alienation, corruption, and tyranny.

Alienation is the forced separation of humanity into fragmented state societies. Allott believes that people the world over retain a natural and deep affinity for one another and that they do not understand the "enforced alienation from each other",[14] which the present international system demands. The present structure of international society inhibits the fostering of a vision of one humanity, one human comunity.

Allott's view of corruption is related to the productive side of the international economy. Within state-societies, state economies are geared towards the achievement of human goals, such as a higher standard of living and a better quality of life. However, the lack of any such vision at the level of the international economy is for Allott a form of corruption: an international society which does not generate and direct an international

[12] P. 207.

[13] P. 249.

[14] P. 251.

economy for the benefit of human society conceived as one humanity is corrupt. The exploitation-degradation of the environment, and the continual recurrence of famine, are examples of the undirected and self-interested patterns of behaviour which occur in the absence of a well-conceived international society acting in the interests of the whole of humanity.

Finally, Allott describes tyranny as the idea that one state-society may decide for its own reasons to destroy the whole of humanity. Tyranny occurs where human beings live under a constant threat of the unrestrained use of force with virtually no control over the processes of decision-making. A truly misconceived society is one which includes its own self-destruction among the possibilities which it might choose. The spectre of global destruction becomes an example of the amorality inherent in the present-day conception of international society.

In Allott's view, the Vattel tradition in international law promoted the creation of an international society which is not a true society. It created a system of sovereign states, which, because each was sovereign, came together as equals, responding to no higher authority and, perhaps most importantly, no constitution. In these circumstances, the internal law and morality of state-societies were protected from the reach of international law. As a result:[15]

> ... governments, and the human beings who compose them, are able to will and act internationally in ways that they would be morally restrained from willing and acting internally, murdering human beings by the million in wars, tolerating oppression and starvation and disease and poverty, human cruelty and suffering, human misery and human indignity, of kinds, and on a scale, that they could not tolerate within their internal societies. Interstatal unsociety is a realm of unmorality.

What Allott wants is a fundamental rethinking of the nature of international society. We must think beyond national boundaries, ethnic difference, nationalism, and other notions of "otherness" which hold us apart. We must have a vision of community which allows difference but does not deny the essential shared humanity of all individuals.

Allott identifies ten different "forms of social development" which need to be recognized in modern international society. He argues that a new theory of international society will be inadequate unless it takes into account not only the traditional players, but also a variety of other players who are often on the fringes of current international law, from ethnic groups and corporations, to informal community groups, multinational statal societies, organisations present in a variety of states, such as religious groups

[15] P. 248.

and professional associations, multinational corporations, international lobby or information groups, and a variety of other players whether formally or informally constituted. The most important subordinate societies are industrial, commercial and financial corporations. These societies wield enormous power, "with the social power of the largest corporations exceeding the social power of many governments of state societies".[16] The inclusion of such subordinate societies in the new international order will have the dual effect of creating a more realistic society and, very importantly, developing some sort of social and legal accountability of these players.

This idea is hardly new. However, it has not always been seen as part of the democratization or salvation of international law. In some writings, the expansion of the number of players is seen more as part of a growing competition for world power.[17] What, then, explains the difference between these two visions of an expanded list of international players and actors? Allott's response might well be that in one view the fundamental structure of the amoral un-society of international law would be left untouched, the new players simply being grafted on as necessity-power dictated. Eunomia, however, requires something more: it requires a constitution of international society that will order and control the participation of the players, the exercise of their power, and the articulation and achievement of the fundamental goals and principles of international society.

III. *Well-Being*

In this section of the book, Allott examines international order in terms of social and legal order and in terms of international economy and culture as well. He launches a stinging attack on modern international law, particularly as regards war and peace, diplomacy, and state sovereignty, but he nevertheless recognizes a few positive developments.

Three phenomena are currently playing a positive role in the development of the idea of an international society. First, a rudimentary "public realm of international society"[18] is in the process of formation. More and more activities are beginning to be seen as belonging to an international public realm rather than exclusively to the domestic spheres of individual state societies. However, the emerging international public realm is still "unrooted, alien, isolated, unnatural, unintegrated in either the structure-system dedicated to the survival and prospering of humanity as a whole".[19]

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[16] P. 222.

[17] See, for example, R. St. J. Macdonald, Gerald L. Morris, Douglas M. Johnston, International Law and Society in the Year 2000 (1973), 51 Can. Bar Rev. 316.

[18] P. 279.

[19] P. 285.

The second positive phenomenon discussed by Allott is the continuing development of the idea of human rights. Allott links this to the rise of democracy and sees both as part of the process of moving from authority-based views of society to a more holistic view of the relationships of power within society. Yet he is critical—I would suggest at times unfairly so—of the way in which human rights have been incorporated into international law.

The third positive phenomenon is that of "international reality-forming".[20] In his initial discussion of society, Allott examined, as one of the dilemmas of a forming society, the need to create a "self" in relation to an "other". In the formation of international society this becomes difficult, because international society theoretically contains all humanity and all societies, making a self-other contrast impossible. Yet Allott suggests that the time of extreme self-other separation, what one could call nationalism, is coming to an end. We are witnessing the generation of "a common experience of all human beings, an international consciousness"[21] which perceives the world as a unified environment and which is the basis of a new way of conceiving of a society that will not involve continual opposition of one group against another.

IV. *Comment*

It is hard to say what Allott's new international society would look like if realized. In a sense, what he does is create a *context* for international society rather than devise a structure for such a society. In many respects, his most scathing attacks on current international society are directed at its moral failures rather than at its institutions. Although his proposed list of players in international society go far beyond sovereign states, it includes groups and societies that exist today, active in international societies in their own ways, and considered by other scholars as potential players in the international law of the future. Allott's work is not necessarily an outright rejection of existing structures of international law. Rather, he situates international society in its relationship to individuals and to other societies. In so doing, he creates a kind of ethics of international law: it is no longer mainly a political arrangement but the essential part of a community whose profound obligations and responsibilities reflect its importance in ensuring the welfare of humanity.

Like the weary traveller who is told that the journey's goal is almost in sight, the reader of this visionary volume longs for a few practical hints as to how to reach his destination. Disappointingly, however, no such

[20] P. 288 *et seq.*

[21] P. 293.

guidance is offered. Eunomia is pure theory, and in this study at least, the author has not felt the need to consider at any length the visible pathways that could in fact lead to the Golden City. A few examples may serve to illustrate the point.

We are told time and again that international society is a pre-society "readying itself for a metamorphosis, a sloughing of its self-unknowing",[22] but what should have been a full discussion of the extraordinary dynamism that has marked the law-improvement processes since 1945 is woefully inadequate; we are told, rather grudgingly, I thought, about developments in the international law of human rights, but there is nothing on the Universal Declaration of Human Rights, which Eleanor Roosevelt fittingly referred to as "the Magna Carta of Mankind"; we are treated to angry criticisms of the classical doctrine of sovereignty, but there is no recognition of the very intrusive inroads made, for example, by the I.N.F. Treaty; we are informed, quite properly, that the absence of significant linkages between international and national societies represents a crucial deficiency in the present system, but no effort is made to draw on the vast experience of federal and confederal states, especially the United States, experiences that have much to offer as to how Allott's highly generalized ideas on division of powers and inter-governmental delegations could be put into effect; we are directed, again quite rightly, to the complex problem of fair representation in international organizations, but there is nothing, nothing at all, on the intricate formulas that are currently being discussed in response to the crucial question: "who represents who, how, where, and for what purposes in international society".[23]

Perhaps more seriously, there is, I believe, a fundamentally ambiguous element in Eunomia, namely, the way in which the "self-other" dilemma is addressed. This dilemma is presented as an inevitable problem which self-creating societies must attempt to confront. It is the reason why one group of people can call itself a society in a meaningful way: the members must be distinguishable to be a society. Yet, at the same time, this self-other distinction is presented as being rather dangerous and destructive; it is that which has been at the root of nationalism, xenophobia, racism, and religious intolerance.

Allott's ambivalence on this point is disturbing. "National" communities participate in an effective self-creation and reality formation. Eunomia requires a similar effort of reconception and creation. What, then, are the

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[22] Pp. 263, 279.

[23] *Ibid.*

ethical boundaries of such a reconstitution of international society? In order to promote international reality-forming, Allott suggests that governments must "lose control of the consciousness of human beings, lose the ability to confine reality-forming within the structures and systems of their own society".[24] Yet in his earlier discussion of players in international society, he opens the doors wide to states formed along national lines and to national non-statal groups. Indeed, Allott describes non-statal nations as "significant and energetic forms of social organization",[25] the "most ancient and the most heartfelt of societies".[26] He not only conserves ethnic, linguistic, religious, and national groups in the process of self-determination, but he tends to look on them as rather basic to human beings.

The question not addressed is whether you can have both—"national" or "ethnic"—communities within the type of community of humanity or the society of societies which the author proposes. This is the very question raised by many small ethnic or linguistic groups today as they struggle to defend their language-culture-identity from encroachment from a mass-produced "international" culture. Allott's theory remains ambiguous about whether, in fact, we can have it all or whether the new international society which he proposes will, by creating new possibilities at the international level, foreclose or limit reality at the smaller "community" level.

V. *Conclusion*

Eunomia is a book for all who are interested in the place of law in society generally and in the possibilities of a global society conceived of *not pluralistically* but as a single, integrated, reconciled community of mankind. It is a courageous study that explores new landscapes, suggests larger meanings and leaves the reader hoping that the author will soon follow up with a second volume on how we are to realize the goal of the good ordering of society that he has set before us. The great merit of Allott's timely and imaginative vision is that it stimulates debate on the transcending purposes of a single, sharing, society.

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[24] P. 418.

[25] P. 221.

[26] P. 226.

Transportation of Dangerous Goods in Canada: A Practical Guide to the Law.

By JOHN DOUMA.
Markham: Butterworths Canada Ltd. 1990. Pp. x, 127. ($35.00)

Reviewed by Paul Thomas*

Anyone who has represented a company charged with contravening a provincial or territorial statute dealing with the carriage of dangerous goods or with infringing the federal Transportation of Dangerous Goods Act, will know the horrendous mass of regulatory material involved in dealing with the case.

This short volume by John Douma, who practices in Toronto with a specialty in transportation law, is indeed a practical and straightforward guide through the maze. It provides information on all provincial, territorial and federal statutes and the regulations involved and provides a summary of the cases in this area thus far. Of particular interest is the discussion of the defence of "due diligence" found in Chapters 7 and 8.

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