Understanding Canada's Constitution.

By MARGARET A. BANKS.
London, Ontario: University of Western Ontario. Pp. vi, 93. ($9.95)

Reviewed by Laurie N. Ledgerwood*

Unlike other literature regarding the Constitution, Professor Banks' book is not aimed at the legal profession, but at average Canadians who have not studied the Constitution. Her purpose is to provide Canadians with the background knowledge necessary to understand the Constitution, the various studies conducted regarding future amendments, and the recent attempts at amending its provisions. Thus, it is useful background for any clients or friends who would like to know what this fuss over the Constitution is all about.

In Chapter 1, Professor Banks briefly describes the main provisions of the British North America Act, 1867 (the BNA Act), including the division of powers between the Federal and Provincial governments; how amendments to the BNA Act were effected; and the changes made to the BNA Act in 1982 when it was renamed the Constitution Act, 1867.

Professor Banks' discussion of the Constitution Act, 1982 in Chapter 2 helps to clear up some commonly held misunderstandings caused by the focus of the courts and the media on the Charter of Rights and Freedoms. Many average Canadians may not be aware of the other components making up Canada's constitution. To clarify this matter, Professor Banks points out that the Constitution Act, 1982 does not merely consist of the Canadian Charter, but is comprised of a number of documents including the Constitution Act, 1867, and she discusses each of those components and their relevance.

In Chapter 3, Professor Banks focuses on describing the various amending formulas and some of the problems raised by those formulas. She discusses a number of constitutional conventions relevant to the Canadian Constitution in Chapter 4. In that chapter, she also outlines the roles of the Governor General, the Privy Council, the Cabinet, the Prime Minister, and the First Ministers of the Provinces, and discusses how

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their functions are performed under a responsible form of government. Chapter 5 contains a brief discussion on Provincial constitutions and how they relate to Canada's Constitution.

The remainder of the book deals with the Meech Lake Accord and the various studies conducted regarding constitutional change and amendment, including the Allaire Committee, the Bélanger-Campeau Commission, the Spicer Commission, and the Beaudoin-Edwards Committee. In addition to outlining the contents and conclusions of each study, Professor Banks comments upon what she perceives are their strengths and their weaknesses and the chances of success of the solutions proposed in each study. She then suggests six possible solutions to the constitutional impasse and raises some issues and problems which continue to be a part of the constitutional debate.

Professor Banks' book provides fundamental information regarding Canada's Constitution and the way our political system works without being wordy or dry, or too complex for non-lawyers to understand. Her comments and questions raise issues to be considered independent of her conclusions. For any average Canadian concerned about the Constitution, this book provides a basis for understanding some of the issues being dealt with in a short and articulate manner. It is a welcome addition to other literature regarding the Constitution.

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Les garanties juridiques dans les Chartes des droits.

Par PIERRE BÉLIVEAU.
Montréal: Les Éditions Thémis. 1991. Pp. xxiv, 658. ($68.00)

Compte rendu de Pierre Blache*

L'objectif poursuivi par le professeur Béliveau est de livrer l'état du droit sur les garanties juridiques contenues à la *Charte canadienne des droits et libertés.*[1] On aurait pu penser que l'ensemble de l'étude y serait consacré.

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[1] Partie de la *Loi constitutionnelle de 1982,* Annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c. 11. Il est fort peu question de la *Charte québécoise* dans cette étude, malgré son titre.

L'auteur a préféré une autre voie. Ainsi la première des deux parties que comporte son ouvrage constitue-t-elle en réalité une présentation de l'économie générale de la *Charte canadienne*. Bien qu'elle soit intitulée "La constitutionnalisation des garanties juridiques", on y découvre en effet rien de propre au domaine spécifique que constitue l'ensemble des garanties juridiques conférées aux justiciables canadiens par les articles 7 à 14 de la *Charte*. Et ce n'est vraiment qu'à compter de la page 281, quand l'auteur aborde la portée des garanties juridiques, qu'il nous entraîne dans l'exploration de celles-ci.

Faut-il lui faire grief d'avoir accordé près de la moitié de l'espace d'une monographie sur les garanties juridiques à l'exposé de l'économie générale de la *Charte*? Je ne le pense pas. Au contraire, dans l'état encore sous-développé des connaissances sur la *Charte canadienne* il aurait été imprudent de prendre pour acquis une solide initiation à l'économie de la *Charte*. La praticienne, comme le praticien, trouvera donc généralement heureuse l'option retenue.

Cette première partie comprend deux chapitres. Le premier, intitulé "Le principe de la suprématie de la *Charte*", se divise en deux sections portant sur la suprématie à l'égard des règles de droit et la suprématie à l'égard de l'activité gouvernementale. Le second traite de la mise en oeuvre de cette suprématie. Il comprend deux sections: l'une sur le recours de droit commun visant la déclaration d'inopérabilité de la règle de droit, l'autre sur l'octroi d'une réparation, recours spécifiquement prévu par la *Charte*.

Le lecteur trouvera sur ces questions un exposé qui vaut par l'organisation de la matière, l'identification des problèmes propres aux divers aspects du sujet, et la présentation de l'état du droit au 30 juin 1990. Il ne doit pas s'attendre à trouver un exposé fouillé sur l'interprétation des droits et libertés, les exigences auxquelles doivent satisfaire les restrictions à ces droits et libertés, ou le domaine d'application de la *Charte*. Mais son attention est attirée sur les difficultés que présentent ces questions et les choix judiciaires tels qu'ils se manifestaient à l'époque sont exposés de manière succincte mais complète.

L'évolution rapide qui a continué à marquer ce domaine du droit depuis obligera le praticien à compléter sur plusieurs points le panorama qui lui est présenté. Mais cette obligation est inévitable dans la conjoncture actuelle, et chacun devrait le comprendre. De ce point de vue, l'approche comporte une invitation implicite à se méfier. En effet, au lieu de s'en tenir à un exposé prudent axé sur la problématique elle-même ou des considérations générales, duquel on pourrait être tenté de déduire des conclusions précises sur des sujets connexes, l'auteur se tient généralement à bonne distance de telles généralisations. Le lecteur est donc averti qu'il s'agit d'un instantané sur un domaine par ailleurs en mouvement. S'il avait

le malheur d'induire de fermes théories à partir de ces instantanés, il ne devrait s'en prendre qu'à lui-même, car l'auteur a rarement cherché à tirer de telles conclusions ou suggéré qu'il soit prudent de le faire. L'on doit comprendre que les considérations sur lesquelles les décisions reposent composent un édifice encore fragile qui doit rendre prudent devant les extrapolations.

La seconde partie, immédiatement tournée vers les garanties juridiques, couvre cet important domaine en deux étapes. L'article 7 sur le droit à la vie, à la liberté et à la sécurité de la personne et les principes de justice fondamentale est étudié au long de soixante pages environ, le plus grand nombre étant employées à l'exposé des ramifications de l'exigence de respect des principes de justice fondamentale. Le second chapitre de cette partie, dernier chapitre de l'ouvrage, traite des garanties spécifiques qui y sont présentées en deux temps: la phase préjudiciaire et la phase judiciaire.

Cette partie est la plus longue et l'analyse des questions s'y fait plus minutieuse. Le praticien y trouvera un excellent guide dans le dédale des questions susceptibles d'être soulevées sur cet ensemble de garanties. On remarquera le long développement que s'est mérité le droit à la protection de la vie privée, et le recours à la jurisprudence américaine aux fins de comparaison ou pour jeter un utile éclairage là où la Cour suprême ne s'est pas encore prononcée.

L'auteur s'est voulu humble intermédiaire entre le lecteur et la jurisprudence raffinée et parfois rébarbative à laquelle cet important domaine des libertés publiques a donné lieu. Sans doute trouve-t-on ici quelques aperçus critiques, mais ils sont le plus souvent brefs. On aurait apprécié que mention soit faite d'une doctrine souvent fort intéressante. Peut-être l'orientation de l'étude explique-t-elle la quasi totale absence de renvois à une littérature juridique souvent critique. Il a pu en effet paraître non pertinent de faire état de celle-ci dans le cadre d'une oeuvre qui est d'abord et principalement le reflet du droit qui se fait. Une telle monographie gagnera par ailleurs à la mise à jour rapide, car la désuétude la menace plus encore que bien d'autres publications en raison de la perspective retenue devant un droit qui demeure encore largement en chantier. Il faut cependant savoir gré à l'auteur de l'avoir offerte au public francophone intéressé à ces questions.

* * *

Dancing With a Ghost—Exploring Indian Reality.

By RUPERT ROSS.
Markham, Ontario: Octopus Publishing Group. 1992. Pp. xxvi, 195 ($15.95)

Reviewed by Gilles Renaud*

Poignant, evocative, awe-inspiring. Words such as these are rarely selected by a reviewer seeking to describe in summary fashion a legally oriented text; of course, Dancing With a Ghost—Exploring Indian Reality is not a typical legal text and for that fact alone, we are indebted to Rupert Ross.

The author is an assistant Crown Attorney for the District of Kenora. His experience and knowledge of Indian reality dates back to his student days as a summer guide. In this moving recital of his insights into the subject of native reality, he has laid bare for all to see his wonder, his doubts and his hopes for the future of the administration of justice in the context of the Ojibway and Cree peoples; of course, his musings should prove to be of signal assistance to all those who are involved with justice and the First Nations in any region of Canada. The author did not intend this book to serve as a guide to advocacy in the native milieu, nor is it meant to set out the imperatives necessary to prosecute accusations involving native persons, nor is it a manual of trial tactics when one is called upon to represent natives accused of criminal and quasi-criminal offences. However, in "articulating his confusion at the actions, reactions and explanations of Native victims and witnesses in the court process",[1] the author may well have succeeded in providing these things. That the litigation process and its handmaidens, evidence and advocacy,[2] are the same for native and non-native criminal litigation, and yet completely different, is the fundamental paradox that Dancing With a Ghost lays bare for all to see.

As noted in the foreword penned by B.H. Johnston, "Kitchi-Manitou has given us a different understanding", and it is the quest for this elusive understanding that has served to illuminate the path Rupert Ross has followed since leaving Toronto and settling in Northwestern Ontario. His book is at once a tapestry of anecdotal evidence respecting his insights into Native culture faced with non-Native court pro-

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[1] P. xvii.

[2] To paraphrase the preface to Jeffrey Pinser's Evidence, Advocacy and the Litigation Process (1992), penned by Lai Kew Chai J., of the Supreme Court of Singapore, p. v.

ceedings,[3] as exemplified by the comment that ". . . looking someone straight in the eye, at least among older people in [the] community, is a rude thing to do",[4] and a rigorous exposition of a decade's experience respecting trial proceedings against the background of native reality. As a result, the reader is free to accept all of Mr. Ross' opinions, to reject all of them, or to accept only part of them, based on empirical or anecdotal evidence to the contrary. Although this is true of any publication, it is rarely made as plain to the reader.

Numerous examples may be cited to illustrate the many insights to be gained from reading this book. In considering only three of these, it must be kept in mind that it is no simple task to summarize many pages of richly reflective text containing many interwoven ideas expressed with passion and rigour.

The first notion involves the stereotypical view of the shiftless Native person whose traditional way of life was devoid of intellectual challenge and who was thus poorly if at all prepared to respond to a sophisticated, respect-generated system of justice. The author seeks to demonstrate how erroneous is this notion, in the following terms:[5]

> I think that we have not fully considered the possibility that the hunter-gatherer context not only required formidable mental activity but a mental activity which differed significantly from the one which grew to predominate after agriculture developed. Nor have we considered that the daily exercise of those unique mental skills would necessarily lead to very different—but equally sophisticated and complex—perceptions of self, of the order of the universe and one's position within it, and of rules governing appropriate behaviour between people.

The second, erroneous, notion is that the non-Native community has nothing to gain from the Native one, least of all in respect to the system of justice, and thus the traditional expression of these indigenous concepts may be allowed to wither and die. In rebuttal, Mr. Ross states:[6]

> . . . there are many aspects of Native culture which not only can survive but that also should . . . be adopted by the majority. These include respect for the natural sphere, an emphasis upon careful and sensitive consensus-building, a focus upon a rehabilitative and preventative response to social turmoil and an insistence upon family and community responsibility for the mental, emotional, spiritual and physical health of each member. . . . It seems clear that some mixing of the two [cultures] is both inevitable and probably welcome. The question, once again, involves deciding what must be adopted from the outside culture, what must be adapted to, what must be retained in its original purity from traditional times and what must be returned to that state.

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[3] The author notes modestly, p. 3, that "what follows is a personal, decidedly non-academic attempt to deal with our communication failure . . . [and] consists of no more than unsophisticated guesswork on my part, for I suspect that it is virtually impossible to climb inside the world view of another culture".

[4] P. 10.

[5] P. 86.

[6] P. 98.

A last example, and probably the most important one, involves the traditional response of the Native community to wrongdoing, viewed by many as a total lack of any response to a threat to the community. In decrying this canard, the author emphasizes a number of significant beliefs, justifying a lengthy citation:[7]

> ... [the underlying ethical notion of] barring interference and the indulgence of disruptive emotions owed their existence to the need for cooperation and putting forth one's best efforts.... Of interest here is the fascinating and seemingly contradictory fact that the most central of all the rules—the one that barred interference in the free choice of others—seems to suggest that there were *no rules at all* for constraining behaviour. A highly structured society was able to maintain that structure, yet deny, to itself as well as others, that it possessed any rules for telling people what they could and could not do.
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> In my court work, I have had to face this apparent contradiction regularly. I hear continual complaints about the court, our instrument of rule-enforcement, when it resorts to punishment for violation of the rules. "We never punished" is the oft-repeated claim. "We talked to people instead, showed them the proper way to live, encouraged and aided them. If things finally became completely intolerable, such people might be banished. But we never punished."
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> I have found this apparent lack of coercion to be extremely admirable. I have also found myself wondering how it was that their traditional rules were so regularly respected that coercion, threats and punishment were never required. Were they so much more respectful of each other than we are that there was never a need to create instruments and techniques of rule enforcement?
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> What I may have failed to take into account is that there was such an enforcement mechanism, one whose coercive power kept everyone in line, following the rules and respecting the commandments: the threat of starvation. It was not, however, a mechanism made or supervised by man. If people stepped out of line, if they failed in their obligations of effort and excellence, they faced the immediate and occasionally fatal response of nature. *The fiction could grow that there were no rules, that everyone was free to say and so as they pleased, because men were seldom called upon to impose punitive measures for contravening those rules.*
>
> In a hunter-gatherer's society ... duties that were neglected had direct consequences not upon strangers but upon loved ones. And those were the very people upon whom you depended for your own survival. Injury to them meant injury to yourself. [Hence], the threat of starvation was indeed a coercive force prompting obedience to the rules, and its interventions were likely to be both swift and severe. No court could come to enquire about the reasons behind your failure, and no lawyer would plead your case....

Dancing With a Ghost—Exploring Indian Reality is not meant only for those who defend Natives accused of offences in Fort Albany, for example, and who are faced with the issue of a near-blank pre-sentence report to account for the life experience of a sixty-year-old individual who has had but little contact with employers, schools and other badges of non-Native achievement. Nor is it meant only for sociologists who seek insights into Native communities, nor even for judges seeking to evaluate the trial

[7] Pp. 134-135 (emphasis added).

procedures followed by Stuart Terr. Ct. J. in *R.* v. *Moses,*[8] including full community involvement in the sentencing process and the physical arrangement of the court in a circle.[9] It is meant for all who wish to deepen their understanding of the Native philosophy of justice, of its depth and richness, and in so doing, to understand better the Canadian system of justice as a whole.

In sum, Rupert Ross may be correct when he says that one may not be capable of truly hearing and understanding "what the other is meant to express"[10] by reason of the deep cultural chasm that is said to separate Native and non-Native "world views" on many subjects, not the least of which is the law. Be that as it may, his excellent contribution to the necessary dialogue between the two communities, assuming for the sake of argument that such complex social organizations may be assimilated to single communities, will be a fulcrum for debate, and thus for enlightenment, for years to come.

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Corporate Law in Canada: The Governing Principles. (Second Edition).

By BRUCE WELLING.
Toronto: Butterworths. 1991. Pp. lxi, 756. ($125.00)

Reviewed by Richard F. Devlin*

Having taught Business Associations for the first time in the Fall of 1991, I thought it might be fruitful to occupy part of the Spring of 1992 reviewing the latest edition of Professor Welling's Corporate Law in Canada, the first edition[1] of which I had occasionally dipped into while preparing for class. My selective readings of the first edition left me with a quite positive impression of a starter/reference text in the classic "black letter law" tradition, and indeed it was, in that light, favourably critiqued in this Review.[2] However,

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[8] (1992), 11 C.R. (4th) 357 (Yukon Terr. Ct.).

[9] See A. Manson, *Moses:* Involving the Community in Sentencing (1992), 11 C.R. (4th) 395.

[10] P. 4.

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[1] (1984).

[2] (1985), 63 Can. Bar Rev. 424 (M.A. Waldron).

the Review did note that "[s]ome corporate scholars may think it is somewhat lacking in its assessment of the social and political role of the corporation".[3] My more reflective and comprehensive reading of the second edition reinforces that concern. This is because of the usually implicit and occasionally explicit ideological underpinnings of the book. Consequently, this review will not accord with the normal conventions of law journal book reviews which suggest that the reviewer might focus on the accuracy of the author's interpretations and categorizations of the law, or to praise Welling for the tightness of his revised sections on how to prove a corporate agent's authority and the common law theory of ostensible authority,[4] or to criticise his still opaque overview of cumulative voting,[5] or to contest his polemics against Laskin J.'s "corporate opportunity doctrine" in *Canadian Aero Service* v. *O'Malley*[6] and the statutory oppression provisions.[7] While these would be appropriate and beneficial discussions, they fail to address what I consider to be the core problematic of the book: that its democratic pretensions and rhetoric are undermined by its hierarchical and exclusivist substance.

Time and again, Welling locates the book in the context of the corporate law reforms of the 1970s and 1980s positing that he is a supporter of these democratic—indeed "revolutionary"[8]—innovations.[9] The overall message he communicates is that, bar a few unfortunate exceptions, Canadian corporate law has been reconstructed on the basis of defensible, rational and participatory principles.[10] The only remaining responsibilities of the corporate legal academic are to "build and *stick to* a framework for analyzing and balancing [such] principles in potential conflict situations"[11] and to tidy up the remaining anachronisms. All that the law student/lawyer reader need do is to discover the Wellingesque principles and apply them. In short, with corporate law's democratic revolution almost complete, tinkerers and technicians are all we need to be. As Welling's emphasis indicates, there is no necessity for a radical revisioning of Canadian corporate law or critical self-reflexivity by Canadian lawyers.

I want to contest these implicit messages on the basis that: (1) they are a partial (in both senses of the word) portrayal of Canadian corporate law; (2) they amount to an appropriation and dilution of the liberationist rhetoric of democracy and revolution; and (3) they engender a pacification

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[3] *Ibid.*, at p. 426.

[4] Pp. 175-222.

[5] Pp. 460-461.

[6] Pp. 400-401, 407-408.

[7] Pp. 553-564.

[8] Pp. 480, 740.

[9] Pp. 50-51, 455,457, 471, 510.

[10] P. 53.

[11] Pp. 53-54. (Emphasis in original).

of the reading subject. The common threads that unite these criticisms are Welling's impoverished conception and analysis of power relations in Canadian society and his assumption that corporations are economic not political bodies.[12]

To elaborate. Corporate Law in Canada commits the classic error of most black letter legal analysis: decontextualization. It focuses on statutory texts and judicial decisions and somehow assumes that this is sufficient for an understanding of corporate legal relations. Hence the subtitle's focus on "principles" and their invocation again and again.[13] Several problems emerge from this fetishization of principles. First, the book is devoid of any serious overview of the corporate power structure of Canadian society, that is, the socio-economic and political context in which these legal principles operate. The best we get is a brief paragraph supplemented with footnote as to the concentrated nature of Canadian corporate power,[14] a passing reference to the "huge Power, Thompson, and Bronfman empires",[15] and an admission of avoidance.[16] Second, without a grounding in this larger context the reader can have little basis for understanding why certain "principles" are chosen (by legislators or judges) rather than others, or how to reconcile a conflict between two or more "principles". Third, and perhaps more jurisprudentially interesting, what is a principle anyway? As distinct from what: rules, politics, policies or pragmatism? Given that Welling invests so much effort advocating a "principled" approach to corporate law, even going to the point of emphasizing particular corporate law principles, one might have expected at least a couple of paragraphs explaining the nature, function and status of principles.[17] Thus, if this pivotal concept is jurisprudentially indefensible as some have argued,[18] or if Welling is prepared to play fast and loose with the concept of a "principle" to the extent of admitting that "rules of public policy" are "principles really",[19] then his whole enterprise is constructed on a foundation that is incapable of bearing the justificatory weight that he wishes to impose upon it.

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[12] Pp. 37, 56, 59.

[13] Pp. 407, 422, 427, 736.

[14] P. 303.

[15] P. 499. For an excellent introduction to the structures, forms and concentration of economic power in Canada, see G. Van Houten, Corporate Canada: An Historical Outline (1991).

[16] P. 739.

[17] The debate as to the legal status of principles has been central to the controversy between, for example, Dworkin and his positivist critics. See R. Dworkin, Taking Rights Seriously (1977); A Matter of Principle (1985); and M. Cohen (ed.), Ronald Dworkin and Contemporary Jurisprudence (1984).

[18] For a full elaboration of the argument that principles are but a juridical encoding of political preferences, see R.M. Unger, The Critical Legal Studies Movement (1986).

[19] P. 417.

Even more problematic than the jurisprudential superficiality of Welling's project are the profoundly undemocratic and exclusivist dimensions of the book. This critique is important to emphasize because of Welling's bold assertions that "[c]orporations are democratic organizations",[20] and that we have experienced "a people's revolution, a statutorily authorized *coup d'état*".[21] I would argue that these hyperbolic metaphors are misleading on two fronts (class and gender) and that Welling's celebrations obscure the oppressive nature of Canada's corporate legal structure.

When Welling discusses the democratic nature of the corporation he identifies three key constituencies: directors, officers and shareholders.[22] His thesis is that we have had a "revolution"[23] because the reforms of the last twenty years have increased the powers of the shareholders.[24] Completely deleted from Welling's analysis are the lower level employees of the corporation, those through whom many corporations make their profits. A critical and reflective analysis would at least inquire as to why employees are not considered to be citizens of this democratic regime, why the "investment" of their labour power does not qualify them as owners as much as the shareholder's investment of capital justifies their proprietary status.[25] Why cannot workers have a legally enforced role in the "task definition" as well as the "task executionary" aspects of a corporation?[26] Indeed, an argument might even be made that employees should have more of a say in the governance of a corporation than shareholders given that frequently social circumstances tie workers to a particular corporation, whereas shares are often freely alienable. Consequently, I would suggest that Welling's celebration of the democratic corporation is only defensible if we take as our model of democracy something like the Greek city state, premised as it was upon serfdom.[27]

Welling's class preferences, ideological partisanship and anaemic conceptualization of power become manifest in his "discussion" of the

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[20] P. 455.

[21] P. 480.

[22] Pp. 54, 56-57, 298.

[23] P. 55.

[24] Pp. 84, 489.

[25] P. 602. The closest that Welling comes to providing an answer is in his critically unreflective insight that "[c]orporations are capitalist institutions, shareholders are investors, and shares are property", p. 634.

[26] Such a role is legally entrenched in Germany through its codetermination policies and is gaining increasing legitimacy in the European Community.

[27] More harshly, I would argue that Welling's ideological construction of shareholders as "the democratic masses" (p. 489) has the effect of rendering the workers the "disapparcidos" of Canadian corporate law. Furthermore, in one of their few guest appearances in the book, employees are objectified and commodified when he encodes them as "personnel" which corporations can "routinely hire and fire", (p. 85).

implications of the Charter of Rights and Freedoms[28] for corporate law. In the last decade or so, there have been extensive debates on whether corporations should be considered "persons" for the purposes of Charter protection.[29] Of particular importance have been the pragmatic[30] and principled[31] contributions of left oriented academics against the conferral of rights on corporations. Welling's treatment of the question as to whether a right is infringed if the government seeks to prohibit advertising by tobacco corporations is to ignore such debates and to assert, "of course it is".[32] Where are the "principled" reasons for this claim? And might there not be countervailing "principles"? And why is Welling's stance not simply a political preference in favour of the corporate elite?

Gender considerations compound the classist dimensions of Corporate Law in Canada. Stated simply, how can one claim the existence of a democracy when in practice over half the population by intent and structure are marginalized in corporations while our legal system does little to remedy these exclusions? But doing little is not doing nothing and, in fact, there have been some significant (though in my opinion, inadequate) legal developments that are worthy of attention for a gender inclusive analysis of corporate law in Canada. Welling's failure to address these recent developments is a severe omission. Consider the following examples. Employment and pay equity legislation engender key debates about the balance of power in a corporation. Yet there is no mention of such legislative interventions. In discussing "innovative cases" on the tortious liability of corporations,[33] Welling fails to address recent Supreme Court decisions that impose responsibilities on corporations to deal with sexual harassment,[34] focusing instead on the quite traditional issues of restrictive covenants in employment contracts and thin capitalization. And cases that may be of particular concern to women are rendered gender neutral, thereby obscuring the way in which men may attempt to use their corporate power to punish women and how the courts can use the oppression remedy to restrain this abuse of economic power.[35]

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[28] Constitution Act, 1982, Part I.

[29] See, for example, Symposium: Commercial Free Speech and the Canadian Charter of Rights and Freedoms (1991), 17 C.B.L.J. 2-74.

[30] A.C. Hutchinson, Money Talk: Against Constitutionalizing (Commercial) Free Speech (1991), 17 C.B.L.J. 2.

[31] R. Bauman, Liberalism and Canadian Corporate Law, in R.F. Devlin (ed.), Canadian Perspectives on Legal Theory 75.

[32] P. 31.

[33] Pp. 137-149.

[34] *Robichaud* v. *The Queen,* [1987] 2 S.C.R. 84; *Action Travail des Femmes* v. *C.N.R.,* [1987] 1 S.C.R. 1114; *Janzen* v. *Platy Enterprises,* [1989] 1 S.C.R. 1252.

[35] *Re Ferguson and Imax Systems Corp.* (1983), 150 D.L.R. (3d) 718 (Ont. C.A.); discussed by Welling at p. 520.

Even Welling's own style contributes to the marginalization of women from the corporate world. Curiously, he finishes the book with the words "that's all she wrote",[36] seemingly referring to himself. But this is one of the minuscule number of times that women are referred to at all.[37] Overwhelmingly, he assiduously avoids the use of gender neutral language.[38] Nor should we forget such important legal concepts as the "reasonable man test"[39] or "piercing the corporate veil".[40] In short, for Welling, "anyone" is a "him".[41] Thus the implicit message communicated is one of sex role stereotyping: that the corporate world is a man's world, or at the very least, that the corporate model and benchmark are male. The one exception is if you have the hypothetical name, "Ms. Action Jackson".[42] Indeed, so comfortable is Welling with maleness as the uncontroverted norm, with the Aristotelian ideology of sameness, that he posits, "[t]he legal rights of corporations, like the legal rights of women are to be assessed by analogy and capacities of men. . .".[43] I suppose this is an improvement over being property. Or finally, when Welling is describing the positive end of "the spectrum of legal personality" he takes as his prototype "the twenty-five year old male celibate, *genus homo sapiens*".[44]

My point, of course, is not to suggest that a gender specific analysis of corporate law or gender inclusive language will remedy the inequality of power between women and men. It is only to argue that influential academics[45]

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[36] P. 741.

[37] Three further comments of Professor Welling may be worth noting. At one point he develops the analogy of the lawyer as midwife of "a new legal being". Not a bad gender inclusive metaphor one might think. However, even here he runs into problems by describing midwifery as a "competent, yet unromantic practice", and by interspersing with this analogy the confusing and biologically loaded propositions of the lawyer "advising . . . his (sic) new legal offspring" and where all "the fun lies in conceiving (sic) the new entity and watching it grow": (p. 237). The second reference to women relates to "a mother kissing a child's bruised arm to make it better . . .": (p. 428). And the third posits that "motherhood", like a share, "is only a concept: it has no physical existence" (p. 703).

[38] Thus we are treated to a relentless construction of a director being "he" (pp. 261, 315), an officer being "he" (p. 328), a shareholder being "he" (pp. 434, 526, 535), a fiduciary being "he" (pp. 415, 443), a complainant being "he" (p. 535), an investor being "he" (p. 649), and a transferee being "he" (p. 710). And then there are the "one man company" (p. 81), "chairman" (pp. 50, 307), "salesman" (p. 115) and "yesman" (p. 310).

[39] Pp. 259, 265, 291.

[40] P. 79. For a feminist critique of both of these legal concepts, see K. Busby, The Maleness of Legal Language (1989), 18 Man. L.J. 191, at pp. 198, 204.

[41] Pp. 601, 705.

[42] P. 262.

[43] P. 114.

[44] P. 76.

[45] It also raises the question of socially responsible and gender equitable editorial practices of corporate publishers like Butterworths.

should not perpetuate the problem either actively, through sex role stereotyping, or passively, by eclipsing issues that are important to women.[46]

Now there is the obvious authorial rebuttal to these criticisms, a response that Welling already invokes on many occasions in the second edition, even to the extent of devoting a whole—if brief—chapter to it: that it is impossible to cover everything. Thus his argument, if he were to consider the class and gender dimensions of corporate law, might be that it is better to "hive-off"[47] such considerations to some "specialty" such as "labour law",[48] for example. Such a strategy of confession and avoidance does little to advance the debate on what our conception of corporate law should look like. The more interesting question is by what criteria does one justify not only that which is included in one's analysis but also that which is excluded? As I read Corporate Law in Canada, the implicit answer seems to be that the reason why issues of gender and class are not addressed is because historically such issues have not been conceptualized as issues of corporate law, or, that like the question of the criminal prosecution of corporations, they are "not of primary interest to the objective corporate analyst".[49] But again, on what principle is such historical marginalization or professional (dis-)interest based? And if space is such a precious commodity that class and gender are considered non-issues for corporate law, one might question the space that is devoted to other topics?[50] He even finds space to ponder the interpretive consequences of what he himself describes as "probably a typographical error" in section 18(d) of the Canada Business Corporations Act,[51] and to "[c]onsider a typically unusual situation".[52] In short, such choices and trivial pursuits indicate that Welling's criteria for inclusion and exclusion are partisan and unprincipled.

In sum, Corporate Law in Canada is a flawed book because the espousal of democracy entails a commitment to equality, but the serious pursuit of equality is incompatible with the perpetuation of capitalist and patriarchal

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[46] Furthermore, some of the same considerations could be raised about the racially inclusive dimensions of the book. I would only point out here the possible affronts to First Nations peoples by Professor Welling's espousal of the "discovery myth", this time by Cartier "when he discovered what is now Quebec City" (p. 42), and the suggestion that prior to white entrepreneurialism Canada was a "nowhere" (pp. 47-48).

[47] P. 54.

[48] P. 740.

[49] P. 369.

[50] How can Welling find room to: discuss tax law (pp. 699-700) and securities law (pp. 362-376); indulge at times in a miasma of particularities (in a book that is supposedly about "principles) (pp. 60-73, 175-194, 601-736); report silly jokes (pp. 29, fn. 88, 123, fn 129, 356); dabble in a law and economics analysis of the legal duties of corporate management (p. 355); insider trading (pp. 360-361) and restrictions on the sale of majority shareholdings (p. 427, fn. 406); and to wallow in gratuitous commie bashing (pp. 31, 636)?

[51] Pp. 232-233.

[52] P. 660, fn. 176.

socio-legal relations. The academic solution chosen by Welling in his "eternal search for a simpler, more elegant theory"[53] is to avoid the contradictions of Canada's messy and oppressive reality by rendering class and gender as non questions, non issues. And most disturbing of all is the danger that such pedagogical closure will fail to enlarge the vision of yet another generation of law students, while at the same time implicitly communicating the message that male and class power are unchallengeable, through explicit pontifications such as "the job of corporate law ... [is to] resolv[e] the problems of practical people operating in the business world".[54]

Why is it that working class men and women are not part of this context?

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Intention, Agency and Criminal Liability: Philosophy of Action and the Criminal Law.

By R.A. DUFF.
Cambridge, Mass.: Basil Blackwell Inc. 1990. Pp. xii, 219. (£37.50)

Reviewed by Bruce P. Archibald*

This is an immensely helpful book which brings the insights of the philosophy of action to bear upon central issues of criminal liability. How are we to understand notions of intention, recklessness and negligence, and when are they appropriately conceived as the foundation of criminal liability? These key questions, among others, are addressed here with a clarity and precision which is sometimes lacking in judicial efforts at their exposition. Moreover, they are expounded in a crisp and invigorating style which presupposes no detailed knowledge of philosophy or criminal law. Simplicity of presentation is achieved through a systematic focus on four British cases—*R.* v. *Hyam,*[1] *Cawthorne* v. *H.M. Advocate,*[2] *R.* v. *Caldwell,*[3] and *R.* v.

[53] P. vi.

[54] P. 211.

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[1] [1975] A.C. 55 (H.L.).

[2] [1968] J.C. 32 (Scottish Court of Justiciary).

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

Morgan.[4] However, the emphasis on this British jurisprudence introduces terminological difficulty, particularly concerning the concept of "recklessness", and makes the adoption in Canada of some of the book's primary propositions both dangerous and undesirable.

Duff is primarily concerned with the fault elements of offences, that is, intention, recklessness and negligence;[5] and with the failure of proof arguments, or defences, which can be made in relation to these "mental elements" in crime. He places the discussion of these concepts in the wider context of the philosophy of action. By exploring philosophical understandings of when an *agent* is *morally* responsible for his or her actions, Duff sharpens the reader's appreciation of when and how an *accused* ought to be held *legally* responsible for criminal conduct, and shows how the law's sometimes implicit philosophical assumptions very often determine the legal responses to these issues.

Duff argues that as accounts of human action, both Dualism (mental states seen as an element in human beings distinct from their bodies and actions) and Behaviourism (mental states seen as patterns of behaviour) are inadequate for the analysis of responsible agency. He asserts that the Dualist tendency to see mental states as "occurrences" or "separate events" has distorted the criminal law's search for "mental elements" which correspond to the external conduct elements of offence definition.

Duff proposes an alternative view which rejects the assumptions of Dualism and Behaviourism:[6]

> We must claim instead that we *begin* with people and their actions: that these are what we can directly observe, and directly know; that these are not reducible by philosophical analysis to such supposedly simpler or more basic constituents as bodies and their colourless movements.

Taking "persons and actions" as the basic categories for logical analysis, Duff nevertheless recognizes that one may "abstract certain aspects of the *unitary* concept of person as an embodied thinking being"[7] and therefore speak of thoughts and bodily movements. While it is not possible in the limited space of this review to do full justice to the complexity of Duff's "alternative view", it is important to note that it is critical to Duff's proposed solutions to the dilemmas posed by issues of intention, agency and criminal liability. Whether Duff's "alternative view" has the validity or explanatory power which he claims for it, becomes a central problem for the book.

The three most satisfying chapters are in Part I. In the first of these chapters Duff presents what he calls the central paradigm or core notion

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[4] [1976] A.C. 182 (H.C.).

[5] Duff puts little emphasis on negligence since, as will appear below, he argues for an extended concept of "recklessness".

[6] Pp. 129-130. (Emphasis in the original).

[7] P. 130. (Emphasis in the original).

of "intended agency", and what others have variously referred to as "actual or direct intention" or "purpose". Duff claims to establish an adequate account of "what it is to act with the intention of bringing about a specified result and to succeed in doing so":[8]

> To act with the intention of bringing about a result ... is then to act as I do because I believe that my action will or might have that result and judge that result to be, overall, desirable.[9]

He says this account explains the paradigm of rational action and intention, and is what ordinary people, including legislators and judges, often really have in mind when talking about intention. However, Duff thinks there is sufficient confusion in both legal and philosophical circles concerning the concept "desire" that it would be better to avoid it entirely when defining intention in legislation or jury instructions. Duff argues that for legal purposes this actual or direct intention is best defined by simply saying "an agent intends those results which she acts in order to achieve".[10]

But there is a second category of situations where we speak of intentional action. This problem arises in practical legal contexts where an accused says: "you must prove I intended the results of my action, but while I foresaw the result as a virtual certainty I certainly did not act in order to achieve it." As Duff puts it:[11]

> The paradigm distinguishes an action's *intended effects,* which an agent acts in order to bring about, from its *foreseen side effects,* which she expects and might want, but does not act in order to bring about.

For example, can one convict a terrorist charged with "intentional killing" where the defence argues: "I put the time bomb on the plane *intending* to draw attention to my political cause, and while I *foresaw* the deaths of passengers I *didn't really want* that—I even hoped it might not happen through some fluke". Following Bentham and others, and parting company from Chisholm, Duff takes the view that in ordinary language and in law we can, do and ought to recognize that there is intentional agency and moral responsibility where an accused foresees the virtually certain side effects of an intended action.

Duff chooses to call his first paradigm of "direct" or "actual" intention *intended agency*. He then calls the extended paradigm of "oblique" or "indirect" intention (that is, foresight of consequences as a virtual certainty) *intentional agency*. He argues that there is a "difference" between "intending a result and bringing a result about intentionally". While this terminological choice seems to provide little advance over the contrast between "actual" and "direct" intention on the one hand, and "oblique" and "indirect"

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[8] Pp. 66-67.

[9] Pp. 71-72.

[10] P. 73.

[11] P. 74. (Emphasis in the original).

intention on the other, Duff's discussion clearly demonstrates the nature of the distinction and strongly supports the idea that both moral and criminal responsibility are appropriately ascribed in both contexts.

In his chapter on "competing conceptions of agency", Duff provides analysis which may be helpful to Canadian discussions of the degree of fault which may be required as a "principle of fundamental justice" in Charter section 7 in order for an offence to be found constitutionally valid. As Duff rightly points out, there are two dimensions to legal, as to moral, guilt: one concerns the seriousness of the harm done, and the other concerns the agent's responsibility for that harm—the degree of "fault". On the latter issue:[12]

> Now I am, of course, blamed for harm which I cause recklessly or negligently: but I am most culpable, because most fully responsible as an agent, for harm which I bring about with intent or intentionally.

This kind of argument provides a philosophical rationalization for the "sliding scale" approach to the constitutional fault requirement which seems to be adopted by the Supreme Court of Canada. That is, "intentional" or "intended" fault is required in serious offences such as murder[13] or attempting[14] such crimes, whereas negligence may be a sufficient basis for responsibility in relation to less serious offences.[15] Liability for recklessness is an intermediate position on the scale.

Part II of the book, entitled "Subjective and Objective", deals with two sets of circumstances where the intended and intentional paradigms of moral and/or criminal responsibility are extended or twisted in practical operation. One chapter deals with circumstances where what happens falls short of what is intended or expected—that is, responsibility for attempted crime. The other chapter covers circumstances where what happens exceeds what is intended or expected, that is, responsibility for recklessness or negligent actions. In the chapter on attempts Duff rationalizes on philosophical grounds the position, dominant in legislation, case law, and academic and law reform commentary, that responsibility for attempts should be based on actual intention and should not be extended to indirect intention, recklessness or negligence. While one might take issue with aspects of Duff's approach, his conclusions on attempts are not controversial. On the other hand, the chapter on recklessness and negligence raises important problematic issues.

Duff calls his chapter "recklessness" and says that it is concerned with whether "recklessness" should be defined "subjectively" or "objectively".

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[12] P. 102.

[13] *R.* v. *Martineau,* [1990] 2 S.C.R. 633, (1990), 79 C.R. (3d) 129; *R.* v. *Logan,* [1990] 2 S.C.R. 731, (1990), 79 C.R. (3d) 169.

[14] *R.* v. *Ancio,* [1984] 1 S.C.R. 225, (1984), 39 C.R. (3d) 1; *R.* v. *Logan, ibid.*

[15] *R.* v. *Wholesale Travel Group Inc.,* [1991] 3 S.C.R. 154, (1991), 8 C.R. (4th) 145; *Nova Scotia Pharmaceutical Society* v. *The Queen* (1992), 93 D.L.R. (4th) 36 (S.C.C.).

This casts the issue in terms which are confusing in the Canadian context, since "recklessness" is defined "subjectively" here.[16] The substantive issue, however, is still very much alive in Canada as courts wrestle with the issues of whether "criminal negligence" in Criminal Code section 219 should be defined in "subjective" or "objective" terms,[17] and when or how objectively defined responsibility ought to be held constitutionally valid.[18] For Duff, the subjective/objective controversy reflects "a conflict between two possible accounts of why intentional agency [that is, responsibility for indirect or oblique intention, or for expected rather than intended results] provides a paradigm of culpably responsible agency".[19] He says that one account emphasizes the concept of choice and would impose responsibility for conscious risk taking only. The other account talks of attitudes rather than choice—of indifference or disregard for others. On this latter account, Duff argues, one may impose responsibility for risks of which one is unaware.

Duff gives an excellent analysis of how "recklessness" is defined by mainstream orthodox subjectivists. He rightly cites the English Draft Criminal Code 1989 as providing the most complete subjective definition of recklessness:[20]

> a person acts ... 'recklessly' with respect to—
> (i) a circumstance when he is aware of a risk that it exists or will exist;
> (ii) a result when he is aware of risk that it will occur;
> *and* it is, in the circumstances known to him, unreasonable to take the risk.

Duff points out that this definition involves subjective awareness of risk on the one hand, and an objective standard of whether the risk is socially justifiable on the other. This definition of recklessness is consistent with much Canadian caselaw.[21] However, in England, as a result of a number of House of Lords decisions, doctrinal unity on the meaning of recklessness has collapsed. There recklessness can, depending on the context, mean subjective risk taking, indifference to the risk, or creating an obvious risk with no thought to the matter. The latter two standards are clearly "objectively defined" recklessness. From the point of view of clarity and

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[16] *R.* v. *Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont. C.A.); *O'Grady* v. *Sparling,* [1960] S.C.R. 804.

[17] *R.* v. *Tutton,* [1989] 1 S.C.R. 1392, (1989), 69 C.R. (3d) 289.

[18] *R.* v. *Wholesale Travel Group Inc., supra,* footnote 15; *R.* v. *De Sousa,* unreported, Sept. 24, 1992, Supreme Court of Canada.

[19] P. 141.

[20] Pp. 142-143 (emphasis added); see Law Com. No.177, Criminal Law: A Criminal Code for England and Wales (1989), cl. 18(c).

[21] *Supra,* footnote 16.

certainty in the law this confusion in England is to be regretted and ought not to be imitated in Canada.[22]

This is not to say, however, that criminal responsibility ought never to be imposed on an "objective" standard. Like H.L.A. Hart,[23] Duff makes a convincing argument that it is consistent with principles of freedom of choice in action to hold people to an objective standard of conduct where they possess the capacity to do so:[24]

> [If an agent] failed to take reasonable care, not because she lacked the capacity to do so, but because she failed to exercise the capacities for thought and attention which she could (and should) have exercised: then to convict her of negligence is to hold her properly liable for what she should and could have helped.

But while Duff would accept that negligence is a genuine species of culpable fault, it is not as serious a fault as intended harm, expected harm, or harm resulting from a conscious risk. The constitutional importance of this hierarchy of types of fault for Canadian law was mentioned earlier. However, Canadian courts which might accept the constitutional validity of objectively defined criminal negligence ought not to confuse it with recklessness or define the latter term objectively. In this, following Duff's terminology in Canada could easily lead to the bewilderment which characterizes English law in this area. It should also be noted that there is a preference in Canada, where objectively defined criminal negligence is being advocated, to ensure that such responsibility should only be imposed where there is a marked departure from the ordinary standard of reasonable care.[25] This "marked departure" standard, of course, raises the normal standard of criminal negligence above that of ordinary civil negligence.

Problems in Duff's argument are particularly revealed under the heading "The Thought Never Crossed My Mind". Where recklessness is the requisite fault to be proved for conviction and where the accused testifies to not having adverted specifically to the risk, Duff argues that one should nevertheless be able to convict. He says:[26]

> [W]e should distinguish *latent* from *actual* knowledge: knowledge which is 'stored in the brain and available to be called on' from 'knowledge which is actually present because it has been called on'.

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[22] In England, the House of Lords decision in *R.* v. *Caldwell, supra,* footnote 3, led to an extraordinary joint call for the abolition of criminal appeals to that body on the part of two of the world's leading criminal law scholars: J.C. Smith, Case Comment. [1981] Crim. L. Rev. 392; Glanville Williams, Recklessness Redefined, [1981] Camb. L.J. 252.

[23] H.L.A. Hart, Punishment and Responsibility (1968), p. 136.

[24] P. 156.

[25] *R.* v. *Tutton, supra,* footnote 17; Law Reform Commission of Canada, Report No. 31, Recodifying Criminal Law (1987), p. 25; Criminal Code, s. 436.

[26] P. 159.

The slipperiness of Duff's approach here, which rests on the notion of "practical indifference to the rights of others" rather than on "responsibility for wrongful choice", becomes apparent under the heading "I Thought She Was Consenting". Duff makes a compelling argument that sexual intercourse is the kind of activity where protection of women's interests may warrant an objective standard in relation to the issue of consent,[27] a position recently adopted in Canadian Criminal Code section 273.2(b).[28] But he frames this approach in terms of "practical indifference" being a form of "recklessness". To adopt this interpretation of recklessness is to turn one's back on half a century of painstaking scholarly effort to create a rational gradation in levels of culpability, and unnecessarily capitulate to the aberrant decisions of the House of Lords which confuse recklessness and negligence.[29] While in Canada Duff's arguments on objective standards for "rape" relate more to legislative policy than to judicial rule making, the underlying approach to "recklessness" is one which ought in either case to be firmly rejected as a matter of general principle.

In summary, Duff's book is an important critical examination of the fault principles which ground criminal responsibility. It ought to be read by anyone who has a serious interest in the general part of criminal law. His exposition of the law and its underlying philosophical assumptions clarifies the various conceptions of intent and recklessness, and constitutes a powerful argument in favour of the imposition of criminal responsibility through objective standards in the right circumstances. However, his approach to the concept of "recklessness" is both unnecessary and inappropriate in the Canadian context. Unthinking use in Canada of his terminology or that of the recent English cases following *R.* v. *Caldwell*[30] would undermine the relative doctrinal stability and clarity which has finally emerged after years of legislative, judicial and scholarly effort in this area.

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[27] Pp. 167-173.

[28] Added by an Act to Amend the Criminal Code (sexual assault), S.C. 1992, c. 38, s. 1.

[29] *R.* v. *Caldwell, supra,* footnote 3, and its ilk.

[30] *Ibid.*

Le livre de la copropriété et de ses registres.

Par MICHELINE CHALUT.
Montréal: Wilson & Lafleur. 1991. Pp. 236. ($65.00)

Compte rendu de Jean Goulet*

La maison d'édition Wilson & Lafleur a publié à la fin de l'année 1991 un ouvrage "du 3ème type" qui ne manquera pas d'attirer l'attention des praticiens et pédagogues tant par la qualité de son contenu que par la forme sous laquelle il est présenté à son public.

Le livre de la copropriété et de ses registres ne constitue en effet ni l'épais recueil de jurisprudence cher au juriste traditionnel, ni le savant traité, non moins familier au civiliste de bonne souche. L'ouvrage renoue plutôt avec la coutume un peu oubliée aujourd'hui du *formulaire* et propose à ses usagers quelque cinquante-trois modèles de rédaction répartis sous dix rubriques, couvrant tout le vécu, presque le quotidien, du régime de la copropriété par déclaration.

Nous allons pour notre part consacrer quelques paragraphes à la description du volet actif de cet ouvrage qui fait appel à la participation du public auquel il est destiné, avant de nous autoriser quelques rêves informatisés provoqués par la systématisation de cette matière difficile qu'a si bien réussi l'auteure du *Livre sur la copropriété.* Mais passons tout d'abord cet ouvrage en revue.

1. *Un livre d'action*

Le livre sur la copropriété et ses registres décrit bien visuellement les buts et objectifs qu'il poursuit. Il se présente dans le fort sérieux habit noir du livre de compagnie, dont les robustes feuillets mobiles sont fermement réunis entre deux épais cartonnages. Son élégance est relevée de pièces et traverses métalliques de couleur argentée qui les réunissent fermement l'un à l'autre. Le matériel choisi par l'éditeur est de première qualité et l'ensemble se manipule aisément pour permettre au besoin l'ajout de pièces utiles.

Il est d'ailleurs prévu que l'usager de ce recueil pratique peut en ajuster le contenu d'après les aléas de sa vie en copropriété, dont tous les aspects ont été envisagés par Me Chalut, depuis la déclaration elle-même jusqu'aux procédures relatives aux assurances ou aux affaires bancaires.

Les dix parties de l'ouvrage, appelées *registres,* sont structurées en quatre sections identiques. Chacune d'entre elles commence par un bref commen-

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taire, toujours clair et incisif, intitulé *Informations générales*. Il précède, en deuxième section, la reproduction des textes pertinents du Code civil du Bas-Canada et il se termine, en dernière section, par les modèles eux-mêmes.

L'utilisateur ne sera pas déçu incidemment par les formules qu'il y trouvera. Elles font appel en effet à un langage clair et précis, évitant les locutions ampoulées parfois chères à une pratique notariale restée pour certains archaïque. L'administrateur "moyen" ne risque pas de se perdre ainsi en conjectures sur le sens des mots et il devrait retrouver facilement tous les outils dont il a besoin.

Il ne me semble pas en effet que l'auteure ait omis de textes essentiels à la marche ordonnée de la copropriété divise. Sans doute eut-il été difficile de suggérer un modèle de déclaration, ce document se trouvant relié de si près à la nature changeante des divers phénomènes possibles ici.

Est-il par contre nécessaire de prévoir des formules différentes pour les "décisions ordinaires et courantes" et les "décisions extraordinaires" prises par les copropriétaires? Cette distinction pourrait s'avérer parfois délicate à établir, même si on suppose que les premières décisions correspondraient aux actes d'administration et les secondes aux actes d'aliénation. Source possible de confusion, cette distinction risque de provoquer une complication logistique inutile. Peut-être deviendra-t-il un tantinet difficile à la longue de se débrouiller dans la recherche de ces deux types de résolutions, alors qu'il est si simple d'y arriver dans un ensemble unique, regroupant toutes les décisions adoptées par les copropriétaires, et regroupées chronologiquement suivant leur adoption par l'assemblée qui en est responsable.

Tout l'appareil inventé par Me Chalut fonctionne donc en principe sans problème, même si, à l'occasion (aux Registres 1 ou 5, par exemple), il arrive que le nombre des formules et de leurs doubles, rendent le repérage des modèles parfois un peu compliqué. L'usager s'en tire en dernière analyse grâce à la table des matières qui lui sert de guide à travers les formules diversifiées qui lui sont soumises.

Aurait-il été possible d'identifier plus clairement certains modèles? Une telle systématisation supplémentaire tenterait sans doute l'informaticien, alléché par le type d'ouvrage que nous propose Me Chalut. De livre d'action, cet ouvrage deviendrait dès lors un livre d'interaction.

2. *Un livre d'interaction*

Nous épargnerons à notre lecteur une analyse de système qu'il n'y a pas lieu d'exposer ici. Nous allons nous contenter dès lors de rêver la structure fondamentale à laquelle un logiciel basé sur *Le livre de la copropriété et de ses registres* pourrait apporter une dynamique enlevante.

Le fondement du progiciel qu'on imagine n'est évidemment pas difficile à trouver. La structure même de l'ouvrage de Me Chalut en constitue la base. Son accès ne peut s'avérer complexe si sa première orientation

s'exécute à partir d'un menu dont les dix registres de l'ouvrage s'offrent comme premiers choix naturels. Le deuxième carrefour d'options devrait ouvrir les voies aux trois sections de chacun des registres, pour se terminer au point d'affichage des modèles désirés, façonnables alors au gré de l'utilisateur.

Le logiciel reste donc simple et ne doit évoluer là-dessus qu'avec circonspection. Il est inutile de vouloir gloser autour de la mine de renseignements que procure l'information de base de l'ouvrage tel qu'il est actuellement présenté. Ne pourrait-on pas ajouter ainsi aux articles du code civil de la jurisprudence pertinente ou des commentaires choisis en mode hypertexte ou par simple renvoi? Mais il faut résister à ces incitations.... Le marché informatique est déjà pollué de logiciels si puissants qu'un diplôme de polytechnique s'avère nécessaire à son décryptage. Restons donc simples, même au plan de la programmation. Car il faudra programmer.

Ni vraiment traitement de texte appliqué ni base de données au sens ordinaire du terme, ce système ne peut s'intégrer dans une "coquille" préconstruite, émanant d'un quelconque Wordperfect ou Paradox ou autre progiciel. Il faudra donc réécrire un logiciel taillé sur mesures, en langage C par exemple.

Mais ce logiciel sera-t-il coûteux? Cette question nous ramène en conclusion à l'ouvrage imprimé lui-même.

Conclusion

Même si un logiciel accompagnait l'ouvrage de Me Chalut et en doublait le prix, cet ensemble vaudrait encore largement son pesant d'or. Rien ne coûte plus cher que l'improvisation à laquelle s'adonnent présentement maints administrateurs de copropriété dont les connaissances en la matière ne leur permettent pas même de faire le tour de leur ignorance. Il suffirait pourtant parfois d'un peu de systématisation pour éviter des catastrophes, des impairs, des maladresses insignes exécutées pourtant sous le sceau de la bonne foi.

L'ouvrage de Me Chalut, sagement employé, évitera bien des ennuis, même s'il ne prétend sans doute pas remplacer le conseil juridique véritable. Un peu comme le ferait un bon dictionnaire de médecine, *Le livre de la copropriété et de ses registres* peut aider l'administrateur prudent à maintenir stable la santé juridique de l'immeuble dont il a la charge. Il lui restera à consulter pour les petites et grandes maladies qui pourront éventuellement affecter la santé juridique de sa copropriété, mais il aura entre temps économisé l'argent des copropriétaires et le temps de ses aviseurs légaux.

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Insurance Law in Canada—Second Edition.

By CRAIG BROWN and JULIO MENEZES.
Toronto: Carswell/Richard de Boo Publishers. 1991. Pp. lxxxv, 489. ($110.00)

Reviewed by M.G. Finlayson*

> INSURANCE, n. An ingenious modern game of chance in which the player is permitted to enjoy the comfortable conviction that he is beating the man who keeps the table.[1]

I wonder whether Mr. and Mrs. Scott would appreciate the Devil's definition. They had fire insurance with Wawanesa Mutual Insurance Co. at the time their fifteen year old son deliberately set fire to the family home. The policy of insurance provided that the son was an unnamed insured and that coverage was excluded for loss or damage caused by a criminal or wilful act of the insured or of any person whose property was insured under the policy. On this basis, Wawanesa denied the claim. The Supreme Court of Canada upheld this denial.[2]

This decision is extraordinary and of dubious moral authority.[3] The manner in which Brown and Menezes deal with this decision exemplifies the value and weaknesses of their text. Under the heading, "Co-Owners", they write:[4]

> In *Scott* v. *Wawanesa Mutual Insurance Co.*, L'Heureux-Dubé J., for the majority, found the exclusion clauses to be unambiguous, and that
>
> > The interests of parents and child in this case, to borrow the words of Viscount Cave in his *dictum* in *Dumas* ... are inseparably connected so that a loss or gain necessarily affects them both, the misconduct of one is sufficient to contaminate the whole insurance.
>
> The conclusion that the introduction of a factual expectancy test for insurable interest makes the property interests of child and parent an indistinguishable whole is not obvious. The predominant view might well have been the opposite. There is no evidence of any attempt by insurers prior to the decision in *Scott,* or subsequently, to bring home clearly the impact of the exclusions to the "ordinary insured". Adding forfeiture of insurance coverage to the trauma brought by the actions of an emotionally troubled infant does appear to merit La Forest J.'s characterization of it as being "draconian".

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[1] Ambrose Bierce, The Devil's Dictionary (1971).

[2] *Scott* v. *Wawanesa Mutual Insurance Co.,* [1989] 1 S.C.R. 1445.

[3] So dubious that at least one insurer, in identical circumstances, chose to ignore the "principle" for which it stands and paid a claim in excess of $100,000.00.

[4] P. 137.

The case is mentioned and the quintessence of it is captured; but the analysis is slight.

Like its first edition, which was published in 1982, the work contains an appropriately succinct overview of the constitutional authority over insurance law and amply canvasses the basic departments, including, among others, insurable interest, subrogation, causation, accidental and deliberate losses, notice and proof of loss, disposal of claims, waiver and estoppel, and agency law in insurance. Whole chapters are devoted to fire insurance contracts and automobile insurance, though the latter would be of interest chiefly to Ontario practitioners.

So striking indeed is the resemblance to the first edition, that one is entitled to wonder why this new edition was published. The preface provides some explanation:[5]

> Most of these [changes] reflect changes in the law. Important examples of this are in the area of insurable interest following the Supreme Court of Canada decision in *Constitution Insurance Co. of Canada* v. *Kosmopoulos* and in liability insurance where significant developments have occurred relating to an insurer's duty to defend and its duty of good faith regarding settlement.
>
> There have also been legislative changes, most notably in Ontario where automobile insurance has undergone radical change....

But, today, this is not really sufficient justification for *this form of publication.* This work (and any of its type) should have been (should be) brought out in looseleaf form. Especially is this true where, as here, reliance upon case law is so great and analysis of first principles so uneven. *Constitution Insurance Co.* v. *Kosmopoulos*[6] may now be included within the work, but there will soon be a plethora of decisions defining the limits and application of the tenets enunciated (or broadly sketched) in that case. In the era of Quik-Law, the utility of this type of publication is of diminishing comparative merit.

By its own measure, however, this work is competently performed. The concision of the writing is often admirable. Some trifling errors are annoying but not significant. For example, in the age of WordPerfect, the typographical errors are copious.[7] There is no reference to names in the index, nor is there a separate name index; and the cross-referencing is imperfect.

In sum, as a general rule, this book would be the place to begin, but not to end one's research and analysis of an insurance question.

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[5] P. v.

[6] [1987] 1 S.C.R. 2.

[7] Even some of the grammatical errors in the first edition remain in the second: for example, at p. 40 (2nd ed.) is the mistake found at p. 41 (1st ed.)—"The basis ... are ...".

Religion and Culture in Canadian Family Law.

By JOHN TIBOR SYRTASH.
Toronto: Butterworths. 1992. Pp. xxiv, 189. ($50.00)

Reviewed by S.J. Toope*

Canadian judges commonly assert that when they deal with family matters, and especially with child custody and access issues, they are perfectly neutral with respect to the religious conflicts which may exacerbate the bitterness of intra-family disputes.[1] It is perhaps the occupational hazard of the judge simply to assume her or his own impartiality. Although members of the judiciary may be expected to display a higher degree of moral self-awareness than the person on the Angrignon Métro line, judges are not immune to that most basic of human failings—self-deception. Syrtash's book reveals the degree to which most Canadian judges are fooling themselves when they claim to be impartial and neutral about religion in family disputes. The author states expressly that his purpose was to trace "what happens when ... judges and legislators meet with parties who do not share the same assumptions or laws of the majority culture".[2] What happens all too often, though not invariably, is that the judge or legislator displays striking insensitivity to values which do not mesh comfortably with mainstream Canadian attitudes towards religion and child-rearing.

Syrtash's point is not that judges and legislators are insensitive oafs; indeed, his tone is deferential throughout. Rather, he attempts to demonstrate that for many members of Canada's legal elites, minority religious beliefs are perhaps unconsciously misunderstood and devalued. An excellent example, unfortunately not discussed by Syrtash, is the Quebec Superior Court decision in *Droit de la Famille—239*. The case is instructive because it reveals a thoughtful judge struggling with what Martha Minow has called "the dilemma of difference".[4] At the time of divorce, the court order had confirmed the agreement of the spouses that custody of a child would be awarded to the mother. Since then, the wife had converted to a very rigorous religious way of life and she wanted to ensure that her child knew right from wrong. She no longer approved of the husband's parenting because

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[1] See, for example, *Chaput* v. *Romain,* [1955] S.C.R. 834; *Irmert* v. *Irmert* (1984), 64 A.R. 342 (Alta. C.A.); *Barrett* v. *Barrett* (1988), 18 R.F.L. (3d) 186 (Nfld S.C.).

[2] P. x.

[3] [1985] C.S. 1106.

[4] M. Minow, Learning to Live With the Dilemma of Difference: Bilingual and Special Education (1985), 48 L. & Contemp. Prob. (No. 2) 157.

he was not tough enough. She chose to inhibit his access, causing him to petition for custody. The husband asserted that although he too wanted to inculcate good values, he chose to do so in a manner more flexible than that of the mother. In determining custody, Goodwin J. faced a most difficult problem:[5]

> [I]l faut choisir entre deux milieux de vie, ou plutôt deux atmosphères, deux méthodes de formation et décider où l'enfant se développera plus sainement.

On these facts, where there was absolutely no evidence that the mother's more rigorous attitudes towards discipline had harmed the child, the judge switched custody to the father. Goodwin J. was clearly concerned that the wife's attitude, which led her to restrict access to the father, was unfair and potentially destructive of the relationship between the father and child.

In a sense, Goodwin J.'s decision could be viewed as exemplary, for it seeks to promote values which Canadians like to espouse: tolerance and moderation. One can also applaud the candour with which the judge expresses his views. He frankly admits that he is choosing between two broadly acceptable ways of life, that the choice is tough, and that it is largely a matter of instinct which life would be better for the child.

Therein lies one particular dilemma of difference. Does one seek to promote inclusively supported values such as open-mindedness and moderation, or does one accept that certain religions and cultures may not value these "ideals" as highly as society at large and allow for the possibility that children may be raised without demonstrable harm in restrictive cultural environments? Syrtash raises these issues again and again without really attempting to suggest any way out of the conundrum. He merely notes that "[t]he extent to which a court, or a litigant, must tolerate intolerance inherent in a party's faith will be the Charter's most challenging test".[6]

This short sentence masks a wealth of complicated issues. At a technical level, the question of the Charter's application to "private" family law disputes is raised. I have argued elsewhere that the Charter is applicable in the family law context, albeit to a limited extent. However, in light of the Supreme Court's decisions in *Retail, Wholesale & Department Store Union, Local 580* v. *Dolphin Delivery Ltd.*[7] and *McKinney* v. *University of Guelph*,[8] the case for its application is not straightforward, and needs to be argued explicitly.[9] Syrtash fails to take up this challenge.

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[5] *Supra*, footnote 3, at p. 1108.

[6] P. 44.

[7] [1986] 2 S.C.R. 573.

[8] [1990] 3 S.C.R. 229.

[9] S. Toope, Riding the Fences: Courts, Charter Rights and Family Law (1991), 9 Can. J. Fam. L. (No. 2) 55, at pp. 63 *et seq.*

On a substantive level, Syrtash's description of the central difficulty as learning to "tolerate intolerance" is also an idea which begs more rigorous argument. In purely descriptive terms, Syrtash is probably correct when he states that "courts are prejudiced against those religions that encompass an entire way of life",[10] and that they tend to view religion as "one among many consumer items of entertainment, recreation or hobby".[11] But is it really enough to deal with this issue by repeatedly suggesting that lawyers should encourage their clients to make their religious views *seem* open-minded, even if they are not.[12] Indeed, that counsel would appear to undermine the central theme of the book, which is that legal elites must do more to respect seemingly "intolerant" religious groups. One does not learn to be tolerant of intolerance by forcing people with strong but sincere beliefs to manufacture a guise of tolerance for their court appearances.

In any case, framing the entire debate in terms of "tolerance" may be misleading. If uncritically constructed, the idea of tolerance may be nothing more than a mask for moral relativism. If our society is truly committed to the "best interests of children", a purely relativist moral position will prove unsatisfying and ineffective. An inverse problem may also occur. "Tolerance" may be used as a subtle method to reassert the social power of a majority culture, by defining that which will be tolerated, and limiting toleration to those social attitudes which do not challenge the dominant culture in any fundamental way.[13] Tolerance is a very complex notion. If it is to serve as the foundation for Canadian courts' treatment of religious disputes in family law, it must be dealt with more fully and critically than Syrtash has attempted in this short book.[14]

Part of the problem is that the title of this book claims more for the work than the author actually attempts. Rather than being a "treatise"[15] on "religion and culture in Canadian family law", the book is a collection of three discrete chapters dealing with: (1) religion in custody and access disputes; (2) "alternative 'cultural' dispute resolution"; and (3) removing the barriers to religious remarriage.

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[10] P. 87.

[11] P. 41.

[12] Pp. 17: "[W]hen seeking custody, a religious parent should appear 'tolerant' and 'accommodating' when discussing the scheduling of access"; 44: "Presumably the parent with the greatest willingness to accommodate the other parent's religious beliefs and practices 'wins'"; 85: "Bluntly stated, the key is tolerance, even if one's religion does not appear to permit such tolerance."

[13] See N. Duclos, Lessons of Difference: Feminist Theory on Cultural Diversity (1990), 38 Buffalo L. Rev. 325, at p. 371.

[14] I have only traced the outlines of some of the difficult questions which need to be pursued more rigorously. For a more complete discussion, see Toope, *loc. cit.*, footnote 9.

[15] The author employs this description in his preface, p. x.

The first chapter is by far the most complete. It contains a thorough review of most of the recent Canadian case law on religious disputes in the context of child custody and access. Notable is the inclusion of an extensive discussion of Quebec cases, often unaccountably excluded from reviews of "Canadian" family law. Syrtash traces the beginnings of a more culturally sensitive position in Canadian courts, some of which now attempt to uphold the sincerely held religious beliefs of custodial and access parents.[16] This development is part of a larger movement towards the recognition of a continuing role for access parents in the life of their children,[17] but is firmly grounded in judicial recognition of a need to foster moral instruction[18] and a desire to uphold the fundamental importance of the freedom of conscience and religion in Canadian society.[19]

Although Syrtash's discussion of religious issues in custody and access disputes is provocative, it suffers from a tendency to skate over the thorny issues. Despite the repeated references to culture, society, multiculturalism and tolerance, the book betrays no theoretical underpinnings. Mere intonations of the value of open-mindedness and cultural sensitivity do not provide much guidance to courts or legislatures. To be fair, these are hard issues, and Syrtash is to be congratulated for at least asking many of the right questions, but given his breadth of practical experience, one might have hoped for more refined conclusions, or even some suggestions.

For example, the new approach to religion in custody and access cases is rooted almost entirely in procedure, specifically in a reassessment of the burden of proof. Religious ways of life used to be devalued by courts which required only that a parent allege some negative effect upon a child of the religious beliefs or practices of the other parent in order to deny custody or impose restrictions upon access. Cases such as *Hockey* v. *Hockey*[20] now

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[16] The key cases in this evolution are *Hockey* v. *Hockey* (1989), 21 R.F.L. (3d) 105 (Ont. Div. Ct); *Young* v. *Young* (1990), 50 B.C.L.R. (2d) 1 (B.C.C.A.) (leave to appeal granted, [1991] 1 S.C.R. xv); *Droit de la Famille—955,* [1991] R.J.Q. 559 (C.A. Qué.).

[17] Some feminist scholars have warned that the renewed emphasis upon "rights" of access parents (usually men) may be used as a tool to attack the choices open to custodial parents (usually women). Although few people would argue that the relationship between an access parent and his children is irrelevant, the fear is expressed that enhanced "rights" of access may be used to harass custodial parents. See S. Boyd, Women, Children and Equality, excerpted in B. Cossman & M.J. Mossman (eds.), Family Law: Cases and Materials (1991-92), Vol. 4, pp. 1314-16 (unpublished casebook, Osgoode Hall Law School of York University). This observation reaffirms the need to pay close attention to the particular context of any "rights" claim advanced in a family law setting; see Toope, *loc. cit.,* footnote 9.

[18] See, for example, *Droit de la Famille—260,* [1986] R.J.Q. 315 (C.S.); *Gauci* v. *Gauci,* [1973] 1 O.R. 393 (Ont. H.C.).

[19] In *R.* v. *Big M Drug Mart Ltd,* [1985] 1 S.C.R. 295, at p. 347, Dickson J. described the freedom of conscience and religion as grounded in "our political and philosophic traditions".

[20] *Supra,* footnote 16, at p. 106.

require "compelling evidence" of harm before restrictions will be placed upon the free exercise of religion of a parent. The meaning of that standard of proof, and how the burden may be discharged, bears more analysis than Syrtash has devoted to the issue. His warning that expert evidence should not be relied upon uncritically is wise, but does not carry the debate very far.[21] Similarly, the problem of how to assess a child's own religious views is merely adverted to; no concrete recommendations are offered.[22]

The second chapter, on "alternative cultural dispute resolution", is the weakest section of the book. It contains an unstructured description of various religions and cultures, and their interest in "legal" aspects of family relations. Syrtash asks to what extent aboriginal peoples, Jews, Roman Catholics, Moslems and Anglicans seek to provide independent systems of dispute resolution in family matters. His conclusion is that various religions and cultures display varying degrees of interest in autonomy from state legal structures, but that state recognition of customary marriage and religious dispute resolution is a hodge-podge across the various legal jurisdictions of Canada.[23] Although uncontroversial, this evaluation is not matched with any very sophisticated attempt to articulate how a state system may accommodate itself to a rich legal pluralism within its borders. Various legal scholars have attempted to articulate theories of pluralism which are directly relevant to the issues discussed by Syrtash, but they are not explored in this work.[24]

From the perspective of a Quebec lawyer, one other issue deserves mention. In discussing the role of Canadian superior courts in family law matters, Syrtash mentions casually that all superior courts possess inherent *parens patriae* jurisdiction.[25] In Quebec, this assertion is controversial. It has been suggested by distinguished doctrinal writers that because of Quebec's unique legal history, Quebec superior courts do not possess any inherent *parens patriae* jurisdiction.[26] Such jurisdiction would have to be granted in legislation, such as art. 30 of the Civil Code of Lower Canada.[27]

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[21] P. 84. For a more extensive discussion of the evidentiary issues, see Toope, *loc. cit.*, footnote 9, at pp. 82-88.

[22] Pp. 45, 83.

[23] Pp. 96 *et seq.*

[24] See, for example, M. Walzer, Spheres of Justice: A Defence of Pluralism and Equality (1983); H.P. Glenn, Persuasive Authority (1987), 32 McGill L.J. 261; R. Macdonald, Office Politics (1990), 40 U.T.L.J. 419.

[25] P. 105.

[26] See, for example, M. Morin, La compétence parens patriae et le droit privé québécois: un emprunt inutile, un affront à l'histoire (1990), 50 R. du B. 827; R. Kouri, L'arrêt *Eve* et le droit québécois (1987), 18 R.G.D. 643.

[27] Art 30, C.C.L.C.: "In every decision concerning a child, the child's interest and the respect of his rights must be the determining factors."

Syrtash's third chapter deals with the removal of barriers to religious remarriage. Again, the title is somewhat misleading, for the focus of the chapter is almost entirely upon the Jewish *get,* a consensual form of religious divorce which is crucial for observant Jews who wish to remarry in the faith. Syrtash describes how the need for a *get* was used by some unscrupulous parties, mostly men, as a bargaining chip in state divorce proceedings. "I will not give you a *get* if you insist upon alimentary support of more than x dollars" was a refrain heard too often for the liking of some leaders of Canada's Jewish community. Syrtash himself was heavily involved in a successful campaign for amendments to the federal Divorce Act[28] and the Ontario Family Law Act[29] which allow courts to set aside, or disregard, spousal agreements reached under the pressure of a refusal to provide a religious divorce.

The description of the problems which arose with the *get* in Canada, and the unique legislative initiatives designed to remedy the situation, is fascinating. However, the chapter is far longer than necessary. It reprints in its entirety a memorandum written by John Whyte, Dean of Law at Queens, defending the constitutionality of the Ontario legislation. The memorandum is vintage Whyte—thorough and tightly reasoned. But it is unclear why it should have been dropped into the middle of a chapter written by another author. A more critical approach, rooted in the considerable theoretical challenges inherent in the topic of religion and culture in Canadian family law, would have ensured a more coherent and rewarding read.

The book is generally well produced. The citation style is consistent, and the index and table of cases are useful. Typographical errors are kept to a minimum. The editors should, however, be taken to task for one glaring error. In a discussion of the *Big M Drug Mart* case, our former Chief Justice is referred to as "Dixon J." One does not expect such a mistake in a book published in Canada.

Should family law practitioners and interested academics buy this book? Despite the reservations expressed above, this reviewer's advice would be to dig into one's pocket and order a copy. Syrtash has tackled a topic rarely discussed in any detail in Canada, and he has provided a wealth of useful citations to the practice of courts across the country. Although this book is not the definitive statement on religion and culture in Canadian family law, it is a worthy first cut on an infinitely complex topic.

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[28] R.S.C. 1985, c. 3 (2nd Supp.) (as am. by S.C. 1990, c. 18, s. 2), s. 21.1.

[29] R.S.O. 1990, c. F.3, ss. 56(5)-(7).