*The Judiciary in England and Wales.*

A Report by Justice.
London (England): Justice 1992. Pp. 81. (£6.00)

Reviewed by Douglas Lambert*

Justice is the short form name of the British Section of the International Commission of Jurists. Within the Justice structure there is a Committee on the Judiciary. In 1992 the Chair of the Committee was Professor Robert Stevens. There were twelve other members: some were barristers, some solicitors, some judges, some public servants, some women, and some men. One was a journalist. The Committee was asked by Justice to prepare a Report on the Judiciary in England and Wales and it was given these terms of reference:

> To inquire into the judiciary with special reference to the appointment and consultation process; training, promotion, and retirement, the use of deputy and retired judges; the concept of a career judiciary; extra judicial appearances and statements, the concept of a Judicial Commission, the independence of the Judiciary and professional and public confidence in it.

The Report of the Committee was unanimous. It was endorsed and approved for publication by the Council of Justice and it was published by the Justice Education and Research Trust.

It is important to understand that the Report is not a governmental report. It is a report by a voluntary organization of legally trained people from diverse backgrounds but with no apparent motives other than the furtherance of the public interest in the administration of justice.

The Report starts by identifying the strengths and weaknesses of the English judiciary. The strengths are legal learning, technical competence, and incorruptibility. The weaknesses and their amelioration occupy the remainder of the Report. There is a chapter on the present system for appointments, training, standards of performance including sanctions for falling short, remuneration and pensions. There is a chapter on areas of concern. Then the primary thrust of the Report is contained in the three final chapters setting out recommendations for reform, a suggestion for a Judicial Commission, and proposals for a number of other changes.

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The Committee believes that judges should be selected from a wider pool of talent; that they should include people of more diverse backgrounds; that judges should start younger and finish younger; that judges should be trained in advance and retrained periodically; and that judges should be picked for their judicial potential and not for their forensic history. The Committee also believes that the processes by which judges are chosen should be more open to informed public participation and public scrutiny.

To those ends the Committee proposes the establishment of a Judicial Commission. Ominously, like the Committee itself, the Commission is to be composed of thirteen members. Six are to be legally trained and seven from other backgrounds. Not more than two are to be judges. The Commission is to have responsibilities for judicial appointments, judicial training, and the career development of judges. The functions of the Commission in relation to High Court, Court of Appeal, and House of Lords appointments would be to select short lists for consideration by the Lord Chancellor, and, with respect to Circuit Judges, to send a list to the Lord Chancellor precisely corresponding with the number of vacancies.

There are some other suggestions for change. Most notable is a proposal that the judiciary should be conceived as a hierarchy of judicial talent rather than a hierarchy of courts. Appeal judges would sit on trial courts, trial judges would sit on appeal courts, recorders and district judges who did not blot their copy book could be promoted. For the top of the pyramid, namely the House of Lords, this is the proposal: "Where there is a conspicuous absence of a law lord with specific skills (criminal law, etc.) there should be a panel of academic lawyers available to sit as advisers on an ad hoc basis."[1] There does not seem to be a mechanism for deciding, from time to time, on the scope of the "etc."

The forces in favour of allowing greater public participation in judicial appointments and greater public scrutiny of those appointments seem destined to prevail. It is very hard to persuade the public that thoughtful consideration of the talent pool by a Minister of the Crown on the basis of careful inquiries through the whole range of professional and public opinion (often referred to by the press as "patronage appointments") is a better method of selecting the judges than an independent commission with a majority of lay people who would look at paper qualifications and formal letters of recommendation, and who may conduct interviews at selection panels. But it may be.

And while it is important that senior judges should not have an opportunity to perpetuate themselves in the appointment of their successors, it is just as important that they do not have the power to select judges to hear cases on the basis of what may seem to be special skills, but where the assessment of special skills is made entirely by those senior judges.

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[1] P. 32.

The Committee seems not to have addressed the part of its mandate about extra-judicial appearances and statements, on which, of course, a rich diversity of views is developing in the common law world.

For those who have formed a good opinion about independent public commissions, with written rules and with processes to interpret and implement those rules, the recommendations may seem wise and far sighted. Those who do not share that opinion will be subject to misgivings that the recommendations, if implemented, will introduce yet more well-intentioned administration into judicial work, with a potentiality for the erosion of judicial independence.

The Report is short and clearly written. Its recommendations can be readily understood, though the possibility of any adverse consequences from the implementation of those recommendations is not explored. There are a number of interesting appendices, including a draft job description for Circuit Judges. It is a pity that no job description was prepared for members of the House of Lords.

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*Report on Testing for AIDS.*

By the Ontario Law Reform Commission.
Toronto. 1992. Pp. xi, 115. (Free of charge)

Reviewed by Donald G. Casswell*

The Ontario Law Reform Commission's Report on Testing for AIDS ("the Report"), released in March 1992, makes recommendations concerning a variety of HIV and AIDS-related issues.[1] These include issues relating to HIV testing, compulsory reporting, contact tracing and confidentiality. While the Report focuses on Ontario legislation and practice, its recommendations are informed more generally by a critical review of the epidemiological, public health and legal experience throughout North America relevant to the AIDS epidemic. The Report also examines the classical biomedical model

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[1] "AIDS" refers to acquired immune deficiency syndrome, which is caused by the human immunodeficiency virus, "HIV".

of infectious disease control in arriving at its recommendations. That model is the foundation of communicable disease legislation and regulations in all provinces and territories. Therefore, the Report is relevant in all provinces and territories.

Chapter 1 of the Report sets out background information about HIV and AIDS, including how HIV is transmitted, how it is not transmitted, the clinical stages of HIV infection and treatment of HIV-infected persons. The Report emphasizes that as yet there is no effective treatment to render an HIV-infected person non-infectious nor is there a cure for AIDS. The most common methods of testing for HIV and problems with those tests are also considered. In particular, since the tests currently used detect HIV antibody, not HIV, and since there is a "window period" between HIV infection and the development of detectable HIV antibody, false negative test results are possible.

The Report then moves into its consideration of testing and confidentiality issues, basing its analysis firmly on the social and medical experience with AIDS. The Report is highly sensitive to the discrimination and stigmatization which threaten HIV-infected persons, since to date the vast majority of such persons in North America are gay men, bisexual men and injection drug users.[2]

Chapter 2 of the Report considers testing for HIV. The Report adopts the following definitions:[3]

> Voluntary testing—Testing is done only with the informed consent of the person to be tested (or if the person is incompetent, of his or her parent, legal guardian, or next-of-kin, as required by law), and the testing does not fall within the definitions of mandatory or compulsory testing.
>
> Mandatory testing—Testing is either a necessary prerequisite for a person to obtain a specified status, benefit, service or access to a given situation, or is a necessary consequence of being provided with one or more of these.
>
> Compulsory testing—Testing is required by law, or policy, and the person has no choice to refuse testing and cannot legally avoid it.
>
> Routine testing—Testing for diagnostic use where it is medically indicated but without the patient's express informed consent.
>
> Screening—Testing performed on a group for epidemiological or research purposes in which the results are not used to identify infected individuals.

The Report refers to commentators and public health officials who, recognizing the severe personal, social and financial consequences which may result for a person identified as HIV-infected, have endorsed HIV testing only with the person's voluntary, specific and informed consent.[4] The Report there-

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[2] See, for example, pp. 12, 19 and 76.

[3] "Voluntary testing", "mandatory testing" and "compulsory testing" are defined at p. 8, "routine testing" at p. 9, and "screening" at p. 71, n. 238.

[4] P. 23.

fore recommends that no HIV-related test should be performed without first receiving the voluntary, specific and informed consent of the person tested.[5]

The Report recommends that there be two exceptions to the general requirement of obtaining a person's voluntary, specific and informed consent to HIV testing. The first relates to donors of blood products or bodily tissues.[6] Noting that in this situation mandatory HIV testing has been universally endorsed by public health officials, the Report agrees. The Report emphasizes that informing prospective donors that an HIV test will be conducted and giving them adequate information about the nature and purpose of the test will encourage self-exclusion on a completely confidential basis.

The second exception to the general requirement of obtaining the voluntary, specific and informed consent of the person to be tested for HIV relates to epidemiological screening designed to determine the HIV seroprevalence rate in a given population.[7] Requiring the informed consent of subjects in epidemiological research may jeopardize the accuracy of such research, since subjects' fear of identification may motivate more infected than uninfected subjects to "opt out". Further, if properly conducted, epidemiological screening is performed on an anonymous basis with no possibility of individual subjects being identified with test results. Therefore, the Report recommends that obtaining the voluntary, specific and informed consent of the person should not be necessary with respect to an HIV test performed as part of an anonymous HIV screening program for epidemiological or research purposes.

It is worth referring to those specific cases in which the Report concludes that no exception to the general requirement of voluntary, specific and informed consent to HIV testing is justified. Since the beginning of the AIDS epidemic there have been suggestions that many groups, up to and including the entire population, be tested for HIV. The Report concludes that involuntary testing of the following groups is not justified:

- — the entire population
- — so-called "high-risk groups"
- — students, teachers and others in the school and pre-school setting
- — hospital patients
- — pregnant women
- — sex workers
- — inmates in correctional facilities
- — applicants for health or life insurance
- — those in the workplace
  - — workers generally
  - — workers whose duties involve public safety, such as pilots and air traffic controllers
  - — health care providers

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[5] P. 27.

[6] Pp. 40-44.

[7] Pp. 71-76.

The Report's analysis of whether involuntary testing of any of these groups is justified focuses on the classical biomedical model of infectious disease control[8] and human rights law.[9] The classical biomedical model of infectious disease control is based on discovering the agent responsible for causing a disease, testing to identify those infected with the agent, treating those infected or already suffering from the disease and tracing contacts of the infected person. There are serious weaknesses in this model. First, it focuses almost exclusively on the identification and control of those already infected rather than attempting to educate those not infected. Conventional morality and the possibility of social stigmatization impede attempts at education. Further, the model is dependent upon the existence of reliable tests and effective treatment. The shortcomings of the classical biomedical model of infectious disease control in the context of HIV and AIDS are obvious. With respect to each group considered, the Report reviews public health experience in the context of the classical biomedical model of infectious disease control. The Report also reviews human rights jurisprudence prohibiting discrimination on the basis of disability or sexual orientation.[10] The Report therefore uses as a touchstone for analysis "the necessity of providing a carefully articulated rationale, closely related to a legitimate public health objective, for any mandatory or compulsory HIV testing scheme".[11]

A few examples will serve to illustrate the Report's technique. Concerning HIV testing of so-called "high-risk groups", such as gay men, bisexual men, injection drug users and haemophiliacs, the Report indicates that:[12]

> ... it is the consensus of public health officials that selective testing of high-risk groups would be unlikely to limit the spread of infection—first, because no effective treatment is available and, second, because selective testing of high-risk groups would fail to identify all infected persons. The likelihood of infection is a function of high-risk activity, not of membership in a group.

Rather than HIV testing of so-called high-risk groups, the Report recommends public health education campaigns targeted at people engaging in high risk behaviour with wide availability of voluntary HIV testing. With respect to hospital patients[13] and health care providers,[14] the Report refers to studies indicating that the risk of HIV transmission from patient to health care provider, while small, is real and that the incidence of HIV transmission from health care provider to patient is exceedingly rare and, until recently, unknown. Given this evidence, the Report concludes that involuntary testing of either hospital patients or health care providers is unwarranted. Instead, the safety of both

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[8] See in particular pp. 27-29 and, generally, throughout Chapter 2.

[9] Pp. 34-40.

[10] Pp. 34-40.

[11] P. 40.

[12] P. 33.

[13] Pp. 46-50.

[14] Pp. 64-71.

groups in the health care setting is best achieved through adherence to universal precautions under which the blood and certain bodily fluids of all patients are considered potentially infectious and treated accordingly. With respect to workers whose duties involve public safety, evidence indicates that "otherwise healthy HIV-infected individuals are not more likely to present a clinically significant cognitive impairment than uninfected individuals".[15] Therefore, there is no medical justification for HIV testing of such workers and the Report recommends against such testing.

Chapter 3 of the Report confronts issues involving the confidentiality and disclosure of HIV-related personal information. Given the potential for discrimination and stigmatization suffered by persons identified as HIV-infected, the Report emphasizes throughout this chapter the belief "that strong confidentiality protection of information pertaining to HIV-related testing and treatment promotes the social interest in individual privacy as well as the public health. Exceptions to the principle of confidentiality should be clearly justified".[16] All provinces and territories require reporting of AIDS cases to public health authorities and most also require reporting of HIV seropositivity. The Report considers whether such reporting requirements should require information personally identifying persons who test positive for HIV infection ("nominal reporting") or not ("anonymous reporting"). The Report indicates that nominal reporting is not necessary, for epidemiological research, counselling and treatment of HIV-infected persons do not depend on compulsory nominal reporting, and evidence shows that strict adherence to confidentiality and anonymous testing encourages people at risk to learn their antibody status, while nominal reporting has the opposite effect. In particular, bisexual men are hesitant to be tested if nominal reporting is required.[17] As indicated in an Ontario Ministry of Health Study:[18]

> A real issue for [bisexual] men was the fear that their going for a test would publicly expose their bisexuality, to the detriment of their marriage, their social life and possibly their business dealings.

The Report, therefore, recommends "that any [person] seeking an HIV-related test should be provided with the opportunity to test non-nominally or to remain anonymous and to provide voluntary, specific, and informed consent through the use of a coded system with no linking of the [person]'s identity to test results".[19]

Chapter 3 of the Report then considers "contact tracing" or "partner notification", that is, the identification of sexual or needle-sharing partners of HIV-infected persons. Once again, the Report considers public health experience in assessing contact tracing. That experience indicates that contact

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[15] P. 63.

[16] P. 78.

[17] Pp. 91-92.

[18] P. 92, n. 77.

[19] P. 111.

tracing is only marginally effective in reducing the spread of HIV infection and that it only complements education programs directed at the wider community.[20] That is, some form of partner notification can be useful. Certainly direct partner notification by the HIV-infected person is the first choice for contact tracing.

However, the Report then proceeds to consider two much more difficult questions. First, should contact tracing be on a "voluntary notification" basis (notification of partners by the HIV-infected person or his or her personal physician with the consent of the HIV-infected person) or a "statutory notification" basis (notification by public health authorities, usually by virtue of some statutory regime)?[21] Second, if contact tracing is to be by means of statutory notification, should the person at risk only be notified that they are at risk or should in addition the identity of the HIV-infected person be disclosed ("notification" versus "identification")?

With respect to the "voluntary notification" versus "statutory notification" question, the Report recommends a combination of both forms of contact tracing. "Patients should be encouraged to notify partners voluntarily, or to cooperate with their personal physician's attempt to do so, within a physician-centred program of partner notification."[22] However, the Report also recommends a form of statutory notification, presumably for those cases in which voluntary notification is not achieved. Unfortunately, the Report does not give reasons for recommending statutory notification. Instead, it refers to the comprehensive HIV-specific legislation in New York as its basis for considering the related issues of confidentiality and statutory notification.[23] After reviewing the New York legislation and referring to policy statements from the Canadian Medical Association and other groups, the Report in a rather conclusory manner recommends that:[24]

> ... physicians should be able to directly notify identifiable, unsuspecting partners of HIV-infected patients who are at risk, *under clearly defined guidelines governing the disclosure of HIV-related information;* ... the option to seek the assistance of public health authorities in the notification process should be available to both physicians and patients; and ... physicians who notify partners should be protected against the potential for liability resulting from responsibilities relating to partner notification.

An obvious question which immediately arises is, what ought those "clearly defined guidelines governing the disclosure of HIV-related informa-

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[20] Pp. 93-94.

[21] P. 87.

[22] P. 111.

[23] The Report contains footnoted references to literature reviewing HIV-specific legislation enacted in many American states. Two excellent comprehensive reviews of such legislation are D.P.T. Price, Between Scylla and Charybdis: Charting a Course to Reconcile the Duty of Confidentiality and the Duty to Warn in the AIDS Context (1990), 94 Dickinson Law Review 435; H. Edgar *et al.*, Medical Privacy Issues in the Age of AIDS: Legislative Options (1990), 16 Am. Journal of Law & Medicine 155.

[24] P. 111. (Emphasis by the author).

tion" to be? No guidance on this crucial aspect of any comprehensive legislative or policy approach to HIV infection is offered by the Report. The Report does, however, at least consider what is perhaps the most difficult question associated with drafting any "clearly defined guidelines", namely, whether contact tracing should be on the basis of notification of the person at risk, without disclosure of the HIV-infected person's identity, or whether identification should be made. The Report outlines the competing interests relevant in such an analysis. The confidentiality expectation of the HIV-infected person must be balanced against the interest of the partner at risk. Further, the analysis does not involve a simple balancing of one individual's interest against that of another individual. The analysis must also consider whether the broader interest of the public at large is better served by a notification process which includes identification or which does not. As the Report asks:[25]

> Will a policy of strict non-disclosure of patient identity provide for more effective contact tracing, with the result that larger numbers of people will be encouraged to avoid behaviour that subjects them to the risk of acquiring an incurable and fatal illness?

Further, the Report recognizes that in some situations notification of the partner at risk will necessarily require identification of the HIV-infected person (for example, notification of a monogamous sexual partner of the HIV-infected person).[26] The Ontario Law Reform Commission states that while it is "reasonably confident that a general policy favouring disclosure would so inhibit the process of contact tracing that its overall effect would be counter-productive",[27] it believes that there may be situations justifying disclosure of the HIV-infected person's identity. Comprehensive HIV-related legislation could regularize the practice of disclosure and subject it to court supervision. The Commission concludes that it is unable to make an informed choice on the "notification" versus "identification" question since it does not have evidence concerning current disclosure practices and any problems associated with those practices.[28] While the inability of the Commission to make a recommendation on the "notification" versus "identification" issue is disappointing, it is certainly understandable. In declining to make a recommendation on this issue, the Commission is consistent with its analysis of preceding questions in which it based its recommendations on generally accepted public health evidence.

Having reviewed the analysis and recommendations of the Report, I briefly mention two additional matters.

First, the Report is impressive not only because of what it says but for how well it says it. The Report is careful and clear. The analysis of complex issues is based on thoughtful and fair review of relevant medical and legal literature. The Report is also extremely sensitive to the contentious aspects

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[25] P. 111.

[26] *Ibid.*

[27] P. 112.

[28] See pp. 112-113.

of HIV-infection and AIDS, reminding the reader throughout of the exacerbating factors of discrimination and stigmatization relevant to this epidemic.

Second, the Report is of general importance as another attempt to educate and, it is hoped, change attitudes concerning HIV infection and AIDS. Despite the clear medical evidence concerning how HIV is transmitted and is not transmitted, unreasonable attitudes and responses to HIV infection and AIDS unfortunately persist. For example, it is now well established that HIV is transmitted only in very specific ways, namely:[29]

— by anal intercourse with an infected person;
— by vaginal intercourse with an infected person;
— by use of needles and other skin-piercing equipment contaminated with infected blood;
— from an infected mother to her foetus (perinatal transmission), and through breastfeeding;
— by transfusion of infected blood or blood products; and
— by tissue, semen, ova, or organ donations from infected donors.

Everyday living, and in particular casual social contact with others, presents no risk of HIV infection. However, the Report refers to a recent survey which indicated that "one out of five doctors and medical students would pull their children out of a class if a classmate were infected with HIV".[30] The need for further education is clear.

In conclusion, this comprehensive, thoughtful and extremely well written Report should be consulted by anyone formulating AIDS-related policies or legislation.

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*The Use and Abuse of Unjust Enrichment. Essays on the Law of Restitution.*

By J. BEATSON.
Oxford: Clarendon Press. 1991. Pp. xxviii, 263. ($96.50)

Reviewed by Nicholas Rafferty*

At the present time, the law of restitution occupies a position similar to "the flavour of the month" at the local ice-cream parlour. Having languished for so long as the poor cousin of the law of obligations, when it was seen as little more than an adjunct to, if not a part of, the law of contract, it is now the primary area for growth in private law. In the last three years, a major Canadian textbook[1] has been published on the topic, along

[29] Pp. 4-5.

[30] P. 45, n. 122, referring to an article entitled, 1 in 5 MDs Fears AIDS in Classroom, The Toronto Star, April 17, 1991, P. A28.

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[1] Peter D. Maddaugh and John D. McCamus, The Law of Restitution (1990).

with two books of essays, one from Australia[2] and the other from the United Kingdom,[3] in addition to the subject of the present review. The general vitality of the area can be illustrated by the fact that, in the short time since the publication of Mr. Beatson's book, two major decisions on the law of restitution have emerged from the House of Lords.[4]

Works dealing with the law of restitution are especially interesting to Canadian readers because, over the years, the Supreme Court of Canada has played the leading role in the Commonwealth in the development and elaboration of restitutionary principles. As long ago as 1954, in *Deglman* v. *Guaranty Trust Co. of Canada*,[5] that court first adopted the principle of unjust enrichment as the cornerstone for restitutionary relief and as the basis for an independent law of restitution. Since that time, the Supreme Court has used that principle, amongst other things, to develop a defence of change of position,[6] abolish the distinction between mistakes of fact and mistakes of law[7] and recognize the constructive trust as a general proprietary restitutionary remedy.[8]

The lower courts too have welcomed an expanding law of restitution grounded in the principle of unjust enrichment. In *James More & Sons Ltd.* v. *University of Ottawa*,[9] for example, Morden J. pointed out that, in order to grant relief in restitution, it was not necessary to fit the facts of the case into some pre-existing category established by precedent. He said:[10]

> Just as the categories of negligence are never closed, neither can those of restitution. The principles take precedence over the illustrations or examples of their application.

Similarly, in *White* v. *Central Trust Co.*,[11] La Forest J.A., while sitting in the New Brunswick Court of Appeal, determined that "the law [will] afford

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[2] P.D. Finn (ed.), Essays on Restitution (1990). I reviewed this book in (1992), 20 Can. Bus. L.J. 474.

[3] A. Burrows (ed.), Essays on the Law of Restitution (1991). I have not yet seen a copy of this work. It was published to celebrate the twenty-fifth anniversary of the appearance of Robert (now Lord) Goff and Gareth Jones, The Law of Restitution (1966), now in its third edition (1986).

[4] *Lipkin Gorman* v. *Karpnale Ltd.*, [1991] 2 A.C. 548 (H.L.), recognizing a general defence of change of position; *Woolwich Equitable Building Society* v. *Inland Revenue Commissioners*, [1992] 1 W.L.R. 366 (H.L.), providing for a general right to restitution of money paid to a government pursuant to an *ultra vires* demand.

[5] [1954] S.C.R. 725, [1954] 3 D.L.R. 785.

[6] *Rural Municipality of Storthoaks* v. *Mobil Oil Canada Ltd.*, [1976] 2 S.C.R. 147, (1975), 55 D.L.R. (3d) 1.

[7] *Air Canada* v. *British Columbia*, [1989] 1 S.C.R. 1133, (1989), 59 D.L.R. (4th) 161.

[8] See, for example, *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; *LAC Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, (1989), 61 D.L.R. (4th) 14.

[9] (1974), 49 D.L.R. (3d) 666 (Ont. H.C.).

[10] *Ibid.*, at p. 676.

[11] (1984), 7 D.L.R. (4th) 236, at p. 245 (N.B.C.A.).

a remedy for unjust enrichment in the absence of a valid judicial policy militating against it". He did, however, add a note of caution. He suggested that, in general, the courts should follow the traditional common law practice of working by analogy from existing categories of liability provided that they bore in mind that the general principle of unjust enrichment transcended the well-recognized categories in which liability had been established. La Forest J.A. wanted to ensure that the courts did not decide cases on some vague notions of fairness and justice.

Such a criticism certainly cannot be levelled against Mr. Beatson. His book shows that he is vitally concerned with the principled development of the law of restitution and with the drawing of the appropriate boundaries for the subject. This collection of essays is a very welcome addition to the learning in the area. Because all of the papers in the book were written, at least in part,[12] by one person, there is a unity to the whole project that is normally lacking from collections of discrete essays on a particular legal subject. Thus, a number of themes are evident throughout the book and, in each essay, there are liberal cross-references to ideas presented in the other papers in the book.

One recurring theme, developed primarily in Essay 2, "Benefit, Reliance, and the Structure of Unjust Enrichment", is that the concept of unjust enrichment should not be stretched too far so as to include within its reach cases where it is very difficult to see that the defendant has obtained any benefit from the claimant. In particular, Beatson rejects the idea that "pure" services, even though freely accepted by the defendant, can constitute an enrichment in the defendant's hands. He would prefer liability in many such cases to rest upon the principle of protecting injurious reliance. In many ways, Essay 2 is the most theoretical of the nine papers in the book and, arguably, should have been the opening essay. Despite its title, "What Can Restitution Do for You?", Essay 1 is more restricted in its scope, dealing as it does with the possibilities for restitutionary relief in the context of ineffective transactions. To that end, it examines the conditions for recovery for benefits conferred under ineffective transactions; the restitutionary remedies available to an innocent party when faced with a contract discharged through the defendant's breach, including the question of the extent to which the plaintiff should be able to recover gains made by the defendant from its breach of contract; and the circumstances in which the contract-breaker might be entitled to restitution from the innocent party. This last topic is dealt with again, and much more fully, in Essay 3, "Discharge for Breach: Instalments, Deposits, and Other Payments Due Before Completion".

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[12] Essay 6, "Mistaken Payments in the Law of Restitution", is a reprint of an article, co-authored with Professor W. Bishop, which first appeared in the University of Toronto Law Journal: (1986), 36 U.T.L.J. 149. Essay 7, "Unrequested Payment of Another's Debt", is a reprint of an article, co-authored with Professor Peter Birks, which first appeared in the Law Quarterly Review: (1976), 92 Law Q. Rev. 188.

Another theme developed by Beatson is that the courts should take care to ensure that the granting of a restitutionary claim in a particular case does not undermine the policies underlying some other area of the law, such as contract or tort. This particular theme pervades Essays 1 and 3 in the context of contract law and also Essay 8, "The Nature of Waiver of Tort", in the context of tort law.

Of course, Beatson's book is not a general textbook on the law of restitution. The essays do not attempt in any way to cover the whole field; nor need they. It is, however, a little disappointing that six of the essays are basically revised versions of articles previously published.[13] Excellent though all of these essays are, most are very well-known and their inclusion will surely dissuade many from purchasing this book.

This problem is compounded by the fact that the three essays written especially for the book are a little uneven. Essay 5, "Duress, Restitution and Contract Renegotiation", begins with an earlier article published by Beatson in 1974.[14] He then, however, seizes the opportunity to embark upon a detailed analysis of the modern law of economic duress. It constitutes the best treatment that I have read of this difficult subject. On the other hand, I found Essay 4, "Gap-filling and Risk-reversal", to be rather difficult to read. It deals with the role of restitution in filling gaps in a contract's coverage, and in delineating and sometimes reversing risks allocated by a contract, where the contract in question has been discharged for breach or frustration. The final essay, "Unfinished Business: Integrating Equity", is a plea for equitable doctrines and principles concerning restitution to be isolated and integrated into a general law of restitution. In many ways, this process is well under way in Canada with the development here of the remedial constructive trust.

Beatson has been working in the field of restitution for the last twenty years and this book represents the fruit of his labours. He is an original thinker and all of these essays repay close study. It is "a good thing that Mr. Beatson's essays should now nestle between hardback covers".[15] It is just regrettable that so much of the book has already been published in one form or another, with the result that it is difficult to justify the purchase of the book.

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[13] Essay 1, "What Can Restitution Do For You?" was first published in Australia in the Journal of Contract Law, two or three years ago. I have not, however, been able to obtain a citation to the article. The other essays previously published are as follows: Benefit, Reliance, and the Structure of Unjust Enrichment (1987), 40 Current Legal Problems 71 (Essay 2); Discharge for Breach: The Position of Instalment, Deposits and Other Payments Due Before Completion (1981), 97 Law Q. Rev. 389 (Essay 3); Mistaken Payments in the Law of Restitution (1986), 36 U.T.L.J. 149 (Essay 6); Unrequested Payment of Another's Debt (1976), 92 Law Q. Rev. 188 (Essay 7); The Nature of Waiver of Tort (1978-79), 17 U.W.O. L. Rev. 1 (Essay 8).

[14] Duress as a Vitiating Factor in Contract (1984), 33 Camb. L.J. 97.

[15] G. Jones, Review of J. Beatson, The Use and Abuse of Unjust Enrichment. Essays on the Law of Restitution (1991), 50 Camb. L.J. 534, at p. 536.

*Securities Regulation in Canada.*
By MARK R. GILLEN.
Toronto: Carswell. 1992. Pp. 483. ($78.00)

Reviewed by R. Marcus Mercier*

Mark R. Gillen should be congratulated for his recently published book, Securities Regulation in Canada. The publication of a Canadian text of this type in the field of Canadian securities regulation has long been overdue and clearly this book fills that void. Securities Regulation in Canada, although essentially aimed at students of law in an introductory context, has a much wider potential audience. Lawyers, law and business students and professors in a variety of disciplines will find this book extremely useful in explaining and better understanding the current state of securities regulation in Canada. Its attractiveness as a securities text is that it is both comprehensive and user friendly.

Mark Gillen's achievement is noteworthy for two reasons. First, it is now the only current securities text of its type available in Canada. Most of the other treatises available are simply out-of-date and no longer capable of adequately dealing with the current state of securities regulation in Canada.[1] Secondly, Securities Regulation in Canada is comprehensive, current and manageable in size as well. Other sources currently available in the field of Canadian securities regulation are measured in volumes, difficult to read and simply far too detailed and expensive for those individuals looking for an overview and introductory look at securities regulation.[2] Gillen's book in this regard is well-written, highly informative and fills this need.

Since Securities Regulation in Canada is introductory in scope it does not fall into the trap of attempting to be all-encompassing. For example, the author deals broadly with each provincial and territorial securities act, using

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[1] Students of Canadian securities regulation are often drawn, out of necessity, to call on older texts in the securities area, such as J.P. Williamson's Securities Regulation in Canada (1960), D.H. Fullerton's The Bond Market in Canada (1962), and D.L. Johnston's Canadian Securities Regulation (1977). Although generally being regarded as strong texts in their time, a great number of important developments have occurred both in Canada and abroad that have profoundly changed the face of securities markets and the way they are regulated at home and internationally. As a result, these texts are no longer current, although their use as historical tools continues.

[2] There are a number of excellent loose-leaf services currently available that cover every detail associated with securities regulation in Canada. See, for example, Canadian Securities Law Reporter, 5 vols. (1991). There are also a number of government reports that provide excellent overviews of Canada's securities markets; however, those too are not current, are cumbersome and clearly not well-suited for an introductory look at securities regulation in Canada. See, for example, Minister of Consumer and Corporate Affairs: Proposals for a Securities Market Law for Canada, 3 vols. (1979), and Ontario, Committee on Securities Regulation in Ontario: Report (1965).

Ontario's Securities Act[3] as his base, but does not attempt to explain away every subtle difference in the operation of the various acts. In fact, Gillen himself in the preface cautions his readers not to rely on his book for making decisions or rendering legal advice respecting securities matters. Readers in need of more detailed information and precedents are well-advised then to turn to the various loose-leaf services which are generally available at most libraries to deal with the specifics associated with Canadian securities laws.[4]

There is a meticulous, logical and coherent flow to Gillen's approach in writing this book. Securities Regulation in Canada, although not steeped in public policy discussions by any means, does cover the necessary and interesting public policy considerations to enhance and facilitate the reader's understanding of current securities regulation. For example, Gillen successfully leads the reader through Canada's progression from the disclosure system to the closed system of securities regulation. This historical look at the two systems, from a public policy point of view, allows the reader to understand better the relevance and importance of the prospectus requirement and disclosure rules. Especially important in a book of this type, Gillen finds the crucial balance between providing too much and too little public policy and historical discussion, a factor often missed by other text writers.

Substantively, Gillen succeeds in providing enough information to readers so they may take away a rudimentary knowledge of what Canadian securities regulation is all about without overwhelming them with details. Gillen's first three chapters provide a useful general background and overview of Canada's securities markets and regulatory framework. As we have come to expect, few Canadian legal texts are complete without even a cursory reference to Canadian constitutional law. Gillen satisfies this requirement by providing a short chapter on how Canada's particular brand of constitutional federalism impacts on the regulation of securities in Canada.

The remaining chapters in Gillen's book move successfully from the general to the more specific aspects associated with Canada's securities laws. For the sake of brevity, Gillen deals with the following issues in separate chapters: (i) the prospectus requirements; (ii) statutory liability and due diligence considerations; (iii) continuous disclosure requirements; (iv) exemptions from the prospectus rules; (v) prompt offerings, shelf offerings and prep procedures; (vi) insider trading; (vii) takeover bid and issuer bid regulation; (viii) regulation of securities market actors; (ix) mutual funds; and (x) enforcement mechanisms.

Gillen finishes his book with a chapter that deals with the current issues and future prospects facing Canada's securities industry. If there is one aspect of Securities Regulation in Canada that is lacking, from this reviewer's perspective, it is the author's rather summary treatment of the impact on Canada of developments in the international securities markets. Aside from

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[3] R.S.O. 1990, c. S-5, as amended by S.O. 1992, c. 18, s. 56.

[4] For example, see Canadian Securities Law Reporter, *op. cit.*, footnote 2, and Davies, Ward and Beck, Canadian Securities Law Precedents (1989).

a very general reference to the recent United States and Canadian agreement creating the multijurisdictional disclosure system[5] earlier in his book, Gillen only looks very generally at the modern day globalized nature of securities markets and the impact this has had and will continue to have on securities regulation in Canada. The importance of international securities markets on the Canadian economy in general and its securities markets specifically is worthy of greater discussion, even in an introductory text.[6] This reviewer would have preferred if Gillen had dedicated an entire chapter to the issue of globalization in securities markets and examined the impact on the regulation of securities in Canada. The couple of pages the author did provide were simply too brief to cover adequately or do justice to the issue.

Aside from Gillen's brief treatment of the international aspects of securities regulation, a deficiency that can easily be cured in his next edition, Securities Regulation in Canada succeeds in meeting the author's objective, that is to provide a useful and introductory text on Canadian securities regulation. It is concise and most certainly will whet the appetite of those readers who want to go on to a more advanced study of this area. Securities Regulation in Canada is an important contribution to Canadian securities regulation literature and would be an excellent text for teaching purposes, both from an instructor and from a student point of view.

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[5] Pp. 110-112. The MJDS, as it is commonly known, permits certain prospectus offerings to be made in Canada by American issuers on the basis of disclosure documents prepared in accordance with American securities regulatory requirements. See National Policy No. 45—Multijurisdictional Disclosure System, 14 O.S.C.B. 2889 (June 28, 1991), for full details respecting the MJDS. For the American version, see Securities Act Release No. 6902, Fed. Sec. L. Rep. (CCH), para. 84,812 (June 21, 1991).

[6] In fact, a 1984 Ontario Securities Commission Blanket Ruling exempted eligible Eurosecurities from the prospectus requirements under the Ontario Securities Act, *supra*, footnote 3, to certain sophisticated Ontario purchasers. See In the Matter of the Securities Act, R.S.O. 1980, Chapter 466 And In the Matter of Eurosecurity Financings Ruling, dated November 24, 1984: (1984), 7 O.S.C.B. 4897.