Constitutional Odyssey: Can Canadians Be a Sovereign People?
By PETER H. RUSSELL.
Toronto: University of Toronto Press. 1992. Pp. viii, 240. ($14.95 - paper - $40.00 - cloth)

Reviewed by M.G. Finlayson*

> Those who do not want democracy deliberately avoid thinking in terms of individuals, but think instead in terms of groups.[1]

As a young lecturer in Political Science at the University of Toronto assigned to teach Canadian Government, Professor Russell sat in on Professor Bora Laskin's class in constitutional law. Since then he has had an abiding interest in Canadian constitutional law and has written thoughtfully and well about it.

The thesis of his latest book is clear and distinct. Canada's constitution was originally imposed from afar without the consent of the Canadian peoples. At the time Canadians, or those of influence in constitutional matters, were Burkean. That is, they believed it appropriate that constitutions be imposed, if at all, by the ruling elite, who were best-fitted to judge the interests of the general population. A constitution outlining fundamental freedoms was unnecessary because these inhered in tradition, moral habit, custom and institutions. Since then Canadians have developed a Lockean perspective and expect to be consulted about and ratify any constitutional alteration of powers or rights. This may diminish the likelihood of an acceptable accord being reached.

There is much truth in this assessment and his canvass of the odyssey is fascinating, but one wonders about the soundness of his prescription. The problem is exemplified starkly in the following two passages:[2]

> Those who say that Canada's constitution should be determined simply by a majority of the Canadian people must explain how those like the Quebecois or the aboriginal nations came to be bound by the will of this majority. If a constitution derives its legitimacy from the consent of the people, then those who share our constitution must first agree to be a people. There is no evidence that either the Quebecois or the aboriginal nations have agreed to be part of a Canadian people sharing a constitution determined simply by majority rule.

This presumes that it would be appropriate in framing a revised constitution to consider the wishes and interests of racial, cultural or linguistic groups, as opposed to those of individuals. Perhaps it would be, but this is not self-evident

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[1] Bruno Bettelheim, The Informed Heart.

[2] P. 6.

and Professor Russell makes no real effort to establish the proposition. Some would say that history shows that within every minority seeking "self-determination" is one or more smaller minorities. For example, within Quebec are aboriginal and English minorities. And within the aboriginal community are multitudes of different peoples. This would suggest that *individuals* are the proper parts for which to construct the essential framework of the body politic:[3]

> If Canadians are to constitute themselves a people, they must be truly federal people accepting what that great teacher of federalism, Carl Friedrich, once called the "federal spirit": "a highly pragmatic kind of political conduct, which avoids all insistence upon "agreement on fundamentals" and similar forms of doctrinaire rigidity. Such behaviour proceeds in the spirit of compromise and accommodation. It is molded by the knowledge that there are many rooms in the house that federalism builds".

This is the rub. No principle is so fundamental that it ought not to be discarded if it obstructs an agreement. Neville Chamberlain was of the same cast of mind. Within the scope of this *fiat* must be included such things as freedom of speech and equality before the law. It is said there are still some Canadians (perfected Lockeans) who believe it is wrong to have regard to a person's colour or ethnic origin in any matter, whether it be within the context of employment or of a civic structure. For these Canadians it is folly to contend in one breath that we are to strive for a colour-blind society, yet in the next propose a constitutional accord founded on racial, linguistic or cultural characteristics. However, Professor Russell would have it that the Canadian who on principle opposes a separate justice system for, say, aboriginal peoples, is violating the Canadian spirit of compromise. Likewise, the Canadian who affirms that no government should have the right to dictate the language used by a proprietor in his own sign is being rigidly doctrinaire. And, *pari passu*, it would follow that Abraham Lincoln was wrong to oppose the secession of the Southern states, wrong to issue the Emancipation Proclamation and wrong to say that if slavery is not evil, nothing is. Because, after all, Lincoln could easily have conceded the issue of slavery in the territories and the South's grievance would have disappeared. If the only goal had been some agreement, no matter how repugnant, the United States federation could thereby easily have avoided division.

Despite these concerns about Professor Russell's presuppositions I am bound to say that his book is an excellent read.

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[3] P. 193.

Social Justice and the Constitution.

By JOEL BAKAN and DAVID SCHNEIDERMAN (Eds.).
Ottawa: Carleton University Press. 1992. Pp. ix, 172. ($17.95)

Reviewed by Charles E. Reasons*

In this brief but timely volume the editors have put together a very good analysis of the issues surrounding the inclusion of a social union provision in the Constitution of Canada. While we may want to repress rather than regress to the Charlottetown Accord and its failed promises, the authors point out, correctly I believe, that the issue of a social union proposal and the arguments surrounding it will again reappear in constitutional politics in Canada. Therefore, while we are grappling with major issues of the economy and the North American Free Trade Agreement, these are very much interrelated to the prospect of a social charter and issues of social equality and inequality in Canada. As the editors point out in Chapter One, the Introduction, this slim monograph is a debate among progressive legal scholars, concerning the pros and cons of constitutional change generally, and specifically of the nature, worth and problems surrounding the inclusion of a social charter in the Canadian Constitution. They point out that the Canadian social welfare state was largely created during the 1960s and 1970s, while it is being attacked and dismantled through privatization amongst other vehicles in the 1980s and 1990s. To quote the editors in their introduction, "it is probably not too cynical to say that the war on poverty of the 1960s has given way to a war on social services in the 1980s and 1990s".[1]

Since constitutional documents, by definition, are broad statements of goals and ideals and to a lesser extent provisions of power and responsibility, one might ask how can a constitution effectively redress social inequality. This was the goal of premier Bob Rae and his emergent New Democratic government in Ontario in suggesting a social charter to the constitution. A watered down version was included in the subsequent failed Charlottetown Accord. The editors note that the Charlottetown Accord's social charter provisions were hotly debated, and viewed by some progressives as largely symbolic and expressive, and amongst other progressives, as an opportunity to constitutionalize collective rights and possibly provide a mechanism for enforcing such collective rights to address some of the gross inequities in Canadian society. This debate about the nature and the worth of a social charter in the Canadian constitution is addressed in the subsequent nine remaining chapters. Of pedagogical use are the five appendices, which include the draft social charter, Ontario's proposal for a social charter, the Beaudoin-Dobbie Report, the consensus report on the constitution, and the Charlottetown Accord draft legal text.

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[1] P. 5.

In Chapter Two, law professor Martha Jackman argues in favour of justiciable social rights. She provides a useful argument against justiciability, distinguishing between classical and social rights, but finally rebuts that argument, and suggests that the courts should be a forum for redressing basic social inequalities. She concludes, however, that the social charter as provided for in the Charlottetown Accord is largely constitutional rhetoric devoid of social justice.

Professor Lucia Lamarche, in the one chapter in French,[2] discusses the debate on social rights in Canada within the context of international law. Of significance is the distinction between civil and political rights (largely individual) and economic and social rights (largely collective) embodied in United Nations treaties. Given the individualization of rights in the Charter, she notes its lack of economic and social rights. Professor Lamarche suggests that new tribunals need not be formed, but the courts should have to address issues of economic and social equality guided by both international law and the constitutionalization of economic rights for those disadvantaged.

In Chapter Four, civil rights lawyer Gwen Brodsky addresses social charter issues. Ms. Brodsky believes that sections 7 and 15 of the Charter of Rights and Freedoms have the potential to help poor people in obtaining rights and redressing inequality. However, this has not happened because of four factors: (1) the government's unwillingness to undertake progressive law reform voluntarily; (2) the lack of access of poor people to the resources necessary to litigate; (3) regressive and anti-egalitarian positions advanced in the courts by the government; and, (4) judicial insensitivity to the problems of disadvantaged groups. Since the experience of the Charter shows that powerful groups have more access to its rights than disadvantaged groups, she does not believe there needs to be justiciability of the social charter. She does propose an independent monitoring body which would be a moral suasion on the government to address social charter issues.

Law professors Nadelsky and Scott in Chapter Five, Constitutional Dialogue, discuss the alternative charter. In a post-modern vein, they see rights as sites of dialogue, and point out the types of dialogue and the power relationships which the alternative charter entails. Finally, they talk about rights as relationships, and, more important, as power relationships of subordination and superordination. The alternative social charter is an empowering document for the rights of the disadvantaged. In post-modernist language, they point out that the rights of the disadvantaged need to be privileged over those of the advantaged in order to reach some degree of equality in Canadian society.

While the chapters to this point have been largely charter waving and social covenant promising, Professor Bakan in Chapter Six, What's Wrong with Social Rights?, critically assesses the larger issue of the role of law and social rights in addressing social inequality. He points out that the Charter of Rights

[2] I greatly appreciate the translation provided by Ms. Cheri D. Eklund, articled student, of Ladner Downs, Vancouver, British Columbia.

and Freedoms has not shifted the balance of power and the nature of inequality in Canadian society, so why should we expect a social charter to be any different? He suggests that the vagueness of social charter rights allows governments and business to use these rights regressively against workers and those who are unemployed or marginally employed and other disenfranchised groups. Furthermore, Professor Bakan observes that it gives abstract social rights while ignoring the economic reality that those rights may cost. In an excellent section entitled "Treating Symptoms and Leaving Causes", Professor Bakan uses social science data in pointing out the extent and nature of inequality in Canadian society. As he points out,[3] the wealthiest five per cent of Canadians own ten times the wealth of the least wealthy forty-five per cent of Canadians. He concludes that it is always easier to pass a law than to deal with the substantive problem of inequality.

In Chapter Seven, Professor Hester Lessard examines the social rights debate from the view of a feminist. The presumed equality of the social contract and the presumed neutrality of the state are myths which mask the subordination and inequality which are largely based upon economic and corporate hegemony. The social charter, Professor Lessard believes, will give Canadians much hope to eat, while the market forces of globalization and transnational corporations will continue to attack Canadian workers and Canadian social programs. The private sphere of the economy, which is of major concern to most Canadians, is largely left untouched by the rhetoric and the substance of a social charter.

"The Social Charter: Poor Politics for the Poor" is the title of Chapter Eight by Professor Harry Glasbeek. He juxtaposes the irony of the fact that while social welfare programs are being eliminated or diluted, while the rich are paying less tax, and corporations and major forms of capital are increasingly able to move within and between countries, the average Canadian is given individual rights. In other words, while the rich get richer the poor get promises of rights and glowing social statements without any kinds of enforceable mechanisms. Rather than waxing in the lofty terms of a constitutional social charter, Professor Glasbeek suggests that people fight at the provincial level as workers and members of the social welfare state for those things that the province can give them. He notes that each provincial government in Canada can constitutionally give them all the rights that any social charter can give them.

In Chapter Nine, The Constitutional Politics of Poverty, Professor Schneiderman critically evaluates the emergence of social charter talk in the context of major economic changes. He views the social charter initiative as largely reactive to the decline in the welfare state, the increasing mobility of capital, and the declining standard of living in Canada. The response to these developments is to create glittering generalities in a constitutional statement to substitute for these real and concrete needs. As Professor Schneiderman points

[3] P. 90, footnote 22.

out, the current redistribution of economics through globalization, means, in the North American context, that trickle-down equals trickling to United States and now Mexico. While social rights talk will continue, with a North America Free Trade Agreement there will be more pressure to harmonize social programs downward to the least or lowest common denominator, that is Mexico. To paraphrase Karl, not Groucho, Marx, "rights talk may be the new opiate of the people in an era of increasing globalization".

Finally in the last chapter, by the only non-lawyer author, Professor Glen Drover, there is discussion of social philosophy and social minima via the proposed social charter. After reviewing issues around positive and negative rights and general and specific egalitarianism, Professor Drover concludes that social minima are justifiable. However, he feels that the charter provisions fail to meet acceptable social minima. In pointing out that social minima are culturally structured, he provides a review of communitarian and feminist concerns with the concept of social minima. This chapter, by a non-lawyer at a more philosophical level, should probably be at the first of the book rather than the last, and I would suggest reading this first to provide a philosophical basis for the subsequent legally oriented papers.

In conclusion, Social Justice and the Constitution provides a concise and well-presented discussion of the constitutionalization of a social charter. It is useful reading for those interested in debates around the social justice provisions in the constitution, and those more generally interested in rights law and social change. It would seem to be an appropriate addition to a law or government course concerning the constitution or civil and human rights. As both a social scientist and lawyer, my only concern is that there is not a more diverse selection of writers and writings reflecting on larger social and political issues underpinning this legal debate. However, this probably would mean a volume two or three times the size of this fairly concise text.

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Restitution - The Future.

By PETER BIRKS.
Sydney: The Federation Press. 1992. Pp. xvii, 149.

Reviewed by Mitchell McInnes*

Restitution is the most exciting area of private law today, not only because of the significant advancements accomplished in recent years,[1] but also because much of the restitutionary landscape remains to be mapped, and the intellectual

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[1] See, for example, *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, (1989), 61 D.L.R. (4th) 14; *Air Canada* v. *British Columbia*, [1989] 1 S.C.R. 1133, (1989), 59 D.L.R. (4th) 161; *Peel (Regional Municipality)* v. *Canada*; *Peel (Regional*

challenges of clarification, organization and rationalization have yet to be completed. The new volume from Professor Birks, the area's leading theoretician,[2] should therefore prove useful despite its limitations. Novelty is not its primary goal and much of what is said has been heard before in greater detail either from the author himself or from his many followers. The book is more modestly aimed at simply identifying and explaining the major tasks that lie ahead in restitution, particularly the elimination of misleading categories and the establishment of new ones.

The book's strengths and limitations are clearly evidenced in the first of its six essays, in which Birks examines the distinction between the substantive and the remedial parts of restitution. The former is concerned with the independent cause of action in unjust enrichment employed when a claimant relies upon the subtractive sense of the phrase "at the plaintiff's expense"; suit is based on the fact that an enrichment moved from the plaintiff to the defendant in circumstances which the law regards as actionably unjust. The remedial part of restitution is concerned solely with the nature of the relief available to the plaintiff, rather than with the elements of the underlying cause of action. It becomes relevant when the phrase "at the plaintiff's expense" is read to mean "by committing a wrong against the plaintiff", as when a rogue breaches a duty of confidence for financial gain.[3] The important question is then whether or not the victim can recover the wrongdoer's gains as an alternative to compensatory damages. As he has done in the past,[4] Birks draws upon the case law to illustrate the substantive-remedial distinction and to argue convincingly that it must become more keenly understood and firmly entrenched. But he does not, for example, endeavour to resolve the difficult remedial issue as to which wrongs should yield restitutionary damages.[5] The concern is raised, but the reader is left to seek a resolution elsewhere.[6]

Municipality) v. *Ontario*, [1992] 3 S.C.R. 762, (1992), 98 D.L.R. (4th) 140; *Lipkin Gorman* v. *Karnaple Ltd.*, [1991] 2 A.C. 548, [1992] 4 All E.R. 512; *Woolwich Equitable Building Society* v. *I.R.C.*, [1993] A.C. 70, [1992] 3 All E.R. 737 (H.L.).

Progress has been made on the scholarly front as well. Recent books include P.D. Maddaugh and J.D. McCamus, The Law of Restitution (1990); P.D. Finn (ed.), Essays on Restitution (1990); A.S. Burrows (ed.), Essays on the Law of Restitution (1991); G. Jones, Restitution in Public and Private Law (1991); A.S. Burrows, The Law of Restitution (1993). Additionally, articles on the law of restitution have become common fare in the law journals.

[2] See P. Birks, Introduction to the Law of Restitution (1985).

[3] See, for example, *A.G.* v. *Guardian Newspapers Ltd. (No. 2)*, [1990] 1 A.C. 109, [1988] 3 All E.R. 545 (H.L.).

[4] Birks, *op. cit.*, footnote 2, ch. X.

[5] Birks simply doubts Goff and Jones' view that restitutionary damages should be available for every acquisitive wrong (The Law of Restitution, *op. cit.*, footnote 1, p. 613), and directs the reader to discussions taken elsewhere: pp. 24-25.

[6] See, for example, Birks, *op. cit.*, footnote 2, pp. 326-346; Maddaugh and McCamus, *op. cit.*, footnote 1, ch. 23; Burrows, The Law of Restitution, *op. cit.*, footnote 1, ch. 14.

Similarly, the essay entitled "Money and Money's Worth" explains that the scope of the enrichment concept has yet to be settled, but does not attempt to provide a definition. References concerning the roles of free acceptance and incontrovertible benefit[7] are supplied in lieu of a substantive discussion. Birks also reiterates the need to approach the "unjust" factor of restitutionary claims consistently,[8] regardless of the nature of a defendant's enrichment.[9] Different rules have come to govern the availability of relief according to whether a defendant (1) directly received money, or (2) directly received goods or services, or benefitted from the payment of money to a third party. Thus, courts have held that a mistake or a total failure of consideration may serve as the "unjust" factor in only the first type of situation.[10] However, once the issue of enrichment is settled, the "unjust" factors ought to be the same in every case; "the law of restitution is concerned with the value received ... not with money, services or goods, all of which are merely things in which value may inhere".[11]

The remaining essays in Restitution - The Future cover a wide range of topics but are united in their emphasis of the work which must be done. To some extent, the tasks identified in the essay "Public and Private" have now been completed; the "future" has become the present, at least in England. In 1992, the House of Lords vindicated Birks' arguments by holding that a taxpayer could reclaim improperly imposed levies on the grounds of Parliament's *ultra vires* demand.[12] Similarly dramatic developments have yet to honour the essay

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[7] The Supreme Court of Canada recently explored the notion of incontrovertible benefit: *Peel (Regional Municipality)* v. *Canada*; *Peel (Regional Municipality)* v. *Ontario*, *supra*, footnote 1. See also M. McInnes, Incontrovertible Benefits in the Supreme Court of Canada (forthcoming) Can. Bus. L.J.

[8] In contrast, asymmetry is inevitable and desirable with respect to the issue of enrichment. The receipt of money is invariably enriching (*B.P. Exploration Co. (Libya) Ltd.* v. *Hunt (No. 2)*, [1979] 1 W.L.R. 783, at p. 799, Goff J.; *cf.* Birks, *op. cit.*, footnote 2, p. 131; the receipt of non-monetary value may or may not be so, depending upon the circumstances. The law must employ rules which reflect that fact.

[9] The same "unjust" factors may be employed whether the enrichment concept is defined broadly or restrictively. Of course, a narrow definition (*eg.* one that holds "pure services" to be non-enriching: see J. Beatson, Benefit, Reliance and the Structure of Unjust Enrichment (1987), 40 C.L.P. 71) would limit the number of situations in which a plaintiff could rely upon the action in unjust enrichment: pp. 100-105.

[10] *Rover International Ltd.* v. *Cannon Film Sales Ltd.*, [1978] B.C.L.C. 540, Harman J.

[11] P. 91.

[12] *Woolwich Equitable Building Society* v. *I.R.C.*, *supra*, footnote 1.

In the same essay, Birks is critical of the Supreme Court of Canada's equivocal decision in *Air Canada* v. *British Columbia* (*supra*, footnote 1), in which La Forest J. held that restitution was generally available for payments made under a mistake of law (as when a valid taxing statute is wrongly applied), but that an exception exists with respect to payments made pursuant to an unconstitutional demand. Birks favours Wilson J.'s dissenting view that restitution must be available in either situation, and that relief should have been available to Air Canada not because of an operative mistake of law, but because of the *ultra vires* character of the province's demand: pp. 73-77.

entitled "The First and Second Measure", which stresses the need to entrench the division between the first and second measures of restitutionary recovery,[13] and to protect the integrity of those categories from the confusing concepts of constructive trusts, tracing, equitable liens, subrogation and the like.

The lengthiest essay, "Strict Liability and Fault", examines the possible basis of restitutionary recovery. Birks argues that liability generally is and should be strict[14] rather than fault-based; it should not matter that an enrichment occurred without culpability on the defendant's part. Once it is established that a plaintiff's intention to effect a transfer of value was vitiated (for example, by mistake), there should be no further need to prove that the defendant knew that he was not to have the benefit; liability is properly imposed simply because a transferor did not intend for a transferee to receive a benefit.[15] Birks does concede that liability may be fault-based if a defendant "freely accepts" a benefit in the knowledge that he should not have received it and despite an opportunity to reject it.[16] However, in the interest of analytical clarity and justice, he stresses the desirability of relying upon an alternative, plaintiff-sided "unjust" factor (for example, mistake) whenever possible. Frequent reliance upon the notion of free acceptance will foster the erroneous belief that restitution will not lie in the absence of fault, as a result of which worthy claims will fail.

The final chapter examines the need to tie systematically the various defences available to restitutionary claims to the composite parts of the principle against unjust enrichment.[17] The reader is told that analytical clarity demands the meticulous categorization of defences as being "enrichment-

[13] A restitutionary claim in the first measure seeks to recover the enrichment received by the defendant, without regard to whether or not she still holds that enrichment. A restitutionary claim in the second measure seeks to recover that part of the enrichment that the defendant still holds: p. 106.

[14] Strict liability is not the same as inevitable liability: in certain circumstances, a defendant is able to invoke a defence to defeat a claim: p. 29.

[15] A number of recent English decisions suggest the contrary. In circumstances of inequality, a plaintiff may not recover in the absence of fault on the defendant's part: *Bank of Credit and Commerce* v. *Aboody*, [1989] 2 W.L.R. 759, [1990] 1 Q.B. 923 (C.A.); *National Westminster Bank plc* v. *Morgan*, [1985] A.C. 686, [1985] 1 All E.R. 821 (H.L.); *Hart* v. *O'Connor*, [1985] A.C. 1000, [1985] 2 All E.R. 880 (P.C.). Birks argues that such cases are best interpreted not as a general reorientation toward fault-based liability, but rather as discrete instances in which the right to restitution is limited on policy grounds: p. 52.

[16] Birks' discussion of the concept of free acceptance is basically a much abbreviated version of his paper, In Defence of Free Acceptance, in Burrows (ed.), *op. cit.*, footnote 1.

[17] The principle against unjust enrichment is based on three questions: (1) Was the defendant enriched? (2) Was it at the plaintiff's expense? (3) Was there an "unjust" factor -that is, circumstances which the law recognizes as requiring the enrichment to be given

related",[18] "at the expense-related",[19] or "unjust related".[20] Birks recognizes that the task will not always be easy; in particular, the defence of change of position [21] poses difficulties because it draws upon a number of underlying principles, each of which is related to a different part of the principle against unjust enrichment.[22] Nevertheless, the project must be completed; if allowed to float free, defences could potentially subvert the rationality that has been so long coming in the law of restitution.

This review has identified a number of limitations of Restitution -The Future. In particular, much of the material is familiar and many substantive points are raised without resolution. Some readers also may find it difficult to share Birks' near-obsessive desire to classify and categorize. However, while this collection of essays certainly will never supplant its author's better known effort, it usefully serves to illustrate the law's current state of underdevelopment and to recommend how progress can be made in key areas. Introduction to the Law of Restitution[23] it is not; a rewarding read it is.

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up?: p. x.

[18] That is, defences which require the measure of a defendant's enrichment to be reassessed (for example, "ministerial receipt", as when the individual ultimately enriched was not the defendant, but rather a principal to whom the defendant paid the money): p. 128.

[19] That is, defences which show that the amount received by a defendant is greater than the amount which a plaintiff lost through subtraction (for example, "passing on", as seen in *Air Canada* v. *British Columbia*, *supra*, footnote 1): p. 126.

[20] That is, defences which bear on the justice of ordering restitution, having regard to all of the circumstances of a case (for example, illegality, incapacity, *res judicata* and passage of time): p. 126.

[21] The defence of change of position was only recently recognized in English law: *Lipkin Gorman* v. *Karnaple Ltd.*, *supra*, footnote 1. In contrast, it has long been part of the Canadian law of restitution: *Rural Municipality of Storthoaks* v. *Mobil Oil (Canada) Ltd.*, [1976] 2 S.C.R. 147, (1975), 55 D.L.R. (3d) 1.

[22] Ultimately, Birks concludes that the defence should be conceptualized primarily as enrichment-related, but concedes that there may be some scope for an unjust-related plea of change of position based on a notion of detrimental reliance. The defence's precise role remains to be settled: pp. 146-147.

[23] *Op. cit.*, footnote 2.

Sexual Abuse and the Rights of Children: Reforming Canadian Law.

By TERRENCE SULLIVAN
Toronto: University of Toronto Press. 1992. Pp. x, 212.
($16.95 - paper, $45.00 - cloth)

Reviewed by Laurie N. Ledgerwood*

Mr. Sullivan's study of recent Canadian law reform efforts addressing the sexual status of young persons is a thought provoking work which calls into question the law reform process. It asks who actually receives the benefits of law reform when it is centred on the sexual status of young persons.

This book is particularly valuable for three reasons. First, it explores different theories, philosophies and approaches to adolescent sexuality, and how they have affected the legal regime governing the sexual conduct of young persons and those persons with whom they deal. Second, one becomes aware of the self-aggrandizing claims of the various interest groups, "experts" and professionals who all claim to be participating in the reform process in the best interests of young persons. The private family is an idealized fiction, and the relationships between the family and both the market economy and the state has prevented the family from being an island unto itself. It appears the complexity of these relationships has contributed to the ability of professional experts to influence significantly any policy reform process in this area. Third, Mr. Sullivan makes suggestions for improving the reform process which would go a long way to addressing some of the problems he identified.

Mr. Sullivan starts by discussing the paradox presented by the liberal concept of a young person's rights. Under this concept, young persons have a right to be protected from certain harmful situations; yet they also have the right to exercise much the same rights as can adults. But to protect adequately a young person from harm, some of the rights of young persons may have to be infringed - hence the paradox. Some of the concepts such as *patriae potestas* (the power of the father), and *parens patriae* (the state as parent), that have traditionally guided the rights of young persons in Canada reveal this paradox. The "best interests of the child" concept brings the courts into a *parens patriae* relationship with young persons, while also attempting to allow young persons autonomy to make decisions in what they perceive to be their own best interests. Finally, treating a young person as a person before the law also illustrates the paradox. In this last concept, the status of being a young person is reflected in certain legal obligations, privileges and incapacities for the young persons and others who deal with them.

The author then explores the historical development of young persons from sexual objects to sexual actors; and how power relationships between young

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persons and their parents, teachers, doctors or other professionals have affected their legal status and rights. Finally, the author points out that the recent emergence of social outrage regarding the physical and sexual abuse of young persons, and the media exposure of these activities, has made it more difficult for society to see young persons as persons who have the capacity to consent to sex.[1]

Chapter 2 contains a detailed outline of the revisions to the Criminal Code under Bill C-15[2] and concludes by discussing some recent judicial decisions. The decisions help to illustrate the complexity of the issues surrounding young persons and their sexuality, and reflect an increasing recognition of young persons' autonomy in decisions by the courts regarding young persons' rights. Such autonomy enables young persons to make their own decisions concerning their welfare and their activities, as against the decisions their parents would make for them in that regard.

In chapter 3, Mr. Sullivan discusses the Report of the Badgley Committee on Sexual Offences Against Children and Youth,[3] and the competition of ideas from the interest groups which influenced and shaped the reforms recommended in the Report. Although the Badgley Committee initially acknowledged the conflict which exists between a young person's right to sexual expression and the necessity to protect young persons from abuse, its final recommendations were primarily protectionist in nature. The author identifies factors which would support taking such a protectionist approach, including: child prostitution; increased risks associated with teenage pregnancy; a fear of increased risks of young persons contracting sexually transmitted diseases; and finally, concern regarding the abuse of young persons by those in positions of trust or authority. The Report's recommendations were criticized as being patriarchal or paternalistic; and some commentators went so far as to state the recommendations were anti-child, anti-sex, and sometimes anti-gay. In chapter 4, the author draws the following conclusion regarding this particular policy reform process:[4]

> The Badgley Report and its subsequent transition into law have played an important role in quelling the legitimacy crisis presented by the apparent rise of child sexual assault while simultaneously and silently advancing professional interests.

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[1] In chapter 2, the author discusses the concept of young persons engaging in consensual sex. Mr. Sullivan points out that past laws regarding consent to sexual acts have focused on upholding a double standard requiring only female young persons to be chaste. The paternalistic tradition behind such legislation is even more apparent with respect to the offence of seduction. In the early 1800s, only fathers were permitted to bring a suit to recover damages for seduction of their daughters, not the "seduced" daughters: C. Backhouse, Petticoats and Prejudice: Women and Law in Nineteenth Century Canada (1991), pp. 44, 45.

[2] Bill C-15 was enacted as An Act to Amend the Criminal Code and the Canada Evidence Act, S.C. 1987, c. 24; R.S.C. 1985, c. 19 (3d Supp.).

[3] Robin F. Badgley (Chairman), Sexual Offences Against Children: Report of the Committee on Sexual Offences Against Children and Youths (August, 1984).

[4] P. 116.

Chapter 5 compares three possible methods of pursuing reform when it relates to the sexual status of young persons. The first is pursuing reform through litigation. In Mr. Sullivan's view, a number of both substantive and practical problems have emerged with respect to implementing reform in this manner. There are risks that the young person would not be heard and the case would actually be used to advance the position of some adult or a particular group of adults. Courts have limited ability to respond, and have responded inconsistently, to other related issues which may affect a young person's sexuality like race, poverty, sexism and age discrimination. Insufficient consideration is often given to how the court's decision may influence a young person's capacity or ability to be a sexual actor. Reform through litigation is expensive, and may not be appropriate because it turns parties into adversaries in situations where ongoing relationships must often be maintained due to the dependencies a young person has on adults early in life.

The second method discussed by the author is legislative reform. In his view, past legislative reform has largely failed to deal adequately with the issues surrounding a young person's sexual status, partly because much of the past reform has shifted parental authority in some areas to the state. However, Mr. Sullivan does see some promise in future legislative reforms if the resulting legislation builds in mechanisms allowing young persons to exercise some level of autonomy and independence and to promote community involvement. These factors would help legislative reform to come closer to achieving an appropriate balance between the protection of children, and their capacity to be sexual actors.

The third reform method discussed by the author is referred to as "counter-discourse". Instead of legislative reform, it may be more appropriate to develop a community-based process whereby young persons and their parents may receive advice, or participate in mediation efforts regarding certain decisions which young persons are faced with making in connection with the expression of their sexuality. In this way, one could avoid the clash of power interests apparent in the most recent legislative reform process, and the extensive influence of professionals who are generally unaccountable to the public for their actions.

Finally, the chapter closes with a number of recommendations regarding the policy reform process when it involves the sexual status of young persons.

I am sceptical that the "counter-discourse" as proposed by the author would necessarily achieve any "better" results than state intervention through legislation or legal reform through litigation. Problems of accountability are inevitable. There could also be a wide ranging disparity of the treatment of these issues from one community to another, which may, in turn, create more inequity and confusion than reform through the courts and the legislature. Community based organizations could, however, help to humanize the law, and help families and their children to understand their rights and obligations within the existing legal regime.

What becomes clear from reading this book is that there are no easy answers to the issues surrounding the sexuality of young persons. There is still room for improving the reform process, and for changing our attitudes and approaches to these issues to ensure that we do not do a disservice to young persons through our reform efforts.