Book Reviews
Comptes rendus

Canadian Copyright Law.

By LESLEY ELLEN HARRIS
Toronto: McGraw-Hill Ryerson. 1992. Pp. 265. ($19.95)

Reviewed by Rosemary Klein*

Promoted as a "layperson's guide for writers, musicians, visual artists, filmmakers, publishers, editors, teachers, librarians, students and business people", Lesley Ellen Harris has successfully achieved her goal to present in a clear, coherent manner a comprehensive guidepost through the maze of Canadian copyright law. She succeeds in addressing a need for a primary copyright law resource text for both lawyers and laypersons.

Perhaps intellectual law specialists may find this text too simplistic in its approach but for the generalist or those practitioners seeking to expand their knowledge of the copyright field, Ms. Harris' book should be the first step for a non-intellectual law specialist to educate him or herself and a good starting point or reference book for an experienced copyright practitioner.

It is impeccably organised and very practical in approach. The author has geared this text directly to laypersons as she utilises specific examples of copyright in action. As Copyright law is a complicated area for even the most seasoned legal practitioner, Lesley Ellen Harris is successful in her attempt to "demystify" Canadian copyright law.

A practical lay-out, good design structure, simple, straight forward language, extensive index and the use of chapter end summaries combine to make this text an extremely functional research tool. Practical examples are used throughout the text to augment Ms. Harris' defining key elements of copyright. For example, in discussing the copyright of "books" in Chapter Five of the text, Lesley Ellen Harris states that "... a book need not have any `literary' merit to be protected as a literary work. A book by Margaret Atwood would be equally protected as a book explaining Einstein's theory. Likewise, a book of poems by e.e. cummings is equally protected as is an instruction manual for your dishwasher".[1]

Charts are also well utilised to assist the copyright novice. In the first chapter a comprehensive chart outlines the different legal treatments of the five traditional areas of intellectual property protection of patents, trade marks, industrial designs, confidential information and copyright.[2]

The chapters are lgically organised and cover all the fundamental principles of copyright law in everyday language. Chapter One is "Understanding Copyright" and outlines what is copyright within the total intellectual property scheme.

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[1] P. 43.

[2] P. 9.

Chapter Two, "Copyright Law in Canada" provides a brief history of the field in Canada and its statutory evolution and international protection.

In Chapter Three, Ms. Harris provides information to determine "Is Your Creation Eligible for Copyright Protection?" It is a brief primer for the novice copyright user to vet whether or not their "work" is eligible for protection.

"How Do You Obtain Copyright Protection" is presented in Chapter Four. A piece of trivia from this chapter is that the licensing fee for the use of the traditional song "Happy Birthday to You" is $12,500.[3] More importantly, this chapter tells the user that copyright protection is automatic in Canada upon creation of a work but it also outlines how to more formally and administratively protect your creative work.

Chapter Five outlines "What is Protected by Copyright?" It is an extensive chapter covering the protection of literary, dramatic, choreographic, musical, sound recordings and other mechanical contrivances, artistic, audio-visual material, folklore and other works. Ms. Harris emphasises in this chapter that "the classification of a work protected by copyright is important with respect to duration of protection, ownership of works and the rights of copyright owners in these works."[4]

In Chapter Six we learn how to determine "Who Owns Copyright?" This is of particular importance because ownership of copyright determines who has control over a particular work. Throughout this text, the author stresses the importance of noting the distinction between the rights of the author and those of the owner of a copyrighted work.

"The Duration of Copyright" is covered in Chapter Seven. The two general rules for duration of published and unpublished works is covered in this chapter. Ms. Harris does a particularly thorough job of explaining the difficulty of determining duration as it pertains to posthumous works and the reversionary interest proviso whereby any subsequent owner of copyright will lose his or her rights (provided the conditions apply) twenty-five years after the author's death.[5]

Chapter Eight explains "Rights Protected by Copyright". The nature of rights, both economic and moral rights as granted by the *Copyright Act* and common law provisions are outlined in this chapter. The chapter does an excellent job of explaining the moral rights protection for authors of copyright and the fact that copyright holders are entitled to a bundle of rights, such as the right to publish, reproduce and perform in public, a copyright work, or to authorize to do so.

The "Limitations on Rights" of copyright owners is presented in Chapter Nine. The specific exceptions for use of copyright materials in specific situations are outlined. This chapter is of particular assistance for those utilising copyrighted materials in schools for educational purposes.

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[3] P. 25.

[4] P. 66.

[5] P. 87.

In Chapter Ten, Lesley Ellen Harris discusses "How Can Rights be Exploited?" Again, she differentiates between the treatment of economic and moral rights in copyrighted material. In this chapter she outlines that a copyright holder, or representative, can assign or license, on an individual basis or through a copyright collective, the economic rights set out in the *Copyright Act*.[6]

"How is Copyright Violated?" is covered in Chapter Eleven. Copyright may be violated directly, by using one of the exclusive rights of the copyright holder without permission, or indirectly through a commercial activity involving a copyright work.[7]

Chapter Twelve presents "What are the Remedies for the Violation of Copyright?" This is a very thorough primer on copyright remedies as it succinctly outlines all the administrative, civil and criminal sanctions for the violation of copyright law.

In Chapter Thirteen, Ms. Harris assures the reader that it is a false assumption to assume that just because a material is copyrighted that it cannot be used. In this chapter on "Using Copyright Materials", how to get permission is specifically outlined including the very practical inclusion of addresses for tracking down copyright ownership of specific works as well as other helpful hints for unlocatable copyright owners.

The final chapter, Chapter Fourteen outlines "How Does Canadian and American and Canadian Copyright Law Compare?" Copyright holders who are protected under Canadian law are also protected when their creations are used in the United States.[8]

Of great assistance is the inclusion in this text in the appendices of a copy of a consolidated version of the Canadian *Copyright Act*, R.S.C. 1985, ch. 42.

The appendices also includes a copy of an application for registration of copyright and certificate of registration.

Lesley Ellen Harris throughout *Canadian Copyright Law* provides an up-to-date capsulization of the current state of the law in Canada. She does a particularly clear job of defining the importance of the moral rights protection of the copyright author versus those economic rights of the copyright owner.

She also thoroughly and clearly outlines the more recent changes to copyright law in Canada such as exhibition rights and public lending rights.

In summary, Lesley Ellen Harris succeeds in her efforts to provide a primary resource text for laypersons and lawyers alike with her publication *Canadian Copyright Law*.

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[6] P. 146.

[7] P. 152.

[8] P. 186.

Burdens of Proof in Modern Discourse.

By RICHARD H. GASKINS
New Haven: Yale University Press. 1993. Pp. 362 ($U.S. 32.55)

Reviewed by S.M. Wexler*

You might think a book with the words "burdens of proof" in the title would necessarily be of interest to lawyers, and a quarter of this book, the two chapters in which Gaskins discusses the way the Supreme Court of the United States used the idea of the burden of proof to change American constitutional law in the 1950s and 60s, should be of tremendous interest to lawyers, even Canadian lawyers. I will return to this point, but first I want to explain why I think the other three quarters of this book will not interest most lawyers at all.

Gaskins' main point is that the idea of a burden of proof is used much more widely than in law. He sees burden of proof as a basic strategy in all sorts of arguments. He calls it "the argument from ignorance" and says it is used in arguments about religious questions, like the existence of God, and in arguments about philosophical questions like the existence of moral standards which are binding on all people. Since no one can provide an objectively verifiable demonstration of the existence of either god or moral standards that bind everyone, Gaskins says we must argue from ignorance and therefore, we put the burden of proof on those who take the position with which we do not agree.

The first words in the book are a quotation from the correspondence of the philosopher Leibnitz, dealing with his proof of the existence of God:[1]

> For every being ought to be judged possible until the contrary is proved, until it is shown that it is not possible.

This is clearly an argument using a burden of proof, but it is not an argument that most lawyers will care to read about. The same is true for the careful discussions Gaskins provides of Kant, Hegel, Wittgenstein, Habermas and Derida. They may be of interest to philosophers, but I do not think most lawyers have any interest in learning that:[2]

> The authority of modern science and moral reasoning has been a significant concern for post-Cartesian philosophy, and today both fields coexist in a fragile neo-Kantian truce introduced at the end of the nineteenth century.

Much of Gaskins' book reads like this. It is not badly written; in fact, for the most part, it is quite well written. But you have to be interested in philosophy to want to read it and I do not think most lawyers are.

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[1] P. 1.

[2] P. 45.

Gaskins' discussion of American constitutional law, on the other hand, should be very interesting to lawyers, even to Canadian lawyers. The reason Gaskins discusses American constitutional law is to show how burden of proof works and this should interest Canadian lawyers because our Supreme Court is now working with the burden of proof set out in section 1 of the Charter of Rights and Freedoms:[3]

> I. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

"Demonstrably justified" is a burden of proof and in *R.* v. *Oakes*,[4] the court said:

> The *onus of proving* that a limit on a right or freedom guaranteed by the Charter is a reasonable and demonstrably justifiable in a free and democratic society rests upon the party seeking to uphold this limitation.

Gaskins analyzes *Brown* v. *Board of Education*[5] and points out that:[6]

> ... the key breakthrough in the 1950s race discrimination discussions was the rejection of the notorious separate but equal doctrine. The Supreme Court had established this phrase in a famous 1896 case approving segregated public services in the South, provided they could be deemed "equal" by some tangible measure. The 1954 *Brown* decision did not directly overrule this doctrine but instead raised to an unbearable weight the burden on states to prove that their segregated services were, in truth, equal.

Putting the burden of proof on the states reversed the presumption of constitutionality which had developed in the United States in the 1930s and 1940s. Gaskins explains how this presumption developed, why it was reversed, and how the American Supreme Court developed the idea that in certain areas "strict scrutiny" of governmental action was required. He then goes on to explain how the idea of strict scrutiny, which was used in the 1960s by the Warren Court to strike down governmental action in the area of race discrimination, came to be used by the Burger Court in the 1970s and 80s to block attempts to challenge governmental action in the areas of welfare rights, gender rights and affirmative action programs.

I was involved in the welfare rights movement in the United States in the 1960s and I remember how optimistic we were about the role of the court. We did not see that the very development we found so promising would come to be used against us. In fact, I did not even understand how this had happened, until I read Gaskins' excellent account of it.

I think this book would be of interest to Canadian lawyers, particularly rights-minded Canadian constitutional lawyers, because it shows how a burden of proof which is for you one day and which seems as though it must always be for you, can come to be against you the next.

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[3] Part I of the *Constitution Act, 1982* being schedule B to the *Canada Act, 1982* (U.K.), 1982, C.11.

[4] [1986] 1 S.C.R. 103 at 136-137. (Emphasis added).

[5] 347 U.S. 483 (1954).

[6] P. 55.

Canadian Tort Law. Fifth Edition

By ALLEN M. LINDEN
Toronto and Vancouver: Butterworths 1993. Pp. xx, 842. ($155.00)

Reviewed by Mitchell McInnes*

While a new edition of Canadian Tort Law is always welcome, recent developments ensure Linden's latest effort an especially wide and appreciative audience. Since the text's last appearance in 1988, our courts have reconsidered many important issues in tort and have fashioned a more distinctively Canadian jurisprudence. Though often adopting a cosmopolitan outlook for analytical purposes,[1] they increasingly have been willing to set, rather than follow, precedent. The Supreme Court of Canada has led the way, breaking sharply with the House of Lords on fundamental matters in negligence, and settling many points of law that, only five years ago, were unclear or unsatisfactory. Both the student and the practitioner will find Linden invaluable in keeping abreast of these developments.

The most obvious change from the last edition is the inclusion of a chapter devoted to the issue of governmental liability. Canadian courts have long followed the basic scheme established by the House of Lords in *Anns* v. *Merton London Borough Council*,[2] according to which governmental actions are characterized as being either "policy" or "operational". A lack of care in effecting a policy decision will not give rise to recovery for resulting losses as long as an authority exercised its discretionary powers conscientiously and in good faith. In contrast, operational activities are subject to the ordinary principles of negligence law. Simple in the theory, the dichotomy is difficult to apply in practice because most governmental activities involve both policy and operational aspects. The Supreme Court of Canada has seized upon that ambiguity in order to reject the conservatism that now informs English law,[3] and to subject public authorities to greater accountability. Linden favourably[4]

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[1] See especially the judgment of McLachlin J. in *C.N.R.* v. *Norsk Pacific SS. Co.*, [1992] 1 S.C.R. 1021.

[2] [1978] A.C. 728 (H.L.).

[3] See eg. *Peabody Donation Fund Governors* v. *Sir Lindsay Parkinson & Co.*, [1985] A.C. 210 (H.L.); *Curran* v. *N. Ireland Co-ownership Housing Assn. Ltd.*, [1987] 2 All E.R. 13 (H.L.); *Rowling* v. *Takaro Properties Ltd.*, [1988] 1 All E.R. 163 (P.C.N.Z); *Murphy* v. *Brentwood Dist. Council*, [1990] 2 All E.R. 908 (H.L.).

[4] *Just* also has its critics. Sopinka J. vigorously dissented from the majority decision, and has written extra-judicially of the need to adopt new principles regarding governmental liability: "The Liability of Public Authorities: Drawing the Line" (1993) 1 Tort L. Rev. 123. See also L. Klar, "The Supreme Court of Canada: Extending the Liability of Public Authorities" (1990) 28 Alta. L. Rev. 648; N. Rafferty & I. Saunders, "Developments in Contract and Tort Law: The 1989-90 Term" (1991) 2 Supreme Court L.R. (2d) 175.

discusses Cory J.'s majority decision in *Just* v. *British Columbia*,[5] which confines the scope of "policy" to the threshold issue of whether or not a government will act in a particular area. In a departure from earlier Canadian cases,[6] it was held that a government program must be reasonable in its terms, as well as in its execution.[7]

Linden also writes approvingly of other recent Supreme Court decisions that embrace an expansive approach to liability. For example, *Snell* v. *Farrell*[8] reiterated that causation was a matter of common sense, rather than of abstract metaphysics or scientific certainties, and held that in the absence of evidence to the contrary, an inference of causation may be drawn on the basis of very little affirmative proof when the facts lie particularly within the knowledge of the defendant. In *Queen* v. *Cognos*,[9] Iacobucci J. rejected the suggestion[10] that only professionals can owe a *Hedley Byrne*[11] duty of care for negligent statements, and endorsed an approach which asks simply whether the parties shared a "special relationship."[12] And in *C.N.R.* v. *Norsk Pacific SS. Co.*,[13] an erudite decision which may prove influential both at home and abroad,[14] our highest court parted company with the House of Lords[15] and held that contractual relation economic loss was actionable.

Consistent with its liberalizing approach to liability, the Supreme Court has made it more difficult for defendants to resist claims for compensation; several defences have been interpreted narrowly in recent years.[16] Again, Linden

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[5] [1989] 2 S.C.R. 1228. See also *Laurentide Motels Ltd.* v. *Beauport (City)*, [1989] 1 S.C.R. 705; *Rothfield* v. *Manolakos*, [1989] 2 S.C.R. 1259.

[6] See eg. *Barratt* v. *Dist. of North Vancouver*, [1980] 2 S.C.R. 418; *City of Kamloops* v. *Neilson*, [1984] 2 S.C.R. 2.

[7] Cory J. did note, however, that the applicable standard of care will reflect the circumstances of a case, including budgetary restraints and the availability of qualified personnel and equipment: *supra* footnote 5 at 1245.

[8] [1990] 2 S.C.R. 311.

[9] [1993] 1 S.C.R. 87 at 117.

[10] See eg. *Mutual Life* v. *Evatt*, [1971] 2 W.L.R. 23 (P.C. Aust); *Bank für Handel und Effeken* v. *Davidson & Co.* (1975), 55 D.L.R. (3d) 303 (B.C.C.A.).

[11] *Hedley, Byrne & Co. Ltd.* v. *Heller & Partners Ltd.*, [1964] A.C. 465 (H.L.).

[12] The Supreme Court has also affirmed that negligent statements may give rise to concurrent liability in tort and contract (*B.C. Hydro* v. *B.C. Checo Int. Ltd.*, [1993] 1 S.C.R. 12 at 27), and may be actionable if made during pre-contractual negotiations: *Queen* v. *Cognos Inc.*, *supra* footnote 9 at 112.

[13] *Supra* footnote 1.

[14] See eg. B.S. Markesinis, "Compensation for Negligently Inflicted Pure Economic Loss: Some Canadian Views" (1993) 109 L.Q. Rev. 5; J.G. Fleming, "Economic Loss in Canada" (1993) 1 Tort L. Rev. 68; M. McInnes, "Contractual Relational Economic Loss" (1993) 52 Cambridge L.J. 12.

[15] *Murphy* v. *Brentwood Dist. Council*, *supra* footnote 3.

[16] Unfortunately, the decision in *Hall* v. *Hebert*, [1993] 2 S.C.R. 159 was rendered too late for inclusion in Linden's text. In a scholarly judgment that compares very well with the leading English authority (*Pitts* v. *Hunt*, [1990] 3 All E.R. 344 (C.A.)), McLachlin J. held that the defence of *ex turpi causa* should be confined to situations in which recovery

welcomes the trend toward a more robust law of tort. In *Norberg* v. *Wynrib*,[17] La Forest J. held that the validity of a consent to battery depends upon the nature of relationship between the parties. A plaintiff's consent will be considered vitiated if a defendant exploited a marked inequality of power.[18] And in *Waldick* v. *Malcolm*,[19] the Court affirmed that a defendant cannot escape liability by simply showing that his impugned actions complied with custom. The law will not countenance an unreasonable practice, however commonplace.

Canadian Tort Law admits of few criticisms. The text would benefit from a more thorough discussion of the nominate torts.[20] So, too, it occasionally could bear a greater comparative component. While the Supreme Court of Canada will clearly no longer operate in the shadow of the House of Lords, its decisions may not be fully appreciated if they are viewed in isolation. For example, Linden's brief discussion of *C.N.R.* v. *Norsk Pacific SS. Co.*[21] does not convey the significance of the Court's resolve to adhere to the two-part test for the recognition of a duty of care that was articulated in *Anns*.[22] The nature of the duty concept and the importance of *Norsk* would be better revealed if mention were made of the reasons underlying the dramatic rejection of *Anns* in Anglo-Australian law.[23] But these are relatively minor quibbles; Linden is recognized as Canada's leading authority on the law of tort, and for good reason. He treats most topics to generous discussion, and his analysis of the law, as it is or as he believes it should be, is consistently of the highest level. The fifth edition of *Canadian Tort Law* will prove as useful as its predecessors.

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of damages would violate the integrity of the legal system as a whole by allowing a plaintiff to evade criminal sanctions or to profit from his wrong by receiving more than pure compensation.

[17] [1992] 2 S.C.R. 226.

[18] *Ibid.* at 247. Whereas the majority preferred a test based on the contractual concept of "unconscionability" and the criminal law notion of "authority", McLachlin J. advocated a novel approach based on the principles of fiduciary relationships. The latter view finds favour with Linden: A. Linden, *Canadian Tort Law* (1993) at 65.

[19] [1991] 2 S.C.R. 456.

[20] While a short chapter is devoted to intentional interference with the person, trespass and intentional interference with property and chattels are not discussed.

[21] *Supra* footnote 1.

[22] *Supra* footnote 2. The *Anns* test was adopted by the Supreme Court of Canada in *Kamloops* v. *Neilson*, *supra* footnote 6.

[23] See eg. *Murphy* v. *Brentwood District Council*, *supra* footnote 3; *Sutherland Shire Council* v. *Heyman* (1985), 157 C.L.R. 424 (Aust. H.C.).

The Law of Commerce in Japan.

By HAIG OGHIGIAN
Prentice Hall. 1992. Pp. 126. ($U.S. 31.00)

Reviewed by Sholto Hebenton*

In his preface to this compact work of 125 pages, the author explains that the book has a limited purpose to serve as a practical guide for non-Japanese lawyers who might use it as source of information before contacting a Japanese specialist. The author identifies two ancillary purposes, to serve as an introductory overview of the Japanese law of commerce and a very general purpose of providing information about Japan. As the Foreword by Professor F. Vogel observes, "the study of Japan has now become too important to leave to a small band of specialists"... "For all the volumes of works published concerning Japan's relations with the outside of the world, the nonspecialist who must deal with the Japanese in a business context still finds it difficult to obtain the necessary information."

The volume consists of a collection of eight articles by different authors. Seven of the articles are written by Japanese lawyers or legal scholars, clearly experts in their respective fields. One chapter is written by the editor, Mr. Haig Oghigian, a British Columbia lawyer who has recently returned to private practice with the Vancouver law firm of Worrall Scott & Page. He is fluent in Japanese and worked as Legal-Economic officer at the Canadian Embassy in Tokyo. He also studied Japanese law at the East Asian Legal Studies Program of the Harvard Law School.

The chapters deal with core subjects of the business lawyer: sale of goods/ commercial law, corporate law, taxation, intellectual property, securities regulation and Mr. Oghigian's chapter on the law of financing and the Japanese capital markets. These substantive chapters are contained between two book-end chapters which help with the context, a chapter on the legal profession and the Japanese judicial system and a chapter on commercial dispute resolution.

The chapter on intellectual property is an interesting example of how this book provides an appropriate context for a lawyer approaching a business transaction involving the Japanese. It deals with eight topics, some broad and comparable to categories in Canadian law, for example copyright, patents and trademarks. It also discusses statutes for which we have no specific equivalent, for example, the "Law Concerning Protection of Circuit Arrangements of Semiconductor Integrated Circuits", and the "Law Concerning the Protection of New Varieties of Plants". The chapters helpfully draw attention to the significant differences between the approach of Japanese law and the approach which we would find in the law of a typical Canadian province or American

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State. The text succeeds in focussing the attention of the reader on the different approaches and in providing interesting reading.

A writer of introductory material continually is faced with difficult judgments on how much detail to provide. The focus in Mr. Oghigian's collection is on the framework. The individual chapters are provided profusely with titles and sub-titles which speed the reader on his way. The descriptions lean toward the compact. One completes reading a paragraph and thinks to oneself that the author is just paraphrasing the statute. On reflection one realizes that the author has done just that but that in a paragraph the author has dealt with the whole statute or a large segment of one, and has laid out enough general principles to alert the reader to major similarities and differences. Moreover the compact descriptions consistently convey a sense of comfort as to how one would pursue more detailed inquiries. And there is an appropriate mix of detailed analysis for those who find their reading pleasure in fine distinctions. If you are pining to know the approach of Japanese law to the second rule in *Hadley* v. *Baxendale* you will turn to page 17.

The authors have done what they intended to do. They have done well. I find that the purposes of the book are understated by the introduction, that it has another dimension. I would recommend Oghigian's The Law of Commerce in Japan to any Canadian lawyer who is dealing with Japanese clients or lawyers in an international trading transaction or in a transaction by which Japanese seek to become involved in a business in Canada as investors or as active participant. The observations on Japanese law relating to corporations, tax, intellectual property and sale are very helpful in revealing the background from which the Japanese will approach these matters in Canada. Understanding interests and expectations is often half the battle in negotiating agreements. This book has some broad perspectives and a number of gems which will help a Canadian reader improve his understanding of the Japanese approach to business.

I recommend it.

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Litigating the Relationship Between Equity and Equality (study paper).

By COLLEEN SHEPPARD
Toronto: The Ontario Law Reform Commission. 1993 Pp. viii, 90. ($2.50)

Reviewed by Alison Hughes*

Affirmative action programs continue to generate controversy. Though the basic idea of addressing group-based, systemic discrimination through proactive measures has been sanctioned expressly by s. 15(2) of the *Canadian Charter of*

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Rights and Freedoms,[1] and by provisions in numerous provincial human rights statutes, the application, scope, and extent of such programs remains unclear. Increasingly, such initiatives are being litigated. The complex and often contentious relationship between legal equality and equity initiatives forms the basis of Sheppard's study paper. *Litigating the Relationship Between Equity and Equality* includes a concise discussion of the diverse issues bound up under the general terminology of affirmative action, a compilation of the relevant caselaw, and a quick reference of human rights legislation dealing with affirmative action. It offers a background against which affirmative action programs can be understood, designed, and implemented. Although directed specifically to adjudicators, legislators, and policy makers, the relevance of the study paper is by no means limited to such an audience. It is an interesting read for anyone involved in the area; it is also a valuable summary for the novice.

Sheppard's approach is contextual. She emphasizes that discrimination and disadvantage are ineradicably linked to a social, cultural, and historical setting. Moreover, the inequality experienced by certain groups in society has pervasive, institutional dimensions, and therefore requires an institutional response. Because of this depth of disadvantage that certain groups have historically experienced, a "formal" definition of equality, in which all individuals are treated equally, is inadequate. It can be harmful as well: by disregarding compelling group-based discriminatory trends, formal equality fails to address the entrenched reasons for inequality. In effect, it perpetuates inequality while purporting to alleviate it. Consequently, Sheppard argues for a "substantive" approach to equality, which recognizes that deep-rooted disadvantage can only be addressed effectively by acknowledging the actual social, political, and economic conditions experienced by disadvantaged groups.

These differing conceptions of equality lead to a difference of response: while claims of discrimination by individuals focus on retroactive, adjudicative relief, equity initiatives focus on collective, institutional responses. Sheppard recognizes that such institutional responses can be either narrow or broad in conception. The former represents the standard, even stereotypical, view of affirmative action programs, in which preferential treatment policies facilitate the entry of historically or socially disadvantaged groups into an institutional setting that itself remains unquestioned. This is, Sheppard argues, a superficial approach. A broad conception of affirmative action initiatives delves deeper; it addresses institutional change by altering policies and practices, and it acknowledges the need for special accommodation of group and individual needs.

Sheppard prefaces her analysis of the cases by highlighting some recurring interpretive issues. The critical, threshold issue is whether affirmative action provisions are properly characterized as exceptions to or expressions of the principle of equality. This distinction mirrors the dichotomy between formal

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[1] *Canadian Charter of Rights and Freedoms*, s.15(2), Part I of the *Constitution Act, 1982*, being schedule B to the *Canada Act* 1982 (U.K.), 1982, c.11.

and substantive equality. Treating affirmative action provisions as exceptions to equality is consistent with formal equality; similar treatment of individuals is the norm. Sheppard rejects this characterization, although she admits that it is the approach generally held by adjudicators.[2] She argues strongly that affirmative action provisions are interpretive aids to equality provisions; they express equality, rather than detract from it. Because affirmative action provisions generally address factors such as historical group disadvantage, and current economic, social and cultural factors, they express a more meaningful, substantive idea of equality.[3]

Given that affirmative action provisions are seen as interpretive aids to equality provisions, Sheppard asserts that members of historically advantaged groups should be precluded from challenging such legislation. Section 15(2) of the *Charter* was specifically drafted to immunize such programs from this kind of "reverse discrimination" scrutiny. She maintains that even in the face of a violation of the formal equality rights of socially privileged groups, equity initiatives are legally justifiable and necessary for the substantive equality of members of socially disadvantaged groups. Sheppard justifies this subordination of one group's rights over another's by citing instances of `internal' checks on affirmative action programs: these include the institutional power of socially advantaged groups in developing equity policies, and the safeguards as to purpose, clarity, and duration built in to many special programs. Sheppard, however, does not explore whether these assumed internal mechanisms are actually adequate to address socially advantaged groups' concerns about the fairness and effectiveness of equity initiatives. Although Sheppard would have it otherwise, litigation for such groups is still a viable option.[4]

Sheppard argues that affirmative action legislation should not entirely be immune from scrutiny; members of historically disadvantaged groups should be able to mount challenges on several fronts. A law purporting to be ameliorative may in fact be disadvantageous to the members of groups it is intended to benefit. Because the concept of amelioration is malleable, an analysis of the effects of "ameliorative" measures must therefore draw upon the experience of those actually affected. Sheppard also raises the related issues of

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[2] And indeed, the plain language of s. 15(2) can easily be construed as creating an exception:

> Subsection (1) *does not preclude* any law, program, or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

[3] The characterization of affirmative action provisions as exceptions to, or expressions of, equality has significant practical implications. As exceptions to equality, constitutional jurisprudence would support a narrow interpretation, while the burden of proof would fall on the party seeking to uphold the program. As interpretive aids (or expressions) of equality, the provisions would be given a large and liberal interpretation, and the burden of proof would shift to the party challenging the equity program.

[4] *Apsit* v. *Man. Human Rights Comm.* [1988] 1 W.W.R. 629, 9 C.H.R.R. D/4457 (Man. Q.B.); rev'd on other grounds, [1989] 1 W.W.R. 481, 10 C.H.R.R. D/5633 (C.A.).

equality through voluntary group separation (eg. aboriginal self-government) and integration (eg. employment equity programs) within the context of treating seriously the distinct experience of socially disadvantaged groups. She emphasizes that neither option should require assimilation; meaningful equality requires that group differences be retained and accorded respect within an institutional framework. Finally, Sheppard questions whether members of socially disadvantaged groups should be able to challenge an equity program's "under inclusiveness". Her main concern in this area is the degeneration of the debate into a similarly-situated analysis of equality, an approach that has been rejected decisively.[5] Meaningful equality may necessitate different responses to the varied circumstances of different groups.

Sheppard concludes by recommending broad principles guiding the structure of equity programs, including basing programs on the experience of the groups involved, and making the programs as inclusive and flexible as possible. Ultimately, she recommends that effective equity programs should challenge the institutional reasons behind the exclusion of certain groups, with a view to change on a more structural level. However, her call for institutional reform seems to remain a vague aspiration, rather than a determinate goal. Clearly, she advocates change on a more fundamental level than mechanisms such as hiring quotas could provide, but what sort of institutional revolution is really in store? There remains an unsatisfying lack of definition surrounding the ultimate aim of equity initiatives.

Sheppard effectively argues that affirmative action is about more than mere preferential hiring; properly implemented, equity programs are but one means by which the experience of socially and historically disadvantaged groups is taken seriously. However valuable, her perspective on the subject remains but one in many. *Litigating the Relationship Between Equity and Equality* will not settle the debate over affirmative action; indeed, it may fuel it. It is, however, a meaningful contribution to the complex evolution of affirmative action discourse.

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Confronting Sexual Assault: A Decade of Legal and Social Change

By JULIAN V. ROBERTS and RENATE M. MOHR (Eds.).
Toronto: University of Toronto Press. 1994. Pp. 355. ($19.95 - paper - $50.00, cloth)

Reviewed by Patricia Hughes*

This volume reflects a feminist approach to law not only in its subject matter, but in its format, framework and development. The various authors met to

[5] *Andrews* v. *Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 168.

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comment on and learn from each other's chapters, and this integrative approach is shared by the reader in the short introductions which link each chapter to others preceding and following it. This is forthrightly a book written from the perspective of the "victims" of sexual assault, primarily women (although the editors in a concluding chapter list male victims of sexual assault as an area of future research); Rita Gunn and Rick Linden add to this focus in their consideration of "The Processing of Child Sexual Abuse Cases", although child sexual abuse is a secondary theme here.

The material is an excellent example of feminist praxis. It merges theory and practice, sometimes in the same chapter, more often in chapters which build and rely on each other (for example, Adelyn Bowland's chapter on the history of sexual history evidence provides us with the necessary extensive assessment to ground Diana Majury's "theoretical" analysis of *Seaboyer*[1] and Renate Mohr's chapter on sentencing generally complements Teressa Nahanee's more specific assessment in the Inuit context). It relies on "women's voices" and on academic research, sometimes one and the same, but most usefully co-existing. Interwoven throughout are echoes of feminists' efforts to incorporate women's diversity in any consideration of how law and social structure treats women and feminists' struggle with reliance on law reform.

The contributions are framed by the 1983 amendments to the sexual assault provisions of the Criminal Code (Bill C-127) at one end of the decade and the 1992 amendments following the Supreme Court of Canada's *Seaboyer* decision (Bill C-49) at the other end, allowing us to see graphically the irregular nature of the legal system's treatment of women in this, one of the most important legal questions for women. Although the first draft of the book was completed in August 1991 and was intended to focus on the effects of the 1983 amendments, a number of the authors nevertheless included some discussion of the 1992 amendments in their contributions, although by necessity, their assessments are speculative.

More substantively, Diana Majury's assessment of *Seaboyer* itself contrasts the consequences of the "assumption of equality" framework used by McLachlin J. for the majority in that case with her resulting emphasis on the rights of accused and the "gender inequality" approach followed by L'Heureux-Dubé in dissent in which she shows how stereotypes about women and rape underpin the provisions at issue dealing with the admission of evidence about the victim's sexual history. Majury's analysis is premised on her conclusion that past sexual history evidence "is never relevant to the determination of the guilt of the accused" and that if one has doubts, it is because one is influenced by the myths and stereotypes. Here, sceptical readers may have benefitted from a separate chapter permitting a more detailed examination of prior sexual history evidence in connection with specific defences to show that Majury's conclusion is justified. Adelyn Bowland places *Seaboyer* in the context of the "battle between the courts and Parliament" in their treatment of "bad girls" (as Bowland points out, the majority of Canadian women). She argues that *Seaboyer* made the

[1] *R.* v. *Seaboyer*; *R.* v. *Gayme*, [1991] 2 S.C.R. 577.

complainant's position with respect to the introduction of sexual history "dramatically worse than it was at common law".

The ambivalence felt by many feminists about the utility of law reform as a path to more substantive social and political change runs as a thread throughout *Confronting Sexual Assault*. The editors refer to it explicitly in their introduction. Maria Los points out in her discussion of "The Struggle to Redefine Rape in the Early 1980s" that law reform detracts from a systemic understanding of rape, the social construction of which approaches "so closely the fundamental gender dichotomy on which the whole modern patriarchal culture rests", but acknowledges that there may not be an alternative to "practical, liberal reformism". Scott Clark and Dorothy Hepworth are aware of the limited effect law reform has on modifying or motivating behaviours and attitudes as they assess the impact of Bill C-127 on the processing of sexual assault cases. Faced with mixed results, some feminists may try to avoid measuring their efforts by their actual effect on the law and with Sheila McIntyre "redefin[e] reformism" by measuring law reform by "the degree to which it translates principles of accountability to, inclusion of, and genuine power sharing among the broad women's community into feminist legal practice", a process which she shows occurred during the consultations on Bill C-49, the response to *Seaboyer*'s striking down of the mis-labelled "rape shield law".[2] Some may see this shifting ground as a creative refashioning of what matters to feminists; others, however, may regard it as a veiled capitulation in the face of the capacity of liberalism to withstand fundamental challenges.

Terminology matters here, as befits a feminist compilation. There are times, nevertheless, that efforts to capture the right word appear knotty indeed. For example, Majury was wise to locate her reasons for preferring (even while carefully recognizing its own difficulties) the term "woman who was raped" to "victim" or "survivor" in an endnote, albeit one a page long. Los criticises "victim" as not "empowering" and as premised on all women's being similarly "victims" of rape, regardless of class, race, age or status; this latter requires more consideration than it is given here. The term "sexual assault" itself remains controversial. I share Majury's view that it "mask[s] the reality of the offence"; one of its purported advantages, its gender-neutrality, is actually reason not to use it.[3] This dispute seems to be a battle lost, however, and in fact Julian Roberts and Michelle Grossman, in their analysis of police statistics, suggest that the 1983 reforms, including the introduction of the term "sexual assault" and the elimination of "rape" offence have increased reporting of sexual assault, although they are unable to explain why. They and Clark and Hepworth indicate that treatment of victims by significant actors such as the Crown and police has

[2] This is a term with which many commentators have taken issue, in part because the provisions did not, of course, protect ("shield") women from rape; Bowland, for example, uses "sexual character provisions" instead.

[3] Prior to 1983, however, the *Criminal Code* prohibited indecent sexual assault against a female (with a maximum penalty of five years) and indecent assault against a male (with a maximum penalty of 10 years). The maximum penalty for rape (which only a male could commit against a female, not his wife) was life and for attempted rape, 10 years.

improved since 1983, in part because it was less likely the victim would have to talk about her sexual history. The reintroduction of sexual history evidence through the 1992 reforms needs to be assessed in this light. It may be that Los's more speculative statement, appearing to contradict these other studies, that increased reporting has merely increased the numbers of women who are subject to negative treatment by the justice system may be the more appropriate conclusion.

While the 1992 amendments, necessitated by *Seaboyer*, are regressive with respect to prior sexual history, in defining consent as they do, they have received cautious praise from feminists generally and by the writers in this book who address them. For example, in her chapter on "The Judicial Construction of Sexual Assault Offences", Christine Boyle expresses optimism that the list of circumstances in which there legally cannot be consent is not simply "a statement of male expectations of women's accessibility".

On the other hand, these writers are less sanguine about the capacity of the 1992 reforms to force judges to address questions about the impact of race, culture, sexual identify or other characteristics of the victim, despite the efforts of the women's coalition to require this analysis.[4] Renate Mohr, in her chapter on the vagaries of sentencing, indicates that these considerations are rarely taken into account, as, more broadly, the harm to the victim is not taken into account. On the contrary, Teressa Nahanee's comment on judge's "cultural bias" in their consideration of sexual assault of Inuit women is a damning indictment of the willingness of white judges to seize a purported "cultural defence" without having the requisite knowledge of traditional or current Inuit sexual mores and practices and to the disadvantage of Inuit women.

Nahanee regrets the lack of alternatives to strict sentencing which treat sexual assault seriously. In another context, Elizabeth Sheehy explores tort actions and criminal injury compensation avenues as methods for women to obtain compensation and other vindication for sexual assault. In discussing criminal injury compensation, Sheehy illustrates the often apparently paradoxical nature of feminist analysis of sexual assault. On the one hand, she lists its private hearings as an advantage, yet she also, without trying to reconcile the two, criticizes that process because it renders invisible sexual assault as part of women's lives. In part, this apparent contradiction (privacy is good, no it is not) arises because sexual assault is at one and the same time a reflection of systemic gendered power relations and an individual experience: individual self-defined interests may not always be apparently consonant with the political systemic paradigm.

As the editors indicate, there is much research required in this area, some of which will help to answer questions about the effects of the 1992 amendments similar to those some of these chapters posed but were unable to answer about the impact of the 1983 legislation. Even so, *Confronting Sexual Assault* will in part or in whole serve as a useful source for academics, legal practitioners and grass-roots activists engaged in work around sexual assault.

[4] An exception is that an inability to consent is part of the list of circumstances in which there can be no consent; presumably, this will encompass women whose disabilities prevent their giving voluntary agreement to sexual activity.