Case Comments
Commentaires d'arrêt

Judicial Proceedings: Media Bans: *C.B.C.* v. *Dagenais.*

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Introduction

Let me offer a confession. Until very recently I was not persuaded that the many restrictions which Canadian law places on reporting in the mass media about judicial proceedings could be justified. I thought our approach was unnecessarily restrictive, that it was based on an unacceptable inclination to err on the side of restraint rather than openness.

Then I watched the television coverage of the trial of O.J. Simpson in California. I have also watched the media circus which has gone on outside the courtroom. This has been something of an epiphany for me and, I think, for many other Canadians. At the very least, I began to think our approach to the proper role of the mass media in the judicial process might not be so bad after all.

The overriding goal of the approach adopted must be to guarantee the integrity of the judicial process, to refuse to allow the media to take control of the judicial process in the same way they have taken control of the political process and of sporting events.

These were some of the broad concerns which recently confronted the Supreme Court of Canada in *C.B.C.* v. *Dagenais.*[1] The Supreme Court does not hear many cases involving the mass media and there have been flaws in the few it has heard.[2] *Dagenais* is no exception.

The background to the decision is straightforward. The C.B.C., in conjunction with The National Film Board, prepared a four hour so-called docudrama entitled "The Boys of St. Vincent". This was alleged to be a fictional account of the sexual and physical abuse of boys in a Catholic Church-run institution. Now, even accepting the good faith of the C.B.C. and the N.F.B. in labelling "The Boys of St. Vincent" a work of fiction, it must, nonetheless, be observed that there can have been few Canadians who were unaware that serious allegations of sexual and physical abuse involving boys at named institutions

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[1] [1994] 3 S.C.R. 835, (1995), 120 D.L.R. (4th) 12 (all references to D.L.R.).

[2] As examples from civil defamation; see *Cherneskey* v. *Armadale Publishers*, [1979] 1 S.C.R. 1067 and *Snyder* v. *Montréal Gazette*, [1988] 1 S.C.R. 494.

had been made. Indeed, at the time — December 1992 — when the C.B.C. planned to air its "docudrama", there were in Ontario four very real criminal trials either underway or pending of men charged with abuse of boys.

On 4 December 1992 the four accused in these proceedings above applied to Gotlib, J. of the Ontario Court of Justice (General Division) for an order delaying the broadcasting of "The Boys of St. Vincent". She obliged and issued an interlocutory injunction to prevent the airing of the "docudrama" anywhere in Canada until all four trials had been completed.

The Ontario Court of Appeal heard an appeal from Gotlib J'.s decision the next day.[3] That court upheld her decision, but varied her order to the extent that the injunction against airing "The Boys of St. Vincent" would apply only in Ontario and to station CBMT-TV in Montréal. Her further order prohibiting publication of any information about the "docudrama" or the injunction proceedings themselves was overturned.

The C.B.C. and the N.F.B. appealed to the Supreme Court of Canada. They were joined by various intervenants, including the Canadian Association of Journalists. It is obvious the court regarded this as an important and difficult appeal as all nine judges took part. Further, while oral argument was heard on 24 January 1994, the court's judgment was not released until 8 December 1994.

The court, in the result, split six to three, the majority agreeing to allow the C.B.C.'s appeal. Lamer C.J. wrote the main majority judgment, a judgment concurred in by Sopinka, Cory, Iacobucci and Major JJ. McLachlin J. produced a separate concurring judgment. La Forest, L'Heureux-Dubé and Gonthier JJ. each wrote a dissenting judgment.

1. *Some Preliminary Considerations*

The central concern in the decision is the mass media and the judicial process. There were other issues, however, and these should be disposed of immediately.

The most important of these is easy enough to state — how did the C.B.C. get its claim before the appellate courts? This issue has both a substantive and a procedural dimension. Of course, the C.B.C. was the respondent to an application for an injunction.

The basis of the C.B.C.'s appeal to the Supreme Court of Canada was the "freedom of expression" guaranteed in section 2(b) of the *Charter*. Thus Gotlib J.'s order, even as varied by the Ontario Court of Appeal, was an unjustifiable limit on that freedom.

But right away there was an obvious problem. This was a 1986 decision of the Supreme Court of Canada in *Dolphin Delivery Ltd.*[4] In jurisprudential terms, the facts of the two cases are similar.

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[3] (1992), O.R. (3d) 239 (C.A.).

[4] [1986] 2 S.C.R. 753.

The union in *Dolphin Delivery* was engaged in secondary picketing, an activity which the Supreme Court found to constitute "expression" within the meaning of section 2(b). A trial judge, exercising the inherent common law jurisdiction of a superior court, had issued an interlocutory injunction prohibiting this activity, which is to say, the judge in *Dolphin Delivery* did exactly what Gotlib J. did in *Dagenais.*

And the union's claim in *Dolphin Delivery* was the same as that of the C.B.C.. The union argued that the injunction should be overturned as an unjustifiable limit on a *Charter* guarantee. The Supreme Court refused to do this, concluding, in the words of McIntyre J., that the *Charter* applied only to the acts of the "legislative, executive and administrative branches of government",[5] but not, apparently to judicial acts.

In *Dagenais* Lamer C.J. got around this problem by simply not referring to it. Instead he took the view, basing himself on other passages in McIntyre J.'s judgment in *Dolphin Delivery*, and the judgment of Iacobucci J. in *R.* v. *Salituro*,[6] that "common law rules"[7] and "common law principles"[8] must be "developed"[9] or "changed"[10] by the judges in such a way as to make them "consistent"[11] with "Charter values".[12] He could, thus, he believed, use the *Charter* as a standard by which to assess and, if necessary, "adapt"[13] the existing law with respect to publication bans.

The question of how the C.B.C. was able to advance its position before a court is equally problematic and was dealt with in an equally unsatisfactory manner.

Prior to the *Dagenais* decision, many people had believed that section 24(1) of the *Charter* afforded journalists the necessary standing to challenge rulings made during the course of judicial proceedings to which they were not parties, but which they, nonetheless, claimed had the effect of limiting freedom of expression.[14] The difficulty with this approach is that it appears, in certain cases at least, to involve a direct *Charter*-based challenge to a judicial act, something which the decision in *Dolphin Delivery* said would not be entertained by the courts.

Lamer C.J. was forced to invent a complicated procedure in order to bypass this obstacle.

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[5] *Ibid.*

[6] [1991] 3 S.C.R. 654.

[7] *Ibid.* at 675.

[8] McIntyre J. referred to common law "principles" in *Dolphin Delivery*, *supra* footnote 4 at 603.

[9] This was the verb chosen by McIntyre J., *ibid.*

[10] This was Iacobucci J.'s verb, *supra* footnote 6.

[11] Both McIntyre J. and Iacobucci J. chose this adjective.

[12] "Charter values" is a phrase used over and over by Supreme Court of Canada judges. Both McIntyre J. and Iacobucci J. used it in *Dolphin Delivery* and *Salituro*.

[13] This was the Chief Justice's verb in *Dagenais supra* footnote 1 at 38.

[14] An early example is *Re Southam Inc. and the Queen (No. 1)* (1983), 41 O.R. (2d) 113 (C.A.).

He took the view that, when a judge issues an order banning publication of material by the mass media without having given appropriate consideration to the *Charter* "value" of freedom of expression, the judge is making an "error of law". This would be the case whether the ban had been made in the exercise of the judge's common law jurisdiction or pursuant to a discretion created by statute.[15] Again, it must be noted that this indirect approach is necessitated by Lamer C.J.'s refusal to simply grasp the nettle and say that a *Charter*-based challenge to a judicial order can be made directly. Lamer C.J.'s indirect approach spawned further complexity, since he was now obliged to make a distinction between the procedures to be followed in challenging a publication ban issued by an inferior court and one issued by a superior court.

The Chief Justice ruled that where a publication ban is made by an inferior court judge it can be reviewed by way of *certiorari* proceedings brought before a superior court and where the ban is made by a trial judge in a superior court it can be appealed directly to the Supreme Court of Canada pursuant to section 40(1) of the *Supreme Court Act*.[16]

The result, both procedurally and substantively, is that third parties can now bring *Charter*-based challenges to purely judicial acts before the courts. Unfortunately, they will have to call them something else and follow an unduly complicated procedure to do so, simply because Lamer C.J. was unwilling to acknowledge that he was overruling the court's decision in *Dolphin Delivery*.

The remaining issue to be dealt with has to do with the way the courts approach section 1 of the *Charter*. Section 1 was intended to give legislatures a substantial discretion to impose limits on *Charter* guarantees. But the Supreme Court of Canada quickly stood section 1 on its 1986 decision in *R.* v. *Oakes*.[17] The approach to section 1 created in that decision — what has come to be called the "Oakes test", implying that judges are engaged in an objective, scientific process — went a long way towards making it practically impossible for legislatures to create any acceptable limits on *Charter* rights. In subsequent decisions the Supreme Court backed away from the full rigour of *Oakes*, suggesting that the judges understood that they had created too high a standard for the political organs of the state to reach.[18]

Lamer C.J.'s contribution in *Dagenais* was to add a gloss to *Oakes*, a gloss which would, once again, make it difficult for the state to justify limits on *Charter* rights and, in addition, turn the judicial application of section 1 into little more than an exercise in unbridled subjectivity.

It is unnecessary to elaborate the *Oakes* analysis. In an attempt to discern whether a limit on a *Charter* guarantee is reasonable and one which can be

[15] As is the case, for example, with a number of sections of the *Criminal Code*, R.S.C. 1985, c. C-46. See sections 486(3), 539(1) and 517(1).

[16] R.S.C. 1985, c. S-19.

[17] [1986] 1 S.C.R. 103.

[18] As examples, see *Law Society of B.C.* v. *Andrews*, [1989] 1 S.C.R. 143; *A.G. Québec* v. *Irwin Toy Ltd.*, [1989] 1 S.C.R. 927 and *Committee for the Commonwealth of Canada* v. *Canada*, [1991] 1 S.C.R. 139.

justified in a free and democratic society, the judges purport to assess both the end which the state is seeking to achieve through the limit and the particular means adopted to achieve it. This results, especially in cases involving freedom of expression, in judgments which are lengthy and convoluted.[19] Lamer C.J.'s contribution in *Dagenais* was to "the third part of the second branch" of the *Oakes* analysis. This is the "deleterious effects" question. The idea here is that even if the state's object is "pressing and substantial" and even if the means chosen are "proportional" to that object, there may still be "deleterious effects" which lead a judge to conclude the particular limit cannot be justified.

Until *Dagenais* the courts had not made much of the "deleterious effects" criterion. But Lamer C.J. seems to have decided it should be turned into an all-purpose standard for assessing the acceptability of any limit on a *Charter* guarantee. Thus he said:

> ... I believe that the third step of the second branch of the *Oakes* test requires both that the underlying *objective* of a measure and the *salutary effects* that actually result from its implementation be proportional to the deleterious effects the measure has on fundamental rights and freedoms. A legislative objective may be pressing and substantial, the means chosen may be rationally connected to that objective, and less right-impairing alternatives may not be available. Nonetheless, even if the importance of the *objective itself* (when viewed in the abstract) outweighs the deleterious effects on protected rights, it is still possible that the actual *salutary effects* of the legislation will not be sufficient to justify these negative effects.

And a bit further on he added, just in case the matter was not entirely clear:

> I would, therefore, rephrase the third part of the *Oakes* test as follows: there must be a proportionality between the deleterious effects of the measures which are responsible for limiting the rights or freedoms in question and the objective, *and there must be a proportionality between the deleterious and the salutary effects of the measures.*[20]

I am not persuaded these words have meaning. The Chief Justice was operating at such a level of abstraction that I fail to see how anyone could actually apply his analysis to concrete facts. Nor is there any reason to imagine judges are in any way better equipped to perform such an analysis than anyone else.

Equally problematic, the Chief Justice's gloss seems likely only to reinforce the worst aspect of the *Oakes* analysis. Rather than elaborating the nature, purpose and content of the various guarantees in the *Charter*, which is what judges are supposed to be doing, the *Oakes* analysis has led them to engage in a series of *ad hoc* evaluations of the desirability or otherwise of particular policies adopted by the political organs of the state. Lamer C.J.'s contribution seems to suggest that the judge, at the end of the day, should simply ask — "do I like this policy, or not?" If the judge likes the particular policy, then the limit on the *Charter* right is justified; otherwise it is not!

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[19] See especially *R.* v. *Keegstra*, [1990] 3 S.C.R. 697 and *R.* v. *Butler*, [1992] 1 S.C.R. 452.

[20] Emphasis in the original, *ibid* at 46.

2. *Publication Bans and the Charter*

The dissenting judgment of Gonthier J. is a well thought out, persuasive analysis of the competing claims of the mass media and the judicial process. Nevertheless, the judgment of Lamer C.J. should be reviewed first.

a. *The Majority Judgment*

Although the bulk of Lamer C.J.'s judgment was devoted to an analysis of the constitutionality of publication bans, he did not address the jurisprudential nature of such orders. I will confine this part of my discussion to publication bans issued, as in *Dagenais*, by superior court judges in the exercise of their inherent authority. I will not deal here with orders made by inferior court judges exercising a discretion created by statute.

A publication ban is an injunction. In the circumstances of *Dagenais* the ban was an interlocutory injunction, in that it was made during the course of proceedings which had not yet themselves been resolved.

The purpose of such an injunction, which is the general purpose underlying all injunctions, is to restrain or prevent the commission of an unlawful act. What exactly is the unlawful act a publication ban seeks to prevent? It is the commission of the crime of contempt of court through breaching the *sub-judice* rule.

The House of Lords, in 1979, sought to establish a general definition for contempt of court.

> ... although criminal contempts of court may take a variety of forms they all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process.[21]

According to Cory J.A. of the Ontario Court of Appeal (as he then was), giving judgment in 1988:

> There are two types of conduct which come within the scope of criminal contempt. Firstly, there is contempt in the face of the court. This type of offence encompasses any word spoken or act done in or in the precinct of the court which obstructs or interferes with the due administration of justice or is calculated to do so. It would include assaults committed in the court, insults to the court made in the presence of the court, interruption of court proceedings, a refusal of a witness to be sworn or, after being sworn, refusal to answer. Secondly, the offence may be committed by acts which are committed outside the court. Contempt not in the face of the court includes words spoken or published or acts done which are intended to interfere or are likely to interfere with the fair administration of justice. Examples of that type of contempt are publications which are intended or are likely to prejudice the fair trial or conduct of a criminal or civil proceeding or publications which scandalize or otherwise lower the authority of the court, and acts which would obstruct persons having duties to discharge in a court of justice.[22]

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[21] *A.G.* v. *Leveller Magazine Ltd. and Others*, [1979] A.C. 440 at 449.

[22] *R.* v. *Kopyto* (1988), 24 O.A.C. 81.

There are, thus, two broad categories of criminal contempt — those committed in the court, known as *in facie* contempts, and those committed outside the court, known as *ex facie* contempts.

A breach of the *sub-judice* rule is a form of *ex facie* contempt. The purpose of the *sub-judice* rule is to delay the publication of information which could have the effect of prejudicing the outcome of proceedings which are pending or actually before the courts. The classic justification for the rule is found in the judgment of Lord Reid in *A.G.* v. *Times Newspapers Ltd.*.

> The law on this subject is and must be founded entirely on public policy. It is not there to protect the private rights of parties to a litigation or prosecution. It is there to prevent interference with the administration of justice and it should in my judgment be limited to what is reasonably necessary for that purpose. Public policy requires a balancing of interests which may conflict. Freedom of speech should not be limited to any greater extent than is necessary but it cannot be allowed where there would be real prejudice to the administration of justice.[23]

Lord Reid went on to caution that the power of the courts to issue an injunction to prevent a breach of the *sub-judice* rule should only be exercised when there exists "a real risk" of prejudice to the administration of justice, "as opposed to a remote possibility".[24] And it must be repeated that such a publication ban is not an absolute prohibition against ever publishing the material in question. The ban delays publication until the real risk of prejudice to the administration of justice has passed. In the circumstances of the original injunction in *Dagenais*, the C.B.C. would have been free to air its "docudrama" as soon as the four criminal trials had been completed.

It is not clear that Lamer C.J. was made aware of these principles. He certainly did not appear to grasp the source or purpose of the authority possessed by a judge of a superior court to issue an injunction in order to prevent a breach of the *sub-judice* rule. Nor is it clear that he appreciated that the *sub-judice* rule applies to civil, as well as criminal, proceedings. These *lacunae* may be explained, in part, by the exceedingly unsatisfactory state of the Canadian law of criminal contempt of court. Contempt of court is the only common law crime still enforced in Canada, the authority of judges to do so being expressly preserved by section 9 of the *Criminal Code*. The result of this is that the crime of contempt remains vague, amorphous and uncertain. One might have thought this would offend against the guarantee set out in section 11(g) of the *Charter*, but in 1984 the Ontario Court of Appeal decided that it did not.[25]

So what, in fact, did the Chief Justice say about publication bans?

He asserted that:

> The common law rule governing publication bans has been traditionally understood as requiring those seeking a ban to demonstrate that there is a real and substantial risk of interference with the right to a fair trial.[26]

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[23] [1973] 3 All E.R. 54 at 60 (H.L.).

[24] *Ibid.* at 63.

[25] *R.* v. *Cohn* (1984) 48 O.R. (2d) 65.

[26] *Dagenais*, *supra* footnote 1 at 36.

The trouble, in his view, with the way this rule was applied in practice was that it " ... emphasized the right to a fair trial over the free expression interests of those affected by the ban".[27] This is undoubtedly a correct statement of the way Canadian courts viewed these matters before *Dagenais*.[28] But the Chief Justice did not believe this approach was consistent with the dictates of the *Charter*. The *Charter* guarantees both the right to a fair trial and freedom of expression and Lamer C.J. believed that both should be accorded "equal status".[29] Thus, a common law rule which tended to favour one over the other was "inappropriate".[30] There was no "hierarchy" of *Charter* rights. Rather, the Chief Justice decided, " ... *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights".[31]

But how, exactly, was this "balance" to be achieved?

The Chief Justice said that the judge hearing an application for a publication ban must consider the objective underlying the particular ban *and* the likely effect of the ban on freedom of expression. To this end he formulated a rule.

A publication ban should only be ordered when:

a. such a ban is *necessary* in order to prevent a real and substantial risk to the fairness of the trial because reasonably available alternative measures will not prevent the risk; and

b. the salutary effects of the publication ban outweigh the deleterious effects to the free expression of those affected by the ban.[32]

What we might call the "first step (or "part") of the first branch of the *Dagenais* test" is little more than a restatement of the standard which Lord Reid laid down in the *Times Newspapers* decision. But what did Lamer C.J. have in mind in his "second step" when he spoke of "reasonably available alternative measures"? These, in his view, included "adjourning trials, changing venues, sequestering jurors, allowing challenges for cause and *voir dires* during jury selection, and providing strong judicial direction to the jury".[33] Now I am not sure exactly what is meant by "adjourning trials", but if it includes adjourning a criminal prosecution *sine die* because adverse publicity has destroyed forever the possibility of an accused person receiving a fair trial, this does not seem like much of an alternative.[34] And the matter of sequestering juries is exceedingly problematic. While our *Criminal Code* implicitly recognises the possibility,[35] the fact is that the sequestering of Canadian juries is highly unusual. There seem

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[27] *Ibid.* at 37.

[28] As illustrative decisions, see *R.* v. *Banville* (1983), 45 N.B.R. (3d) 134 (Q.B.) and *Re Smith* (1984), 38 C.R. (3d) 209 (Ont. C.A.).

[29] *Dagenais*, *supra* footnote 1 at 37.

[30] *Ibid.*

[31] *Ibid.*

[32] *Ibid.* at 38.

[33] *Ibid.* at 40.

[34] See the discussion in *R.* v. *Vermette*, [1988] 1 S.C.R. 985.

[35] See section 647(2).

to be two reasons for this. First, to sequester a juror is, in effect, to imprison a juror. A citizen who serves on a jury is already making a substantial sacrifice; to deprive the citizen who is undergoing some hardship in order to perform a public duty of his freedom is rightly regarded in our system as something to be avoided. Second, sequestering is usually unnecessary. This is one positive result of our rules which inhibit pre-trial publicity. Conversely, sequestering juries is far more common in the United States because of its laxer rules about publicity. One consequence of the Chief Justice's decision in *Dagenais* is that we may well see more juries being sequestered.

It was in the "second branch" of his "test" that the Chief Justice sought to find a means of balancing the two *Charter* guarantees of freedom of expression and the right to a fair trial.

To begin with, Lamer C.J. rejected what he called the "clash model",[36] the notion that freedom of expression and the right to a fair trial are inherently antimonous. The Chief Justice asserted that the "clash model" was peculiarly "American" and, therefore, unsuited to "Canadian jurisprudence", an argument which appears at odds with the general drift of his judgment. But, more important, was the Chief Justice correct when he claimed " ... it is not the case that freedom of expression and the accused's right to a fair trial are always in conflict"? His goal of "balancing" the two only makes sense if this claim is well-founded.

But surely it cannot be except at a level of utter abstraction. Our legal system already permits the publication of substantial information about pending trials. It does this because it is obvious that such information could not possibly prejudice the outcome of a trial. But the Chief Justice has missed the point. It is only when the information in question raises a risk of prejudicing subsequent proceedings that anyone is going to bother making an application for a publication ban. The Chief Justice's claim can only make sense if we assume that applications for publication bans are, first, common and, second, made capriciously or frivolously. Such evidence as is available, however, suggests that few such applications are made and even fewer granted.[37]

The very notion of "balancing" is, if thought about concretely, open to doubt. While it is clear that there can be *limits* on free expression which do not necessarily stifle or suppress it, that is, that there can be degrees of "freeness" of expression, can there likewise be degrees of fairness of a particular trial? It seems to me that a trial is either fair or it is not. Freedom of expression can be compromised to the extent of delaying the publication of certain information, but once the essential fairness of a trial has been undermined, the entire proceeding is compromised.

The fundamental flaw in the Chief Justice's notion of "balance" is that it denies that judges have a duty to make choices. In the final instance a judge must

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[36] *Dagenais*, *supra* footnote 1 at 40-42.

[37] See B. Cantley, "Judges Aren't Always So Quick to Impose Publication Bans" (1994) 1 Media 16.

decide between allowing the mass media to do as they please and thereby risk prejudicing a trial or not. The methodology outlined by Lamer C.J. is wrong in suggesting that judges can avoid making difficult decisions like this. Our legal system is adversarial. The judge, at the end of the day, must favour one side over the other. This is the responsibility judges accept when they take their oath of office. They cannot avoid it through abstract chatter about "balancing".

The Chief Justice was on more solid ground, however, when he mused about the "efficacy" of publication bans. As he noted in an empirically correct, albeit ungrammatical, observation: "There is no data available on this issue."[38] He was also correct, I believe, when he suggested that jurors are far more capable than our legal system has often imagined of putting extraneous matters out of their minds. But the Chief Justice did not even advert to the responsibility, borne by all judges, of ensuring the integrity of the judicial process. The fairness of a particular trial, important as it undoubtedly is, is not the only consideration which a judge dealing with a matter of this nature should have in mind. There is a clear and inescapable contradiction between the ever-expanding demands of the mass media and the fundamental requirements of the judicial process. The Chief Justice did not, with respect, appear to have grasped the existence, let alone the extent, of this contradiction.

Lamer C.J. concluded his judgement by "suggesting" six "guidelines" which judges should follow in dealing with applications for publication bans. Some of these make sense, others do not. The ones which do not make sense invite judges to weigh highly speculative considerations and, what may be even worse, appear to demand that judges in these situations produce lengthy and abstract judgments.

The first suggests that the judge dealing with the application for the ban should give standing to the mass media to permit them to take part in the hearing. The idea that injunctions can be issued *ex parte* is offensive to basic principles of our legal system. If the mass media are to be ordered not to publish something, they, or their representatives, should be heard before such an order is made. There are, however, two major practical difficulties. How much advance notice of an application must be given and who, exactly, is to be notified? The Chief Justice's guidelines provide no direction on these points.

The second guideline says "the judge should, where possible, review the publication at issue".[39] This does not go far enough. Reading the story or viewing the videotape should be mandatory. How can judges possibly assess whether a publication creates a real and substantial risk of prejudice to a particular proceeding unless they have read or seen or listened to the publication? Clearly, however — and this could be what Lamer C.J. had in mind when he said "where possible" — the judge can only "review the publication", if it actually exists. A publication ban can also be issued as a means of pre-empting publication.

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[38] *Dagenais*, *supra* footnote 1 at 42.

[39] *Ibid.* at 47.

The Chief Justice's third guideline states, in a somewhat convoluted fashion, that the burden of proof rests with the party applying for the publication ban.

Guideline four raises complications. The judge must "consider all other options besides the ban" — adjourning the trial (which, of course, has not started yet and may not for some time), change of venue, sequestration, challenges for cause and *voir dires* when it comes time to select the jury and directions to the jury — and "find there is no reasonable and effective alternative available".[40] This task is simply impossible; it is impossible because it demands that the judge hearing the application for the publication ban be able to predict the future. How, for example, can a judge in such a position assess the entire range of information and opinion which might possibly be published concerning a pending trial if a publication ban were not to be made? Trial judges — even judges of the Supreme Court of Canada — do not possess this capacity.

The fifth guideline would require the judge to "consider all possible ways to limit the ban" and to, in fact, "limit the ban as much as possible."[41] How?

It is in his sixth guideline that the Chief Justice attained previously unimagined heights of abstraction.

> The judge must weigh the importance of the objectives of the particular ban and its probable effects against the importance of the particular expression that will be limited to ensure that the positive and negative effects of the ban are proportionate.[42] The methodological difficulty with this stricture should be obvious. The Chief Justice has demanded that judges "weigh" matters which are, by their nature, unquantifiable; and, in addition, to do so prospectively, to "weigh" "effects" which may not occur until some time in the future, if at all. And once again the language chosen is highly obfuscating, investing what must be an entirely subjective decision with an aura of scientific objectivity.

Now I wish to examine the judgment of Gonthier J.

b. *The Dissenting Judgment of Gonthier J.*

Gonthier J.'s judgment is clear, concrete and rooted in both an understanding of and a respect for Canadian legal traditions.

To begin with, Gonthier J. recognised that the authority to issue publication bans was derived from the law of criminal contempt of court. Further, he accepted that publication bans were a legitimate tool used by courts to ensure the fairness of judicial proceedings, that the point of such orders, in the words of another judge, was to "... prevent the dissemination before the conclusion of the trial of media publicity that might be prejudicial to the accused's fair trial."[43]

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[40] *Ibid.* at 48.

[41] *Ibid.*

[42] *Ibid.*

[43] *Ibid.* at 73 quoting Thorson J.A. in *Re Global Communications and A.G. for Canada* (1984), 10 C.C.C. (3d) 97 at 111-112 (Ont. C.A.). This is, in fact, the same decision as the *Re Smith* referred to in footnote 28.

Gonthier J. understood that the Canadian tradition had tended to favour the protection of the right to a fair trial over claims advanced by the mass media. He believed that this was a sound tradition and saw no need to abandon it in favour of an American approach. In this connection he offered a strong general admonition to many present and former judges of the Supreme Court of Canada.

> I disagree with those who argue that the *Charter* requires that we emulate American society and discard the unique balance of fundamental values which existed in this country prior to 1982.[44]

He also realised that the existence of publication bans in no way altered or comprised the fundamental principle that Canadian courts are to be open to the public and the mass media — a rather important point, but one not mentioned in the judgment of the Chief Justice.

Gonthier J. also rejected the complex and abstract judicial methodology invented by the Chief Justice. He suggested instead a simple and direct approach, one which judges hearing applications for publication bans could actually follow.

> What is required is that the trial judge be satisfied that the publication will create a real and substantial risk to the fairness of the trial, which available alternative measures will not prevent.[45]

Finally, Gonthier J. actually applied his analysis to the substance of the "docudrama" "The Boys of St. Vincent" itself. Surely it was to achieve precisely this that the parties bothered to appeal the matter to the Supreme Court. There is, by way of contrast, a distinctly other-worldly quality to the Chief Justice's judgment. The major factor in making his views seem so ethereal is that he did not devote a word of his thirty page judgment to discussion of "The Boys of St. Vincent". The extraordinary result is that it is impossible to know how the Chief Justice and the other judges who agreed with him analysed "The Boys of St. Vincent" and why they concluded that it could not be the object of a publication ban.

Conclusion

I want to end by discussing five implications which flow from the *Dagenais* decision. All but one, it seems to me, are undesirable.

First, the decision opens the door a bit wider for the invocation of the *Charter* in purely private litigation where there is no direct state involvement. It must have been the intention of those who created it that the *Charter* was to guarantee certain rights against the state and *only* against the state. *Dolphin Delivery* appeared to affirm this. But if, as the majority judgment suggests, *all* common law rules and principles can be subjected to *Charter*-based scrutiny, it is difficult to imagine any litigation in which a party would not be able to raise the *Charter*.

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[44] *Dagenais*, *supra* footnote 1 at 76.

[45] *Ibid.* at 78.

Second, *Dagenais* is yet another example of how Supreme Court of Canada decisions, especially *Charter* decisions, are deficient as jurisprudence. I would have thought that the one feature which should distinguish judicial decisions from other decisions is they are capable of being generalised. This must be particularly so when we talk about decisions of a final court of appeal. But if there is one consistent feature of recent Supreme Court decisions, it is that they cannot be generalised, that each stands alone, purely *ad hoc*. Taking *Dagenais* as a starting point it would be impossible to even guess what a given judge seised of an application for a publication ban might decide. There is a further difficulty here. We have had a body of case-law which did address certain issues as to what the mass media might or might not say about judicial proceedings. One result of *Dagenais* is that this entire body of law is now effectively superceded. I have no idea what replaces it. The only thing that can be said with certainty is that each specific issue will have to be raised again and resolved again.

The third implication is a further step in the Americanisation of Canada. Our mass media will look a little more like the American media and Canadian trials will look a little more like American trials.

Fourth, the concrete result of the *Dagenais* decision is bad. The mass media will now be less accountable, less amenable to legal control than they had been. Power without public accountability would seem to be anathema in a democracy, but this is clearly what the mass media want and in *Dagenais* the Supreme Court of Canada accommodated them.

The good implication arising from *Dagenais* is, I hope, to draw attention to the need for codification of the law of contempt of court. The need has been around for a long time, but the manifold deficiencies in the *Dagenais* decision might spur Parliament to action.[46]

[46] See the discussion in R. Martin, "Contempt of Court: The Effect of the Charter" in Philip Anisman and Allen M. Linden, eds., *The Media, the Courts and the Charter* (Toronto: Carswell, 1986) at 207.

Book Reviews
Comptes rendus

A Guide to Construction Liens in Ontario (Second Edition).

By H. KIRSH.

Toronto: Butterworths, 1995. Pp. 510 ($125.00).

Reviewed by J. Stephen Tatrallyay*

Butterworth's has just published the second edition of Harvey Kirsh's *A Guide to Construction Liens in Ontario*, which I have had an opportunity to review. The original edition was published in 1984, and a considerable amount of legislative change and judicial interpretation has taken place since that time, which Kirsh has tried to take into account in preparing the second edition.

An introductory chapter explores the history of Mechanics' Lien legislation in general and the *Construction Lien Act* in particular, including a most interesting analysis of the reasons for each legislative change to the *Construction Lien Act* since its enactment.

Kirsh then turns in the next chapter to the lien itself, dealing thoroughly with issues of entitlement, scope, the nature of lien rights, defective liens and the curative provisions of the *Act*, and including an in depth exploration of issues relating to ownership of projects for lien purposes as well as a discussion of the general lien. The portion of the chapter which deals with the topic of the purchaser as owner has been entirely rewritten for the second edition.

Chapter three is entitled the "The Statutory Holdbacks" and explores the payors' obligations with respect to basic and finishing holdbacks although not notice holdback. Particularly useful is the section "Payments in Reduction of Holdback".

The fourth chapter deals with the expiry, preservation and perfection of liens. Of necessity, Kirsh explores the concept of substantial performance as well as some of the issues surrounding the certification thereof. Kirsh then turns to the topic of the preservation of the lien, with a series of helpful diagrams graphically depicting various timeliness issues which may arise in lien litigation. In dealing also with the perfection of liens, Kirsh clarifies the concept of sheltering which has caused considerable difficulty for both lawyers and judges. To round out the chapter, Kirsh summarizes the cases and legislation relating to the expiry of perfected liens due to the passage of time, particularly the recent legislative amendments.

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In chapter five, "The Trust Fund", Kirsh provides an overview of the various types of trusts created by the CLA, including both an analysis of how the trusts are created and the circumstances in which payments may be made from the trust funds. He then canvasses fact situations in which contractors, banks, owners and the principals of corporate actors may be held liable for breach of trust.

The sixth chapter deals with the "Right to Information" provisions, primarily found in Section 39 of the CLA, and also discusses methods of enforcing those rights available to the various parties entitled to them. The chapter also considers the *defendants'* rights to information available through the cross-examination provisions of Section 40.

Chapter seven covers the removal of liens from title, either by discharge, release or court order, by withdrawal of notice, by postponement or by order vacating the lien. The chapter provides a valuable technical guide both to the procedural aspects of obtaining an order removing a lien from title, and to the various sections of the Act under which it may be appropriate to move in any given circumstance.

The next chapter, "Extraordinary Remedies", deals firstly with the appointment of lien trustees, considering in particular the powers which courts can give to trustees. Kirsh then turns to the topic of Labour and Material Payment Bonds, dealing with issues such as the giving of notice, the commencement of actions to enforce claims and the surety's right of subrogation once it has paid a claim.

Chapter nine provides a thorough review of jurisdiction, practice and procedural issues. Substantial portions of this chapter have been considerably rewritten since the publication of the first edition.

The tenth chapter begins with an explanation of the relevance of the competition in priority between lien claimants and mortgagees and proceeds to explore in some depth the legislative scheme which has been set in place to resolve such questions. Again the text of the first edition has been substantially revised to take into account the considerable developments in the law in this area over the last few years. This is followed by a discussion of competing priorities as between persons having liens, including the priorities between various classes and priorities within a class. A brief discussion of the competing priorities between liens and executions is followed by an analysis of the relative priorities as between lien and trust claims on the one hand and the "super priority" in favour of Revenue Canada created by section 224(1.2) of the *Income Tax Act*, on the other hand.

The last chapter deals with liens against public lands. Kirsh summarizes the public policy considerations surrounding the special treatment given to liens on such lands and then addresses, in sequence, the various types of public lands which have been earmarked for special treatment. The chapter includes a particularly helpful discussion of what

may or may not be held to be a Crown agency to which the special provisions of the Act would apply. *Quaere*, for example, whether Ontario Hydro is a Crown agency.

Finally, Kirsh includes some sixty-eight precedents, ranging from the materials surrounding the appointment of a lien trustee, to a statement of claim in a trust action, to a motion for a declaration of substantial performance, as well as the standard precedents one would expect to find in a lien action such as the statement of claim, statement of defence and counterclaim, and material for the removal of a lien from title. The precedents have all been updated to bring them completely into line, not only with current legal developments but also with the updated *Rules of Civil Procedure* and Practice Directions. An index of precedents is a new innovation which is most helpful.

Kirsh's simple and direct writing style and practical approach to problems, as well as his treatment of the law which is generally exhaustive on any given subject, make this book an essential volume in the library of any practitioner of construction litigation.

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Law and English Railway Capitalism: 1825-1875.

By RANDE KOSTAL.

Oxford: Clarendon Press, 1994. Pp. 417. (incl. index, bibliography and appendix). Pp. 372 (text only). ($121.50).

Reviewed by S.M. Wexler*

This is a very good book which should be of interest to lawyers in a wide variety of different areas. The development of the English railroads in the 19th century cuts across many different aspects of law. This book has chapters on stock promotions, contract law, property law, monopolies, local taxation and tort: something for everyone, in other words.

I first looked at Kostal's book because I am interested in tort, and railways were the biggest cause of litigation when modern tort law was being constructed. I found the chapter on torts very interesting. It is primarily about the difference between the judicial treatment of suits by injured railway workers and suits by injured railway passengers. Kostal tries to explain why such favourable law was developed about injured passengers and such unfavourable law about injured workers. He provides a useful historical analysis of a wide range of issues, particularly the fellow servant rule, vicarious liability and Lord Campbell's Act.

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The discussion of these issues is careful and technical enough to be interesting to tort specialists, but not so technical as to be beyond the reach of those who are not specialists in tort. I also learned some surprising and interesting little facts in this chapter, for instance, that Blackburn J., the principal judge in *Rylands* v. *Fletcher*, wrote an opinion advocating strict liability when a passenger had been injured in a railway accident.[1]

But, even putting my specialty aside, I found this book fascinating. Indeed, a few lines in it did what only the very best books have ever done for me: altered my gestalt about something. The following passage showed me in a flash that, unbeknownst to myself, I had been assuming that there was one natural, inevitable way to think about railroads, when in fact, there was another, quite different way to think about them.

> Parliamentarians of the 1830s and 1840s had not intended to create private commercial monopolies over steam railway transport. They had imagined, rather, that the private railway Acts would establish a network of privately owned rail 'ways' accessible to any party suitably equipped and able to pay tolls. As President of the Board of Trade Edward Cardwell observed in 1854, 'Railways grew up under a state of law which contemplated open roads.' They were conceived as a complementary addition to England's pre-existing system of inland transport. Public access was explicitly guaranteed in all of the early railway statutes.[2]

According to the legal theory under which they were first created, railroads were supposed to be just like roads, only made of rails! The idea was that if you paid a toll, you could take your train for a spin, just the way you could take your horse for a spin on the private toll turnpikes which existed in England at the time: just the way now you can take a car out on the highway or a plane up in the air; just the way, then and now, you can take a ship out on the ocean. This is a completely different idea of a railroad from the one I had been carrying around.

> As early as 1842, however, English judges recognized that the public access clauses of the railway Acts were a dead letter. 'The supposition of free competition of carriers on the same railway', Lord Denman stated in a parochial tax case, 'is practically little else than absurd.' Almost immediately upon their introduction it was universally agreed that railways could be operated safely and efficiently only when a single company controlled access to a line.[3]

"Railways consolidated what had always been separate in English transport: ownership of the road and the vehicles running over it."[4] The actual legal problem that arose as a result of giving railroads total control over their own tracks was not whether people could use their own trains on the rail lines, but whether the multitude of package delivery companies that had existed for a long time in England could keep doing business by shipping their packages on the railways. Could the railways, as they tried to do, refuse to carry the shipments

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[1] *Ibid.* at 303. *Readhead* v. *Midland Railway* (1867), 2 L.R. 412 at 433 (Q.B.).

[2] *Ibid.* at 183.

[3] *Ibid.* In the past few years, our telephone system has been revolutionized by allowing competitive access to phone lines. I'd bet dollars to donuts the phone companies argued that telephones "could be operated safely and efficiently only when a single company controlled access to a line."

[4] *Ibid.* at 233.

of package companies? Could they, as they also tried to do, charge prohibitively high rates for them? In other words, could the railroads use their monopoly of the new, fast transport to drive the old package companies out of business? Kostal discusses this legal issue at length, but I will not. I point out the two different ideas about what a railroad is because once you see that the basic legal idea of what a railroad is changed in the course of building the railroads, you begin to get some idea of just how much stress the building and running of the English railroads must have put on the law in the 19th Century, and equally, just how influential the law must have been in the creation of the railways.

Kostal's book is about the effect the law had on the railroads and the effect the railroads had on the law. The most striking thing about the book is that it treats law not as a separate, theoretical enterprise, but as a practical part of the real world, and it does this, not in a general or abstract way, but in terms of a concrete legal problem, one of the biggest, if not the biggest, problem the law has ever faced.

> From their earliest beginnings railway companies were engaged in a ceaseless struggle with disgruntled investors and creditors, rival companies and commercial concerns, landowners and local officials, passengers and employees. Almost invariably these disputes were mediated by legal professionals hired by parties on both sides of a dispute. Generally these disputes ended in some negotiated compromise, but often they did not. The introduction of steam railways produced an enormous amount of civil litigation, and a vast body of reported and unreported 'railway law' decisions. Many of the railway industry's most crucial conflicts, conflicts involving the commercial fortunes of both individual companies and the industry as a whole, were decided by judges and juries. In any meaningful sense English railway capitalism was regulated by the mid-nineteenth century English state, it was regulated principally by the ideas, techniques, procedures and decisions of lawyers at work inside and outside the courts of law.[5]

The creation of a railway system was an all-embracing social phenomenon. Constructing the railroads required Parliament to authorize the expropriation, by private, profit-making companies, of extensive tracts of other people's land. This required the development of a new approach to property. I found Kostal's discussion of this new approach quite instructive, particularly his use of the word "utilitarian" to describe the new approach. I had often heard it said that Jeremy Bentham's development of utilitarianism in the early 1800's was associated with the rise of new industrial wealth in England, and that it reflected an attack on the values of the old landed gentry. I had never been able to understand this, however. Bentham developed utilitarianism in connection with punishment. He said that in determining the amount of punishment to be inflicted on a criminal, it was wrong to look backward at "values" which could supposedly be found in the desserts of the criminal. Utilitarianism required us to look exclusively forward, Bentham said, at the consequences, beneficial or harmful, of any proposed course of conduct, including punishment. I could never see how this had anything to do with the values of new industrial wealth

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[5] *Ibid.* at 7-8.

[6] *Ibid.* at 175.

or old landed gentry, but allowing railroads to confiscate the land of an individual because the railroads serve the interests of the majority, is both a prefect blending of utilitarianism and new industrial wealth and a perfect rejection of the values of the old landed gentry. In the words of a contemporary legal writer whom Kostal quotes, it put "the 'sanctity' of private domains ... up against the requirements of public utility."[6]

Another thing about this book which is quite striking is that Kostal is not just interested in law. He is interested in lawyers. Or to put the matter somewhat differently, Kostal sees what lawyers do as part of what law is. He has one whole chapter on the relationship between the railroads and their lawyers and throughout the book he discusses the way lawyers influenced the law. He talks, for instance, about how a handful of barristers and a somewhat larger group of solicitors monopolized the practice of appearing before Parliament as advocates for and against private railway bills. These private bills authorized expropriations and were, thus, essential to the railroads (and to their opponents). Kostal explains how the lawyers kept control of the committee hearings, by treating them as 'parliamentary litigation' and how by custom or 'trade discipline,' the parliamentary lawyers forced both sides to pay extraordinarily high minimum fees for this representation, fees which were many times higher than the fees paid for representation in even the highest English courts. Clients paid for services they never got because lawyers took multiple briefs, all of which they could not perform. A client, therefore, might wind up paying high fees to a senior barrister and several juniors. "[L]eading parliamentary barristers with multiple briefs could earn £1,200 a day ..."[7] in an age when railway clerks earned £120 a year. "By 1862, the industry as a whole [not counting its opponents] had disbursed a staggering total of £30 million on it parliamentary business [though not all of it to lawyers]."[8]

Kostal also discusses the role lawyers played in the riotous surge and disastrous collapse of the market for joint-stock railway futures in 1845.

> [A]lmost 1400 new railway companies were registered by promoters in the first ten months of 1845. Over 450 joint-stock railway projects were registered in September 1845 alone. Another 363 were registered in October. Scores of additional schemes were advertised but never formally registered. The railway mania was one of the greatest episodes of frenzied company promotion and speculation in world history.[9]

Overnight, hundreds of new, assetless railway proposals were floated in the hope that they would someday be turned into companies on which Parliament would confer the right to confiscate land and build a new railway line. Railway company shares traded at tremendous premiums. Even when there were no "shares," (because the companies had yet to be formed) railway scrip, which evidenced the right to buy shares, if and when shares were issued, traded at huge premiums. Even letters of allotment (which evidenced the right to buy scrip) were being sold at high premiums. All this speculation was based on nothing

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[7] *Ibid.* at 123.

[8] *Ibid.* at 126.

[9] *Ibid.* at 29.

more than investment fever and the names of the prominent men who had been appointed to the pre-incorporation committees. Lawyers were deeply involved.

> It was well known to promoters that the name of an eminent firm of solicitors on a prospectus was a strong inducement to the subscription of shares. Such names lent an aura of dependability and integrity even to the most unlikely schemes. [B]ubble promoters sometimes misappropriated the names of established firms. But the commercial value of established legal reputation also explained why some of the most respected English solicitors had become directly involved in bubble companies. The more speculative the joint-stock project, the greater the need for the glint of respectability on its prospectus. As a consequence, reputable legal men were offered large sums of money merely for the display of their names.[10]

Not only did lawyers lend their names to the crooked schemes of others, Kostal presents evidence which suggests that lawyers may have been among the biggest crooks of all.

> In May 1845, the threshold of the subsequent avalanche of railway promotions, 31 of 75 concerns registered that month were companies in which lawyers made up at least 25 per cent of the promoters. Seven of these railways were promoted by lawyers alone.[11]

The major source for Kostal's book is the newspapers of the railway industry. He is one of the first scholars to make extensive use of newspapers to analyze legal history. He reports that the railway industry was very critical of lawyers and blamed them for the crash, but he himself does not blame the crash on lawyers. Kostal says that lawyers were part of the problem, but he is very careful not blame to them for it. He also says the law was part of the problem. There had been stock crashes in 1825 and 1835. After the latter, a House of Commons committee, chaired by William Gladstone, had set to "investigate how joint-stock companies had been organized and promoted in the past, and how this activity might be better regulated in the future."[12] This committee decided that deceit in the promotions was the big evil, particularly deceit as to those who supported the schemes. *An Act for the Registration, Incorporation and Regulation of Joint Stock Companies* (*JSC Act*) was drafted by Gladstone and passed by Parliament in September 1844. It required full disclosure and registration.

> Gladstone's legislation was an attempt to improve the operation of a free market in corporate securities. Investors were to be given the raw data needed to distinguish legitimate companies from bubbles, and then left to make their own decisions about share purchases. The principle regulatory role of the government was to ensure the free flow of accurate information about new companies *before* they offered shares.[13]

The *JSC Act* did not work. "[T]the new company legislation had actually worked to facilitate, not to deter, bubble swindles. The system of provisional registration lent a deceptive gloss to fraud and recklessness."[14] Again, this is not

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[10] *Ibid.* at 22.

[11] *Ibid.* at 45. This evidence is not conclusive because the sessional papers for July-October 1845 were destroyed.

[12] *Ibid.* at 21.

[13] *Ibid.* at 26 (emphasis in the original).

[14] *Ibid.* at 51.

Kostal's criticism. He presents it as the judgment of the railway industry newspapers.

If I have any criticism of this book, it is that Kostal determinedly refuses to make moral judgments about things. He describes what people and institutions did, but he does not criticize anyone for anything. He does not offer any opinion about whether what law or lawyers did was good or bad, nor any opinion about whether what railroads or railroad men did was good or bad. I take it this refraining from moral judgment is deliberate on Kostal's part. I assume he thinks it is wrong for a historian to criticize or praise the people or institutions he or she studies. I assume he thinks a historian's job is simply to describe and explain what happened, without making moral judgments about it.[15]

I can see the point of this. There is nothing about being a historian that gives a person a special right to be judgmental: praise and criticism have no special validity just because they come from a historian. I can also see that I would have liked this book a lot less if Kostal had made moral judgments with which I disagreed. But still, I do not like the current style of historical scholarship: analytical and non-judgmental. Let me give an example of where I think this style is defective. Kostal describes the stock market crash of 1845. He says that when the crash came "[t]he fortunes and life savings of tens of thousands of people had been wiped out."[16] Naturally, the law was called upon to pick up the pieces. This is one of law's roles: to pick up the pieces after disasters.

Kostal describes three kinds of litigation that arose as a result of the crash of 1845. First, small businessmen who had provided services (like advertising and printing) on credit to the hundreds of provisional railway companies that went broke, sued the 'provisional committeemen' (the big names on the prospectuses) for what had been given to the companies. Second, scrip buyers sued the provisional committeemen, alleging that they had never gotten the shares to which they were entitled. Finally, companies sued investors who had made deposits on shares but refused to pay the balance when the shares dropped in value. "By the end of 1846 the three courts of common law together had issued 24,000 more writs than in the previous year"![17]

Kostal describes how the courts dealt with this flood of litigation. Each type of case involved points of law which had not been decided up to that point and while Kostal deals with the legal technicalities, I will not. I am more interested in the overall picture that he paints. What he shows is that in *all three kinds of cases*, the courts initially made one decision, then a few years later, changed their minds. As we would expect, in all three kinds of cases, the early decisions were used to pressure settlements from prospective defendants, settlements

[15] The closest thing to a moral judgment in this book is when Kostal says someone was "undone by a combination of sloppy lawyering and judicial antagonism." (*Ibid.* at 262) "Judicial antagonism" may not be critical: it merely says the judges were against the plaintiff. But it seems to me that "sloppy lawyering" is clearly critical. Perhaps Kostal would say it was merely descriptive.

[16] *Ibid.* at 41.

[17] *Ibid.* at 53-4.

which the later cases reveal they should not have made. In the earliest suits by merchants against committeemen, the courts said that the merchants could succeed; many committeemen settled, but a few years later, the courts said the merchants could not succeed. In the earliest suits by investors against committeemen, the courts said that the investors could succeed; many committeemen settled, then, a few years later, the courts said the investors could not succeed. In the earliest cases by the railways against their scrip holders and allottees, the courts said that the railways could succeed; many scrip holders and allottees settled, but then, a few years later, the courts said the railways could not succeed.

Kostal discusses this in a paragraph which I think is central to the non-judgmental approach to history. The paragraph begins with the question: "Did the English common law system fail the railway industry at a crucial moment in its development?"[18] It is surprising that given his non-judgmental stance, Kostal would even ask this question. He certainly will not answer it. The very next sentence says: "There are, of course, no objective criteria to bring to bear on this question." This I take to be the essence of the non-judgmental approach and I do not agree with it. One of the things law promises to do for us is to make decisions on which we can rely. If, over a year or two, the law had reversed itself on one out of the three new issues which were presented to it (or even on two out of the three) we might say that the law had not failed. But the law failed to live up to its own promises on all three of the new issues that were presented to it. I think it is objectively possible to call this a failure.[19] Certainly, the railway industry newspapers thought the law had failed. The next sentence in the paragraph says: "It is of considerable importance to the legal history of industrial capitalism, however, that leading railway managers and journalists believed that the system had miscarried."[20]

As a historian, Kostal can report moral judgments made by others. He cannot, however, be critical himself. This leaves him, as the last half of the paragraph I have been discussing reveals, in a very awkward position.

> The railway panic generated unprecedented numbers of novel legal claims. The claims were heard in three different common law courts, in the context of an ancient and inflexible manner of pleading, and by judges of different ability, training, and acumen. In the glare of intense public scrutiny the judges were asked to fashion a new jurisprudence of joint-stock capitalism. The fate of thousands of private fortunes, and of the recovery of a vital new industry, had been left to them to decide. Added to these pressures was the uncertainty of the jury system and a notoriously clumsy system of case review and appeal. In this light it is understandable that the judges sometimes were uncertain or unnerved. The post-panic frenzy of litigation simply had overwhelmed a system of law evolved in less litigious and dynamic centuries.[21]

[18] *Ibid.* at 108.

[19] It is worth noting that Kostal describes several other instances, in which the law did not fail in this way: several instances in which its decisions were remarkably consistent.

[20] *Ibid.*

[21] *Ibid.*

I assume Kostal thinks this is *not* a moral judgment. It is just more history. He is simply recording the fact that the creation of the railways exerted enough pressure to overwhelm 19th century English law. But any legal system is "clumsy," "ancient" and "inflexible" when tested by new problems. The test of a legal system is how well it handles new problems with clumsy, ancient and inflexible procedures. The whole point of a legal system, after all, is to bring old values and techniques to the solution of new problems. If the old values and techniques don't work, even in their own terms, that is not simply a matter of historical fact, it is an objective basis for being critical.

I think Kostal winds up excusing the law for its failure. This is the danger of restricting oneself to explanations, of refusing to praise or blame. If you explain things well enough, if you list all the causes of a failure, it ceases to seem like a failure. It simply becomes what happened. This makes moral judgment impossible, not just for historians, but for everyone. It means that even the worst excesses can be explained away as the result of the historical forces that produced them. For instance, Kostal says that though

> railway employees were maimed and killed much more frequently than railway passengers ... England's common law judges created a body of decisional law that was exceedingly generous to injured railway passengers, but almost intractably ungenerous to injured railway labourers.[22]

In denying relief to injured railway workers, the law, as Kostal shows, was highly consistent from the very beginning. This means we cannot criticize the law for being inconsistent or indecisive in this area, but we can certainly criticize it for being cruel and unjust. I find it disappointing that Kostal does not make this criticism, but perhaps he does not need to: I can make this criticism for myself and, as I say, even given this one small disappointment, I think this is a very good book.

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The Charter of Rights and the Legalization of Politics in Canada (Revised, Updated and Expanded Edition).

By MICHAEL MANDEL.

Toronto: Thompson Educational Publishing Inc. 1994. Pp. 542. ($24.95).

Reviewed by Janet Epp Buckingham*

The *Canadian Charter of Rights and Freedoms*[1] wrought *the* most significant change in the history of the law Canada. Most in the legal profession did not,

[22] *Ibid.* at 255.

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[1] *Canada Act, 1982*, U.K., 1982, c.11.

and indeed, could not have foreseen the dramatic change both in the law and the way law and politics is now practiced in Canada.[2] There was an expectation that the Canadian courts would maintain their traditional conservatism, meaning, deference to the legislatures. Nothing could be farther from reality. The courts have not shied away from considering political issues as abortion, euthanasia and the legal rights of same sex couples. It is trite to say that the *Charter* has legalized politics.

Michael Mandel tackles the issues relating to the legalization of politics head on. He is avowedly left of centre and attempts to give a comprehensive picture of the jurisprudential history of the *Charter* from that left wing armchair. For the most part, he succeeds. He is able to dissect cases along with the political manoeuvring surrounding each case and put it in the context of not only other cases but also the political climate of the moment.

Mandel's thesis is:

> When the status quo of social power...is threatened in the legislative arena, the courts will adopt an activist and interventionist approach to support that status quo. When conservative forces are in office, the courts will become passive and deferential, with the same net effect on the status quo.[3]

Mandel applies this thesis to the politics of language in Québec and Manitoba, to criminal law, labour law and finally, to equality issues.

Mandel argues that while the *Charter* was "sold" to Canadians as being democratic, it is in reality quite undemocratic. He claims that then Prime Minister Pierre Trudeau's sole motivation in entrenching a Charter of Rights was as a solution to Quebec sovereignty by means of the enforced bilingualization of Canada. This ignores Trudeau's strong commitment to the liberal ideology of individual rights.

Mandel analyzes the education language cases both pre-*Charter* and post-*Charter* as well as the cases involving bilingual statutes and traffic tickets to show how Trudeau's purpose succeeded. He rightly points out that the "large and liberal" interpretation of French language rights in the *Charter* evaporated once the Parti Québécois was defeated in 1985 and the threat to Canadian unity passed (for the moment). When there was a threat to Canadian unity, bilingualism was legally enforced. When unity was not in issue, the courts tended to argue that bilingualism was a political issue or, on technical grounds, that bilingualism need not be enforced.

The changes to the criminal law and procedure in Canada are predictable to anyone who has studied American criminal law under the Bill of Rights. Criminals are seen as an inherently disadvantaged group needing all the protections a Charter of Rights can afford them. The courts have taken the

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[2] See, for example, J.G. Castel, "The Canadian Charter of Rights and Freedoms." (1983) 61 Can. Bar Rev. 1; Gérard V. La Forest, "The Canadian Charter of Rights and Freedoms: An Overview." (1983) 61 Can. Bar Rev. 20.

[3] Mandel, *supra* at 159.

highest possible view of privacy, presumption of innocence, right to counsel to throw out surprising numbers of cases.[4] Mandel, surprisingly, decries this, pointing out that frequently the victims of crime are more disadvantaged than the perpetrators of crime. Such can be said of the demise of the rape shield law.[5] In other areas of criminal law, however, once police practice conforms to *Charter* requirements, there are fewer acquittals on the basis of technicalities.

Where a disadvantaged group does make gains under the *Charter* these are often lost in the political process. Refugees gained the advantage of an oral hearing in *Singh*[6] but the government overhauled the legislation to bring even fewer refugees to Canada. He also points out that in the refugee amnesty which resulted from the backlog caused by *Singh*, many who were not refugees gained entry to Canada resulting in possibly fewer legitimate refugees. Thus, what looked like a victory under the *Charter*, in the final analysis, left refugees worse off.

The most interesting analysis in the book is that contrasting the interpretation of rights of corporations with rights of unions. Corporations have been found to have freedom to advertise even to the detriment of vulnerable children.[7] "Freedom of religion" has allowed retail businesses to be open on Sunday[8] despite the fact that the majority of employees are low paid women who must leave their families to make a small wage. Unions, on the other hand, were found to have no right to strike, no rights to secondary picketing and no rights to use funds collected from non-union members for political purposes.[9] Unions are creatures of statute so their rights are tied to those given by statute. The Supreme Court of Canada has found that these restrictions are demonstrably justified while the rights of corporations are those of all citizens so must not be curtailed.

Lastly Mandel applies his thesis to the area of equality rights. He deals specifically with aboriginal peoples, women and abortion. Aboriginal people were essentially shut out of the constitutional process of the *Charter* and have gained nothing from it. In fact, the decisions on racism[10] do not give much comfort to Canadians at risk from white supremacists. Women, have for the most part been on the defensive. Equality has just as often been

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[4] See for example *R.* v. *Askov*, [1990] 2 S.C.R. 1199.

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

[6] *Re Singh and Minister of Employment and Immigration and 6 other appeals*, [1985] 1 S.C.R. 177.

[7] See *Attorney-General of Québec* v. *Irwin Toy Ltd.*, [1989] 1 S.C.R. 927.

[8] *R.* v. *Big M Drug Mart*, [1985] 1 S.C.R. 295.

[9] See *Public Service Alliance of Canada* v. *The Queen in Right of Canada*, [1987] 1 S.C.R. 424; *Retail, Wholesale & Department Store Union, Local 580 et al.* v.*Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573; and *Lavigne* v. *Ontario Public Service Employees Union*, [1991] 2 S.C.R. 211.

[10] E.g. *R.* v. *Zundel*, [1992] 2 S.C.R. 731.

used against rights of women as for them. Only in the area of abortion has there been an unequivocal gain for women.

The section on equality is Mandel's weakest. It is difficult to deal comprehensively with the decisions under section 15 of the *Charter*. He gives a passing comment to rights of gays under the *Charter* but does not deal with euthanasia, or rights of the terminally ill. He deals with abortion but not the fetal right's case.[11] He deals with the right of a woman to abort, decries the lack of a right to strike and loss of democracy yet ignores the Ontario Attorney General's bid to have an injunction to prevent pro-life picketers from picketing abortion clinics, hospitals and doctor's homes.[12] Mandel merely indicates that the Ontario NDP government "took strong measures to end harassment of women seeking abortions"[13] but does not mention that the means was exactly the type of use of the law which he decries in other situations.

Mandel is somewhat weak in his sourcing. When analyzing situations outside his area of competence, *i.e.* internationally, he often seems to rely on only one or two sources. He tends to include information about American trends and events in Europe only to buttress his arguments. One is left with the impression that the book is a polemic. Of course, Mandel makes no attempt to be even-handed in any of his analysis but with Canadian issues, the reader tends to have enough background information to make an informed and critical analysis of his argument.

Mandel includes a lengthy section analyzing both the Meech Lake Accord and the Charlottetown Accord. These are interesting from an historical perspective but not much else. Neither became law nor were litigated in the courts. So that the analysis seems out of place.

Despite its shortcomings, *The Charter of Rights and the Legalization of Politics in Canada* is a worthy attempt at a daunting task. It is totally biased. It takes potshots at lawyers, the legal profession, legal academics who hold a different viewpoint and anyone right of centre. It is not an all inclusive look at the state of *Charter* litigation but tends to focus only on those cases supporting Mandel's thesis. Ultimately, it is a good, left wing social commentary on the state of *Charter* litigation. This kind of critique of *Charter* interpretation serves to further our understanding of the role of the *Charter* and, indeed, of the courts in Canada today.

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[11] *R.* v. *Sullivan and Lemay*, [1991] 1 S.C.R. 489.

[12] *Ontario (Attorney General)* v. *Dieleman* (1994), 20 O.R. (3d) 229 (Gen. Div.).

[13] Mandel, *supra* at 432.

Abortion, Conscience and Democracy.

By MARK R. MACGUIGAN.

Toronto: Hounslow Press, 1994. Pp. x, 165. ($16.99 — paper).

Reviewed by Patricia Hughes*

Six years have passed since the Supreme Court of Canada struck down the abortion provisions of the *Criminal Code*,[1] yet abortion remains at the forefront of the political agenda.[2] For lawmakers, abortion may test not only their courage, but their ability and their willingness to distinguish their public role from their personal views. In *Abortion, Conscience and Democracy*, Mark MacGuigan offers his own philosophical response, developed as a Parliamentarian and Minister of Justice and Attorney General of Canada, to the dilemma of recognizing as legally legitimate something he nevertheless personally considers to be morally wrong.[3]

MacGuigan's theoretical position grows from the parallel developments of pluralist democracy and of the liberalization of religion, merging in the secular democratic state, the separation of the political from the religious, and the growth of secular principles to guide the determination of moral decisions. Yet he sees the religious and the secular as ultimately intertwined: "a religiously neutral, pluralist democracy . . . is more than a mere toleration of diversity. It is an acceptance of pluralistic society as God's plan for the world". Freedom of conscience, on which he grounds women's claim to abortion, and majority rights find themselves living side by side in the secular democracy. Thus legislation outlawing abortion "would violate the first principle of democracy [commitment to freedom of conscience], it would not respect the democratic compact, and it would be incapable of enforcement".

MacGuigan therefore concludes that the moral wrongness of directly

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[1] *R.* v. *Morgentaler*, [1988] 1 S.C.R. 30.

[2] In *R.* v. *Morgentaler*, [1993] 3 S.C.R. 463, the Supreme Court of Canada declared that legislation enacted in Nova Scotia, ostensibly to protect the integrity of the health care system, was *ultra vires* as being in relation to Parliament's criminal law power under section 91(27) of the *Constitution Act, 1867*. Efforts by the New Brunswick government to restrict abortion to hospitals were rejected the Court of Queen's Bench, (*Morgentaler* v. *New Brunswick (Attorney General)* (1994), 117 D.L.R. (4th) 753, a decision affirmed by the Court of Appeal, [1995] N.B.J. No. 40 (QL). As of this writing, the New Brunswick government has sought leave to appeal to the Supreme Court of Canada. On the other hand, the Ontario Attorney General obtained an injunction against picketers harassing patients as they entered clinics and doctors at their offices and homes: *Ontario (Attorney General)* v. *Dieleman* (1994), 20 O.R. (3d) 229 (Gen. Div.).

[3] As a Federal Court judge, MacGuigan does not have to consider cases relating to abortion.

induced abortion does not mean that it should be prohibited by criminal law. Yet since he acknowledges that the criminal law is dependent on morality for its legitimacy and acceptance, he must distinguish morality which must be regulated from that which we are free to follow in our own lives but which we cannot force on others. In a secular democracy, says MacGuigan, we do not have the right to impose our own moral beliefs on society if they are not shared by a sufficient number of people or if our doing so will result in the denial of others the right to act on their moral beliefs. But while the private sphere should not be regulated, private acts which have public consequences *are* amenable to regulation.

Permissible regulation lies in the salience of freedom of conscience in a democracy, for MacGuigan the most important of our liberties. By "conscience", he means being able to determine the most appropriate way to act in light of one's needs: its realization relies on people's "moral obligation to make themselves as knowledgeable as possible about correct behaviour and to act as effectively as possible on the basis of that knowledge". MacGuigan's is a functional conscience (for which, as he explains, "prudence" is a synonym) as much as it is an ethical one. The ability to restrain the exercise of conscience derives from its dual nature: negative conscience, the protection of which requires that no one is forced to act in a personal way contrary to one's beliefs (there is no limitation on this, it is absolute); and positive conscience: no one is restrained from acting in accordance with her or his beliefs, within appropriate limits, measured by reference to majority rule.

In relation to abortion, not surprisingly, the applicable notion of "conscience" shifts after the point of the foetus's viability; before that point, a woman's conscience (the only conscience at issue and one which underlies her decision and right to have an abortion) cannot be curtailed and thus abortion cannot be restricted; at viability, when there are two consciences to satisfy, the woman's and the foetus's, negative conscience ceases to be operative and it therefore becomes legitimate to impose limits on women's right to abortion. The woman's right is the right not to serve as an incubator (in MacGuigan's words, "the right to be unburdened of the fetus [sic]"), not the right to destroy the foetus, and thus when at least theoretically the foetus may survive when separated from the woman's body, it is acceptable to restrict women's exercise of conscience to circumstances involving their health or life.[4]

[4] He points out that his position does not require Catholics (and others opposed to abortion) to have abortions, although it requires them to know that abortions are being performed. In fact, compulsory abortion or sterilization is not something MacGuigan addresses (he does talk about euthanasia, believing it "illogical" that aiding suicide should be an offence); yet it is not insignificant that the pro-choice movement has been criticized for concentrating on access to abortion when a disproportionate number of poor women, black and white, as well as Native women and women with mental impairments have been subject to compulsory sterilization. The use of abortion to control family size in China and to select out female children in other places also indicate the complexity of the issue.

The point of viability, while conceptually clear, is in practice shifting ground. As medical advances make the point of viability earlier, women's access to abortion will decrease. And here we reach the sticking point in MacGuigan's theory. Superficially attractive as a philosophical treatise (this is not the same as saying that it is a superficial philosophical treatise — it is not — but rather a way of saying that its honesty and forthrightness may tempt the reader to accept it uncritically), *Abortion, Conscience and Democracy* fails at the end of the day to link the philosophical with the reality of abortion for many women.

MacGuigan's position is grounded in the rights of women who are "morally impelled to have abortions". This attribution of the demands of conscience provides a symmetry perhaps necessary to a thesis premised on rationality and logic. But in the nearly twenty-five years that I have been involved in this struggle, I have never heard a woman claim that she has been "morally impelled" to have an abortion. Rather, I have heard women talk about the failure of contraception, having to raise existing children singlehandedly, having conceived from rape, and young women who, like their male companions of the instant, were careless and faced severe disruption of their lives. These are not reasons which MacGuigan would recognize as legitimate after viability, but they are the reasons women need access to abortion. (I note, though, that MacGuigan reserves some of his strongest condemnation for the Vatican's rejection of contraception.)

He is also perhaps too sanguine about the impact of non-criminalization when he states that "[s]uch legislative silence avoids the withdrawal of access to abortion by physicians anxious to avoid lawsuits . . . .": physicians withdraw their services in the face of physical and governmental threats against them, as well as a legal proscription against abortion. In this regard, however, it must be pointed out that MacGuigan condemns the tactics of certain pro-life supporters, referring not only to the obvious acts of violence, but to the picketing of clinics and the harassment of staff and patients; these acts are "destructive of democracy". Catholics' moral obligation is to "act as living witnesses to the truth as they know it, not adopting the lower morality embodied in the law, but displaying by their lives the higher morality in which they believe". MacGuigan's commitment to "the rule of law" as reflective of majority wishes leads him to reject civil disobedience as an option because its purpose is to cause a change in the law; here the object is to cause a change in the attitudes underlying law — to change the majority view rather than override it.

Abortion, Conscience and Democracy is not a book about law as much as it is a book about a modern man committed to a medieval institution; he is the educated man whose affiliation is with a Church about which it has been said that it has "a vested interest in the preservation of ignorance".[5] Its most attentive audience will be those who share MacGuigan's dilemma of the honest person

[5] C.C. O'Brien, *On the Eve of the Millennium* (Concord, Ont: Anansi, 1994) at 15. O'Brien is referring to Third World birth and fertility rates which are satisfactory to the Vatican, but which rely on people's lack of information about contraception.

and it is to them he offers this principled resolution. It will not appeal to those most sure of the righteousness of their opposition to abortion under all circumstances; for them it likely goes too far. I am among those who will not be able to accept his ultimate position because it does not go far enough. Nevertheless, I value MacGuigan's thoughtful analysis as a reminder not only of why we value freedom of conscience, but also of the moral obligations which attach to its exercise, a stance which goes far beyond abortion to encompass the other significant controversies confronting Canada. Much as I admire the integrity of the individual man, however, I approach his position of toleration with caution, knowing that it would be regressive for women. As MacGuigan struggles with his dilemma, at least some readers will welcome the dialogue while fearful that the gentleness of those professing tolerance is often more successful in its lulling than the anger of more radical opponents.

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The Death of Common Sense: How Law Is Suffocating America.

By PHILIP K. HOWARD.

New York: Random House, 1994, Pp. 202. ($25.00).

Reviewed by Lorne Sossin* & Julia E. Hanigsberg**

Philip Howard, an American lawyer, has a simple point to make in this book, and he makes it effectively and often: the predominance of procedures and rules precludes any role for human judgment from shaping bureaucratic decision-making. The result is that the application of law in the administrative state is irrational, inappropriate, dangerous, costly, counterproductive and silly, depending on the example under scrutiny. While the setting for Howard's polemic is the American welfare state, the same arguments could as easily be levelled against bureaucratic decision-making in Canada, perhaps even more so, given that Canadian society is more heavily regulated, and public officials intervene in more areas of life in Canada than in the United States (e.g. health care).[1] The problem of discretion in the two welfare states is basically the same:

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[1] Indeed, the argument that bureaucracy should embrace more discretion, and rely less on abstract rules, recently has been made in the Canadian context as well; see L. Sossin, "Redistributing Democracy: Authority, Discretion and the Possibility of Engagement in the Welfare State" (1994) 26 Ottawa L. Rev. 1-46; and L. Sossin, "The Politics of Discretion: Towards a Critical Theory of Public Administration" (1993) 36 Can. Pub. Admin. 364; See also G. Albo *et al.*, eds., A *Different Kind of State?* (Toronto: Oxford University Press, 1993).

government is seen as a remote and arbitrary force issuing decisions that affect people's lives according to rules that do not always make sense.

The examples employed by Howard are as lively and readable as they are illustrative of bureaucracy's pathologies. For example, on the first page of the book, he chronicles the struggle of Mother Theresa's charitable mission to renovate an abandoned City-owned tenement building and convert it into a homeless shelter in New York. It took over a year to secure approval. The City then demanded elevators be put in, despite testimony that to use elevators would violate the Nuns vow of poverty. Faced with a bureaucracy unwilling to make exceptions, Mother Theresa packed up her good intentions and went elsewhere. Howard spins one horror story after another in this vein for most of the rest of the book. On one page, he is decries the designation of bricks as a "poisonous" substance because silicon might be released through sawing (despite the fact that bricks are never sawed), the next page he assails sentencing guidelines for drug offences which are tied to the weight of the drugs smuggled, allowing nefarious street-dealers who push joints to children to escape jail, while putting middle-men who arrange for the shipment of large quantities of drugs in jail for life. In Howard's formulation, the archetype of a law able to be applied justly is the U.S. Constitution, which is concise, ambiguous, and therefore flexible, while the archetype of a law susceptible to unjust application is the *Income Tax Act*, which is voluminous, precise, and therefore gives rise to loopholes for the rich, and more work for lawyers.

Howard's insights regarding the causes of this malaise are both random and compelling; for example, he contends that legislation such as the *Occupational Health and Safety Act* is saddled with detailed regulations attempting to provide a rule covering any conceivable judgment an official might be called upon to make, thus preventing officials from overlooking minor violations if a company's overall safety record is exemplary. He points to a bribery scandal involving local New York politicians and procurement contracts in which, due to complex checks and balances, no one appeared actually to have authority to give out the contracts. Because no one has ultimate responsibility for a given outcome, no one has any incentive to get the job done. This chapter, Howard entitles, "The Buck Stops Nowhere." Likewise, Howard considers why the process of constructing a desperately needed hospital in Queens, for which funds were budgeted in 1984, has taken over ten years to get off the ground. The villain this time is due process, as challenges, hearings and reviews between rival contractors drag on. These procedural guarantees have become, in Howards view, a tool with which to manipulate government for one's own ends. Hearings have supplanted handshakes, rules have taken the place of reason, and a system designed to increase fairness has instead handcuffed public officials, and inundated them in wasteful paperwork. To be sure, Howard makes a valuable point, but to where does this point lead us? For Howard, if the outcome of bureaucratic action makes sense, why should we quibble about the means? So what if a few boxes in the forms are skipped? On the one hand, "red tape" is undeniably a serious problem. On the other hand, a certain measure of chaos must always attach to democratic governance if it

is to be genuine. In Howard's argument, however, there is little room for such subtleties. It was Mussolini, after all, who made the trains run on time.

Howard next joins forces with the backlash against the folly of "political correctness" which is blamed with clogging the courts with frivolous discrimination suits and victim narratives. He alludes ominously to rumours he has heard of minority candidates who were not hired for positions because the employers feared they would be sued if they ever tried to fire the prospective employee. He recounts the story he has heard of a female student extorting good grades from a professor by threatening a harassment suit. These undocumented anecdotes suggest that those claiming to protect their rights are instead seeking to promote their power. To believe the portrait of America painted by Howard, it is a wonder any able-bodied, straight, white males are able to make ends meet. Most of Howard' s venom, however, is reserved for the handicapped, who insist on enormous expenditures to provide comparable services to those without comparable abilities. For example, he cites vast sums of money spent on special education for autistic students resulting in less money for books and resources for the majority of able-bodied students, or the time it takes a bus in New York City to accommodate a wheelchair bound rider during rush-hour, resulting in other passengers arriving to work late. Howard's conclusion is that rights have no right to dominate the debate on the distribution of public goods and services:

> Rights are not the language of democracy. Compromise is what democracy is about. Rights are the language of freedom, and are absolute because their role is to protect our liberty. By using the absolute power of freedom to accomplish reforms of democracy, we have undermined democracy and diminished our freedom.[2]

Howard's thesis, in the final analysis, is deeply conservative. Bureaucracy would be much better if it were run like a business, we are told.[3] Participatory procedures, more often than not, get in the way of the necessary and proper exercise of authority. Howard does not cite a single example of a wiser or more just bureaucratic decision resulting from increased public consultations. Feminists, environmentalists and other "lobbyists" are portrayed as powerful agents of special interest groups who pressure timid officials to take a myopic view of law, resulting in the fabric of American society coming apart at the seams. For example, a progressive and cheap program to install public, self-cleaning toilets on New York City streets was torpedoed by self-serving advocates of the handicapped who insisted on access to the public toilets, and

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[2] At 168.

[3] Howard's analysis adopts the argument that public managers should learn from private managers to always view the bottom line. This was best articulated in D. Osborne and T. Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector* (New York: Penguin, 1992); and institutionalized as the U.S. government's plan for administrative reform in Vice President Al Gore, *From Red Tape to Results: Creating a Government That Works Better and Costs Less: The Gore Report on Reinventing Government* (1993); see in the Canadian context, B.G. Peters & D.J. Savoie, "Reinventing Osborne and Gaebler: Lessons from the Gore Commission," (1994) 37 Can. Pub. Admin. 302.

refused the compromise of separate facilities. The hijacking of government by special interests, and the need to somehow return it to the control "of the people" is, by now, a familiar refrain in American politics. But rather than calling for town-hall meetings or grass-roots protests, Howard seems more interested in a flexible civil service motivated by results rather than process. The proper model for the application of law, in Howard's estimation, is the common law, where gridlock is the exception and adaptability the rule, and where Judges know best. Howard's answer to the morass of rigid rules and rudderless administration is to allow public officials the chance to simply muddle through: "Americans can do almost anything. We'll figure it out, and if we don't, we'll work so hard it won't matter."[4]

For common sense to be reintroduced into government, more discretion must be provided bureaucrats to apply laws outside the rigid confines of uniform rules and regulations, and free from the fear of vexatious litigation. What principles should guide this vast new delegation of power? In the absence of rules, how will bureaucrats justify the lack of uniformity in the application of law to those adversely affected by it? The brief, concluding chapter of the book, entitled portentously, "Releasing Ourselves," offers up only bland platitudes (such as "Judgment is to law as water is to crops"[5] and "The sunlight of common sense shines high above us whenever principles control")[6] and an abiding belief in the frontier values of self-reliance. To Howard, this means bureaucrats should be more decisive and citizens should tolerate bureaucratic indecision less. On this view, if only officials and those subject to their authority could sit down, look each other in the eye, and say "let's be reasonable," everything else would work itself out. Our criticism of this ideal is not that it is hopelessly utopian, but that it is dangerously naive. The application of law, like its formulation, is not a neutral enterprise. Some people benefit, others are burdened. It is one thing to remove waste and inefficiency from the administrative process, but it is altogether another to remove any participatory input from a structure of power with explicitly political outcomes.

Howard's failure to elaborate on what he means by "common sense", or more to the point, whose idea of "common sense" should take precedence, does not weaken his attack on a lamentable status quo. What it does do, though, is skirt the question of *why* increased bureaucratic discretion is so widely feared, and *who* benefits from the status quo. Despite its shortcomings, it should not come as a surprise that this book quickly has become a bestseller. It succeeds in touching a powerful chord with the multitude who believe in the idea of law but have lost faith in the practice of government.

Though this book is aimed at a general audience, its message will resonate most strongly with those who study or practice law. Each chapter is really a compendium of anecdotes, followed with a general proclamation on how the

[4] At 171.
[5] At 175.
[6] At 177.

stories demonstrates or expand upon the thesis. Additionally, short sections are devoted to the history of relevant topics such as due process, welfare rights, and judicial review, which serve as crisp introductions for those not familiar with the cornerstones of American Administrative Law. Though the book contains no footnotes, and neither promises nor delivers an academic treatise, Howard's prose is peppered with memorable quotations from American legal luminaries such as Cardozo, Brandeis, Frankfurter, Holmes as well as many law professors, political scientists, government officials and philosophers. All of these authorities are deployed to convey the same message: sensible judgments are good; senseless rules are bad.

The Death of Common Sense serves to highlight an interesting paradox. The premise of the book is that too much bureaucracy is bad for democracy, too much democracy is bad for bureaucracy, and the welfare state has found itself with too much of both. Howard addresses this premise with a catalogue of parables on how disconnected practical reason has become from both the legal and administrative processes with shape people's lives. If you are mad as hell at the system, this book will give you the basis for concluding that you ought not to take it any more; if you are looking for more than this, you may well be disappointed, for Howard concludes, "law cannot save us from ourselves."[7]

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The Happy Couple. Law and Literature.

Edited by J. NEVILLE TURNER and PAMELA WILLIAMS. Annandale, N.S.W.: The Federated Press, 1994.
Pp. xvii, 395. ($49.00).

Reviewed by M.H. Ogilvie*

A "protean collection" was the avowed goal of editors J. Neville Turner and Pamela Williams and a "protean collection", *The Happy Couple. Law and Literature,* truly is. But then so is the putative subject, Law and Literature, which seems to be not so much a single discipline but a grab bag into which many topics are tossed, as this volume intriguingly reveals. This collection of essays is based on the second Australian Law and Literature conference held in 1991 at Monash University and contains a selection of papers given at the conference and supplemented by others in order to ensure some thematic homogeneity to the book, for a total of thirty-two papers in all, together with "A Dickens of a Legal Quiz" presented at the conference diviner by Chief Justice Asche of the Northern Territory.

[7] At 187.

* M.H. Ogilvie, of the Department of Law, Carleton University, Ottawa.

Although this is the first volume published in Australia about Law and Literature, Australian topics are scarcely canvassed; rather, the collection is international in scope with English themes and topics prevailing. The volume is divided into four parts. The First Part consists of four essays primarily about the history of language, including essays on the language of Roman statutes; the rhetorical use of sixteenth century property law in Thomas Starky's Dialogue between Reginald Pole and Thomas Lupset; Edward Burke's aesthetics as revealed in his 1757 *A Philosophical Enquiry into the Origin of our Ideas of the Sublime and Beautiful;* and a study of how Victorian children are portrayed in the Poor Laws and by certain authors including Charles Dickens and Charles Kingsley.

The Second Part, consisting of fourteen essays, focusses on what most would regard as the core subject-matter of Law and Literature, that is, the use of law, legal institutions and legal actors in literature. This part will not disappoint the lover of literature as essays are found on such varied topics as infanticide in William Wordsworth and in Sir Walter Scott's *The Heart of Midlothian;* insanity in Dicken's *Bleak House,* John Galt's *The Entail* and Scott's *Redgauntlet; Bleak House* (of course); Dickens (of course); and Evelyn Waugh's views on marriage and divorce law reform as found in his journalism as well as in *A Handful of Dust.* In addition to essays on the classical English and Scottish authors, essays are also found on a variety of modern plays and films, including several Australian authors and their largely negative portrayals of lawyers in Australia, as well as on Holocaust and woman's literature.

The Third Part is the section with which black-letter lawyers will be most comfortable since it encompasses essays on a number of issues in which the law regulates literary and artistic production, including defamation, copyright and adhesion contractual practices. Finally, in the Fourth Part, entitled "On a Higher Plane [sic]", nine essays explore a variety of topics from judicial literary styles (Oliver Wendell Holmes and Lord Atkin respectively are their country's top judicial writers *qua* writers) to originalism in Australian constitutional interpretation to a truly devastating critique of Catherine MacKinnon's literary style and its consequences for the intellectual clarity and integrity of her feminism.

Protean indeed! It may be that no review and no reviewer in the world can do full justice to each of the thirty-two papers in this volume. Although, I am happy to report that I answered ten of the eleven questions in the Dicken's quiz correctly! However, several general observations might be made. First, and most obviously, the selection of topics and essays is not only catholic but cosmopolitan. Law and literature is not, as a legal topic, restricted to the literature of the British Isles. Rather, law and legal actors figure in both the "great books" and the contemporary books from New England to New South Wales. Unfortunately, the subject is still in its infancy, as many of these essays reveal, since they are concerned primarily with descriptions of the literary works in which law figures. More interesting will be the future studies in which underlying themes and approaches and grand themes incorporating the literature

of different times and places are essayed and debated.

Secondly, the subject of law and literature is so ragged at the edges that it remains difficult after reading this volume to define what it is about. Perhaps that will always be the case and deliberately so. It would have been interesting within the context of this particular collection to have one or two essays attempting to discuss and define what the topic is about. Perhaps that is asking too much at this time.

Finally, the essays in this collection are all of a high calibre and interesting to read in their own right. Some are even useful from a practitioner's perspective, both narrowly and broadly construed.

That literature reflects life is almost too trite to state. That literature occasionally also reflects law might be a salutary reminder of the truth of part of the final verse of Robert

Burn's *To a Louse:*

> O Wad some Pow'r the giftie gie us
> To see owrsels as others see us!
> It wad frae monie a blunder free us
> An' foolish notion.