Book Reviews
Comptes rendus

Osler, Hoskin & Harcourt: Portrait of a Partnership.

By CURTIS COLE.
Toronto: McGraw-Hill Ryerson, 1995. ($45.00-hardcover).

Reviewed by Lyndsay Campbell*

Osler, Hoskin & Harcourt: Portrait of a Partnership tells the story of the origins and growth of one of Canada's oldest law firms. The book represents the culmination of Dr. Curtis Cole's effort to produce perhaps one of the most difficult forms of historical studies; the commissioned institutional history. From my point of view as a reader with an interest in Canadian, particularly Torontian, legal history but no special interest in Oskin, Hosler & Harcourt, the book is a mixed success. Its strengths are its detail — i.e. the compendious research that evidently lies behind it — and the seven or eight really memorable, colourful incidents that populate the book. The partners of Osler, Hoskin & Harcourt are to be commended for allowing certain uncreditable stories in the firm's history to be revealed: they are an asset to the book.

Osler, Hoskin & Harcourt is arranged chronologically, with chapter divisions marking major rearrangements in the partnership or other large events. The first chapter sheds some light on how entry to the legal profession and success once one got there were achieved before the turn of the last century. Family and political connections and views figure largely. The firm's founder, Britton Bath Osler, seems to have had a knack for playing Goliath on controversial social issues. One of his early cases was *In Re: Hutchison and the Board of School Trustees of St. Catharines*, in which Osler successfully represented a school board that wished to prevent a black youth from attending a local public school. Osler's racist argument was rejected, but the Court found that the school was already full.

In Toronto in 1882 Osler joined forces with D'Alton McCarthy, apparently one of the most prominent appellate counsel in the country and also the personification of the "virulent Anglo-Canadian backlash against francophone self-determination." One of the most significant events for Canada and for McCarthy, Osler, Hoskin & Creelman was the North-West Rebellion of 1885. The Riel trial was a career highlight for Osler. Riel was prosecuted by Christopher Robinson, son of Sir John Beverley Robinson, but Britton Bath Osler was chosen by the government to marshall the

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evidence and examine the witnesses. Osler also opened the case for the Crown. Cole provides a detailed description of the procedure at the trial and the two sides' strategies.

Britton Bath Osler died in 1901 and D'Alton McCarthy in 1898. The firm underwent considerable upheaval in the result. The remaining lawyers stuck together for about fifteen years and then the three McCarthy relations who were on board at that point left. The most senior lawyer was Britton Bath Osler's nephew H.S. Osler, who had gone into semi-retirement by the time of his involvement with the so-called Teapot Dome scandal. That story lay behind the solicitor-client privilege case of *U.S.* v. *Mammoth Oil*. H.S. Osler had been approached by certain unscrupulous Americans with important political connections who were intent on making a lot of money out of the sale of some federally-owned American natural resources. Osler facilitated this sale, perhaps not entirely knowing what was going on, by incorporating a Canadian company. When the American authorities sought found out the identity of Osler's client, he relied on solicitor-client privilege, defending himself up to the Ontario Court of Appeal where he eventually lost; but it appears that by that time his evidence was no longer of very great assistance to the American authorities. Osler decided to protect his client even at the expense of his own public reputation, although his actions probably were good for his professional reputation as a protector of his clients' secrets.

The other potentially embarrassing skeleton from the firm's closet is the W.B. Reid affair. Reid stole from clients and other lawyers. Cole digs deep into Reid's past: he was a philanderer; he failed criminal law; and when he applied for admission to the Law Society, he could not find two people who had known him ten years and would swear to his good character — the Law Society ever so wisely eased up on the requirements for him. Cole emphasizes the shock and the long-lasting impact these revelations of betrayal had on the firm's partnership and its ability to open up to newcomers, especially during its dramatic expansion, which began in the 1950s.

Chapter six describes, among other things, Bertha Wilson's experiences at Osler, Hoskin & Harcourt. To the firm's credit, it permitted her to article there and kept her on afterwards, making her the first woman to practice with the firm. She became the first research lawyer, apparently partly because it was felt that women lawyers might not be all that well received by clients and partly because she was exceptionally good at it. Her research department became indispensable to the firm.

Most of the rest of the book is concerned with how the firm's relations with its clients changed over the years and how the clients changed the firm. Ken Dryden's time with the firm and his decision not to become a Bay Street lawyer are described in some detail. Also described is a nasty incident in which an employee of one of the firm's clients was held hostage in Saudi Arabia. The employee was induced to go to Saudi Arabia to resolve a dispute between the client company and one of its customers. The company

was then told the man would not leave until $500,000 was paid. J. Edgar Sexton's handling of the case is an inspiring display of diplomacy.

Toward the end of the book (i.e. from some time in the 1970s on), Cole was restricted, I suspect, by the needs of client confidentiality to discussing only the changing composition of the partnership and the considerations involved in choosing appropriate digs for the firm. I find myself unable to refrain from noting at this point that the over-a-page-long quotation from a letter weighing the merits of the space available in different office buildings seriously taxed my patience. My other quibble with the book is that although it is very well edited as a whole, the word "judgment" is spelled "judgement" throughout, which bothers pedants like me.

The book has two appendices, which may be of some interest. One lists all of the lawyers and students who have ever worked for the firm. The next lists Canada's largest law firms from 1862 to 1992 in ten year intervals and gives the names of the individuals who were practising with the firms at the beginning of each decade from 1862 to 1952.

This book will appeal mainly to those with a particular interest in or affiliation with Osler, Hoskin & Harcourt. It is dedicated to a meticulous description of the growth and development of the firm — how it has been owned and managed since its founding. This is not a weakness *per se* but this is the kind of book it is. It attempts to show how a remarkable legal institution came into being. The book's theme is that certain identifiable values have, for over a century, guided the firm's growth and its continuing success. The prologue, entitled "A Tradition of `Affection and Esteem'," introduces the theme that the firm's strength lies in its people's mutual concern and respect.

The book is well written but anecdotal. The march of time provides the narrative with what momentum it has — despite the effort I think I detect to make the working out in practice of the firm's philosophy drive the story forward. As I have said, *Osler, Hoskin & Harcourt* is obviously extremely carefully researched and prepared. Perhaps its real importance, however, is that it demonstrates an awareness by the partners of Osler, Hoskin & Harcourt that their firm has been and continues to be part of the legal-historical process. Many of the primary sources for legal history are privately held and are probably not even recognized as having historical importance. I hope that the publication of this book will encourage other firms to open themselves up to the historian's endeavour. Dr. Cole and Osler, Hoskin & Harcourt are to be credited and thanked for their contribution to the development of Canadian legal history.

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Rethinking Rights and Responsibilities.

By ARTHUR J. DYCK.
Cleveland: Pilgrim Press, 1993. Pp. 441. ($24.00 U.S.).

Reviewed by Michael J. Bryant*

Hobbes is out; Calvin is in. Rights-talk is wrong; responsibility is right. Nature eclipses nurture, and there are moral requisites to a community. Such are the hopeful messages coming out of Arthur J. Dyck's *Rethinking Rights & Responsibilities*, one of the better contributions to what can only be called a natural law revival.

What on earth could be significant to the bar about such a revival? The natural law revival is not only a movement taking place in the academy, but also one operating in the case law. For example, the criminal law jurisprudence, particularly in its post-*Charter* incarnation, has shifted markedly over the past decade, piercing through the often obscure debates over *mens rea* with a straightforward proposition: criminal fault will be determined not only by reference to defendants' rights, but also to individual and state responsibilities to oneself and one's community. That shift is one from individualism to natural law; from *Morgentaler* and *Vaillancourt*, on the one hand, to *Rodriguez* and *Creighton*, on the other.[1]

Moreover, whenever a philosophical shift occurs in the jurisprudence, even at the seemingly abstract level of constitutional law, the practical impact eventually becomes pervasive.[2] At the very least, the courts will inevitably cite, if not follow, notable movements in jurisprudential thought, as was the Canadian experience with the Dickson Court in the 1980s, and the American experience with the Warren Court in the 1960s.[3] In other words, any major revival in legal thinking is not only the hobgoblin of scholars, but is also a crystal ball for the bar and bench.

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[1] *Morgentaler* v. *The Queen*, [1988] 1 S.C.R. 30; *Vaillancourt* v. *The Queen*, [1987] 2 S.C.R. 636; *Rodriguez* v. *British Columbia (Attorney General)*, [1993] 3 S.C.R. 519; *R.* v. *Creighton*, [1993] 3 S.C.R. 3. See M.J. Bryant, "Criminal Fault As *Per* The Lamer Court and the Ghost of William McIntyre" (1995) 33 Osgoode Hall L.J. 79.

[2] *E.g.*, the power of the state to redistribute wealth through federal income tax was hardly an abstraction in 1895 when the United States Supreme Court usurped that power in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895). Yet *Pollock* had its precursors: the decision "exemplified the crystallization and culmination of ideas that had been gathering strength ... for over fifty years." M.J. Horwitz, *The Transformation of American Law: 1870-1960* (N.Y.: Oxford University Press, 1992) at 19.

[3] For the former, see Dickson Legacy Symposium (1991) 20 Man. L.J. at 263-561; for the latter, see P. Bobbitt, *Constitutional Fate: Theory of the Constitution* (N.Y.: Oxford University Press, 1982), *passim.*

Not long ago, however, natural law was so *passé* that only priests and pontiffs were caught mentioning the two words in close juxtaposition. After all, natural law and natural rights had been scorned by most jurisprudes and lawyers since the eighteenth century. Natural law was dismissed by Jeremy Bentham as "nothing but a phrase": its natural tendency was "to impel a man, by the force of conscience, to rise up in arms against any law whatever that he happens not to like."[4] John Hart Ely seconds that scorn in his masterwork, *Democracy and Distrust*, noting that, as a student in the 1950s, "moral and political philosophy were sneered at by knowledgeables." Ely concludes that "our society does not, rightly does not, accept the notion of a discoverable and objectively valid set of moral principles."[5]

Today, on the other hand, there has been a revival of natural law, broadly understood,[6] such that reference to the *pièce de resistance* of natural law — personal responsibility and community interests — have themselves become modern clichés. Best-sellers by William Bennett, Philip Howard, and even the Commission on Global Governance reflect the popular appeal of natural law thinking, with scholarly works by the Harvard and Oxbridge professorial joining the likes of political philosopher David Selbourne and a Justice of the Supreme Court of Canada.[7]

Amidst this revival, Professor Dyck's work remains unique in its breadth, simplicity, and appeal to lawyers and non-lawyers interested in the topic of rights and responsibilities. Many talk the talk of natural law these days, without necessarily identifying the traditions from which they borrow at will. Moreover, many lawyers understandably lack the philosophical background to muck around in the literature without inordinate extra reading. Dyck fills in those blanks, outlining the major traditions that inform our modern conception of "human rights," and setting forth his own formulation in a deeply personal way.

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[4] Cited in Sir E. Barker, *Traditions of Civility* (London: Cambridge University Press, 1948) at 311.

[5] J.H. Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980) at 53, 54.

[6] Reference to natural law is intended more for its association with thinkers advocating duties than for its opposition to positivism. But note, as one famous defender of natural rights put it, that "[i]t is difficult to achieve effective communication in any discussion of a term that bears as many meanings as does 'natural law.'" L. Fuller, "Human Purpose and Natural Law" (1956) 53 Journal of Philosophy 697 at 697.

[7] Respectively: W.J. Bennett, *The Book of Virtues: A Treasury of Great Moral Stories* (N.Y.: Simon & Schuster, 1993); P.K. Howard, *The Death of Common Sense* (N.Y.: Random House, 1994); *Our Global Neighbourhood: The Report of the Commission on Global Governance* (Oxford: Oxford University Press, 1995); J. Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980); M.A. Glendon, *Rights Talk: The Impoverishment of Political Discourse* (N.Y.: Free Press, 1991); L.L. Weinreb, *Oedipus at Fenway Park: What Rights Are and Why There Are Any* (Cambridge: Harvard University Press, 1994); D. Selbourne, *The Principle of Duty* (London: Sinclair-Stevenson, 1994); Honourable Mr. Justice Iacobucci, "The Evolution of Constitutional Rights and Corresponding Duties: The Leon Ladner Lecture" (1992) U.B.C. Law Rev. 1.

Dyck is no lawyer, but a Canadian professor at the Harvard Divinity School who has spent a lifetime mulling over the ideas and implications of rights and responsibilities. The advantages of this non-legal approach are quickly apparent to the reader, who requires no familiarity with the jargon of legal philosophers. Also, Dyck uncovers and then translates the principles operating underneath a particular judicial holding, often catching that which most of us would overlook for lack of theological training.

For example, his assessment of a notable "right to die" case, *Brophy* v. *New England Sinai Hospital Inc.*,[8] places the three opinions of the Court into separate traditions with distinct, underlying metaphysical assumptions. The majority opinion in *Brophy* was said to belong to the Benthamite tradition that individuals have the freedom to assert pleasure-seeking and pain-avoiding rights. One dissenting judgement "invokes Hobbes in his opinion," while another dissent belongs in the natural law tradition, emphasizing "the natural proclivities to refrain from killing and to protect and nurture life, which are expressions of the sociality of human nature."[9]

Throughout his book, Dyck returns to this categorization of human rights as conceptualized by Thomas Hobbes, J.S. Mills, Jeremy Bentham, and the author himself. Mills and Bentham are labelled "individualists," who view human beings not as social beings, but primarily as pleasure-seeking, pain-avoiding individuals that have the right to do whatever they want provided that they not harm others. Such individualism, Dyck explains, took its cue from the works of Hobbes, who "portrays human beings as naturally egoistic, self-interested, and self-preserving."[10]

Against these traditions of individualism and self-preservation, Dyck contrasts Calvinist thinking and then formulates his own rethinking of rights and responsibilities. After tracing the evolution of human rights from Hobbes to the present, he "reconceptualizes" rights as grounded in responsibilities, community and moral knowledge. At times the theory becomes cumbersome and unbalanced, as the author has a tendency to dwell on tangential points, occasionally providing too many factual details for his illustrations. Having said this, the exercise of reconceptualizing rights will always be cumbersome, and Dyck makes the going less rough by relying upon terms and concepts — such as "ideal companionship" and "loving impartiality" — which remain accessible to any reader.

Besides the ability to distill centuries of thought on human rights into a straightforward, almost folksy discussion, Dyck has produced some profound musings along the way. After a lengthy discussion about justice, taking up the last of three Parts of the text, he ends up defining "justice as the name for all those moral responsibilities, those moral bonds of community that we can expect from

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[8] 398 Mass. 417 (1986 S.C.).

[9] Dyck at 279-283.

[10] *Ibid.* at 390.

others, and if need be, claim from others as rights." Dyck then goes on to sum up his thesis in characteristic fashion:

> [N]urture, a set of moral responsibilities, requisite of community, [and] a demand for justice ... elicits what can guide us in areas such as physician-assisted suicide, divorce law, laws governing rescue, and health care policy. ... In all of these areas, it [is] also clear that human rights are only rendered actual by ensuring that individuals and communities meet the responsibilities on which our very lives and liberties to act depend.[11]

Such painstaking respect for individual rights sets his theory apart from those who trumpet the virtue of duties merely in reaction to liberal individualism. Arthur Dyck, like his theological contemporary overseas, Duncan Forrester, writes out of a need to state the obvious and the good, all with the best of human intentions.

Rethinking Rights and Responsibilities comes at the twilight of Dyck's career as an ethicist and health care-scholar. Worth the wait, this unsung Canadian produces a veritable *magnum opus* on human rights and responsibilities, emphasizing the utterance of one never without the other, whilst giving the fairest shake to those who have dominated the study and practise of "rights-talk" for so long.

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Domestic Abuse: Toward an Effective Legal Response.

By: ALBERTA LAW REFORM INSTITUTE.
Edmonton: Alberta Law Reform Institute, 1995. Pp. 203. (Free of charge).

Reviewed by Diana Ginn*

In the last several years, a number of provincial governments have introduced initiatives in response to criticisms that the legal system has not dealt effectively with family violence, and particularly, with wife assault. In 1990, a specialized family violence court was established in Winnipeg, to hear criminal cases involving spousal assault, child abuse and elder abuse.[1] In 1995, the Nova Scotia government announced its Family Violence Prevention Initiative, aimed at educating those within the justice system who deal with family violence and at reducing violence through effective and consistent enforcement of existing

[11] *Ibid.* at 393.

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[1] E.J. Ursel, "The Winnipeg Family Violence Court" in M. Valverde, L. MacLeod and K. Johnson, eds., *Wife Assault and the Canadian Criminal Justice System*, (Toronto: Centre of Criminology, University of Toronto, 1995) at 169.

laws. Also in 1995, Saskatchewan proclaimed into force its *Victims of Domestic Violence Act*.[2] Prince Edward Island is considering similar legislation.[3]

In June, 1995, the Alberta Law Reform Institute published a discussion paper, *Domestic Abuse: Toward an Effective Legal Response*.[4] While noting that "the law does not hold an exclusive position in either the response to, or the prevention of, domestic abuse"[5] and that the "law is particularly unhelpful to those victims who are committed, for whatever reason, to remaining in an abusive relationship,"[6] the Institute states that when victims of violence do turn to the legal system, the law should respond effectively, efficiently and with sensitivity. The Alberta Law Reform Institute recommends introducing legislation to provide for civil protection orders for victims of domestic abuse.[7] After reviewing a number of approaches to defining domestic relationships, the Institute concludes that the focus should be on relationships which demonstrate the "indicia of vulnerability".[8] These indicia include dependency, intimacy, potential for emotional intensity, privacy, continued physical proximity, and a reasonable inference that the relationship would involve trust.[9] The legislation would be aimed at "abusive and controlling behaviour"[10] such as physical or sexual assault, destruction of property, unauthorized entry into a residence, coercive or harassing behaviour, or emotional abuse.[11] The legislation would provide for protection remedies, property and compensation remedies, and prevention remedies.[12]

The chief protection remedy would be "clear and unequivocal"[13] no-contact orders. Where there are to be some exceptions to the no-contact order, whether because of shared responsibility for children or because the applicant requests continued contact, the Institute recommends that the order be very specific as to what contact is allowed and in exactly what circumstances. The Institute recommends that "consideration... be given"[14] to the circumstances in which a no-contact order could be granted *ex parte*. Since the Discussion Paper focuses on the provisions of domestic violence legislation, rather than the enforcement

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[2] S.S. 1994, c. V-6.02.

[3] Speech from the Throne, Government of Prince Edward Island, 1996.

[4] Alberta Law Reform Institute, *Domestic Abuse: Toward an Effective Legal Response* (Discussion Report No. 15) (Edmonton, June, 1995).

[5] *Ibid.* at 1.

[6] *Ibid.* at 47.

[7] *Ibid.* at 2. These orders would be in addition to the two civil remedies now available in Alberta: an interlocutory restraining order granted in other proceedings and, if the couple is married, an application for exclusive possession of the matrimonial home, under the *Matrimonial Property Act*, R.S.A., c. M-9, s. 19.

[8] *Ibid.* at 103.

[9] *Ibid.*

[10] *Ibid.* at 71.

[11] *Ibid.* at 73.

[12] *Ibid.* at 105.

[13] *Ibid.* at 106.

[14] *Ibid.* at 53.

of such legislation, the Institute simply notes a number of enforcement options, including mandatory arrest for breach of an order.[15]

The Law Reform Institute also poses a number of questions with regard to prevention orders:

- Should the court be able to grant a mutual order of no contact, where only one party has applied for such an order, and that party has shown that the respondent has engaged in conduct covered by the legislation?[16]

- Where a prevention order includes an interim custody order, should there be a presumption that the children's best interests are served by awarding temporary custody to the non-abusive parent?[17]

- Should the court be able to grant an order of exclusive possession of the residence, regardless of which of the parties owns or leases the home?[18]

The first question is rather troubling. The Discussion Paper notes that mutual orders have been criticized for a number of reasons, including the fact that such orders "send a message to both the abuser and the victim that the victim is equally to blame for the abuse"[19]. The opposing argument is that mutual orders are needed to ensure that an applicant does not obtain a no-contact order and then initiate contact herself or even "lure the respondent into the making of a breach".[20] Commenting on these opposing views is an article in itself. Briefly, however, by not making a recommendation against mutual orders, the Law Reform Institute appears to be presenting the two arguments as of equal weight, thus, in my view, legitimizing the view of battered women as vindictive, manipulative and largely responsible for their own misfortunes.

With regard to the next question, it is to be hoped that in any final recommendation, the Law Reform Institute does recommend such a presumption with regard to temporary custody provisions in a prevention order. This presumption might go some way to dispelling the idea that beating one's wife is somehow completely divorced from parenting - that one can be an abusive partner, but a good parent. Such a view ignores the emotional harm caused by children witnessing violence against their mother and ignores the importance of role modelling in parenting. Such a presumption might also help women who are staying in abusive situations for fear of losing custody of their children.

With regard to the third question listed above, since being forced to leave the family home and find shelter for herself and her children can be a major impediment to a woman wishing to end an abusive relationship, the legislation should empower the court to order the perpetrator out of the home - whether this

[15] *Ibid.* at 55.
[16] *Ibid.* at 118.
[17] *Ibid.* at 126.
[18] *Ibid.* at 142.
[19] *Ibid.* at 115.
[20] *Ibid.* at 117.

is done through separate exclusive possession orders, or simply as a term of a no-contact order.

Property remedies recommended in the Discussion Paper would include a court order authorizing a police officer to accompany the applicant to her home to collect specific personal property and orders requiring the respondent to refrain from converting or damaging property in which the applicant has an interest.[21]

The Discussion Paper does not make recommendations on prevention remedies, but asks whether the legislation should provide for orders requiring the respondent to take counselling,[22] or to pay for counselling for the applicant[23] or their children.[24]

The Discussion Paper is concise and well written; having discussion followed by recommendations set out in bold type is helpful both for the person reading the Paper as a whole and for the reader who wants to check a particular point.

The Alberta Law Reform Institute has done an excellent job of describing the scope of the legislation. By focusing on "indicia of vulnerability" rather than attempting to define the relationships which would or would not be covered by the legislation, the Institute has come up with a comprehensive and flexible approach.

I have some difficulty with the Institute's explanation of why it chose to use "gender neutral" terminology:

> [I]t is extremely important, in developing strategies for law reform in the area of domestic abuse, to remain aware that the problem is one in which the vast majority of victims are women... However, we are of the view that it is ultimately exclusionary to assume that victims are **universally** female and perpetrators are **universally** male... This gender neutrality is not intended to obscure the fact that the problem of domestic abuse is gender specific.[25]

It seems to me simplistic to argue that choosing language which reflects reality is exclusionary, and therefore less desirable than language which does obscure the gendered nature of the violence and also obscures the fact that wife assault is simply one reflection of the gender inequities[26] which are well entrenched in our society.

Is provincial legislation which provides for prevention orders and other civil remedies an effective way to respond to wife assault? There is no easy answer to this question, given the complexity of the issues. The Saskatchewan legislation

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[21] *Ibid.* at 144.

[22] *Ibid.* at 151.

[23] *Ibid.* at 152.

[24] *Ibid.* at 153.

[25] *Ibid.* at 56 (emphasis in original).

[26] Whether discussing the position of women generally, or the justice system's response to wife assault more specifically, it is important to note that not all women's experiences will be the same. Factors such as race, culture, economic class, language, disability and sexual orientation will affect how women are viewed within the justice system and the extent to which the law is likely to provide any remedy or protection.

is too new to provide much in the way of statistics, and even when such statistics become available, they are unlikely to either prove or disprove the efficacy of domestic violence legislation. So much will depend on the extent to which such legislation is supported by adequate resources and training, and whether civil protection orders are used in conjunction with, or as a replacement for, the criminal law.

Resources and training were a prime focus in the launching of Saskatchewan's *Victims of Domestic Violence Act*; police officers were trained both about the Act itself and also about the realities of domestic violence,[27] and new justices of the peace were appointed and trained specifically to grant emergency intervention orders under the domestic violence legislation. Also, in Saskatchewan, the application for such an order is made by a police officer, rather than the victim. Under the Alberta approach, where the victim would be the applicant, court support services would also be necessary to ensure that the victim knew how to proceed, and was aware of what evidence would be necessary and what kinds of relief would be available.

If domestic violence legislation were to be introduced, careful thought would have to be given to what level of court would be most accessible while still having the authority to make the kinds of orders contemplated and, above all, to streamlining procedures so that urgent cases could be heard immediately and all applications would be dealt with promptly.

Without sufficient resources, support services and training and without efficient procedures, new legislation would probably not offer real protection for victims or act as any deterrent for perpetrators. This of course begs the question: if the justice system were accessible; if police officers, judges and others were aware of real danger to which victims are exposed; if delays were minimized; if violations of peace bonds, conditional discharges and terms of probation were dealt with swiftly and firmly, would there be a need for domestic violence legislation or could the criminal law and existing civil remedies actually prevent violence and protect victims? In other words, there is no clear answer as to whether what is needed is more law, or better enforcement of the existing laws. It would have been helpful had the Alberta Law Reform Institute discussed this in more depth.

However, the Alberta Law Reform Institute's Discussion Paper on Domestic Violence is interesting and useful reading for anyone concerned about the way in which the justice system responds to wife assault and other violence within families. Accepting that there is no perfect legal solution, and that the law itself is only one part of the answer, it is useful to consider different ways of dealing with the violence. In its Discussion Paper, the Alberta Law Reform Institute explores one possible avenue: civil orders made under specific domestic violence legislation.

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[27] J. Turner, "Saskatchewan Responds to Family Violence: The Victims of Domestic Violence Act, 1995," in *Wife Assault and the Criminal Justice System, supra* footnote 1 at 192.

Equitable Damages.

By P.M. MCDERMOTT.
Sydney: Butterworths, 1994. Pp. 301. ($98.00).

Equity [:] Issues and Trends.

By M. COPE, ed.
Annandale, N.S.W.: The Federation Press, 1995. Pp. 272. ($64.00).

Commercial Equity [:] Fiduciary Relationships.

By J. GLOVER.
Sydney: Butterworths, 1995. Pp. 358. ($143.00).

Reviewed by Lionel D. Smith*

There are many ways to classify lawyers. One is to divide them into "equity pragmatists" and "equity purists." To the purist, equity is a refined system which is eminently worthy of study in its own right. It has its own internal logic, which is in many ways foreign to that of the common law. To the pragmatist, the rules of equity are simply one part of the tapestry of the law, albeit a part with a special history. In *United Scientific Holdings Ltd.* v. *Burnley Borough Council,* Lord Diplock said:[1]

> My Lords, if by "rules of equity" is meant that body of substantive and adjectival law that, prior to 1875, was administered by the Court of Chancery but not by courts of common law, to speak of the rules of equity as being part of the law of England in 1977 is about as meaningful as to speak similarly of the Statutes of Uses or of Quia Emptores. . . . the waters of the confluent streams of law and equity have surely mingled now.

Those are the words of an equity pragmatist. In reference to Lord Diplock's judgment, the authors of a leading Australian text said, "This speech represents the low water-mark of modern English jurisprudence."[2] Those are the words of equity purists.

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[1] [1978] A.C. 904, [1977] 2 W.L.R. 806 (H.L.), at A.C. 924-5. See also at 944-5, *per* Lord Simon of Glaisdale.

[2] R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane, *Equity: Doctrines and Remedies,* 2 ed. (Sydney: Butterworths, 1984) at xi. The authors also said, "If Baron Parke were to survey the common law today, he would be baffled and understandably dismayed by what he saw. But his great equity contemporaries would, at least if they migrated to this country, be of good heart." See now the Preface to the 3 ed. (Sydney: Butterworths, 1992), at xi: "In 1984, in the

The equity pragmatist does not necessarily think that law and equity are or should be "fused."[3] He or she simply takes the view that law and equity do not occupy watertight compartments, and that a good reason is required whenever the position "at common law" is said to differ from that "in equity." The reason, to be a good one, must be rooted in principle, not just in history. The coherence of the law *as a whole* is more important than the maintenance of doctrinal purity. The best example of equity pragmatism in recent Canadian law is *Canson Enterprises Ltd.* v. *Boughton & Co.*[4] The equity purist, on the other hand, rejects the idea that equity should ever be tainted by notions derived from the common law. For example, in discussing what they call the "fusion fallacy," R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane say, ". . . the price for continued purity in doctrine will be an assiduity in exposing and rooting out false doctrine equal to that demanded by this great Lord Chancellor [Hardwicke] in pursuing the fraudulent."[5] These are commentators who, in discussing the consolidation of the courts under the Judicature system, are still able to ask, "Was it a mistake?"[6]

In Canada, most lawyers are equity pragmatists. In their view, specific performance and promissory estoppel are parts of the law of contract; injunctions and constructive trusts are part of the law of remedies. As with so many things, the prevalence of the pragmatist viewpoint can be attributed at least in part to the way lawyers are trained. Unlike the situation in the United Kingdom[7] or in Australia,[8] there are no Canadian books about equity as such.[9] Few Canadian

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Preface to the Second Edition, we expressed the sanguine view that the future of equity in this country, whatever it was in England, looked rather rosy. In the period which has elapsed, this view seems to have been somewhat over optimistic." Note however that W.M.C. Gummow was appointed to the High Court of Australia on 21 April 1995.

[3] Indeed, as Meagher, Gummow and Lehane point out *(ibid.* at 66), those who speak of fusion do not always make clear exactly what they mean. See however the discussion in P.M. Perrell, *The Fusion of Law and Equity* (Toronto: Butterworths, 1990).

[4] [1991] 3 S.C.R. 534, 85 D.L.R. (4th) 129. Both the majority judgment of La Forest J. and the minority judgment of McLachlin J. expressed a willingness to draw wisdom from the common law in answering a question of fiduciary law, though it is fair to say that McLachlin J. was more cautious in this regard. The majority judgment drew on the reasons of Cooke P., a true equity pragmatist, in *Day* v. *Mead,* [1987] 2 N.Z.L.R. 443 (C.A.). See also *LeMesurier* v. *Andrus* (1985), 54 O.R. (2d) 1, 25 D.L.R. (4th) 424 (C.A.). For a recent English decision favouring equity pragmatism, see the majority speech of Lord Browne-Wilkinson in *Tinsley* v. *Milligan,* [1994] 1 A.C. 340 at 370-371, [1993] 3 W.L.R. 126 (H.L.).

[5] *Supra* footnote 2 at 50.

[6] *Supra* footnote 2 at 64-70. The authors do not explicitly answer this question, but their clear intention is to respond in the affirmative.

[7] P.V. Baker and P.St.J. Langan, *Snell's Equity,* 29 ed. (London: Sweet & Maxwell, 1990); J.E. Martin, *Hanbury and Martin Modern Equity,* 14 ed. (London: Butterworths, 1993).

[8] R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane, *supra* footnote 2; I.C.F. Spry, *The Principles of Equitable Remedies,* 3 ed. (London: Sweet and Maxwell, 1984).

[9] There is R.J. Sharpe, *Injunctions and Specific Performance,* 2 ed. (Toronto: Canada Law Book, 1992), but this book does not attempt to deal with equity as a whole. Moreover, Sharpe is clearly an equity pragmatist.

law schools offer a course called "Equity"; their courses tend to be organized on functional lines, not historical ones. As a result, Canadians learn their equity in bits and pieces.

De-emphasizing the unity of equity has both strengths and weaknesses. Its main weakness is that it becomes difficult or impossible to see overarching themes. True, equity's most significant legacy endures as an independent subject of study in courses and texts on trusts; but most Canadian students learn the rest of equity in dribs and drabs. Fiduciary law is picked up by combining lessons from trust law, corporate law, agency, and perhaps professional responsibility. Injunctions and specific performance might be coverend in a course on remedies; constructive trusts might be covered there, or in a course on restitution. Another weakness is that equity pragmatism can be used as an excuse for failing to understand the legacy of history, or worse, for analytical sloppiness. The careful equity pragmatist takes full account of the historical development of the law and understands the continuing importance of both legal and equitable doctrines and modes of reasoning. He or she does not, however, put history and tradition ahead of the continuing rational development of the law as a whole. The greatest strength of this approach, as Lord Diplock suggested, is that it takes account of the modern reality that there is only one set of courts and, in the final analysis, only one set of rules.[10] Equity is no longer a "mystery,"[11] and equity pragmatism is surely the way of the future.

This review considers three recent Australian books which reflect a variety of approaches to equity. The first, Peter M. McDermott's *Equitable Damages,*[12] is clearly the work of an equity purist. McDermott's study is a narrow one (but deep): the statutory equitable jurisdiction to award damages "in substitution for" an injunction or order of specific performance, under Lord Cairns' Act[13] and cognate Commonwealth legislation.[14] The book is concerned solely with this statutory jurisdiction, and does not address the more general idea of equitable compensation.[15] From the standpoint of an equity pragmatist, this

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[10] That is, the common law and equity together make up "the law." See S. Gardner, "Two Maxims of Equity" [1995] 54 C L.J. 60, at 63-68.

[11] See S. Gardner, "Equity, Estate Contracts and the Judicature Acts: *Walsh* v. *Lonsdale* Revisited" (1987) 7 Oxf.J.L.S. 60, at 93-94.

[12] (Sydney: Butterworths, 1994).

[13] 21 & 22 Vict., c. 27.

[14] See the pragmatic analysis in E. Veitch, "An Equitable Export — Lord Cairns' Act in Canada" (1980) 12 Ott. L.R. 227.

[15] Hence the reader will not find much discussion of the type of problem which arose in *Canson Enterprises Ltd.* v. *Boughton & Co.*, *supra* footnote 4. The book does deal briefly with "equitable compensation" in Chapter 11. Although the term "damages" need not be confined to compensatory responses (see P.B.H. Birks, "Civil Wrongs: A New World," in *Butterworth Lectures 1990-91* (London: Butterworths, 1992)), when it is so used it is rather difficult to justify a distinction between "damages" and "compensation," since the function of (compensatory) damages is to provide compensation. McDermott says (at 225) that "[t]he relationship between the remedies of compensation and damages is not easy to deduce from the cases, although it has been suggested that the two remedies are in substance the same as both remedies are compensatory."

might seem a curious undertaking. Lord Cairns' Act, passed in 1858, is generally thought to have been one of the milestones on the road to the Judicature Act reforms of the 1870s. Thus the project of curial consolidation of which Lord Cairns' Act was a part was not only completed, but it was completed over 120 years ago. Can this statute then have continued relevance?

McDermott goes so far as to provide evidence in support of the view that, according to the intention of its drafters, it should not. The Chancery Commissioners were charged with reporting on Chancery procedure, and they proposed in 1856 that Chancery jurisdiction should be enlarged so that a suit commenced in equity would not need to be supplemented by an action at common law in order to reach a final settlement of the dispute.[16] Clearly, what they had in mind was that the court of Chancery should be able to make the same kind of damage award that the common law courts could make. Sir Hugh Cairns' speech on the Act's first reading also indicates that the legislative intention was simply to give the Court of Chancery the same jurisdiction over compensatory damages as that possessed by the courts of common law.[17] McDermott takes the position, however, that due basically to bad drafting, the provision created and still provides a jurisdiction which is not identical to that of the common law courts.[18] A less technical view was propounded in *Johnson* v. *Agnew*,[19] where Lord Wilberforce expressed the view that Lord Cairns' Act was no longer important: "... I find in the Act no warrant for the Court awarding damages differently from common law damages...". McDermott, staunchly supported by Meagher, Gummow and Lehane,[20] takes the view that the decision is wrong on this point. But Canadian judges, predominantly equity pragmatists, have adopted the reasoning in *Johnson*.[21]

This book is extremely valuable as a work of legal history. It provides a detailed discussion of Chancery jurisdiction before Lord Cairns' Act, and of the parliamentary processes leading up to the enactment of the statute. It is filled with examinations of the courts' varying interpretations of the Act since its passage. It also contains innumerable fascinating details, including notes on the jurisdiction of the Lancaster Palatine Court[22] and particulars of the enactment of Lord Cairns' Act in jurisdictions all over the world. These include not only the United Kingdom, Australia, New Zealand, and common law Canada, but also such jurisdictions as Niue, Barbados, Hong Kong and Nigeria. As a textbook on modern law, however, its usefulness in the Canadian context is

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[16] McDermott cites this report at 28.

[17] Quoted by McDermott at 31.

[18] At 34, McDermott cites another author's view that it is unclear whether it was "by accident or design" that the statute created a jurisdiction different to that at common law. McDermott goes on to say, "It was certainly not by design . . ."

[19] [1980] A.C. 367 at 400, [1979] 2 W.L.R. 487 (H.L.).

[20] *Supra* footnote 2 at 644-647, 648.

[21] See for example *306793 Ontario Ltd.* v. *Rimes* (1979), 25 O.R. (2d) 79, 100 D.L.R. (3d) 350 (C.A.).

[22] At 48-49.

probably limited. As befits an equity purist, McDermott's analysis is technical in nature. It consistently defers to the conventions of doctrine, but arguably fails to subject that doctrine to the type of critical analysis which is necessary to ensure that the law is internally consistent and responsive to society's changing needs.

Equity [:] Issues and Trends,[23] edited by Malcolm Cope, is a collection of papers delivered at a conference on Equitable Doctrines and Principles which took place in Brisbane in July 1994. Not surprisingly, the eight essays reflect a wide range of approaches. Derek Davies' paper, "Equity and Trusts: What Should Happen When Developments Outpace Origins?" is a thoughtful piece from a pragmatic point of view. Davies ranges over a number of equitable topics, and, with a weather eye on the constraints imposed by the past, makes some suggestions as to how equity may develop in the future. Julie K. Maxton's essay, "Intermingling of Common Law and Equity," is also the work of an equity pragmatist. Maxton notes how judges are increasingly discarding a number of traditional restrictions on equitable jurisdiction (such as injunctive relief), even while formally insisting on their continued existence.

The next two papers are more clearly the work of equity purists. Anthony J. Oakley's contribution, "Liability of a Stranger as a Constructive Trustee: Some Recent English and Australian Developments," is a lengthy piece on a topic which has been much discussed in recent years.[24] As the paper's title suggests, its value to Canadian lawyers is weakened by its failure to include a discussion of Canadian developments; there is no mention of the Supreme Court of Canada's latest word on the subject.[25] Malcolm Cope's comprehensive paper, "Ownership, Obligation, Bribes and the Constructive Trust," addresses the issues raised by the recent and controversial decision in *A.-G. Hong Kong* v. *Reid*.[26] In that case, the Privy Council rejected the holding in *Lister* v. *Stubbs*[27] to the effect

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[23] (Annandale, N.S.W.: The Federation Press, 1995).

[24] See for example C. Harpum, "The Stranger as Constructive Trustee (Part I)" (1986) 102 L.Q.R. 114; R. Sullivan, "Strangers to the Trust" (1987) 8 E. & T.Q. 217; P.L. Loughlan, "Liability for Assistance in a Breach of Fiduciary Duty" (1989) 9 Oxf.J.L.S. 260; P.B.H. Birks, "Misdirected Funds: Restitution from the Recipient" [1989] L.M.C.L.Q. 296; H. Norman, "Knowing Assistance — A Plea for Help" (1992) 12 Legal Studies 332; P.D. Finn, "The Liability of Third Parties for Knowing Receipt or Knowing Assistance" in D.W.M. Waters, ed., *Equity, Fiduciaries and Trusts 1993* (Toronto: Carswell, 1993); P.B.H. Birks, "Persistent Problems in Misdirected Money: A Quintet" [1993] L.M.C.L.Q. 218; various authors, "Knowing Assistance and Knowing Receipt," in P.B.H. Birks, ed., *The Frontiers of Liability*, vol. 1 (Oxford: Oxford University Press, 1994); G. Watt, "Accessory Liability for Breach of Trust" (1995) 4 Nottingham L.J. 111; T. Allen, "Fraud, Unconscionability and Knowing Assistance" (1995) 74 Can. Bar Rev. 29; S. Gardner, "Knowing Assistance and Knowing Receipt: Taking Stock" (1996), 112 L.Q.R. 56.

[25] *Air Canada* v. *M. & L. Travel Ltd.*, [1993] 3 S.C.R. 787, 108 D.L.R. (4th) 592; see T. Allen, *ibid.* There is also no mention of the ground-breaking (and equity-pragmatic) analysis in *Royal Brunei Airlines Sdn. Bhd.* v. *Tan*, [1995] 2 A.C. 378, [1995] 3 W.L.R. 64 (P.C., Brunei), although of course this decision was handed down after the conference took place.

[26] [1994] 2 A.C. 324, [1993] 3 W.L.R. 1143 (P.C., N.Z.).

[27] (1890), 45 Ch.D. 1 (C.A.).

that while the recipient of a bribe was personally liable to his principal, the bribe or its proceeds were not held on trust. After carefully weighing the competing positions, Cope arrives at the position—now orthodox in Canada—that the constructive trust is a remedial tool available to correct all manner of wrongdoing. The next question, still unanswered in Canada, is what factors will structure this potentially explosive discretion.

Paul Finn's contribution is called "The Forgotten 'Trust': The People and the State." It examines whether public officials owe fiduciary obligations to members of the public. Rejecting the traditional idea that some trusts are "in the higher sense,"[28] Finn argues that public officials should be seen as owing fiduciary obligations to the public whom they serve. It is a fascinating argument, even though it appears to leave one important question unanswered. If public officials are trustees or fiduciaries, who is or are the beneficiaries with legal standing to enforce those fiduciary obligations? W.A. Lee's paper, "Industry Superannuation in Australia," is technical in nature and probably of interest only to the pension specialist.

Rebecca Bailey-Harris's contribution is entitled "Property Disputes in De Facto Relationships: Can Equity Still Play a Role?" Bailey-Harris is clearly an equity pragmatist, but she explains how even an equity pragmatist must be pessimistic about the potential for equity to solve the problems arising out of domestic relationships in Australia. Her call is for statutory intervention. Again, the paper is of limited use to a Canadian reader, except perhaps for comparative purposes. The focus is entirely on Australian law, which appears to have evolved very differently from the Canadian jurisprudence rooted in *Pettkus* v. *Becker*.[29] The final essay, by Mr. Justice M.H. McPherson, is called "Information as Property in Equity." His Honour quickly arrives at the unassailable conclusion that whether confidential information is "property" depends on what we mean by the word "property."

This collection of essays also features commentaries by various authors on some of the papers. These commentaries are uneven in their occurrence and their breadth; some essays are unaccompanied by any commentary, while some of the commentaries are longer than the shortest essay in the collection. From a technical standpoint, there are difficulties with the book: there are frequent typographical errors, and the quality of the printing is not the highest. The real difficulty from a Canadian standpoint, however, is simply the lack of Canadian content. None of the papers really takes account of the way in which Canadian law deals with the various topics which are discussed. It may well be that this is because, from the point of view of an equity purist, equity in Canada has gone hopelessly off the rails. Be that as it may, while this book provides excellent insights on Australian law and belongs in every law school library, its narrow

[28] That is, not legally enforceable. Why the enforceable trust is "in the lower sense" and the unenforceable one is "in the higher sense" is something of a mystery.

[29] [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257.

focus limits its value to the Canadian lawyer.

For most such lawyers, the most interesting book in this trio will be John Glover's work, *Commercial Equity [:] Fiduciary Relationships*.[30] Glover's project is a thorough examination of the role which fiduciary relationships now play in the commercial context. Glover is clearly an equity pragmatist, and indeed part of his motivation appears to be to show Australian lawyers the way equitable doctrines have developed in North America. The book is divided into three unequal parts. The first part, "Relationships of Trust," is by far the longest. Glover begins with a careful study of various theories as to the incidence of fiduciary relationships, and then proposes a theory of his own. He goes on to discuss the varying scopes that such relationships can have, the different ways that the concomitant duties can be breached, and the remedies available for such breaches. The second part deals with undue influence, and the third part with confidential information.

Glover takes unorthodox positions in relation to some matters. The most obvious is his decision to classify the law governing undue influence and confidential information as part of fiduciary law. A more traditional view is that while these are equitable doctrines, they are not fiduciary relationships as such.[31] It does not appear, however, that Glover is arguing for some new unity between these three areas of law; he cautions against reasoning from one to another.[32] He has merely made an unusual choice of terminology.[33]

More substantially innovative is Glover's view as to the basis of fiduciary obligations.[34] He rejects attempts to find a single conceptual basis or justification for such obligations: "Just as legal discourse never contains 'essences,' except as a figure of speech, there is no essence in the fiduciary relation."[35] Instead, he finds that there are four "characteristics" which fiduciary relationships have: an undertaking by the fiduciary; the entrustment of property to the fiduciary; reliance on the fiduciary; and power or discretion held by the fiduciary. Facts which generate a fiduciary relationship need not have all of these characteristics;

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[30] (Sydney: Butterworths, 1995).

[31] See for example *Lac Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14, where the Supreme Court of Canada decided by a 3-2 majority that there was no fiduciary relationship, but decided unanimously that there was a breach of confidence.

[32] At 10-11.

[33] Similarly, one might be surprised at the statement (at 135) that "[f]iduciary duties do not impose positive obligations." Trustees have many positive obligations. The explanation is that Glover is excluding trustees from the word "fiduciary" in this connection, which is surely an unusual terminological choice. To most people, trustees are the paradigm case of fiduciaries.

[34] In this review, "fiduciary" is confined to its usual usage, that is the type of relationship which Glover calls one of trust and with which he deals in his first part.

[35] At 44.

[36] E.g. at 23, 42. The argument from Wittgenstein is that the referents of a general term may not have any common essence; rather, they may only form a family, whose members have "family likenesses." But members of a family, whether or not they physically

one of them may be sufficient. Citations to Wittgenstein notwithstanding,[36] one might be tempted to reply that if there was no single unifying characteristic of fiduciary relationships, then there would be reason to use the single label of "fiduciary relationship" for all of them.[37] Glover's response would perhaps be that fiduciary relationships are unified by the duties they involve, but not by the reasons for finding that the relationships exist. This rather postmodern approach to fiduciary relationships, however, sows the seeds of its own difficulties: if it is folly to seek a single explanation for fiduciary relationships, then what is the magic in four?[38]

It might be thought that Glover is merely purporting to describe four distinct factual patterns in which courts have, as a matter of empirical observation, found fiduciary relationships; thus, the justification for four categories would simply be that four is the number which can be observed in the cases. In fact, Glover is doing more than this. And so he must: fiduciary relationships are not natural phenomena, which judges find like diamonds in the rough. Judges have, or should have, defensible reasons for finding them. What is needed is an analysis of what those reasons are or should be; such an analysis can then be applied to the facts of a new case to provide an answer. A mere description of past cases will not serve; indeed, Glover makes this very point.[39]

Glover's four categories do, however, provide a useful way of understanding the expanding incidence of fiduciary relationships. It is noteworthy that he uses his categories to explain not only fiduciary obligations which arise automatically out of certain relationships, such as solicitor and client, but also those more difficult ones which arise out of the facts of the particular case. Glover is probably right that it is impossible to find a "fiduciary essence" which justifies all fiduciary relationships. On the other hand, rather than finding four justifications which together cover all relationship-based and all fact-based fiduciary obligations, it is arguably more important to distinguish between the justification for relationship-based fiduciary obligations and that for fact-based fiduciary obligations. Fact-based fiduciary obligations can only be justified on the basis of the particular history and features of the precise interaction in issue. Relationship-based fiduciary obligations, on the other hand, must be justified by

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resemble one another (and whether it is a family in the colloquial sense or in the biologist's taxonomic sense) *do* have a common essence: they can trace descent from a common ancestor, either through blood or, in an extended sense, through marriage or other domestic relationship.

[37] It might be argued that the only unity among fiduciary situations is in the remedial consequences which flow from the fiduciary relationship. Glover, however, does not adopt this instrumentalist view: see at 28-31. The Supreme Court of Canada has rejected it in both *Lac Minerals Ltd.* v. *International Corona Resources Ltd., supra* footnote 31, and in *Hodgkinson* v. *Simms,* [1994] 3 S.C.R. 377, 117 D.L.R. (4th) 161.

[38] Glover's postmodernism seems to come and go; he says (at 1) that "Belief in the neutrality of systems of rules is also in decline"; and yet, in the Preface (at xi), he says of the whole book, "No legal theory is promoted."

[39] At 23-24.

the generic features of a particular class of interaction (such as solicitor and client), *without regard to* the particular history and features of the precise interaction in issue.[40] I have argued elsewhere that "undertaking," which is one of Glover's justifications, is sufficient to explain all fact-based fiduciary obligations; while relationship-based fiduciary obligations must be justified according to an entirely different calculus which transcends the facts of individual cases.[41] Glover's analysis is persuasive on the point that the search for a single essence for fact-based fiduciary obligations might be fruitless; but it remains unclear that those obligations and relationship-based fiduciary obligations can be justified according to the same analysis.

The book has many strengths. It is logically organized, proceeding from a theoretical discussion of its subject matter, through the questions of whether there is a fiduciary relationship, what may be its scope, how its duties can be breached, and what remedies will be available. Glover cheerfully debunks several outdated ideas, such as that fiduciary relationships are in some way inherently foreign to profit-oriented activities.[42] Similarly, he notes that the characterization of a relationship as "arm's-length" is usually simply a statement of a conclusion that there is no fiduciary element.[43] In a like vein but on another point, he suggests that describing "corporate opportunities" as a form of property is just a way to reach a liability conclusion without rigorous analysis as to whether it is appropriate.[44]

There are weaknesses as well. Some are surprising: Glover surely errs in saying that liability for conversion requires that the subject property be identifiably in the possession of the defendant at the time of trial.[45] Glover also states that the book's orientation towards practitioners "tends to proscribe the meta-languages of economists and the English restitutionary scholars."[46] This would appear to be, at least in part, a reference to the work of Peter Birks, whose ground-breaking insights, occasionally expressed in appropriately innovative terms, are shaping the modern law of restitution.[47] And yet on one page, Glover

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[40] Unless, of course, that history includes a voluntary alteration of the incidents which the relationship would otherwise impose.

[41] L.D. Smith, "Fiduciary Relationships — Arising in Commercial Contexts — Investment Advisor: *Hodgkinson* v. *Simms*", forthcoming in the *Canadian Bar Review*.

[42] At 20-21.

[43] At 48-50.

[44] At 72-74.

[45] At 277.

[46] At xi.

[47] See P.B.H. Birks, *An Introduction to the Law of Restitution*, rev. ed. (Oxford: Clarendon Press, 1989); P.B.H. Birks, *Restitution [:] The Future* (Annandale, N.S.W.: The Federation Press, 1992); and articles too numerous to list.

[48] The context of the discussion at 227 is the law of constructive trusts. Glover suggests that Birks's "second measure of recovery" (i.e. liability measured by the value retained by the defendant, not the value received) is just another way of referring to proprietary recovery. In fact, Birks goes out of his way to indicate that this is not true, and to suggest that there may be personal recovery in the second measure *(An Introduction to*

misunderstands two of Birks's most important contributions.[48] It might also be said that some topics are addressed in a rather fleeting fashion. Of course, one book cannot be expected to deal with every issue relating, however tangentially, to fiduciary obligations in the commercial setting. But where depth is not provided, attention can at least be drawn to the unexplored complexities. Two examples will suffice. The difficult topic of subrogation, now the subject of its own monograph,[49] is treated in a scant 15 lines, with no suggestion of the underlying detail.[50] The subject of tracing is then introduced with some inaccurate generalizations which exclude a great deal of important material.[51]

As far as technical production is concerned, there are no real problems, but two points are worth mentioning. First, the occasional page has a faded appearance, which is unusual in a book from a major publisher.[52]

The other point is that Glover adopts an unusual method of citation, providing pinpoint references (e.g. "at 424") in the text itself rather than in the footnotes.

All of that said, this is an important work for Canadian lawyers. The sweep of Glover's book is impressive. His innovative approach to fiduciary relationships, identifying them according to four paradigm types, is worthy of careful consideration by lawyers in all common law jurisdictions. He makes much use of Canadian materials, and pays particular attention to decisions of the Supreme Court of Canada. Thus, Canadian lawyers will find that the book provides not only a solid analysis of their own cases, but an *entrée* into Australian, New Zealand and United Kingdom cases as well. This book belongs on the shelf of every commercial litigator. More so than the other two books reviewed here, it reflects an awareness that equity pragmatism is in the ascendant, in the courts and in the law schools.

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the Law of Restitution, ibid. at 6, 85-87, 106-107, 394-401). Also at 227, Glover says that Birks collapses together the questions (i) whether the plaintiff has or had an interest in some property and (ii) whether there are traceable proceeds of that property. In fact, it will be one of the enduring legacies of Birks's work that he insists on the rigorous separation of these issues, and has done so since 1985 if not earlier: *Introduction,* at 83-85, 358-375. At 358 Birks says, "It is very important to make a clear distinction between two questions. The first is whether any of the enrichment originally received can be identified as surviving in the defendant's hands. The second is whether any kind of claim can be made to the enrichment which has been identified." See now P.B.H. Birks, "Overview: Tracing, Claiming and Defences," in P.B.H. Birks, ed., *Laundering and Tracing* (Oxford: Clarendon Press, 1995).

[49] C. Mitchell, *The Law of Subrogation* (Oxford: Clarendon Press, 1995).

[50] At 222-223.

[51] At 223, Glover says, "Tracing is incidental to most kinds of property rights, not including the lien and the proprietary uses of subrogation." The second half of the sentence is puzzling. Tracing can be essential for the establishment of rights depending on subrogation: see Mitchell, *ibid.* at 39-41; *Boscawen* v. *Bajwa,* [1995] 4 All E.R. 769 (C.A.). Moreover, the equitable lien is generally considered one of the remedies available to a claimant who is able to trace misappropriated assets into their proceeds: see P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora: Canada Law Book, 1990) at 127.

[52] There is also (at 301) a footnote which has literally been pasted in.

Judicial Conduct and Accountability.

By THE HONOURABLE MR. JUSTICE DAVID MARSHALL.
Toronto: Carswell, 1995. Pp. xxiv, 131. ($55.00).

A Place Apart; Judicial Independence and Accountability in Canada.

By MARTIN FRIEDLAND.
Ottawa: Canada Communication Group — Publishing, 1995.
Pp. xvi, 401. ($29.95).

Reviewed by Richard F. Devlin*

In the not too dim and distant past, it was once believed that law was relatively autonomous from politics and that judging was a peculiar task premised upon discrete norms.[1] More recently, however, political scientists and legal academics have identified the twin phenomena of the legalization of politics and the politicization of the judiciary.[2] Paralleling these developments, in the course of the last decade or so Canadian judges have been subjected to increasing scrutiny and criticism from a variety of sources: academics, the legal profession, commissions of inquiry and the general public. While it would probably be hyperbolic to suggest that the Canadian judiciary is facing a crisis of legitimacy, I think that it is fair to say that there is significant concern within the judiciary as to the scope and intensity of the criticisms.

Two recent books are reflective of this growing sense of disease among Canadian judges, The Honourable Mr. Justice David Marshall's *Judicial Conduct and Accountability*[3] and Professor Martin Friedland's *A Place Apart: Judicial Independence and Accountability in Canada*[4] which is a report prepared for the Canadian Judicial Council. Both books structure their analyses around what the authors perceive to be the inevitable and foundational tension between independence and accountability. But despite this commonality the

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I would like to thank Professor Tom Cromwell for his criticisms of an earlier draft of this review. His advice was not always followed.

[1] See e.g. J. Wilson, *A Book for Judges* (Ottawa: Supply and Services, 1980).

[2] See e.g. M. Mandel, *The Charter of Rights and the Legalization of Politics in Canada*, 2d ed. (Toronto: Thompson Educational Publishing, 1994); P. Russell, "The Effect of a Charter of Rights on the Policy Making Role of Canadian Courts" (1982) 25 Can. Pub. Admin. 1.

[3] (Toronto: Carswell, 1995) [hereinafter Marshall].

[4] (Ottawa: Canada Communication Group, 1995) [hereinafter Friedland].

works differ dramatically in terms of scope, method, research, approach, tone and conclusions. Marshall J. adopts a position that in effect seeks to resist criticism[5] while Friedland attempts to accommodate criticism through a variety of "modest renovations".[6] Both merit careful consideration, but I want to suggest that each is flawed due to the author's excessive focus on judicial independence.

Mr. Justice Marshall's book does make several useful points. For example, he identifies the difficulty that the Supreme Court has in distinguishing between independence and impartiality,[7] and he is rightly critical of the lack of training provided to novice judges. However, to be frank and with all due respect, Mr. Justice Marshall's book is disappointing. First, this already very slim volume of approximately one hundred and fifty pages is heavily padded. There almost twenty pages of general introduction by other judges and academics, and the final thirty six pages are a reprint of the A.B.A. Model Code of Judicial Conduct (1990). Secondly, the research tends to rely quite heavily on secondary sources and therefore adds little that is new in terms of substantive knowledge.[8] Thirdly, while Marshall J. attempts to cover a great deal of ground (including judicial independence, the appointment and promotion of judges, education programmes, ethical standards for judicial conduct and the condemnation and removal of judges) the brevity of the discussions and the hastiness of the analyses renders the reader only marginally wiser on completing the book. There are other infelicities in the work such as repetition,[9] unsubstantiated assertions[10] and the odd unintelligible sentence.[11]

In my view, given these limitations, *Judicial Conduct and Accountability* cannot therefore be read as a either a comprehensive survey of, or a meditation upon, the difficult issues of judicial ethics. Rather it is a polemic. There is, of course, nothing wrong with polemicism *per se*, for this can be a very effective argumentative strategy, but I think that the title presented to us by the author is somewhat misleading. Mr. Justice Marshall has one, almost all consuming, aim in this tract: to argue that in recent years in Canada the pendulum has swung too far towards judicial accountability and that this has resulted in a radical diminution of the independence of the individual workaday puisne judge. The villains in the plot are identified as the chief judges and the Canadian Judicial Council. In Marshall J.'s opinion the collective and cumulative administrative, discretionary and regulative powers possessed by these judicial mandarins has

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[5] See e.g. Marshall, *supra* footnote 3 at 86.

[6] Friedland, *supra* footnote 4 at xiii.

[7] Marshall, *supra* footnote 3 at c.l.

[8] For example, in terms of doctrine, there are a mere fifteen references in his table of cases. While case law is not everything, it is not nothing and there is a great deal more law on the matters discussed than Marshall's arguments seem to suggest.

[9] See especially the conclusion.

[10] Marshall, *supra* footnote 3 at 34, 48.

[11] *Ibid.* at 18-19.

a chilling effect on the independence of puisne judges.[12] Worse still, it is suggested that these judicial bureaucrats (perhaps motivated by perks)[13] are too closely aligned with those who possess political power and that certain ideological positions are being foisted upon a judiciary that should be free from the contaminations of politics. As his star example he discusses recent judicial education programmes which are driven by what he calls "public interest groups" rather than judicial need.[14] Even judicial codes of conduct are resisted.[15] In short, Marshall J. might be characterized as having a libertarian approach to judicial independence.[16]

Mr. Justice Marshall does articulate a potentially troubling concern: the increasing concentration of administrative power in the hands of a relatively small number of judges and some of the dangers inherent in such a process. But, unfortunately, his assessment is somewhat unbalanced. The major problem with the polemic is its starting premise: that our primary goal is an independent judiciary. I disagree. As the Supreme Court has emphasized[17] and Marshall J. acknowledges only in passing,[18] judicial independence is not an end in itself but only a means to the end of fair and impartial decision-making. Thus there are other important values in a democracy that interact with and circumscribe the obvious virtue of judicial independence; accountability, responsibility and equality for example. Judicial independence unmodified can result in judicial supremacism. Indeed, Marshall J. even explicitly proclaims that individual judges should be "sovereign in their work".[19] To my mind, this goes too far. At the bare minimum it is important for a liberal *democracy* like Canada to have a regulative body like the Canadian Judicial Council that can serve as an admittedly limited check upon partial or incompetent judges.[20] Or again, once we recognize that our overarching goal is fairness in decision-making, judicial education programmes in relation to race or gender can be understood not as exercises in political correctness as Marshall J. suggests,[21] but as *bona fide* endeavours to assist judges to do their jobs better by helping them to understand the patterns of systemic discrimination that can frustrate the ideals of fairness and equality.[22] Social context education is not a threat to independence; rather, it is a prerequisite for impartiality.

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[12] *Ibid.* at 87.

[13] *Ibid.* at 48.

[14] *Ibid.* at 58-61.

[15] *Ibid.* at 68-69.

[16] *Ibid.* at 6, 59, 61, 73-75, 91.

[17] *R.* v. *Lippé*, [1991] 2 S.C.R. 114 at 139.

[18] Marshall, *supra* footnote 3 at 29.

[19] *Ibid.* at 91.

[20] Marshall J. suggests that the Canadian Judicial Council's disciplinary powers should be reduced and perhaps even eliminated altogether but he offers little to replace them. *Ibid.* at 86, 90.

[21] *Ibid.* at 60.

[22] I should acknowledge that I have been involved with such programmes.

If Mr. Justice Marshall is excessively hostile to chief judges and the Canadian Judicial Council, it may be that Professor Friedland is a tad too deferential. Like Marshall J., he too relies on the tension between independence and accountability to structure his analysis, but the research is significantly more thorough and at times quite original.[23] Of particular assistance are his comparative discussions of recent developments in Australia, England, New Zealand and the United States. Once again many important topics are addressed — judicial security, discipline, education, administration and bureaucratization, appointments and elevations and retirements — but this time there is more of an attempt to address the various perspectives that might be held and the positions ultimately adopted by Professor Friedland are quite tentative. This is not to say that the Report is obsequious. There is much in it that many judges will be concerned about from pensions and the constitutionality of salary rollbacks[24] to performance evaluations and more democratic appointment procedures.[25] Other important highlights include: the suggestion that in light of the *Gratton* case, it would be appropriate to disconnect issues of disability from that of discipline;[26] the argument that the test for finding a reasonable apprehension of bias is disturbingly indeterminate;[27] and the review of the complaints process adopted by the Canadian Judicial Council which, prior to this report, was a bit of a black hole.[28]

For all its strengths, however, the report also has its weaknesses. Again, this is because Professor Friedland attaches a little too much value to independence and too little to accountability. He understands independence and impartiality as inseparable and co-ordinate principles[29] whereas I would suggest that impartiality carries greater normative weight. For example, while Professor Friedland's review of the resolution process for complaints to the Canadian Judicial Council is quite enlightening, he seems relatively unperturbed by the fact that 95% of complaints are dismissed at a preliminary stage.[30] Obviously, I am not in a position to assess the accuracy of his claim that the Council does a good job as I have not been privy to the confidential files which he has reviewed, but I do worry that there is significant dissatisfaction expressed by many Canadians in relation

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[23] Some readers might complain that it is unfair to compare the two texts as one is authored by a busy judge, the other by an academic under commission. I am of course fully aware of the importance of context, but the simple fact is that Mr. Justice Marshall could have made his important point in one relatively short essay.

[24] Friedland, *supra* footnote 4 at c.4.

[25] *Ibid.* at c.7, 11.

[26] *Ibid.* at 48-52, 74.

[27] *Ibid.* at 18. See also my "We Can't Go On Together with Suspicious Minds: Judicial Bias and Racialized Perspective in *R.* v. *R.D.S.*" (1995) 18 Dal. L.J. 407.

[28] *Ibid.* at 98.

[29] *Ibid.* at c.l.

[30] *Ibid.* at 95, 119.

to the judiciary[31] but that this does not find any real outlet in the Report.[32] By way of comparison, the recently published *Report of the Commission on Systemic Racism in the Ontario Criminal Justice System*[33] attempts to address problems more from the bottom up than from the top down and therefore advocates somewhat more dramatic reform proposals.[34] Similarly, Professor Friedland's preference for informal as opposed to more formalized regulative processes[35] and his suggestion that these be within the purview of Chief Judges,[36] runs the risk of too much local or regional variation and may not those who demand that, particularly in these troubled times, justice must manifestly be seen to be done.[37] Finally, I would suggest that the Report pays insufficient attention to one of the potentially most important pressure points in the system of regulating inappropriate judicial conduct: whistle blowing lawyers.[38] It is lawyers rather than the general public who are most familiar with judicial conduct but, for obvious reasons, lawyers are reluctant to complain. Perhaps greater thought needs to be given to considering ways to enable lawyers to articulate their concerns without exposing them to unacceptable risks to their own professional careers.

In conclusion, while both books are compulsory reading for anyone who is concerned about judging in a modern democracy, I would suggest that they share a common weakness: they take independence as their starting point. The problem with this approach is that such a strategy makes all attempts at constructing mechanisms of accountability presumptively suspect. My own view is that if we truly value the criterion of "public confidence"[39] in the judiciary, then our starting point should be the goal of fair and impartial decision-making. This changes the equation quite significantly in that it recognizes that accountability and independence are equally important and that there should therefore be no *a priori* assumptions either way. This of course does not make the task of designing appropriate institutional structures and processes any easier, but it does at least enable us to begin to imagine mechanisms that are appropriate to a pluralistic society such as Canada which prides itself on a constitutional commitment to equality.

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[31] See e.g. *Commissioner's Report: Royal Commission on the Donald Marshall Jr. Prosecution* Vol. IV (Halifax: The Commission, 1989) at 18, 27; C.B.A. Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993) c.10.

[32] He does suggest some lay representation on disciplinary inquiries but my sense is that the "modesty" of the suggestion will render such participation more symbolic than effective. *Ibid.* at 137-138.

[33] (Toronto: Queen's Printer For Ontario, 1995).

[34] *Ibid.* at 233-234.

[35] Friedland, *supra* footnote 4 at 121-122, 132-133.

[36] *Ibid.* at 133.

[37] *R.* v. *Sussex Justices, Ex parte McCarthy*, [1923] All E.R. Rep. 233 at 234 (C.A).

[38] Friedland raises the issue briefly at 140-141.

[39] Friedland, *supra* footnote 4 at 81.