The Birth of a Criminal Code, the Evolution of Canada's Justice System.

By DESMOND H. BROWN.

Toronto/Buffalo/London: University of Toronto Press, 1995, 505 pp. ($115.00).

Reviewed by William A. Schabas*

Professor Desmond H. Brown has complemented his important study, *The Genesis of the 1892 Criminal Code*, published in 1990, with this volume of documents, many of them hitherto inaccessible. Indeed, it was Brown's complaint that he had been unable to obtain documents held by the Department of Justice and the National Archives of Canada that prompted assistant deputy attorney general Bruce MacFarlane to propose that the files be opened up. Professor Brown himself was asked by officials from Justice to undertake the job of editing the material, and this latest book, *The Birth of a Criminal Code: The Evolution of Canada's Justice System*, is the result.

The collection contains a cross-section of materials that influence the policy-making process, and that helped to mould the 1892 *Code*, forerunner of our present legislation. There are letters from individuals and experts, sometimes annotated with the mention that they had no influence whatsoever on the end product. In addition, the work contains a selection of briefs, legislative drafts and correspondence from the archives of important politicians of the time. Professor Brown has prefaced the collection with a very helpful background article that is cross-referenced to the documents.

The most striking impression to emerge from these documents is how very little has changed in criminal law. More than a century later, it seems that we are still debating the same points. For example, the documents manifest a substantial interest with sexual offences, a subject that continues to dominate law reports, the media and Parliamentary debates. Adultery had been an infraction only in New Brunswick, but it was not retained in the 1892 *Code*. Still, it wasn't until the late 1960s that Parliament firmly resolved to keep its nose out of the bedrooms of the nation. Even in the 1890s, some wise jurists

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warned of the dangers of legislating morality. In the parliamentary debates, one member explained that such crimes had "crept into the common law from the earlier ecclesiastical law, and they were rather sins thacrimes." He questioned whether such crimes should be punished "by long terms of service in the penitentiary," recommending that "flogging, or something of that sort" was preferable, and the best deterrent.

There are several letters and other documents in the collections concerning what was called the "girl question". What was meant, of course, were statutory prohibitions on sexual contact with adolescents. One concerned citizen, troubled that the draft was insufficiently rigorous, described a recent case involving a brothel-keeper who was acquitted after establishing that she "had reasonable cause to believe" that the girl was sixteen, when in fact she was somewhat younger. D.A. Watt lobbied Minister George A. Drummond on behalf of the Society for the Protection of Women and Children, arguing that the age of consent be raised "to a point somewhat nearer to civilized decency," and he proposed sixteen. Parliament did indeed tighten up the requirements, eliminating the defence of mistake of fact in cases involving adolescents, a principle that remained intact until the 1980s when it succumbed to sections 7 and 11(d) of the *Canadian Charter*. Even now, however, the pre-1892 defence of "reasonable cause" is unacceptable, and today's *Code* requires an accused to take "all reasonable steps to ascertain the age of the complainant." As for the age of consent, a century later it remains twelve, in some cases, and fourteen generally.

The term "pornography" was still unknown, but a prominent Quebec criminal lawyer, Laurent Genest, wrote the minister to urge measures aimed at repressing a "new class of crime". He was referring to the "most nefarious trade" in "photographies [sic] of men and women taken in a nude state, in most scandalous, lewd, immoral & indecent attitudes." Genest added that such photos were being sold "to our youth, to the great corruption of their morals." The legislation he proposed was fierce and draconian, making it an offence for a photographer to have lewd photos in his possession without justification or excuse, "the proof whereof shall lie upon him." These extremes were avoided, but they find an echo in recent amendments to the *Code* concerning child pornography.

Jeremy Bentham had been an early and aggressive proponent of codification of the common law. Though his views were frustrated in England, where serious efforts at codification finally stumbled upon reticent Parliamentarians, they found a receptive audience in many parts of the Empire, including Canada. My law professors in Quebec had taught that codification was of particular interest to our country because it helped make the criminal law accessible to French-speaking lawyers, although there is not a word in Professor Brown's collection, or for that matter in his earlier work, to support such a hypothesis. Certainly, the legislative process at the time was a very English affair, and there are only a few scattered documents in French in the collection. In one letter, the Queen's Printer, Samuel E.

Dawson, transmits some amendments to the Deputy Minister in English only. He says that if he insists on having them in French, "you will have to get the translator to the Senate out of bed to do it." Dawson's advice: "Perhaps you can do without French." Plus ça change...

Sometimes it is hard to understand the importance of the material in this collection. For example, Professor Brown seems at times to be almost obsessed with the salaries of nineteenth-century civil servants. He tells us in his introductory chapters not only how much they made, but what they spent it on, and where they lived. And then we have the documentary proof, as if to make sure that we are convinced of what seems, to this writer at least, to be obscure and unnecessary. Roughly half of the volume is consumed with the debates in the House and the Senate. The interest of this material is undeniable, although the need to reprint it is far from evident. After all, unlike the documents in the first portion of the book, these debates are readily available in most reference libraries. Their republication seems unnecessary and, might it be added, costly.

Of course, the *Canadian Charter* was not even a glimmer in the eye of the codifiers, although there is considerable evidence of concern with civil rights, specifically those that protect individuals who are arrested, detained and charged with offences. The common law equivalents of the *Charter* rights found in sections 7 to 11 were viewed at the time as fundamental principles, and there was no suggestion of either "reasonable limits" on these rights or of their suspension, by emergency legislation or otherwise. Also, the relationship between freedom of expression and criminalization of its abuses became an important theme in the debates, focused on the offence of criminal or defamatory libel. John King, counsel for the Canadian Press Association, had considerable success influencing the drafting of the relevant provisions. In one letter, he wrote: "Most criminal prosecutions for libel are commenced, as far as my experience goes, by persons of means, but there are occasionally prosecutions of a purely wanton and vexatious character by persons financially worthless. Journalists should as far as possible be protected in such cases..." Although alert to the dangers of "libel chill", he may however have misjudged the threat to the press coming from "persons of means".

Some letters indicate an interest with gun control, and of provision for that subject in the codification. Other issues of concern include consumption of tobacco by minors, and that marvelously Canadian offence of leaving a hole in the ice unattended. As for the latter, in 1892 Parliament treated it rather lightly, as a "misdemeanor". The mayor of New Glasgow wrote his own M.P. in efforts to have the provision strengthened. There is also an interesting exchange of letters in the collection on the subject of lotteries, with one missive from a Quebec prosecutor, A.W. Atwater, aimed at tightening up loopholes in the law. Atwater asked that his communication remain confidential, "as I do not care to let the lottery people, whom I am actually prosecuting, know what I consider to be the difficulties on our way." Atwater could not have imagined that his own employer, the

government, would eventually take over the lottery business from the lottery people.

One of the most interesting documents in the entire collection is a lengthy letter from Justice Henri-Elzéar Taschereau of the Supreme Court of Canada. Taschereau had not been involved in the discussions when the draft *Code* was being adopted, but once the legislation was in force he sought copies immediately so that he could prepare a third edition of his treatise on criminal law. As Professor Brown puts it, the new legislation "gave him pause". Justice Taschereau undertook a public campaign against the *Code*, to no avail, but also corresponded with the Justice Minister, Sir John Thompson. Apologizing for his absence in the debate prior to adoption, Taschereau explained that he had "discovered the defects" in the code "accidentally, as it were".

Justice Taschereau attacked the *Code* for being incomplete, and much of his broadside addressed omissions, in terms of offences, parties and defences. Incomplete it was, and only in 1955 would Parliament finally eliminate common law infractions that had continued, for nearly six decades, to co-exist with those that had been codified. Despite efforts by the Law Reform Commission of Canada to provide a genuine codification, especially of the general part of the *Code*, it still corresponds in large part to the improvised patchwork that so annoyed Taschereau. Taschereau's comments also provide one of the rare considerations of the issue of sentencing, a point whose absence from most of the documents suggests that it was of little more than marginal concern. The scope of the death penalty had been considerably reduced over the years preceding codification, but it continued to apply in the most serious cases, as did whipping or flogging. Taschereau was not a penal reformer, and only wanted to ensure that the scheme of sanctions had some coherence.

Certainly the most striking impression, on this reader at least, is of the maturity of the debate. In the 1990s, it seems almost impossible to speak of criminal law reform without unleashing demagogic forces that pander to sentiments of fear and vengeance in the general public. In the 1890s, the discussion was serene and intelligent, aimed at addressing real problems rather than imaginary ones. Many, though not all, of the arguments and representations are shown to be cogent and even persuasive. Unlike those of Napoleon, or Justinian, or even the ill-fated text of Justice Stephen, upon which the Canadian legislation relied considerably, the 1892 *Code* bears no name. How typically Canadian, a product of bureaucrats. Professor Brown's collection provides us with some new insights not only into criminal law, but also into a legislative process which with more than a century of hindsight appears to have been remarkably and surprisingly healthy.

Undue Exploitation of Violence.

By Department of Justice Canada.
Consultation paper — March 1996. Pp. 26. (Free of charge).

Reviewed by Margaret Isabel Hall*

Whether or not Canadian society is actually becoming more violent, and whether the proliferation of violent imagery is, at least partially, responsible, representations of violence permeate our public space and many Canadians don't like it. The perception apparently exists that so much fictitious violence must have a considerable, and considerably malign, impact on the shape of real life. Although such a link remains debatable, the reduction of media violence is identified here as a "key component" of the federal government's strategy to reduce violence in society. This Consultation Paper, issued by the Department of Justice in March 1996, describes the range of existing voluntary activities dealing with media violence before considering the direction in which the federal government should proceed.

The four appendices attached to the Paper detail these existing schemes: government initiatives, voluntary industry measures, including self-regulation, non-governmental organisations, institutions and community action groups, and educational materials. The idea, as recommended by the National Crime Prevention Council, is that through this kind of non-legislative activity "societal values" can be changed. This approach pursues meaningful change from the inside-out: work to change the values of society and violent representation will lose much of its mainstream appeal and profitability. A legislative prohibition pursues change from the outside-in: take the violent pictures away and the gentling of Canadian society will follow. The particular characteristics of this problem (the arguable existence of the crucial "link" and the nature of the problem as one of pervasive media violence, rather than isolated "extreme cases") favour the non-legislative inside-out approach, the Paper's analysis suggests, and its consideration of the legislative options available to the government underscores why this is so.

Analysing possible legal approaches to the problem of "undue exploitation of violence", the Paper gives priority of consideration to the Canadian *Charter of Rights and Freedoms* and the protection given to freedom of expression by s.2(b), characterised here as "the cornerstone of democracy". This "cornerstone of democracy" will, of course, limit restrictive legislation, although such legislation may be "saved" by s.1 if it can be shown to be reasonable and demonstrably justified in a free and democratic society. The Paper notes the

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equality rights guaranteed by s.15 as pertinent to any s.1 "balancing act" if the restriction in question can be characterised as protecting vulnerable groups, but the power of s.2(b) and the still debatable link between real and fictional violence may combine to make restrictive legislation impossible. Nevertheless, there are recommendations under consideration by Parliament to control the undue exploitation of violence from the outside-in, via legislation.

The current *Criminal Code* does not prohibit excessive violence: "obscenity" considers excessive violence only in the context of sex:

> s.163(8) For the purposes of this *Act*, any publication a dominant characteristic of which is the undue exploitation of sex and any one or more of the following subjects, namely crime, horror, cruelty and violence, shall be deemed to be obscene.

The Standing Committee on Justice and Legal Affairs, in a report tabled in November 1994, recommended that the obscenity section of the *Criminal Code* be amended to include excessive representation of violence, or that a provision be created to prohibit the "undue exploitation or glorification of horror, cruelty or violence." The Paper considers the argument that an amendment to the current obscenity definition would be preferable to the creation of a new section, as this would not create a new legal concept but, rather, extend an old one, the well developed community standard of tolerance based on risk of harm. The *Criminal Code* may, however, be entirely the wrong place in which to "do something" about media violence.

In most circumstances, a criminal prohibition would infringe s.2(b) of the *Charter*, and the government would have to meet the s.1 "test". In order to do so, the government would have to establish on the balance of probabilities a link between exposure to the violent material in question and harm to society as a whole, a link that has yet to be conclusively proven, despite the many studies endeavouring to do so. The government would also need to show that it had considered less restrictive means of attaining its objective, and that the course chosen- the criminal sanction- was the most appropriate means of achieving the specific government objective (itself reliant on the dubious link): resolving the social harm caused by violent materials. Because of these restrictions, any viable change to the *Criminal Code* could address only the "extreme cases", and should not be looked to as a potential "cure" for the problem of pervasive violence: "As a partial response, it would not address all the representations of violence in the media, entertainment and advertising industries that the Committee had in mind." Casting further doubt on a criminal solution, the Paper quotes from *The Criminal Law in Canadian Society* (a paper issued by the government in 1982) which includes among its principles the following statement: "the criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate, and in a manner which interferes with individual rights and freedoms only to the extent necessary for the attainment of its purpose."

The Paper anticipates the difficulty of enforcing such a law, referring to the problem which arose in the context of sexual obscenity in the *Jorgensen*[1] case of proving that an accused "knew" that the materials he was selling were "unduly exploitative", not merely concerned with sex. Finally, such a change to the *Criminal Code* would entail a similar amendment to the *Customs Tariff*. The Paper refers to the difficulty that police and customs officials have in enforcing changes to the *Code* and *Tariff*, concluding that legislation which cannot be enforced weakens the rule of law; the brave new world of the Internet and beyond makes this question of enforcement particularly fraught (although the Paper goes on to remind that illegal communication remains illegal in whatever form it appears, citing the conclusion of the Report of the Information Highway Advisory Council, *Connection, Community, Content: The Challenge of the Information Highway*, which recommended the enforcement of existing *Criminal Code* provisions, together with educational initiatives and industry self-regulation, as the most appropriate response to concerns about this new frontier.)

Pervasive and excessive media violence is a significant social problem, but the criminal sanction seems unwise here because unworkable; if able to clear the *Charter* the most significant impact of such legislation on the "public value system" may be to further devalue the rule of law through the impossibility of enforcement.

Also of interest here is a discussion of approaches taken by other countries to the problem of excessive violence in the media. The paper identifies the problem of violence on television as less critical in Great Britain due to the fact that two out of four channels are owned and operated by the government itself. Additionally, the *Broadcast Act 1990*[2] which governs television and radio broadcasting establishes a Commission which develops codes for regulating violent content on the independents. The *Video Recordings Act 1984*[3] has established a classification system for all videotaped materials with two aims in mind: to inform the public about the content of videos and to prohibit the distribution of those found to be unsuitable. *The Children and Young Persons (Harmful Publications) Act*[4], though rarely used, is designed to prevent violent content in material aimed at children.

New Zealand has several statutes regulating media content, which define "indecency" as "describing, depicting, expressing or otherwise dealing with matters of sex, horror, crime, cruelty or violence in a manner that is injurious to the public good", a definition which is much broader than our own exclusively sexual "obscenity". "Indecent" materials can be prohibited.

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[1] R. v. Jorgensen (1995), 43 C.R. (4th) 137 (S.C.C.).

[2] C.42.

[3] C.39.

[4] C.28.

In the United States, there has been no federal regulation of broadcasters in this regard, although one important step towards industry *self-* regulation occurred with the enactment of the *Children's Television Act 1990*[5] which allows broadcasters to meet and set standards and guidelines, which they have done (prior to this they were prohibited from meeting by anti-trust laws). The Consultation Paper refers to various proposals (as of March 1996) being considered by Congress, including the mandatory installation of the famed "V-chip" in all new televisions. The practicalities of the "V-chip" are proving more complicated than they first appeared: what will the V-chip do about violent advertisements or, even more subtly, advertisements for violent programs? Such problems are inevitable, given the definitive messiness of this issue, and the unfolding saga of the V-chip will tell us a great deal about the feasibility of standards where the freedom of expression is a primary ideological virtue.

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Laundering and Tracing.

Edited by P.B.H. BIRKS.

Oxford: Clarendon Press, 1995, Pp. xxxv, 353 ($121.50).

Reviewed by M.H. Ogilvie*

Laundering and Tracing brings together papers presented at two seminars at All Souls College, Oxford, sponsored by the Society of Public Teachers of Law and organised by the Regius Professor of Civil Law, Peter Birks. The first seminar was devoted to tracing and the second to defences, especially *bona fide* purchase, change of position and ministerial receipt. Tracing has once more become important because of the global increase in money-laundering of funds derived from drug trafficking and international terrorism. The European Union enacted a Directive on Money Laundering[1] in 1990, which has now been followed by member state legislation putting its provisions into effect in the national laws of the member of states, including the United Kingdom.[2]

[5] 47 U.S.C. 303. See Feldman, Comment (1996) 39 How. L. J. 587.

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The title "Birks: Laundering and Tracing" at [1996] 75 Can. Bar Rev. 631 was inadvertently applied to Dr. M.H. Ogilvie's review of David Walker's "A Legal History of Scotland — The Seventeenth Century".

[1] Council Directive 91/308/EEC (O1/1991/L166/77). This Directive is to be understood in the context of the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (Vienna Convention)*, Vienna, 20 December 1988.

[2] *Criminal Justice Act (U.K.)*, 1993, Part III and Money Laundering Regulations S1 1993/1933.

The aim of the legislation is to deter money-laundering through the criminal law and to obstruct it by compelling banks and other financial institutions to require greater disclosure of information about customers and the sources of funds placed on deposit. Although the legislation does not directly change the civil law, it is clear that victims and their insurers will increasingly seek restitution of funds wrongfully gained and, to do so, will need to trace the funds claimed, through the intricate web of accounts and property-transactions through which such funds are typically passed to disguise their origins. Restitutionary principles will increasingly come under judicial scrutiny for fairness since the defendants in such civil cases are likely to be equally innocent of knowledge or involvement in the money-laundering activities and equally easy targets for defamed plaintiffs, such as bankers, lawyers and legitimate business enterprises in which the money has been properly invested.

The law relating to tracing has until now been relatively under-utilized and not clearly understood. An increase in cases, however, especially in England, is now leading to greater development in principle and sophistication in application of the procedure, so the timely appearance of this volume is to be welcomed. The eleven essays it contains exemplify how outstanding doctrinal legal scholarship, of a kind now largely absent from Canadian law faculties and legal writing, can illuminate difficult factual situations which require justice and fairness in the definition of and application of the common law.

The volume begins with an essay by Professor David Hayton, entitled "Equity's Identification Rules"; it addresses the threshold issue of identifying the equitable rules which tell us whether one asset may be traceable to another. What is principally traced is value, and the rules help to determine whether and to what extent value in one asset may be located at another point in time in another asset. Tracing, the application of the identification rules, is distinguished from claiming, the assertion of a right which has been selected. However, in the third essay by Stephen Moriarty, "Tracing, Mixing and Laundering," the view that value is traced, not assets, is challenged, and the more traditional view, that what the law is really doing is treating the entirety of the fund as subject to a lien is advanced. In the final essay, Professor Birks casts considerable doubt on the issue and concludes with Professor Hayton that the essential characteristic of tracing is the tracing of value through substitute assets.

In an amusing essay, "The Legal and Moral Limits of Common Law Tracing,", which at times seems to cover life, the universe and everything else, Professor Paul Matthews further considers the relationship between tracing and the nature of property and property rights. Through an exploration of a set of both real and hypothetical cases of considerable intricacy, Professor Matthews explores how the common law has or may understand what it has done in tracing and concludes that it is still too early to definitively state how tracing operates or ought to operate.

A more practical approach is taken in the fourth essay by Helen Norman, "Tracing the Proceeds of Crime: An Inequitable Solution?", which analyzes the recent legislation and case law on money laundering, as does the fifth essay by Simon Gleeson, "The Involuntary Launderers: The Banker's Liability for

Deposits of the Proceeds of Crime," whose title accurately describes the paper. This essay is of particular interest to banking lawyers since it concludes with some helpful observations on how banks may use internal checking procedures to protect themselves from becoming "involuntary launderers".

The remaining five papers in this collection are concerned with defences to a claim for tracing. The recognition by the House of Lords in 1991 in *Lipkin Gorman* v. *Karpanale Ltd.*[3] of the defence of change of position probably signalled a significant change in judicial approaches to tracing, since the defence will likely afford greater protection to the innocent recipients of wrongfully misappropriated funds than the core notion of unjust enrichment. In chapter six, "Change of Position" and chapter seven, "After Change of Position: Good Faith Exchange in the Modern Law of Restitution," Richard Nolan and Kit Barker, respectively, explore the ramifications of the *Lipkin Gorman* decision. Nolan rightly suggests that the kinds of questions to which the courts should be expected to give answers, in order to achieve the balancing of plaintiff and defendant interests, include the kind of defendant who may avail himself of the defence, the kind of action to which the defence applies and the kind of change of position which might limit, diminish or extinguish the defendants's obligation to make restitution. Barker argues that the defence of *bona fide* purchase for value without notice is not a sub-species of the defence of change of position, and appears to have resolved that debate for good, forcing Professor Birks in his final chapter to renounce this position which he had advocated as heretical and wrong.

In chapter nine, "Failure of Consideration," Professor Ewan McKendrick deals with the question of whether counter-restitution is in itself a defence and concludes that it is not, simply stating that it is the principle that a plaintiff who seeks restitution must surrender to the defendant any benefit received from the legal connection. Professor McKendrick shows how difficult it is to identify the actual principles in this area because the case law is so fragmented. Finally, in chapters nine and ten, William Swadling and Professor Francis Rose, respectively, explore "Ministerial Receipt" and "Passing On," again demonstrating with great elegance the difficult and fragmentary nature of the law in relation to these defences.

As this review demonstrates, it is not possible in the space of a book review to do more than state the contents of a volume such as *Tracing and Laundering* and to give some indication of the importance of its contents. All of the essays are detailed, thoughtful, highly intelligent and articulate, exemplifying English legal writing about difficult and protracted subjects at its very best. In an area in which the global nature of the problem should require a uniform and consistent set of legal principles applied to cases across the jurisdictions, it is clear from this volume that the English judiciary and academy are taking the lead in developing fundamental doctrinal principles for application to some of the most complex and sophisticated legal issues faced to date by both the common and civil law systems. This volume deserves to be known and consulted by Canadian lawyers and judges as they too come to grips with these problems in the future.

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[3] [1991] 2 A.C. 548 (H.L.).

Explorations in Difference: Law, Culture and Politics.

By JONATHAN HART AND RICHARD BAUMAN, EDS.
Toronto: University of Toronto Press, 1996.

Reviewed by Rebecca Johnson*

> ".. the politics of community, need not and indeed cannot be an all-or-nothing affair; as the negotiation of differences, it is not a zero-sum game in which one either wins or loses. It is inevitably a politics of communication in which history is made, not by victories and defeats, but by the diplomacy of confrontation and accommodation, that is by the simple recognition that differences are not absolute and that others are potential partners just as partners are potential others".[1]

The recognition that differences are not absolute may be simple, but the practical consequences and theoretical wanderings inspired by this recognition have been far from simple. Debates in law, politics and culture have long struggled against the sense of being high-centred on complex questions of identity politics and the dilemmas of equality and difference. Is difference something to be accepted, accommodated, surmounted, or denied?

This collection of articles participates in the 'diplomacy of confrontation and accommodation' surrounding questions of difference.[2] Eight scholars from differing backgrounds offer their thoughts and observations on "difference". These observations cover a wide range of views, and illustrate differing levels of ambivalence with respect to difference and its implications.

In the introduction, editors Hart and Bauman draw together the themes and questions which link these differing essays, to create a cogent whole. They do so by first situating the articles in the context of debates around the postmodern condition. While their brief summary of postmodernism will probably not convert the sceptic or unbeliever, it does provide a context for the articles which follow. It draws the reader's attention to those recurrent themes of postmodernism which surface throughout the book: the relationship of power to powerlessness and the individual to the state or community; the problem of "identity"; the role

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[1] R. Chambers at 61.

[2] Earlier versions of the essays were originally presented at the conference after which the collection was named, held at the University of Alberta in 1992.

of reason and enlightenment thinking in creating current dilemmas; and the possibility of solving these problems given the incommensurability of different individuals, groups, or cultures in communicating and constructing communities. The introduction also emphasizes that the postmodern condition is a place of contradictions and ambivalences. With this context set, the reader is well placed to identify the ways in which the essays in the collection reveal dimensions of postmodern practice: self-reflexivity and ambivalence with respect to the libratory potential of difference.

The essays are divided into two sections: "Theoretical Accounts", and "Instances". The first section, "Theoretical Accounts", establishes a context for postmodern inquiries into difference. It begins with a contribution by Ross Chambers (French and Comparative Literature, Michigan). In "No Montagues Without Capulets: Some Thoughts on Cultural Identity", he explores the cultural practice of scapegoating. Culture, he argues, is not a principle of identity but a precondition of community, which is itself a precondition of communication. Communication, he adds, exists only where there are differences to negotiate. Scapegoating permits one group to portray another group as "different", but in a way that erases the differences within the scapegoated group. By presenting the "other" as monolithic in its difference, scapegoating makes it possible for the scapegoating group to see communication with the scapegoated group as unnecessary; there are no differences to negotiate. Chamber's exploration of theory leads him to suggest possible (and perhaps even plausible) strategic plans of action for "scapegoated" groups. He suggests that the important politics of identity could be followed by a politics of self-affirmation and a politics of invitation, where the scapegoated attempt to absorb the "scapegoating" community into their already diverse group.

Jennifer Nedelsky (Political Science, Toronto) follows with "Reconceiving Rights as Relationships", exploring the ways in which current forms of "rights talk" pose difficulties for those concerned with difference. For her, the fundamental premise of constitutional rights is equality. But what is the meaning of equal moral worth given the reality that in almost every conceivable concrete way people are not equal, but are vastly different? How can society structure relations of equality among people with many different concrete inequalities? She suggests that rights talk, though important, is dangerously one-sided: it helps people avoid seeing the relationships of which they are a part. She suggests greater vigilance in the use of rights talk, and a tighter focus on the relationships that our rights structure. Such an approach better reveals the connections between society's powers to exclude and, for example, the plight of the homeless. She concludes with a concrete application of her theory, examining the question of whether property rights belong in the *Charter*.

The third article is an essay by Christopher Norris (English Studies, Communication and Philosophy, University of Wales at Cardiff) titled, "Enlightened Pursuits: Truth-Seeking Discourse and PostModern Scepticism."

Norris focuses on postmodern critiques of the Enlightenment and of notions of truth-seeking and progress. While agreeing that these critiques are important, Norris suggests that in them, postmodernism sometimes risks throwing the baby out with the bath water. He argues that there is a need to re-value Enlightenment criteria of logic, reason, and reflexive auto-critique, criteria which help us resist the dogmatic imposition of ideas which derive their authority from mystified notions of absolute transcendent truth. Radical theory, Norris concedes, is often experienced as having disabling political consequences (a point made by many critics of postmodernism and deconstruction). Norris suggests a counterweight: a focus on distinguishing different orders of truth claims. There is a difference between truth imposed by arbitrary fiat, and claims to truth advanced in the public sphere of open argumentative debate. Norris argues that people need to stand more firmly before those who suggest that we have the unenviable choice of being dupes or inquisitors, victims or agents of will to power masquerading as critical reason. The challenge is not to reject truth, but rather, to reinscribe truth in ways that re-value consensus, good faith, lucidity, rigor and criticism.

The section concludes with, "Some Disquiet About Difference" by Christine Sypnowich (Philosophy, Queen's). In articulating her disquiet, Sypnowich does not dismiss the importance of thinking about difference. However, her focus is on the relationship of theories of difference to concrete strategies for political change. The danger, she argues, is not in talking about difference or identity. Rather, the danger is in making identity the primary focus of political claims. It is inequality rather than difference that must be the focus of strategies for change. Difference must be acknowledged, but not just for its own sake: the idea is to remedy those injustices that are the consequence of difference. She also cautions against deconstructing into the dust notions of rights and the ideal of impartiality. Echoing the themes raised in earlier articles, she argues that rights are an important correlate of difference: rights give us grounds for a commitment to an entity outside our disparate identities.

The second section of the collection, "Instances", contains essays which provide applications of postmodern theories of difference to particular issues. It opens with a contribution by Sheila Noonan (Law, Queen's). In "Pertaining to Connection: Abortion and Feminist Legal Theory", Noonan seeks to broaden the scope of stories told about both feminist legal theory and reproduction. In particular, she argues that Robin West's formulation of women as "connected" is problematic in its tendency to flatten the complexity of women's lives. That is, women's stories of reproduction exceed the boundaries of separation and connection emphasized by some feminist legal theories. The complexity of women's differences, she argues, may provide valuable insights. The very diversity and range of stories may help theorists better identify patterns of injustice, justice, connection and difference, and thus help to build connections across difference without erasing those differences in the process.

In his essay, "When Legal Cultures Collide," Richard Devlin (Law, Dalhousie) speaks to the value of postmodernism, while expressing concern about the disengagement and political quietism which it sometimes engenders. Devlin argues that the postmodern focus on texts and epistemology is absolutely necessary yet nonetheless insufficient for those who seek to achieve a society of both inclusion and difference. This postmodern focus, he argues, must be supplemented by an emphasis on both politics and ethics. He attempts such an integration in his examination of the Irish hunger strike of 1981. This examination resists the tendency towards disengagement and political quietism, while providing an opportunity to reflect on that enduring question of social theory: the relationship between structure and agency.

Claude Denis (Sociology, Alberta) contributes "Rights and Spirit Dancing: Aboriginal Peoples Versus the Canadian State". Here, Denis creates a complexly layered discussion, focusing both on conflicts between aboriginal and anglo-Canadian culture, and on anglo-/franco-Canadian culture. Denis sets the stage for his discussion by noting the ways in which "there is an antagonism being set up between the claims of Quebec and the claims of aboriginals, with the latter being used in english-speaking Canada to undermine the former."[3] Denis looks at the commonalities between Quebec and aboriginal claims, noting the irony that this commonality is expressed as an antagonism rather than an alliance. These questions lead him to pose additional ones about the extent to which communication is possible between cultures. He turns his attention to a British Columbia case (*Thomas* v. *Norris*) dealing with the aboriginal ritual of "spirit dancing". His examination of the case makes a compelling read, and leads him to conclude that communication between cultures may be more difficult than some have thought. However, he does not suggest the impossibility of the task. Rather, he suggests that communication is possible, but that it requires knowledge of the difficulties of the task.

The final essay in the collection is by Patricia McCallum (English, Calgary). In "Rewriting the Enlightenment: Allegory and Trauerspiel in Alejo Carpentier's *El Siglo de las luces*", McCallum explores the limits to the emancipatory project of the Enlightenment as worked out in Carpentier's novel, whose title translates as 'A Century of Enlightenment'. McCallum's essay is one of the more difficult ones in the collection. As a legal reader, I found I had to do more work than I had anticipated to connect this article to the collection as a whole. However, for the reader willing to follow McCallum into the world of literature, there are connections to be made. Focusing on the techniques of allegory, she provides a reading of both the novel and the enlightenment which suggests that the outcome is "more than a little uncertain",[4] and which focuses attention on obscurities, instabilities, and the possibility of something new. Thus, the

[3] At 201.

[4] At 240.

collection closes much as it began, with a sharp focus on the contradictions and ambivalences inherent in the postmodern condition.

This collection will be of great interest to those who are concerned with the day to day dilemmas of difference. The question in this book is not just "what difference does difference make?" but is also "what do we make of difference?" and "what difference does it make how we think of and theorize those differences?" This book does not settle the debates over difference. In fact, it suggests that the debates are there to be participated in rather than settled. Those seeking straightforward answers will find themselves disappointed. The tentative answers implied in this collection carry the markings of a postmodern ambivalence: suggestions of new possibilities walk hand in hand with obscurities and instabilities. These essays propose lines of inquiry rather than solutions, and encourage the reader to participate in those inquiries. As a work that participates in the diplomacy of confrontation and accommodation, this collection is a success.

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Hearsay and Confrontation in Criminal Trials.

By ANDREW L.-T. CHOO

Oxford: Clarendon Press, 1996. Pp. xxx + 236. ($94.50).

Reviewed by Hamish Stewart*

In a series of cases decided since 1990, the Supreme Court of Canada has revolutionized the law of hearsay. The traditional approach, in which hearsay was inadmissible unless it came within one of the recognized common law exceptions or was admissible by statute, has been supplemented by a "principled approach", in which otherwise inadmissible hearsay may be admitted if it is necessary and reliable.[1] Yet the precise principles which are

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[1] This approach was first articulated by McLachlin J. in *R.* v. *Khan*, [1990] 2 S.C.R. 531. It was possible to interpret *Khan* as creating a new common law exception for statements by children; but in *R.* v. *Smith*, [1992] 2 S.C.R. 915, the Supreme Court stated that the principled approach had a much broader application. Since *Smith*, the court has said that the principled approach governs the admissibility of previous inconsistent statements for their truth (*R.* v. *B.(K.G.)*, [1993] 1 S.C.R. 740) and the admissibility of testimony from a preliminary inquiry, where that testimony is not admissible under the *Criminal Code*, s. 715 (*R.* v. *Hawkins*, [1996] S.C.J. No. 117 (QL)).

supposed to govern the "principled" approach remain somewhat elusive.[2] Andrew L.-T. Choo's lucid survey and persuasive critique of the English law of hearsay[3] may well be of some assistance in the development of appropriate principles.

Choo begins with a discussion of the rationales for excluding hearsay. His treatment of the argument that hearsay is unreliable breaks no new ground, but is admirably clear and complete. The trier of fact's assessment of any witness depends on its assessment of the witness's sincerity and ability to perceive, recall, and narrate the incidents in question. Choo emphasizes the familiar point that when the evidence is hearsay, the trier of fact must assess these testimonial factors at one remove from the maker of the statement,[4] so that each testimonial factor has its corresponding "hearsay danger". He examines each of these four factors in detail, with reference to the psychological literature on testimony.[5] But, in addition to the argument that hearsay is unreliable, Choo considers a number of extrinsic rationales for excluding hearsay: he draws on the work of certain American academics who suggest, for example, that the hearsay rule reinforces the participatory nature of the trial and helps to protect the accused by ensuring that the prosecution has to produce its witnesses.[6]

Choo then moves to a systematic examination of judicial treatment of the rule and its exceptions.[7] The theme of this examination is that, in light of the internal and extrinsic reasons for excluding hearsay, both the rule against hearsay itself and the standard exceptions to the rule are inadequately rationalized and frequently perverse. This unfortunate state of the law has three consequences. First, the rule against hearsay sometimes requires the exclusion of highly reliable evidence.[8] Second, because the rule sometimes operates in this way,

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[2] M. Rosenberg, "B.(K.G.) — Necessity and Reliability: The New Pigeon-holes" (1993) 19 C.R. (4th) 69; A.W. Mewett, "Editorial: Hearsay after Smith" (1993) 35 C.L.Q. 273; D.A.R. Thompson, "The Supreme Court Goes Hunting and Nearly Catches a Woozle" (1995) 37 C.R. (4th) 282; S. Schiff, *Evidence in the Litigation Process*, 4th ed., vol. 1 (Scarborough: Carswell, 1993) at 479-81.

[3] A.L.-T. Choo, Hearsay and Confrontation in Criminal Trials (Oxford: Clarendon Press, 1996).

[4] *Ibid.* at 16-21.

[5] *Ibid.* at 22-37.

[6] *Ibid.* at 37-43.

[7] *Ibid.*, chapters 3, 4, and 5.

[8] To illustrate this point, Choo discusses *R.* v. *Kearley*, [1992] 2 A.C. 228 (H.L.), where the police, while seizing drugs at the accused's residence, received numerous phone calls and visits from persons seeking to purchase drugs from the accused. The Crown offered the officers' report of these calls and visits to show that the accused possessed the drugs for the purpose of trafficking. A majority of the House of Lords held that the phone calls were hearsay, since each caller, in trying to buy drugs from Kearley's residence, was impliedly asserting, "Kearley is a drug dealer", and that the evidence must be excluded, because it fit into no recognized exception to the rule against hearsay (*Kearley, supra* at 246 per Lord Bridge, at 255 per Lord Ackner, and at 272-273 per Lord Oliver; Choo, *supra* footnote 3 at 77-80).

courts are sometimes driven to avoid it by finding an implausible non-hearsay characterization for hearsay evidence.[9] The third consequence concerns the exceptions to the rule. These exceptions should, in principle, enable courts to deal honestly and straightforwardly with reliable hearsay; but, since the exceptions are not always rationally motivated, they sometimes permit the introduction of evidence that is not reliable at all. For example, "a declaration made when the declarant was under a settled and hopeless expectation of death is admissible in evidence, in a homicide prosecution, to prove the cause of the declarant's death."[10] The original rationale for this exception was that was that when a person faces death, he or she has no motive to lie and every reason to tell the truth: the declarant has nothing more to gain in this world and everything to fear in the next. Choo points out that this rationale is unlikely to be valid in a modern society, where many varieties of religious belief compete less with each other than with non-belief; yet the exception continues to be recognized.[11] On the other hand, if the rationale remains valid, there is no reason to limit it to homicide cases; yet the exception has never been extended where the accused was charged with something else.[12] Choo analyses other common law exceptions and reaches similar conclusions.

These defects in the rules governing hearsay are well-recognized; the real question is what to do about them. The approach taken by the Supreme Court of Canada was to create a residual or "principled" exception to the rule against

[9] On this point, consider the rule that a witness's previous, out-of-court, identification of the accused is admissible to identify the accused as the offender, where the witness cannot identify the accused in court. *R.* v. *Osbourne*, [1973] Q.B. 678 (C.A.); *R.* v. *Swanston* (1982), 65 C.C.C. (2d) 453 (B.C.C.A.). It has been suggested in some cases that such evidence is not hearsay, because "the evidence is adduced merely to prove the fact of the identification, rather than the fact that the person identified was the perpetrator of the offence." Choo, *supra* footnote 3 at 53, outlining the reasoning of Gibbs C.J. and Murphy J. in *Alexander* v. *The Queen* (1981), 145 Commonwealth L.R. 395. The fallacy of this argument is simple: the fact that the witness previously identified the accused ("I recognize that man") is of no relevance unless it is joined with the witness's previous statement that the accused was the offender ("I recognize that man as the person who committed the offence"). Choo therefore suggests that the rule in *Osbourne*, *supra*, should be recognized as an exception to the rule against hearsay: Choo, *supra* footnote 3 at 54-55. This view is supported by *R.* v. *Langille* (1990), 59 C.C.C. (3d) 545 (Ont. C.A.) (although in that case the evidence was admissible even though the witness did identify the accused in court).

[10] Choo, *supra* footnote 3 at 106.

[11] Choo discusses a series of cases from Papua New Guinea, where the exception was ultimately held to apply both where the declarant's beliefs about life after death did not include the expectation that he would meet his Maker, and where the declarant had no religious belief at all. *R.* v. *Kipali-Ikarum*, [1967-8] P. & N.G.L.R. 119; *R.* v. *Ambimp*, [1971-2] P.& N.G.L.R. 258, as cited by Choo, *supra* footnote 3 at 107. The exception was recognized in Canada as recently as 1958: *R.* v. *Jurtyn*, [1958] O.W.N. 355 (C.A.).

[12] Choo, *supra* footnote 3 at 108.

hearsay, based on the twin criteria of necessity and reliability.[13] Choo proposes another path:

> I would propose that the hearsay rule and its exceptions, as presently constituted, be abolished. The admissibility in evidence of out-of-court statements should be justified on a case-by-case basis, and accused persons should have a right of confrontation ... Thus, evidence of all out-of-court statements should be regarded as *prima facie* inadmissible on behalf of the prosecution. In order to secure admissibility, the prosecution must satisfy the trial judge that the maker of the statement is either being called as a witness ... or is unavailable. If the prosecution is able to do so, the evidence should be admissible so long as the prosecution also satisfies the trial judge that it is sufficiently reliable to be left to the jury for its evaluation.[14]

Choo argues that the requirement that the declarant be unavailable "reflects considerations of extrinsic policy by emphasizing the role of confrontation as an expression of the importance of participation in a criminal trial."[15] He thus regards the requirement of unavailability not just as a practical threshold for the admission of hearsay, but as "reflect[ing] the moral value of ensuring, wherever possible, face-to-face confrontation between a defendant and those whose statements are being used against her or him."[16] He nonetheless provides a long and open-ended list of situations where a declarant would be "unavailable." If the declarant is unavailable, Choo proposes that the reliability of the hearsay statement be assessed with specific reference to the four hearsay dangers that motivate judicial distrust of hearsay; rather than assuming that any given categorical exception can adequately compensate for the hearsay dangers, the court should assess each one in each case.[17] But where hearsay evidence is tendered by the defence, the requirement of unavailability should not be applied strictly, since the Crown has no "right of confrontation"; the focus should be on reliability.[18] This regime, Choo argues, would make for fairer and more rational decision-making on hearsay evidence without any significant loss in the certainty and predictability of the law.[19]

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[13] See the cases cited in footnote 1, *supra*. Choo interprets the Canadian "principled approach" as an additional exception, rather than as a wholly new approach: Choo, *supra* footnote 3 at 169; see also Thompson, *supra* footnote 2 at 291-92; Schiff, *supra* footnote 2 at 479. A fact situation where a hearsay declaration fit one of the standard exceptions but was unnecessary, or insufficiently reliable, to be admissible under the principled approach would force the Court to determine whether the "principled approach" replaces or supplements the existing common law hearsay rules. See Rosenberg, *supra* footnote 2 at 71.

[14] Choo, *supra* footnote 3 at 192-93, footnotes omitted.

[15] *Ibid.* at 193.

[16] *Ibid.* at 185.

[17] *Ibid.* at 194-95.

[18] *Ibid.* at 196; compare *R.* v. *Williams* (1985), 18 C.C.C. (3d) 356 at 378 (Ont. C.A.).

[19] Choo, *supra* footnote 3 at 196-98. Much of what Choo says regarding the desirability of determining the reliability of hearsay evidence on a case-by-case basis with reference to the hearsay dangers has been said before: see E.M. Morgan, "Hearsay Dangers and the Application of the Hearsay Concept" (1948) 62 Harv. L.R. 177; S. Schiff, "Evidence — Hearsay and the Hearsay Rule: A Functional View" (1978) 56 Can. Bar Rev. 674; Thompson, *supra* footnote 2 at 299.

As Choo points out, a reform of this magnitude would, at least in England, require legislative intervention.[20] But many aspects of his proposal could be judicially incorporated into the Supreme Court's "principled approach", and would provide much-needed guidance on the elements that go to the necessity and reliability of an out-of-court statement. Choo's invocation of something like a "right of confrontation" could help to discipline the concept of "necessity", the scope of which remains unclear since out-of-court statements have been held to be "necessary" even where the declarant is available as a witness.[21] Similarly, Choo's attempt to link the admissibility of hearsay with the hearsay dangers could help structure the concept of reliability. To see this point, consider the facts in *Smith*. The accused was charged with murder and his defence was alibi. The court considered the admissibility of three phone calls from the victim to her mother. In the first and second, the victim stated that she had been abandoned by the accused and needed a ride home. In the third, she stated, "Larry [the accused] has come back and I no longer need a ride." The third call was crucial to the Crown's case; if admitted for its truth and believed, it would put the victim in the accused's company shortly before the murder was committed. The Supreme Court held that the first and second calls were admissible under the principled approach, but that the third was not. Various factors indicated the unreliability of the third call: eyewitness evidence suggested that the victim may not have had a chance to observe whether the accused was present before making the call; the victim's mother had urged her to accept a ride from one Philip, whom the victim feared and distrusted, which might have encouraged the victim to lie about the accused's presence in order to avoid Philip; and the victim "was travelling under an assumed name and using a credit card which she knew was either stolen or forged."[22] While all of these factors do indeed affect the reliability of the declaration, Lamer C.J.C. does not explain why they go to admissibility rather than weight, or how the last one in particular provides a sharp distinction between the first two declarations and the third. Choo's approach would link these factors to the question of the declarant's sincerity and ability to perceive, and would further explore any circumstances that might be relevant to the declarant's ability to recall and describe the events in question. Perhaps nothing would be gained in *Smith* itself from considering the other hearsay dangers; but Choo's more structured approach would provide much better guidance to judges grappling with the twin criteria of necessity and reliability than anything the Supreme Court has said so far.[23]

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[20] Choo, *supra* footnote 3 at 198.

[21] *B.(K.G.)*, *supra* footnote 1; *R.* v. *U.(F.J.)* (1995), 42 C.R. (4th) 133 (S.C.C.); but see *R.* v. *Aguilar* (1992), 77 C.C.C. (3d) 462 (Ont. C.A.). Mewett, *supra* footnote 2, characterizes the court's discussion of necessity in *Smith*, *supra* footnote 1, as "cryptic".

[22] Smith, *supra* footnote 1 at 936.

[23] Schiff, *supra* footnote 2 at 479 criticizes the court in *Smith* for disregarding the work of Morgan and other commentators. Mewett, *supra* footnote 2 at 274, suggests that the decision in *Smith* "is long on enthusiasm and rather short on a consideration of the difficulties faced by trial judges and counsel ... in taming that enthusiasm to the exigencies of a trial."

I do have some quibbles about Choo's book. His treatment of extrinsic rationales for the rule against hearsay does not extend to a very clear discussion of which of those rationales he would himself adopt, his treatment of the various reform options covers a lot of ground but seems to have been cut short rather arbitrarily, and his enthusiasm for overturning the rule against the admission of prior consistent statements overlooks the real concerns about process that inform the rule.[24] But, on the whole, this monograph is a very valuable addition to the literature on hearsay, particularly in a jurisdiction such as our own where the rule against hearsay is changing rapidly.

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Equality of Women in the Legal Profession: A Facilitator's Manual.

By DR. SHEILAH MARTIN AND GAYLENE SCHELLENBERG.
Ottawa: Canadian Bar Association, 1995.

Reviewed by Rosalind Currie*

This comprehensive teaching Manual contains a blueprint for conducting educational sessions about the equality of women in the legal profession. The material is designed to provide practical information and suggestions for facilitators and educators delivering programs of this nature in a legal workplace, such as a law firm, corporate or government department. The Manual also provides substantive background information necessary for session leaders to draw upon when designing and delivering educational sessions about equality issues and to assist them in answering difficult questions often posed by participants. While issues concerning racial discrimination, discrimination against lesbians and women with disabilities within the legal profession are raised in the materials, more attention should have been paid to these issues to ensure that all aspects of gender discrimination were adequately addressed.

Dr. Sheilah Martin, Professor of Law at the University of Calgary, and Gaylene Shellenberg, Legal Policy Analyst at the National Office of the Canadian Bar Association, have adapted materials originally prepared by

[24] Choo, *supra* footnote 3 at 51, would admit prior consistent statements simply "[w]here there has been a challenge to the truth of a witness's testimony". But a challenge to truthfulness is sufficiently common that one can imagine Choo's rule leading simply to a practice of having witnesses swear pre-trial affidavits containing the substance of their anticipated evidence. This would add nothing but cost to the trial process.

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Jennifer Koshan for the Law Society of Alberta to produce *Equality of Women in the Legal Profession: A Facilitator's Manual*[1] for the Canadian Bar Association (CBA). These materials, endorsed by the Standing Committee on Equality of the Canadian Bar Association, were introduced and discussed on November 25 and 26, 1995 at a two day meeting in Ottawa called *Touchstones II, Strategy, Education and Evaluation.* Over 100 lawyers interested in promoting women's equality in the legal profession attended the meeting to discuss ways to assist the legal workplace to become more inclusive, diverse and accommodating of different needs.

This Manual builds on the work of the CBA's Task Force on Gender Equality, which, chaired by Madame Justice Bertha Wilson, produced *Touchstones for Change: Equality, Diversity and Accountability.*[2] The Task Force on Gender Equality was established by the Canadian Bar Association in August 1991, to inquire into and make recommendations for the improvement of the status of women within the legal profession. The mandate of the Task Force was:

- to inquire into and make recommendations for the improvement of the status of women within the legal profession, with particular reference to parental leave, alternative work arrangements, upward mobility, professional development, remuneration, hiring practices, child care, sexual harassment, multiple discrimination and encouraging women lawyers to remain in the profession;

- to inquire into and make recommendations respecting gender bias within the Canadian Bar Association;

- to refer to the Canadian Bar Association substantive and procedural laws raising issues of gender equality;

- to undertake extensive consultations and act as a conduit for collection and distribution of information regarding initiatives on gender equality.[3]

The Report found there was strong and unequivocal evidence that women and other disadvantaged groups encounter various forms of discrimination at all levels of the profession.[4] The vast majority of women lawyers reported "both

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[1] Dr. Sheilah Martin and Gaylene Shellenberg, *Equality of Women in the Legal Profession: A Facilitator's Manual* (Ottawa: Canadian Bar Association, 1995).

[2] Canadian Bar Association Task Force on Gender Equality in the Legal Profession, *Touchstones for Change: Equality, Diversity and Accountability* (Ottawa: Canadian Bar Association, 1993).

[3] *Supra* footnote 1 at Tab 4, 27 (Module 1).

[4] In addition to the CBA's national study of women in the profession, several law societies have conducted similar studies within their respective provinces. The Manual notes the remarkable consistency among the findings of the regional reports and those in *Touchstones for Change.*

the perception and experience of gender bias in the profession, and the vast majority of men lawyers perceive such gender bias."[5] The authors of the Report characterized the discrimination as systemic and structural. They were of the view that these deeply-rooted problems stemmed from the fact that the legal profession was "developed based upon the interests and needs of members of the profession from a time when those members were almost exclusively white males."[6] The authors went on to say that with "increased diversity in the profession, it has become apparent that this is not a neutral mode, and is not consistent with the concept of an egalitarian and multi-cultural Canadian society."[7]

The authors of the *Facilitators Manual* considered how to use the findings and recommendations from the *Touchstones* Report to devise an action plan and strategy for manifesting change in the legal profession. In the process of implementing the Report's many recommendations, the CBA has "attempted to assist law firms in achieving a better understanding of the nature of the problem and in managing the practical difficulties confronted when considering how to rectify existing inequalities."[8] This Manual is the CBA's attempt, in a very practical way, to assist law firms and other legal workplaces to move forward on the Report's recommendations for change. It provides educators and facilitators with tools to assist in their job of helping to implement changes in the Canadian legal workplace.

In the authors' view, this Manual should be viewed as a "work in progress". They advise against viewing this Manual as containing a recipe for success in educating the legal profession about women's equality issues. Rather, the authors have tried to provide the necessary framework and information for an effective presentation, but caution about the difficulties inherent in educating people on these issues.

With these cautions in mind, the authors believe that educators and facilitators require two types of skills, those that relate to substantive knowledge about inequality, and those that are organizational to ensure an effective presentation. This Manual provides both and hence is a very practical tool for anyone contemplating designing an educational program on women's equality issues for a legal workplace, including law firms, government and corporate legal departments. Some of the information is particularly focused on law firms, but most of the material can be applied to any legal workplace.

The authors are also of the view that facilitators should be "familiar with the background and manifestations of women's inequality in the profession, the changes required to achieve equality, and how to implement and monitor those changes in the legal workplace, but also how to communicate that knowledge

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[5] *Supra* footnote 1 at Tab 4, 29 (Module 1).

[6] *Ibid.*

[7] *Ibid.*

[8] *Ibid.*, Preface iii.

in the most effective way possible."[9] To this end, the Manual is "intended to address both needs, serving as a working guide for facilitators in delivering the information contained in a series of modules to legal workplaces, providing practical suggestions for preparing for and conducting training sessions, and supplying sufficient details on the substantive background knowledge required."[10] The Manual provides comprehensive background information to facilitators on the topic areas to be covered in order to ensure that facilitators have a deep understanding of the issues and subject matter and to provide a reference for tough questions.

The Manual is generic but also provides province-specific components. Often under one issue a sampling of national information is provided, rather than an exhaustive province-by-province account. There is also an indication where facilitators will need to add regional material, to make the presentations relevant and specific to the participants' workplace. The authors have attempted to develop a coherent "framework for change". Specifically, the Manual:

- shows the history of women's exclusion from the profession
- provides statistics on current demographics
- shows the evidence from many recent reports on gender equality demonstrating that discrimination remains a problem for the profession
- canvasses the many reasons why the legal profession should care about equality
- provides the substantive information in support of each of those reasons
- suggests ways of addressing the denial of the evidence that a problem exists, and
- makes concrete suggestions about how to address the current inequities

The Manual is divided into a series of modules that can be adapted to suit a particular legal workplace setting, depending on the circumstances, time available and needs of the participants. The Manual begins with a chapter about how to plan an educational session on women's inequality for members of the legal profession. This chapter stresses that both organizational planning and substantive preparation is necessary. The five modules are:

[9] *Ibid.*
[10] *Ibid.*

1. Documenting the Problem of Inequality in the Profession
2. Why Change is Necessary
3. Implementing Change
4. Evaluating Change
5. Conclusion

The material is presented in a large three-ringed binder with numbered tabs separating each section for easy use. Within each module the material is well-organized and practical. Each module contains: (i) a Summary Paragraph; (ii) Facilitator's Objectives in Presenting the Material; (iii) Basic Points, which sets out the major points to be covered in the session, and (iv) Background Information. The Basic Points are designed to be easily transferable to an overhead to facilitate the presentation of the information to the participants. The Background Information provides detailed information about the issues and points to be covered during the module.

Finally, a separate section called "Making Final Plans", included at the end of the materials, is perhaps the most useful and practical section in the Manual. Under the heading "Considering Group Dynamics", this section identifies issues and areas of potential difficulties that facilitators may encounter. For example, the problem of how to handle participants who resist the results of the numerous studies and reports documenting women's inequality in the legal profession and insist that the facilitator "prove it" is discussed.

A "Questions and Answers" section is also included to address questions facilitators might typically face. This section is organized under the following headings: (a) Client Concerns; (b) Nature of Profession; (c) Costs of Accommodation; (d) Sexual Harassment; (e) Alternate Work Arrangements; (f) Concepts of Equality/Ethics. Finally, two separate appendices are provided with the Manual. Appendix I contains reprints of original letters and attachments from each provincial jurisdiction concerning (i) the human rights legislation and jurisprudence related to equality; (ii) the code of professional conduct; (iii) the applicability of human rights law to the legal profession, and iv) research to date on equality in the legal profession. Appendix II, entitled "Additional References" provides suggested overheads, suggestions for workshops, a checklist on conducting a seminar on equality and other relevant information such as statistics from the Federation of Law Societies which shows participation rates by sex.

The authors identify and draw attention to some aspects of multiple discrimination where possible. However, in my view, these issues are not adequately dealt with. While the authors claim that this Manual is a "work in progress", it is evident that the Task Force Report, which this Manual draws heavily from, was flawed due to its inattention to these issues. The authors of the Manual acknowledge that Aboriginal women, Women of Colour, women

with disabilities and lesbians "experience discrimination because of race, disability and sexual preference/orientation as well as sex-based discrimination. For many women, these forms of discrimination are entangled, and produce unique experiences which do not fall into the neatly divided categories of discrimination crafted to date."[11] The authors also note that the CBA has recognized the need to examine all forms of discrimination in the legal profession and that a Standing Committee on Equality has a mandate to examine issues related to discrimination based on race, disability and sexual orientation. This is welcome news and must continue in earnest. Some of this important work is currently underway, for example, "[i]ssues of race discrimination, including the inter-relation of race with other forms of discrimination, are currently under review by the CBA's Working Group on Racial Equality in the Legal Profession."[12]

Much more attention should have been paid to issues of discrimination on the basis of race, sexual orientation and disability, and their intersection with gender, in these materials. Once the work of the CBA Committees studying issues of multiple discrimination is complete, it is crucial that the CBA revise this Manual to incorporate a much fuller discussion of these important and complex issues.

It may have been helpful if more information was included in the Manual about the way in which adults learn. Reference is made to the fact that one of the difficulties in conducting educational sessions for members of the legal profession is that they are lawyers and adult learners. It may have been helpful to include an article written by experts in the field of adult education, to help the facilitator better understand the dynamics of adult learners. It might also have been helpful to include information about how to help people examine their values and beliefs, particularly about diversity in the workplace, during an educational session of this nature. Profound changes in attitudes, values and beliefs is required of the members of the legal profession in order to meet the challenges posed by equality-seekers, and tools and techniques to help participants do this would have added to the strength of the materials.

Overall, this Manual is a well-researched, well-organized, practical tool for facilitators taking on the daunting challenge of educating members of the legal profession about some aspects of women's inequality. Its major weakness is the lack of adequate attention paid to equality issues related to race, disability, sexual orientation and their intersection with issues of gender.

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[11] *Ibid.* at v.

[12] *Ibid.* at vi.

The Annotated Construction Contract (CCDC 2 — 1994).

By HARVEY J. KIRSH AND LORI A. ROTH.
Aurora: Canada Low Book. ($65.00).

Reviewed by:John G. Davies

The Annotated Construction (CCDC 2 — 1994) by Harvey Kirsh and Lori Roth is a comprehensive and detailed source of reference for all participants in the construction industry, whether they be architects, engineers, contractors, owners or their lawyers. It contains the summaries of over six hundred selected Canadian court decisions reported between 1963 and mid-1996. The book is organized in an easy-to-reference format with context that directly relates to each individual part, general condition and definition of the latest stipulated price Canadian Standard Construction Document CCDC 2 — 1994. The text is further supplemented with helpful editorial comments, a comprehensive bibliography, the full text of the stipulated price contract, and the complete wording of the new rules for Mediation and Arbitration of CCDC 2 Construction Disputes.

Since many of the referenced cases were tried and reported prior to the release of the latest standard form of contract, it is easy to see how evolving law can influence the wording of such documents.

The reader quickly appreciates the wisdom of using standard forms of contract whenever possible and the importance of resisting the temptation to stray from the standard terminology continued in the documents. Consistent use of standard forms minimizes exposure to potential litigation.

Some disturbing concepts are also raised in the book, particularly those relating to the duties and activities of consultants during the construction phase. Terms like "approve", "properly inspect", (architects having an) "obligation to supervise" abound. Although the standard consulting and construction contracts currently use the softer term "review", it is to be hoped that such findings by the courts are not harbingers of a colder, harder and less forgiving trend to visit stricter, and perhaps unachievable, duties of care on professionals during the construction phase.

By far the most common causes of action arise out of issues relating to defective work, payment and liens, and changes in the work. This book responds by offering a proportionately larger (94, 79 and 138 cases respectively) selection of cited cases addressing these particular issues.

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With the growing popularity of Alternative Dispute Resolution (ADR), The Canadian Construction Documents Committee (CCDC) has responded by expanding its old ADR clause into a full-blown stepped ADR process, supported by comprehensive rules for Mediation and Arbitration. Such procedures are, for the most part, confidential, and therefore findings will most likely never be reported. It is therefore even more important for practitioners to be fully informed of the prevailing law on construction issues.

I believe this book is an excellent first stop on the route to being informed.

Mr. Kirsh and Ms. Roth are to be congratulated on their sterling effort.

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La liberté d'expression entre l'art et le droit.

Par JEAN-FRANCOIS GAUDREAULT-DESBIENS.
Québec, P.U.L., Liber, 1996,-299p. (30,00 $).

Compte rendu de Michel Lebel*

Voici un essai juridique marqué par la modernité, le premier du genre, nous semble-t-il, publié au Québec. A partir d'un thème, à savoir comment la liberté d'expression s'exerce dans le cadre de subventions accordées aux artistes par le Conseil des arts du Canada, l'auteur s'interroge entre autres sur le droit pour un artiste appartenant à un groupe majoritaire d'utiliser des éléments appartenant à un groupe ethnique minoritaire (certains reprocheront à Gauguin de se servir de la culture tahitienne dans ses tableaux ou aux artistes canadiens de s'inspirer sinon de copier des objets, des mythes ou des thèmes des cultures autochtones). L'auteur se demande aussi si le Conseil des arts pourrait établir des critères particuliers pour l'octroi de subventions aux artistes appartenant à des groupes minoritaires ou aux autres artistes qui voudraient utiliser des éléments des cultures minoritaires. Cette thématique relativement précise permet aisément à M. Gaudreault-Desbiens de s'interroger sur des grandes questions d'actualité tels la censure, l'appropriation culturelle (éléments d'une culture minoritaire qui peuvent être "volés" par un artiste du groupe majoritaire dominant), le

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phénomène identitaire (l'attachement préférentiel à un groupe selon ses caractéristiques sexuelles, culturelles, religieuses ou autres plutôt qu'à la société civile dans son ensemble), l'obscénité, le multiculturalisme, l'égalité et la démocratie. On le voit bien, le titre du volume déborde son cadre relativement étroit, ce qui ne fait qu'ajouter à son intérêt et au plaisir de la lecture. Le chapitre le plus substantiel au plan juridique est sans aucun doute le sixième, intitulé: *La Charte et la liberté d'expression* (pp. 161-231). A l'aide des arrêts *Keegstra, Taylor* et *Butler*, l'auteur s'arrête aux questions de l'obscénité et de la propagande haineuse en regard de la liberté d'expression mais aussi en regard des droits à l'égalité garantis à l'article 15 de la Charte canadienne des droits et libertés. M. Gaudreault-Desbiens, tout en soutenant que le droit égalitaire est perméable à l'ensemble des droits et libertés garantis par la Charte, précise bien dans son analyse qu'il ne faut pas fusionner la liberté d'expression et l'article 15. Chacun a son rôle, la liberté d'expression devant garder essentiellement un contenu négatif en limitant le plus possible les censures de l'État, tandis que le droit égalitaire devant plutôt servir à sauvegarder des mesures protégeant des groupes contre des expressions particulièrement abjectes et préjudiciables. En d'autres termes et de façon bien schématique, la liberté d'expression viserait plutôt l'individu, tandis que le droit égalitaire serait surtout concerné par le groupe, ce que ne dément certainement pas la jurisprudence de la Cour suprême. Il faut ajouter que la même garantie peut être obtenue grâce à l'application contextuelle et modulée de l'article 1 de la Charte, lequel laisse une assez grande marge de manoeuvre aux pouvoirs publics, permettant à ceux-ci de tempérer certains excès possibles dans l'expression.

L'auteur constate qu'en règle générale la Cour suprême s'est bien acquittée de sa tâche d'interpréter la liberté d'expression et le droit égalitaire et le lien à établir entre les deux garanties. La Cour, en matière de liberté d'expression, n'a pas adopté la position absolutiste de son homologue des États-Unis et elle a plutôt manifesté de la déférence à l'égard de certaines mesures de protection limitant l'expression pour le plus grand bénéfice de groupes vulnérables. Nous partageons cette analyse et nous pensons comme ce juriste du Québec que cette attitude mesurée du plus haut tribunal du pays est tout à son honneur. Les jugements de la Cour pourraient sans doute être souvent plus concis, mais il demeure que des questions importantes et complexes relatives à la liberté d'expression et au droit à l'égalité peuvent rarement se régler en un tour de main!

Comme bien des arrêts de la Cour suprême, l'essai de M. Gaudreault-Desbiens est fort dense mais nuancé. Réflexions philosophiques, éthiques et littéraires et références à des oeuvres d'art s'y trouvent en abondance. Enfin à l'instar de l'auteur, nous nous opposons également à toute forme d'intégrisme culturel, préférant que l'art se nourrisse de toutes les avenues, admettant la censure que dans des rarissimes cas, tout en reconnaissant que

des artistes appartenant à un groupe minoritaire peuvent avoir besoin, dans certains cas, d'une protection différente de celle de la majorité. Bref tout juriste intéressé par les grands débats contemporains devrait lire le livre de M. Gaudreault-Desbiens. Nul doute qu'il y trouvera ample matière à réflexion et à discussion.