Book Reviews
Comptes rendus

The Corporate Counsel Guide to Banking and Credit Relationships.

By ALISON R. MANZER and JORDAN S. BERNAMOFF.
Canada Law Book Inc., (Aurora 1999). Pp. xiv, 244 ($76.00).

Reviewed by M.H. Ogilvie*

This is a hybrid book combining doctrinal legal analyses and points of practice for beginning corporate counsel advising clients about credit relationships with banks and other financial institutions. It is not a new text-book on banking law or debtor and creditor law or insolvency law, although certain aspects of these branches of commercial law are discussed. Nor is it simply a handbook of checklists and precedents for practitioners, although both are provided in relation to certain topics. It is a guidebook to certain aspects of the law and practice of bank lending for the beginning corporate counsel and should be reviewed as such.

Six of the seven chapters discuss key aspects of the law and practice of bank lending, while the seventh chapter contains a number of precedents for such lending documentation as a pro forma opinion letter, loan agreement, various security agreements and guarantees, as well as a secured loan closing checklist. The precedents comprise approximately one-half of the text.

The main strength of this book is in its practical advice to practitioners about points to watch for in negotiation to protect both client and self. This strength is particularly evident in the third chapter dealing with loan transactions in which the authors set out with great care the processes of negotiating both unsecured and secured loans, noting especially issues for the borrower, including the protection of intellectual property and the respective responsibilities of the parties for environmental review. A second strength of the volume is the clear descriptions of certain aspects of financing grouped together for comparison and not found so organized in any other Canadian text. Thus, in chapter five, one reads about the non-bank sources of financing available to a borrower today and in chapter six, the various options for insolvency or re-structuring. Chapter five discusses the legal relationships involved in receivables financing, inventory financing, leasing, government financing, securitization, distress preferred shares, mezzanine financing, trade credit, consignment, letters of credit and derivatives. Especially helpful here is the discussion of securitization, but the

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discussion of derivatives is weak and brief. Granted derivatives are a notoriously difficult subject, but if the purpose of the book is to introduce corporate counsel to difficult subjects, then the authors ought to have done so in relation to derivatives.

With the exception of the first chapter about the banker and customer relationship, the textual analysis is largely free of legal citations, relying instead on a narrative account of what the legislation says about various issues. Clearly, this book is meant to be a guide to the relevant legislation, usually noted in the footnotes, and anticipates that once the practitioner has been pointed in the direction of the legislation he or she will be able to understand and apply it. The text rarely sets out, in other than the most general way, the authors' interpretation of the legislation. Almost no case law at all is considered in the chapters on loans, guarantees, financing sources and insolvency, although some cases are relevant, notwithstanding the "guide to" nature of the book and the emphasis on practical narrative rather than on legal detail.

The issue of case citation arises again in relation to the first chapter on the banker and customer relationship. This chapter attempts to provide in just under forty pages a mini-guide to the duties in contract, tort, and fiduciary obligation owed between banker and customer - "banking law" in the classical sense. While this chapter has much to recommend it, it is flawed in several ways. First, the case citations seem to peter out in the early 1990's; the last one I spotted dates from 1994. In a text of this sort, this would not necessarily be fatal to the scholarly integrity of the text, provided the law is stated accurately, although not all recent precedents are cited. However, in several places, the failure to update the text to as close as possible to the date of publication, given the extended nature of the publication process, results in some inaccuracies in stating the law in several places: for example, in relation to the banker's duty of secrecy[1] and in relation to the banker's fiduciary obligations.[2] Again, the authors do not set out with sufficient distinction the contractual and tortious duties: surely, a general duty of care is one in tort and not in contact. Separation of the discussion in the text between duties in relation to cheques and contractual duties generally results in unnecessary duplication of discussion: surely the duties in relation to cheques are one aspect of the contract subsequent under the bankers' duties in relation to payment instruments. Finally, in my view, the law relating to the fiduciary duties of bankers is clearer than the text would suggest; greater consideration of recent cases might have been helpful here.

Chapter two, about electronic banking, is too brief for a book concerned with practice. While it sets out some of the contractual issues in relation to E.F.T. generally, it might have included descriptions of various electronic transmission processes, since the speed with which legal interests in funds is transferred affects ownership interests in debtor and creditor transactions.

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[1] At 32-35. For example, the following important case is omitted: *C.I.B.C.* v. *Sayani* [1994] 2 W.W.R. 260 (B.C.C.A.); leave to appeal refused [1994] 3 W.W.R. lxvi (S.C.C.).

[2] At 35-37. Numerous recent cases.

Notwithstanding these criticisms, this is a useful publication and largely successful within the criteria set for itself. Gaging how much law to include and what topics to exclude is a difficult and individual decision. Nevertheless, the text is a good introduction and directs readers to the law and more detailed legal discussions. Most importantly, there is much common sense and good advice for corporate counsel, which renders the volume most recommendable to those starting out in the field.

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Les tribunaux et les questions politiques. Les limites de la justiciabilité.

Par GENEVIÈVE TREMBLAY.

Montréal, Wilson & Lafleur, 1999, 155 pages (45,00$). (ISBN - 2- 89127-484-9).

Compte rendu de Jean-François Gaudreault-DesBiens*

Plus que jamais, le discours juridique colonise le social. Plus que jamais, également, les jugements rendus en matière constitutionnelle font sentir leur impact hors des cercles que forment les parties aux litiges ou, plus largement, la communauté juridique. Par ailleurs, l'accroissement du nombre de motifs d'inconstitutionnalité à la faveur de Chartes constitutionnelles ou quasi constitutionnelles garantissant des droits libellés en termes souvent très vagues, est susceptible d'inciter des juges à se montrer plus «activistes», au risque cependant de susciter la grogne dans certains segments de la population. Chez les commentateurs, cette grogne contre l'activisme judiciaire s'exprime principalement de deux façons: les uns s'en prennent à ce phénomène à partir d'un point de vue externe au droit (comme par exemple F.L. Morton et R. Knopff dans leur ouvrage récent, *The Charter Revolution & the Court Party*, Toronto, Broadview Press, 2000), alors que les autres estiment plus approprié de mettre en question les doctrines - ou devrait-on plutôt dire l'absence de doctrine? - qui, à l'intérieur même du droit positif, permettent la croissance d'un tel phénomène. Dans son ouvrage intitulé *Les tribunaux et les questions politiques. Les limites de la justiciabilité*, Geneviève Tremblay se situe clairement dans le deuxième groupe.

Son ouvrage repose sur deux postulats: d'une part, les systèmes juridiques sont limités par des paramètres spatiaux, temporels et juridictionnels qui peuvent être définis avec une relative précision et qui sont assez aisément identifiables; d'autre part, le droit positif détermine seul la juridiction des

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tribunaux. Si elle prend acte de l'évolution du rôle du pouvoir judiciaire dans les démocraties libérales contemporaines, l'auteure n'en inscrit pas moins sa réflexion dans le cadre d'une représentation idéelle, que l'on pourrait qualifer de «classique», des rapports entre les diverses branches de l'État. Légitime et, du reste, exacte du point de vue du droit constitutionnel positif, cette représentation impose à chacune de ces branches l'obligation de respecter les prescriptions de la Constitution. C'est elle qui sert de toile de fond à l'analyse que fait Geneviève Tremblay de la théorie de la justiciabilité en droit canadien et qui l'amène en fin de parcours à conclure à son insuffisance.

Remarquant que la théorie de la justiciabilité qui inspire les tribunaux canadiens en confine la portée à des considérations strictement procédurales ou personnelles, l'auteure soutient qu'en procédant à une telle réduction conceptuelle, ces tribunaux parviennent à s'assurer un *imperium* virtuel sur des questions qui relèvent a priori beaucoup plus des sphères morale ou politique que de la sphère juridique proprement dite, les incitant du coup à empiéter sur les prérogatives des pouvoirs législatif et exécutif. À l'inverse, une conception plus substantielle, «substantive» dit-elle, de la théorie de la justiciabilité leur permettrait de décliner juridiction, de façon définitive et péremptoire, lorsqu'on les saisirait de telles questions. Une telle attitude présenterait notamment l'avantage de maintenir un équilibre acceptable entre les diverses branches de l'État, et de garantir la légitimité d'un interventionnisme judiciaire redevenu «bien tempéré», pour paraphraser Jean-Sébastien Bach.

Une fois constatée et critiquée l'insuffisance de la théorie de la justiciabilité au Canada, du moins dans sa formulation officielle, Geneviève Tremblay s'emploie ensuite à disséquer la doctrine des questions politiques élaborée en droit constitutionnel américain. Selon cette doctrine, les tribunaux devraient automatiquement décliner juridiction dès lors que se pose une question dite «politique». Grosso modo, une telle question en est une qui, aux termes de la Constitution, relève expressément d'une autre branche de l'État, qui ne peut être analysée à partir de critères strictement juridiques, qui exige que le tribunal se prononce au préalable sur une question relevant des politiques publiques plutôt que du droit positif, qui requiert du tribunal qu'il statue sur une question sans être en mesure d'en examiner tous les tenants et aboutissants, ou, enfin, dont la nature est tellement ambiguë que diverses branches de l'État pourraient légitimement aspirer à la résoudre, avec toutes les contradictions et l'incertitude qui résulteraient d'un tel chassé-croisé. Cette recension des principales applications de la doctrine des questions politiques en droit américain et des débats que cette doctrine suscite mène l'auteure à proposer une relecture de la jurisprudence canadienne portant sur le concept de justiciabilité. Elle affirme à cet égard qu'une étude attentive de cette jurisprudence montre que, d'une manière indirecte, les tribunaux canadiens fondent déjà certaines de leurs décisions sur des considérations équivalentes à celles inspirant la doctrine des questions politiques aux États-Unis. Ce constat l'incite à affirmer la nécessité de systématiser l'application de cette doctrine au Canada pour mieux la «rethéoriser».

Ce n'est certes pas un hasard si madame Tremblay nous convie ainsi à participer à un projet de «rethéorisation» de la doctrine de la justiciabilité au Canada. En effet, tout au long de son ouvrage, elle ne fait nullement mystère des réserves que lui inspire l'ingérence de plus en plus marquée des tribunaux dans les débats sociopolitiques qui ragent au pays. Pour elle, bien que le pouvoir judiciaire ait un rôle important à jouer afin d'assurer le respect des prescriptions constitutionnelles encadrant l'action des autres branches de l'État, il reste que, poussé trop loin, l'activisme judiciaire emporte des effets pervers. Premièrement, il déresponsabilise les pouvoirs législatif et exécutif eu égard à certaines questions épineuses qui devraient normalement faire l'objet de débats dans un cadre plus large et plus démocratique que celui qu'offre l'arène judiciaire; deuxièmement, il opère un dédoublement des recours à l'égard de certaines questions, dédoublement qui peut se solder par des réponses contradictoires de l'une ou l'autre des branches de l'État; troisièmement, dans la mesure où il étend la saisine judiciaire à des problématiques pouvant difficilement faire l'objet d'une résolution juridique, l'activisme judiciaire soulève la question du manque d'expertise des tribunaux. Autrement dit, les tribunaux ne sauraient prétendre détenir et surtout imposer *leur* vérité quant à la solution à apporter à des débats sociaux qui n'ont qu'une faible incidence juridique.

Cette thèse, Geneviève Tremblay l'expose avec talent et conviction. Son analyse des forces et des faiblesses de la théorie canadienne de la justiciabilité, à la lumière de la doctrine américaine des questions politiques, est bien menée et, à maints égards, fort instructive. Si certaines de ses interprétations n'emportent pas toutes l'adhésion (par exemple, l'appui qu'elle prétend trouver dans l'article premier de la Charte canadienne au soutien de sa thèse voulant qu'une conception plus substantielle de la théorie de la justiciabilité soit en train de frayer son chemin dans la jurisprudence canadienne), force est de reconnaître que d'autres sont à bien des égards plausibles. Aussi juges et praticiens du droit constitutionnel tireront-ils profit d'une lecture attentive de son ouvrage.

Cela dit, si, du point de vue du droit positif, la thèse de madame Tremblay se défend, dès lors que l'on s'éloigne un tantinet du paradigme positiviste, les postulats sur lesquels elle repose vacillent. Voyons très brièvement en quoi. Rappelons-le, l'un de ces postulats veut que les systèmes juridiques soient limités par des paramètres spatiaux, temporels et juridictionnels assez aisément identifiables et définissables pour les juristes. Il est toutefois légitime de se demander si, à la lumière des évolutions récentes qui ont affecté les rapports entre le droit et les autres systèmes normatifs, il est encore possible de le représenter comme un sous-système séparé des autres par des cloisons à peu près étanches. C'est d'ailleurs précisément en postulant l'existence d'une telle cloison entre droit et morale que l'auteure appréhende la problématique de la justiciabilité (page 3). Or, cette cloison (ou celle entre droit et politique) est-elle si étanche?

À cet égard, Geneviève Tremblay soutient que «[l]e fait d'affirmer qu'il existe une relation entre le droit positif et la morale n'équivaut toutefois pas à prétendre qu'il existe une connexion essentielle ou une parité entre la création

du premier et l'existence de la seconde. Le droit positif demeure le produit d'interventions humaines qui, même si elles possèdent une origine sociale, ne sont jamais tributaires de l'assouvissement de quelconques valeurs morales.» (page 10) S'il n'est pas faux de prétendre qu'il n'existe pas de connexion essentielle ou de parité nécessaire entre la création du droit et l'existence d'une morale, on ne manque pas de s'étonner du «jamais» qu'emploie l'auteure. Le droit positif peut bien sûr sciemment aller à l'encontre de la morale dominante, mais il reste que toute norme positive cherche à concrétiser une politique juridique quelconque inspirée de préconceptions morales ou sociales que l'on souhaite en quelque sorte «positiviser». Ne pourrait-on pas arguer qu'une telle «positivisation» représente au contraire le stade ultime de ce qui n'est rien d'autre qu'un véritable assouvissement d'une valeur morale? De fait, une valeur morale ne se trouve-t-elle pas *ipso facto* universalisée via son intégration au droit positif, d'autant qu'elle profite des différents mécanismes étatiques de mise en oeuvre et de contrainte qui complètent l'universalisation désirée?

Nous sommes par ailleurs loin d'être convaincu que le fait que des normes morales soient phagocytées par le droit positif change du tout au tout leur nature et qu'on assiste alors à un phénomène de transsubstantiation. En fait, ne serait-il pas plus juste de dire que pareille phagocytose leur ajoute une dimension, de sorte que leur «nature» ressort de ce processus sous forme d'agrégat plutôt que sous celle d'une substance pure? Par ailleurs, l'usage même du mot «nature» paraît ici problématique. Existe-t-il vraiment des normes unidimensionnelles, dont on peut dire qu'elles sont d'une «nature» intrinsèquement morale, politique ou juridique? Si une telle prétention semble plus facilement défendable lorsqu'il s'agit d'appliquer, disons, l'article 331.2 du *Code de procédure civile* (posant les règles de dénonciation des pièces dans les instances introduites par une déclaration), peut-on en dire autant lorsque, par exemple, on doit interpréter le droit *positif* à la vie garanti à l'article 7 de la *Charte canadienne des droits et libertés*? Nous en doutons. Mais l'on constate que madame Tremblay, quant à elle, adhère bel et bien à ce qui ressemble fort à une conception ontologique du droit, qui ferait en sorte que tout ce qui ne relève pas de l'«essence» de ce droit serait dépourvu de juridicité. Face à la «dé-différenciation» des sous-systèmes sociaux, y incluant les systèmes normatifs, il est loisible de se demander si une vision aussi essentialiste et catégorique est encore fondée et si, de toute façon, elle a une quelconque valeur heuristique.

L'impact de cette préconception ontologique se fait sentir à travers tout l'ouvrage, et se manifeste de façon plus particulière dans la saisie que fait l'auteure du rôle des juristes et des juges. Ainsi, selon elle les juristes doivent adopter une position neutre sur le plan éthique. Fort bien. Elle fait cependant l'impasse sur les problèmes rattachés à cette vision, par exemple la passivité qu'elle insuffle en transformant le juriste en simple technicien de la norme et en l'empêchant de considérer pour ce qu'ils sont les problèmes éthiques que soulèvent certaines normes positives. S'agissant des juges et du rôle d'arbitres qu'ils jouent parfois dans les conflits agitant la société, madame Tremblay estime que ceux-ci devraient sérieusement considérer la possibilité de décliner

juridiction dans les cas où on leur demande de sortir de leur rôle traditionnel de diseurs du droit applicable au regard de litiges dont les paramètres sont parfaitement bien circonscrits sur le plan juridique. La raison en est, selon elle, qu'ils ne peuvent résoudre de façon claire et précise *tous* les aspects des différends politiques et sociaux.

Mais qu'en est-il si un tel différend présente une importante composante juridique ou constitutionnelle sans pour autant n'être que juridique - pensons par exemple à l'hypothèse principale soulevée dans le *Renvoi relatif à la sécession du Québec*, [1998] 2 R.C.S. 217? Dans cette optique, les tribunaux ne devraient-ils pas décliner juridiction dans la plupart des litiges constitutionnels? Du reste, est-ce la mission des tribunaux de régler *tous* les aspects d'un litige, surtout ceux dont la teneur en juridicité est faible? Ressort-il de la fonction judiciaire d'appréhender de manière totale et exhaustive une problématique donnée? On peut en douter. Plus globalement, peut-on appréhender dans sa totalité une problématique sous un angle juridique? Comment, le cas échéant, les dimensions juridiques, politiques ou morales d'une question donnée peuvent-elles être séparées des autres? Bien sûr, cette façon de voir est entre autres fondée sur l'objectif, fort louable, d'assurer un minimum de sécurité juridique aux justiciables. Ne peut-on toutefois pas se poser la question de savoir si la recherche d'une absolue sécurité juridique n'est pas devenue un peu vaine et si, au contraire, les tribunaux dans les sociétés post-modernes ne se sont pas transformés en gestionnaires d'une insécurité juridique relative qui découle autant de la complexification du droit positif lui-même que des rapports sociaux qu'il est censé appréhender ou du flou qui caractérise ses propres rapports aux autres systèmes normatifs? Enfin, quel critère devrait déterminer la juridicité d'une norme? L'existence seule de sanctions étatiques, comme semble le dire Madame Tremblay, fidèle à son prisme positiviste? Là encore, peut-être y aurait-il lieu de relativiser. Ne pourrait-on pas, par exemple, mesurer la juridicité d'une norme à sa capacité démontrée de persuader son auditoire d'adopter un comportement donné, et ce, même en l'absence de sanctions étatiques formelles? Chose certaine, les constitutionnalistes ne pourront plus longtemps éviter de se poser de telles questions, notamment au vu des commentaires formulés par la Cour suprême quant à la portée normative des «principes constitutionnels» identifiés dans le *Renvoi relatif à la sécession du Québec*, précité.

À son crédit, Geneviève Tremblay reconnaît que le modèle sécurisant d'un juge-arbitre neutre et apolitique des différends juridiques «doit céder sa place à une vision plus contemporaine». (page 38). Cependant, son ouvrage est marqué de bout en bout par sa conception ontologique du droit, laquelle inspire son analyse de ce que constitue la normativité juridique ainsi que du rôle que les interprètes du droit doivent et peuvent jouer. Cela ne l'empêche toutefois pas d'avoir raison à bien des égards, notamment lorsqu'elle met en lumière les risques que court le pouvoir judiciaire à se prononcer sur des questions à propos desquelles il ne possède aucune expertise particulière. La démonstration que fait l'auteure incite d'ailleurs à s'interroger sur les limites du modèle régissant

le procès de connaissance en matière constitutionnelle dans les juridictions de *common law*. Il convient en effet de se demander si le modèle traditionnel adopté dans ces juridictions, où des tribunaux non spécialisés saisis dans le cadre de litiges «concrets» statuent sur les questions constitutionnelles et où ce sont les parties au litige elles-mêmes qui se chargent de l'administration de la preuve, permet de faire face adéquatement à la complexité croissante de ces questions. Loin de nous l'idée d'affirmer péremptoirement que ce modèle est périmé ou que d'autres sont nécessairement meilleurs, mais il reste que s'interroger là-dessus ne devrait plus être considéré comme une démarche hérétique, précisément au vu de l'effacement des frontières entre les des sous-systèmes sociaux que nous évoquions précédemment.

Si nous ne nions pas l'importance que les tribunaux fassent preuve d'une certaine retenue afin de maintenir un équilibre entre les diverses branches de l'État, la question de savoir en fonction de quels critères et dans quelles circonstances il y a lieu ou non de faire preuve d'une telle retenue demeure entière. Or, croyons-nous, une réponse minimalement satisfaisante à cette question ne peut émaner d'une conception essentialiste du droit et, partant, de ce qui se trouve «hors-droit». Sans nier toute spécificité au droit, il nous semble que ce n'est pas à partir d'une image d'Épinal de celui-ci - que, paradoxalement, le droit constitutionnel positif contribue lui-même à miner depuis quelques années -, qu'il sied d'appréhender cette problématique. On ne peut non plus y parvenir en se fondant sur une idéalisation de l'action d'aucune des branches de l'État, qu'il s'agisse du pouvoir judiciaire, comme certains le font un peu trop allégrement, de l'exécutif ou du législatif, comme le fait à son tour madame Tremblay en invoquant le mandat électif de la plupart des acteurs politiques qui forment cette dernière branche. En effet, dans un système caractérisé, premièrement, par une concentration des pouvoirs entre les mains de l'exécutif, deuxièmement, par une déresponsabilisation corollaire des législateurs élus, et, troisièmement, par un fractionnement de l'électorat en groupes d'intérêts de plus en plus atomisés, la représentation idéelle d'une assemblée législative composée d'élus exprimant une volonté populaire, évidente et monolithique semble quelque peu éculée. Dans ce sens, on ne saurait faire l'économie d'une «reproblématisation» des concepts sur lesquels repose la mythologie du droit constitutionnel positif. Pas plus qu'il n'y a de droit pur - autrement que sous les traits d'un idéal-type au sens wébérien -, il ne saurait y avoir de droit constitutionnel pur, ni de théorie pure de la justiciabilité.

L'ouvrage de Geneviève Tremblay est l'aboutissement d'un projet fondé sur une conception positiviste du droit constitutionnel. On peut le regretter, bien sûr, mais ce choix théorique reste tout à fait légitime. En ce sens, notre différend avec elle quant à la manière d'aborder la problématique de la justiciabilité procède de notre vision fondamentalement différente des concepts de normativité, de juridicité, de droit, ainsi que des rapports que celui-ci entretient avec les autres sous-systèmes sociaux. Bref, ce différend résulte de ce qui est d'abord et avant tout une divergence d'opinion. Aussi les réserves que nous avons exprimées précédemment ne devraient en aucun cas faire ombrage aux grandes

qualités de son ouvrage. Au contraire, sous un angle positiviste, force est de reconnaître que madame Tremblay a atteint avec brio ses objectifs. Si nous avons exprimé quelques regrets à propos de l'angle un peu fermé à partir duquel elle aborde la problématique de la justiciabilité, c'est en définitive parce que le traitement qu'elle en fait à travers un prisme strictement positiviste est de grande qualité et parce que nous ne doutons nullement de sa capacité à contribuer plus avant au débat sur ces questions fondamentales si elle le souhaite. Au contraire, nous l'encourageons à le faire.

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William R. McIntyre: Paladin of the Common Law.

By W.H. McConnell.

Montreal: McGill-Queen's University Press, 2000. Pp. 248 ($55.00).

Reviewed by Gordon Bale*

Professor W. Howard McConnell's book on William R. McIntyre,[1] who served on the Supreme Court of Canada from 1 January 1979 to 1 February 1989, is a welcome addition to the biographies of the judges of our highest court. However, because this literature is so scant, one is prompted to ask why the author selected McIntyre. Granted McIntyre was a good conscientious judge with an independent spirit and an ability to write clear and concise judgements; nevertheless, his service on the court of just slightly more than 10 years is comparatively short. Since the establishment of the Court in 1875, 65 justices have completed their service and of these 40 had a longer tenure than McIntyre. A contention that McIntyre made a profound contribution to our evolving jurisprudence would also be difficult to sustain. The author apparently selected his subject largely because he himself subscribes to McIntyre's philosophy of judicial restraint in Charter cases. McIntyre graduated from the College of Law of the University of Saskatchewan. Obviously this factor would appeal to a professor whose whole teaching career had been spent there.

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[1] W.H. McConnell, *William R. McIntyre: Paladin of the Common Law* (Montreal & Kingston: McGill-Queen's U. Press for Carleton University, 2000).

McConnell stresses that the decade McIntyre spent on the Supreme Court of Canada was divided almost equally between pre-Charter adjudication, followed by five years focused on the inaugural interpretation of the Charter of Rights and Freedoms which began arriving at the Court in 1984. These two periods also coincided with the last five years of Laskin's term as Chief Justice and the first five years of that of Dickson. McConnell summarizes the function of his book when he writes: "This examination of McIntyre's life, opinions, and legal craftsmanship endeavours to show how one important jurist, at a pivotal time in Canadian legal history, assessed the advantages and the disadvantages of the new legal order."[2]

The subtitle of the book, *Paladin of the Common Law*, indicates that McIntyre viewed "the Charter operating essentially as a supplement and occasional corrective, not as a rival to the common law"[3] and that the existing common law "contained or embodied most of the ideals enshrined in the Charter".[4] Although McIntyre accepted the supremacy of the Charter, he believed in applying it "more sparingly and selectively than did most of his colleagues"[5] in order that the role of the legislature would not be usurped. This deference to the legislature accords with McConnell's own disposition as illustrated by his rhetorical question: "Why should nine middle-aged lawyers, often from elite law firms, and in many ways unrepresentative of Canadian society, make social policy for Canada in the twenty-first century?"[6] The book is a plea for deference and self restraint.

In the first paragraph of the book we learn that William R. McIntyre was born on 15 March 1918 in Lachine, Quebec, of Ontario parents who had joined the western migration to the prairies and had been firmly settled there for more than a decade preceding William's birth. Why then was William born in Lachine, Quebec? The author never answers this very natural question. We learn that his mother's maiden name was Pauline May Sifton and that she had won a gold medal upon graduating from high school but economic circumstances rendered university education impossible. It would be interesting to know how the mother fits into the Sifton lineage since all of that name in North America are believed to have descended from Bamlet, Charles, Robert, John and Joseph Sifton who emigrated from Ireland in 1818 and 1819,[7] including of course Sir Clifford Sifton, Laurier's Minister of the Interior and one time owner of the Manitoba Free Press. The fact that McIntyre's mother was an Irish Protestant and from a strong Liberal tradition also suggests she was part of the famous Sifton family but doubtlessly from a less affluent branch. Sidney McIntyre,

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2 *Ibid.* at viii.

3 *Ibid.* at 64.

4 *Ibid.* at 93.

5 *Ibid.*.

6 *Ibid.* at 230.

7 D.J. Hall, *Clifford Sifton: The Young Napoleon 1861-1900* (Vol.1) (Vancouver London: U. of British Columbia Press, 1981) at 2-5.

William's father, who was of Scottish and English descent,grew up on an Ontario farm and received only four years of elementary schooling but through home study obtained his high school certificate. He became a manager with the Prairie City Oil Co. and its successor companies, and lived in Moose Jaw, Saskatchewan. His brother was an ardent Liberal, but Sidney was a Tory until becoming disillusioned by the dismal performance of the Conservative Anderson government in Saskatchewan (1929-34), when he became a Liberal. William strongly disapproved of his father's renunciation of his Conservative faith, perhaps revealing a natural inclination to support the underdog since the Liberals had governed Saskatchewan from its inception in 1905 until 1929. Later he would also become a Liberal.

William was the third of six children and all the children benefitted from their parent's resolve that their children should have the educational advantages denied to them. William's two brothers became medical doctors and also specialists. Of the three sisters, one took a Ph.D. in speech and became an academic, one became a nurse with specialized training in public health and one became a physiotherapist. When any of Sidney's children became discouraged at school, he would say "The cheapest thing in the world is muscle".[8] The family attended church but William found the sermons tedious and the doctrine unpersuasive, although he was influenced by its moral teachings. William's own daughter, Elizabeth, describes her father as a "Christian Agnostic".[9] The author declines to tell us which Protestant denomination should be credited with turning McIntyre away from organized religion.

McIntyre attended the Moose Jaw Central Collegiate and rated it an outstanding school. In the fall of 1937, having completed his first year in Moose Jaw, he commenced study in Arts and Science in Saskatoon and resided at St Andrews College. In 1938 he entered the College of Law situated in Qu'Appelle Hall, which doubled as a student residence. McIntyre applauds the quality of the law faculty which consisted of only three full-time professors and never more than 49 law students in his day. He was greatly influenced by Dean Frederick C. Cronkite's course in jurisprudence and it was in this class that he acquired his life-long interest in philosophy. The excellence of his legal education McIntyre ascribes to good teachers raising basic issues of principle and developing critical thought patterns.

McIntyre and Bud Estey were close friends in law school and a prank still remembered by their classmates occurred when neither were invited to a Sadie Hawkins Day Dance. The pair obtained a quarantine sign for measles and attached it to the front door of the women's residence causing much confusion and greatly delaying the dance. Later both would serve on the Supreme Court together. McConnell notes the rarity of having two members from a small law school sitting on Canada's highest court at the same time. Another interesting fact is that McIntyre represented B.C. and Estey Ontario. This illustrates both

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8 *Supra* note 1 at 2.

9 *Ibid.* at 2.

the disproportionate number of Saskatchewan law graduates who sought opportunities outside the province and the legacy of the drought, rust, grasshoppers and dust storms of the 1930s which contributed to the dreariness of the province in the 1940s.

McIntyre should have graduated in 1941. However, not only was it necessary to pass each law exam, which McIntyre did, but an overall weighted average had to be achieved, and McIntyre fell short. He had been distracted from his studies by the war. Thus on return from war service in 1946, he was required to write special exams and he easily increased his average. His 1941 exam results, McConnell assures us, did not reflect his ability, for he was clearly a superior student.

In May 1941, he joined the forces, initially taking infantry training, and then transferred to the artillery. He served in the Italian campaign and in February 1944 he was posted back to England to strengthen the units preparing for the D-Day landings. However, he ended up being sent to Cambridge for flight instruction. With the war virtually over, he never flew operationally. This posting permitted him to get to London and indulge his lifelong interest in music, particularly the opera. As a youth he had learned to play the trumpet and the cornet.

In Cambridge, McIntyre meet his future wife, Hermione "Mimi" Reeves, who was running the cafeteria at the English Speaking Union. She was born just outside Budapest, where her parental grandfather had been chief trainer of race horses for the Hungarian Rothschilds and her father an assistant trainer. Her mother was the daughter of another English trainer who emigrated to Hungary. In 1914, she and her family were interned in Hungary as enemy aliens and at war's end they fled to Vienna, fearing a communist takeover. Here she completed her schooling, except for one year in England. About 1930, the Reeves family moved to Chantilly in France and shortly after Mimi left to work in England. A job of governess for two young children took her to Kashmir for a year. As a child, she spoke German, Hungarian and English and then acquired French. Her language skills were a great advantage in her next job with the travel agency, Thomas Cook and Sons. She lived in various Swiss hotels acting as the Cooks' liaison officer for English and American tourists and brought the last tour back to England in September 1939 to escape the war. For a young man raised in Saskatchewan, Mimi with her cosmopolitan upbringing was fascinating, and they were married in Cambridge in 1944 with his older brother Hugh, a medical officer in the RCAF stationed in Yorkshire, as best man. McConnell relates that the McIntyres' daughter, Elizabeth, thought that "her mother's influence... made her father, intellectually and socially, a much broader person than he would otherwise have been".[10] Her "charm, conversational gifts, and engaging manners", Madame Justice Wilson attests, "added zest to social functions held by the Supreme Court, where she was the life of the party".[11]

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[10] *Ibid.* at 16.

[11] *Ibid.*

In the spring of 1946 he was demobilized with the rank of captain and returned to Moose Jaw. He articled with Fred J. Gilmour K.C., who gave him a thorough grounding in the practice of law. He was called to the bar of Saskatchewan in 1947 and having been so impressed with Vancouver Island while receiving his military training, he and Mimi proceeded to the west coast. Norman Whittaker of Victoria offered him a position with his two-man firm. After writing examinations in B.C. statutes and in practice and procedure and paying a large transfer fee, McIntyre was admitted to the B.C. bar in July 1947. A few months later, Whittaker was appointed to the B.C. Supreme Court leaving only John R. McIlree and McIntyre in the firm. McIlree promptly made McIntyre his partner. McIlree was basically a solicitor, while McIntyre was the barrister, but as this was the age of the generalist, McIntyre also did wills and estates and other matters. He frequently acted as a Crown prosecutor, acquiring a wide experience in criminal law and read extensively in the area. Although disliking divorce work because of its generally adverse effect on the family, he would handle some divorce cases.

He became a good friend of Lloyd McKenzie in 1948 when the Benchers of the Law Society were investigating the fitness of Gordon Martin to be a member. Martin was a self-professed communist. McKenzie testified to his good character, but the Society concluded that Martin, as a communist, could not be a man of good repute even though of good character. McIntyre believed that as Martin was prepared to take the oath administered to everyone, he should be admitted because there was no other way of determining loyalty. He agreed with McKenzie that denying admission to Martin solely on the basis of his political views, constituted a gross infringement of his civil rights. However, the decision of the Benchers was upheld by the trial judge and by a unanimous Court of Appeal. McIntyre, who later served as a Bencher from 1965 to 1967, contends he would unhesitatingly have voted for admission. The decision of the Benchers, confirmed by the B.C. courts, attests to the pathological anti-communist feelings that swept North America and jeopardized civil rights.

Following the retirement of McIntyre's senior partner in the mid-1960s, he and Lloyd McKenzie arranged to merge their flourishing firms. The new firm, Harman & Co., with a complement of seven lawyers, soon came to rival Crease & Co., Victoria's largest firm. Their partnership was very harmonious, with never a disagreement over the "division of the spoils", and without the obsessive concern about "billable hours" found in current practice. McIntyre did *pro bono* legal work for the Salvation Army and received its highest decoration. The University of Victoria, upon its formation in 1963, selected McIntyre as its solicitor and he assisted in drafting its founding documents, acquiring land and facilitating construction of their new campus. The University in 1995 conferred upon him an honorary doctor of laws degree.

An insight into the judicial selection process constitutes a significant contribution of this book. In the summer of 1965, Chief Justice J.O. Wilson of the B.C. Supreme Court asked MacIntyre whether he had ever thought about a judicial career. When McIntyre indicated that he had, the Chief Justice said,

"You're not going to get the next appointment but you should get the one after that".[12] This prediction proved slightly inaccurate, for two appointments to the B.C.S.C. followed. However, at the Union Club in Victoria sometime later the Chief Justice of B.C., Henry Bird said, "I understand you're going to the bench"[13] and the next week Mr. Justice Jack Ruttan told McIntyre that "Wilson's fixed it. You're going to join him".[14] Then Pearson's Minister of Labour, John R. Nicholson, the regional minister for B.C., called and asked whether McIntyre would accept, if offered, a superior court appointment. He said yes and the federal cabinet made the appointment on the recommendation of the Justice Minister, Pierre Elliott Trudeau. This glimpse into the selection process reveals the important and perhaps decisive role that a Chief Justice and other judges have in filling a judicial vacancy. McIntyre's Liberal political affiliation, the author states "certainly did not impede his chances for elevation to the bench"[15] but McConnell insists that it was not a political patronage appointment. McIntyre had not played a leading role in politics, although he had actively supported Allan Macfarlane, a fellow lawyer, who ran provincially as a Liberal for Oak Bay. It was a merit appointment, assisted by the fact that Chief Justice J.O. Wilson admired McIntyre's ability as a barrister. The Chief Justice became McIntyre's "treasured friend and mentor".[16] Wilson was unenthusiastic about constitutionally entrenching basic rights and freedoms because the litigation it precipitated would necessarily entangle the courts in making political decisions. The author remarks on McIntyre's own doubts about entrenchment and states, "the degree of agreement between the two jurists is striking".[17] I don't find this striking, for I believe a large majority of judges of that time were uncomfortable about being thrust into developing social policy in a wider framework than that necessarily involved within current adjudicative norms. The Canadian Bill of Rights represented an invitation to the judiciary to be creative, but it generally fell on deaf ears.

McIntyre contends that being a trial judge gave him the greatest satisfaction and states that "[q]uickness of mind and a mastery of substantive law and procedural rules and evidence were essential attributes".[18] The author indicates that McIntyre was sensitive to the concerns of the accused and their families and graphically illustrates this. In a drug conspiracy case one of the accused was the father of a baby brought to the trial by the mother who went to leave the courtroom when the child started to whimper. McIntyre said: "Madam, you don't need to take that baby out. It doesn't bother me; it doesn't both(sic) the jury; if it bothers anyone else they can leave".[19]

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[12] *Ibid.* at 34.
[13] *Ibid.*
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid.* at 38.
[17] *Ibid.* at 39.
[18] *Ibid.* at 37.
[19] *Ibid.* at 43.

McIntyre's move to the B.C. Court of Appeal came as a complete surprise. In 1973, Otto Lang, Trudeau's Minister of Justice, telephoned and inquired whether he would accept such an appointment. Having had abundant prior notice of his initial judicial appointment, he thought the offer was a practical joke but soon realized it was Lang speaking. He accepted, but left the trial court with a certain sadness, having developed a firm friendship with and deep respect for Chief Justice Wilson. We are not told how influential Wilson and Chief Justice of B.C. John Farris were in his new appointment. The author does not say so, but McIntyre's LL.B. from Saskatchewan would not have deterred Otto Lang, a former Dean of the College of Law of the University of Saskatchewan, from recommending his appointment to cabinet.

Interestingly, the two decisions that the author selected as McIntyre's most significant while on the B.C. Court of Appeal were *R* v. *Miller and Cockriell*[20] and *R* v. *Rourke*.[21] The first was a dissenting opinion which attracted no support in either the B.C.C.A. sitting as a 5 member panel or with a full bench of the S.C.C. In the second, McIntyre does write the judgement for the B.C.C.A. but the S.C.C. in a 5 to 4 decision rejected McIntyre's holding that in a clear case the court has the inherent power to stay proceedings in order to prevent abuse of prosecutorial discretion. In this case, McIntyre probably had the weight of common law authority on his side. The author cites these two cases partly to refute "those who consider McIntyre to be a conservative jurist overly concerned with the preservation of public order".[22]

The issue addressed by McIntyre in *R* v. *Miller and Cockriell* was whether the Criminal Code's then mandatory sentence of death for the murder of a police officer on duty was rendered inoperative by section 2(b) of the Canadian Bill of Rights (1960), prohibiting the imposition of cruel and unusual punishment. McIntyre interpreted cruel and unusual in section 2(b) disjunctively so that cruel punishments however usual ... might come within the proscription, and then on a number of criteria finds capital punishment to be cruel and therefore held the death penalty should be rendered inoperative. Advocates of total abolition of the death penalty praised the decision, as did those who desired to see life instilled into the Canadian Bill of Rights. McIntyre acknowledged that he was venturing "into the realm of policy" and departing from "established practice" and that "such a course is beset with danger" but that "the *Bill of Rights* has not only authorized but has commanded such an approach".[23] Of the fourteen appeal court judges, McIntyre was the only judge to give that or any effect to the Bill of Rights. However, while the case was being argued in the Supreme Court of Canada, Parliament was repealing the death penalty. Thus, as the author states, McIntyre had prevailed in "Parliament if not in the courts".[24]

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[20] (1976), 63 D.L.R. (3d) 193 (B.C.C.A).

[21] [1975] 6 W.W.R. 591 (B.C.C.A.), aff'd on other grounds [1978] 1 S.C.R. 1021.

[22] *Supra* note 1 at 47.

[23] *Supra* note 20 at 258.

[24] *Supra* note 1 at 51.

Commentators disagree about the merit of McIntyre's dissent. Mr. Justice A.B. Robertson who wrote the majority decision in the B.C. Court of Appeal thinks the dissent was emotional, and Chief Justice John L Farris has described it as "a diatribe against the concept of capital punishment".[25] McConnell however says it is "a controlled and closely reasoned" judgment.[26] I am disposed to agree with McConnell, but McIntyre's dissent represents a marked departure from his philosophy of restraint and deference to parliament.

The author subsequently notes that "Dickson... contrary to McIntyre, took the view that doctrine and academic writing were very important within the body of the judgment".[27] Thus McIntyre's dissent was again anomalous, compared with his later judgments, for he not only cites three American law journals, but uses four quotes from these journals in his decision. This was very unusual in 1975 and even when it became common-place in the 1980s, McIntyre did not embrace this trend to the same extent as his colleagues.

The dissent in *Miller & Cockreill* was handed down 5 June 1975. Three years later when Mr. Justice Spence retired from the S.C.C. on 29 December 1978, McIntyre was selected as his replacement. Marc Lalonde, the Minister of Justice, recommended McIntyre's appointment to the Trudeau cabinet. The author tells us Lalonde had known. McIntyre personally before his elevation and had formed a favourable opinion which was reinforced by a personal interview in Vancouver just prior to his selection. One wonders whether this acquaintance might have arisen as a result of the dissenting judgment in *Miller & Cockreill*. Normally, Spence's replacement would have come from Ontario. Someone with strong knowledge of the criminal law was required but why look outside Ontario? The L.S.D. triumvirate was being partially dismantled with Spence's retirement and it is possible that Trudeau thought the more liberally oriented wing of the court led by Laskin needed reinforcing. How better to assure this result than to chose the person who penned the liberal *Miller & Cockreill* dissent? This supposition may be suspect because by 1979 many regarded McIntyre's judicial work as middle of the road. Nevertheless, his famous dissent may have played a decisive role in his selection, for it indicated that he could use the Canadian Bill of Rights creatively, while the Supreme Court had shied away from doing so after *The Queen* v. *Drybones*[28] in 1969. The selection of McIntyre may possibly have been based on an unrepresentative decision. McConnell does not make this argument but merely singles out this dissent as significant. He also states that "McIntyre was a superlative candidate" for the highest court.[29]

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[25] *Ibid.*

[26] *Ibid.* at 52.

[27] *Ibid.* at 92.

[28] [1970] S.C.R. 282.

[29] *Supra* note 1 at 63.

McConnell contends that "[s]cholars... have found little evidence of politically motivated appointments" to our highest court.[30] He also states that "few, if any, recent appointees to the Supreme Court have been politically active, in the sense of running for provincial or federal office, prior to their appointments".[31] It would be more accurate to say the only recent appointee to have run for political office was Julien Chouinard. He was appointed immediately after McIntyre's elevation. Chouinard had run unsuccessfully for the Progressive Conservative Party in Matane, Quebec in the federal election of 1968.

Shortly after McIntyre arrived on the Supreme Court, two important reference cases came before it. The first concerned Parliament's power to reform the Senate and the second was the Patriation Reference. In the first, the Court unanimously held that Parliament lacked the power to alter the Senate so as to create a House of the Federation. The Court found the Patriation Reference more difficult. McIntyre was part of the seven member majority which held that the federal government had the legal right to present any constitutional amendment it desired to the British Parliament following a joint address by both Houses of the Canadian Parliament. He, together with Chief Justice Laskin and Estey, dissented from the six member majority which held that it would be unconstitutional for the federal government to proceed without obtaining substantial provincial consent because of an existing constitutional convention. Thus Laskin, Estey and McIntyre accorded more power to the centre than any of their other colleagues. The strongest provincial rights proponents were Martland and Ritchie. McConnell notes that the first three were Trudeau appointees and the later two had been appointed by Diefenbaker. Between these poles were Julien Chouinard, an appointee of Clark, and three Trudeau appointees, Dickson, Beetz and Lamer, who endorsed the government's legal power but considered that convention required "provincial consultation because the package derogated from provincial powers".[32] McConnell states that this reference was "one of the most 'political' cases ever to be decided by the Court" but insists that the judges "did not make their rulings based on politics".[33] He does note that McIntyre is apprehensive about reference cases for the "Court may be acting in a political rather than a judicial manner".[34] McIntyre still adheres to his position in the Patriation case and wonders whether Canada is more united as a result of the majority decision that the address to the British Parliament would be legal but unconstitutional on the basis of convention. McIntyre regrets that the negotiations which followed isolated Quebec, but this was neither a necessary nor a foreseeable result of the process. He does not refer to the s.33 override, another consequence of the negotiations. Had Trudeau

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[30] *Ibid.* at 68.

[31] *Ibid.*

[32] *Ibid.* at 70.

[33] *Ibid.*

[34] *Ibid.* at 80.

proceeded unilaterally, McIntyre believes that "British refusal would have severed Canadian links with Britain and presaged the end of the monarchy"[35] but he is confident that Britain would not have refused. However, the constitutional amendments procured would have lacked political legitimacy with eight provinces opposed, unless wholeheartedly endorsed by the Canadian people.

McConnell believes McIntyre's dissent in *R* v. *Morgentaler* reflects his "general approach to Charter interpretation".[36] McIntyre would have upheld section 251 of the Code which permitted therapeutic abortions to safeguard the life and health of the mother subject to compliance with certain conditions, one of which was that a therapeutic abortion committee in an accredited hospital had certified the pregnancy would endanger her life or health. An abortion performed without a certificate rendered both the doctor and the woman criminally liable. The majority in a 5-2 decision struck these provisions down. McIntyre, however, said "[T]he task of the Court in this case is not to solve or seek to solve what might be called the abortion issue, but simply to measure the content of section 251 against the Charter ... It is only when such legislation goes beyond interfering with priorities and aspirations, and abridges rights, that courts may intervene".[37] McIntyre could find no expressed right to an abortion and did not regard the court as the appropriate vehicle for the creation of social policy. McConnell, obviously approves of this approach for he writes: "On incendiary contemporary issues such as abortion, judges may be tempted to substitute their own social policy preferences for those of Parliament, but if they do, they are not exercising the self-restraint so essential to their office".[38]

Commentators generally regard McIntyre's decision in the *Andrews* case, the first equality case to reach the Court, as a major contribution to defining equality rights under section 15 of the Charter. Andrews, a U.K. citizen with an Oxford law degree who had satisfied all the requirements for admission to the B.C. bar except that of citizenship, sought a declaration that s.42 of the *Barristers and Solicitors Act* imposing a Canadian citizen requirement contravened section 15 of the Charter. McIntyre's judgment is a subtle and sensitive investigation of the equality provision. He states "discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group not imposed upon others, or which withholds or limits access to opportunities, benefits, and advantages available to other members of society".[39] McIntyre held that the discrimination forbidden by s.15 was not limited to the enumerated grounds but included analogous grounds. He also set out the

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[35] *Ibid.* at 113.

[36] *Ibid.* at 121.

[37] *Ibid.* at 121-22.

[38] *Ibid.* at 121.

[39] [1989] 1 S.C.R. 143 at 174.

respective roles of Sections 15 and 1. Later cases have developed McIntyre's approach but perhaps have not significantly improved upon it. "It is somewhat ironic", McConnell says, "that the classic Supreme Court formulation on 'equality rights' was made in a dissent".[40] All six judges had agreed that the citizenship requirement breached s.15 but only McIntyre, with Lamer concurring, held the discrimination could be justified under s.1. Thus at the second stage, we see McIntyre's deference to the legislature emerging. McIntyre was also one of the three judges who took the view that the *Oakes* test was too stringent for s.15 violations.

McConnell contends that McIntyre had "a major influence on Canadian constitutional jurisprudence".[41] In addition to the cases already noted, he relies on *R.W.D.S.U.* v. *Dolphin Delivery* in which McIntyre, writing for a unanimous court, held that "government" in s.32(1) of the Charter applied to the executive and legislature but not to the courts. Peter Hogg, however, states that "[t]he *Rahey* and *BCGEU* decisions have, in effect, repudiated McIntyre J.'s ruling in *Dolphin Delivery* that the word 'government' in s.32 excludes the courts".[42] McConnell rightly notes that *Dolphin Delivery* has never been expressly overruled.[43] However, a case which is ignored or implicitly repudiated constitutes a poor basis for the contention that McIntyre has had a major influence.

In Chapter VI, dealing with Criminal and other decisions, McConnell recognizes that some legal observers believe that McIntyre "was excessively concerned with the promotion of law and order".[44] However, he maintains that McIntyre was "always mindful of the need to balance liberty of the person with the state's interest in security".[45] He relates that McIntyre worked "on the friendliest terms" with Lamer and Wilson and that they have acknowledged that "his cautionary advice ... has had a salutary effect on the Court".[46] McConnell contends that McIntyre prevented the Court "from adopting more unbalanced positions"[47] in criminal law and that his reputation as a conservative needs to be reconsidered. Again he points to *Miller and Cockreill*, but McIntyre was dissenting and may have felt freer from restraint as a result. He may have been so impressed with the argument and factum of Josiah Wood and so adamantly opposed to the death penalty that he penned a dissent which was inconsistent with his general approach.

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[40] *Supra* note 1 at 126.

[41] *Ibid.* at 144.

[42] P.W. Hogg, *Constitutional Law of Canada*, student edn. (Toronto: Carswell, 1998) at 683.

[43] *Supra* note 1 at 132.

[44] *Ibid.* at 154.

[45] *Ibid.*

[46] *Ibid.*

[47] *Ibid.*

McConnell relates that McIntyre retired in 1989, four years short of the mandatory retirement age of 75 years, for three reasons. Firstly, on his appointment he decided to stay for only ten years, believing that the Court "benefitted from the infusion of new ideas".[48] Secondly, his wife, Mimi, was not in good health and wished to return to B.C. Thirdly, he was anxious about the trend of Court decisions. Dealing with the third point provides an opportunity to review McIntyre's criticisms of the Court which are the following: The Charter is being interpreted too expansively and should be applied more sparingly and selectively. The Court grants leave to appeal in too many cases so the workload is too heavy to permit time for research and reflection necessary for proper adjudication. The judgments have become too long and convoluted with the result that the *ratio decidendi* is difficult to extract. "To keep up with the present Supreme Court decisions," McIntyre says, "would be like reading *War and Peace* every two weeks".[49] McIntyre also disapproves of the growing practice of issuing separate concurring opinions. He criticizes the practice of judges "reading in" missing provisions to render legislation compatible with equality rights because repairing invalid laws should not be a function of the court and is inescapably political, for the mantle of the legislator is being assumed. "Reading down" he finds much less controversial, for this approach accords with the presumption of constitutionality and an existing text receives no additions. He criticizes the Court's official endorsements of headnotes and is concerned with the consequence in a subsequent case of the discovery of a disparity between the headnote and the text of a judgment. McConnell refers to this problem several times but surely it is insubstantial, for the judgment itself must prevail since the purpose of the headnote is only to achieve more accurate press coverage.

An important issue addressed by McConnell is whether we need to know more about prospective appointees to the Supreme Court of Canada in advance of their elevation now that the Court plays such a pivotal policy role. He asks whether we need a judicial confirmation process similar to that in the United States. McIntyre doubts that a review process would be desirable and suggests instead that judges use restraint in exercising their Charter powers. McConnell, however, contends that a persuasive case favouring a legislative confirmation process can be made. He also believes that pressure will increase for such a process as the Courts continue to be involved in formulating social policy.

McConnell deserves our thanks for extending our knowledge about Mr. Justice McIntyre. It has been said that in reading a biography that you learn as much about the author as the subject of the biography. This is true in regard to this biography. McConnell's opinions play such an important role that often it is difficult to discern whether the ideas expressed are those of McIntyre or McConnell. Probably only a person believing in judicial restraint in Charter

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[48] *Ibid.* at 63.

[49] *Ibid.* at 219.

interpretation would be attracted to the task of writing McIntyre's biography. However McConnell emphasizes deference so strongly that he neglects to paint a more detailed and richly textured portrait of McIntyre. His own agenda also inhibits him from providing us with a more critical assessment of McIntyre's contribution to the law. I find the plea for deference eminently more satisfactory than the shrill criticism of the Supreme Court's Charter interpretation found in, for instance, *The Charter Revolution and The Court Party*,[50] which appears to allege that the Court has become the victim of a left wing conspiracy. I remain unpersuaded by the generalized plea for restraint because I applaud the recognition of rights so long denied to disadvantaged groups. However, *Re Provincial Court Judges* illustrates the need for restraint. I am persuaded by Mr. Justice La Forest's sole dissent which holds that s.11(d) of the Charter neither prohibits salary discussion between governments and judges nor mandates recourse to a judicial compensation commission before changing judges' salaries. As La Forest contends the independence provided for in s.11(d) is for the benefit of the judged, not the judges and does not grant judges a level of independence to which they feel entitled. "It does not require legislatures", as La Forest states, "to establish what in some respects is a virtual fourth branch of government to police the interaction between the political branches and the judiciary".[51] When dealing with the subject of judicial salaries at any level, judges are not disinterested parties and to derive additional protection for judicial independence from the preamble to the *Constitution Act*, 1867 does little credit to our Court. McIntyre's admonition, that "the courts must not, in the guise of interpretation, postulate rights and freedoms which do not have a firm and reasonably identifiable base in the Charter"[52] or in the rest of the constitution has particular relevance when the judiciary is virtually in a conflict of interest situation. Deference and restraint, epitomized by McIntyre and promoted by McConnell, are important qualities but determining when they should prevail remains the conundrum implicit in judicial review.

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[50] F.L. Morton and R. Knopff, *The Charter Revolution and the Court Party* (Peterborough: Broadview Press, 2000).

[51] *Re Provincial Court Judges*, [1997] 3 S.C.R. 3 at 196.

[52] *Ibid.* at 123, quoting *R.* v. *Morgantaler* [1988] 1 S.C.R. 30 at 55.