BOOK REVIEWS
COMPTES RENDUS

Administrative Law, 2d ed. By David J. Mullan. Toronto: Carswell, 1979. Pp. 283.

Professors are expected to produce learned dissertations on arcane topics and are promoted and tenured on that basis. Other types of writing, popularizations for laymen as well as syntheses for students, are often ignored in the quest for original thought and for promotion. David Mullan proved his mettle in the "normal" professorial arts when he wrote his justly celebrated articles on fairness.[1] He succeeded at the less conventional task of synthesis in his book *Administrative Law*.[2] Now, the second edition of *Administrative Law* has both updated the synthesis and refined it considerably.

Administrative Law makes no pretence to being an exhaustive text of Canadian administrative law.[3] However, Mullan provides concise notes on almost all areas of administrative law, together with references to jurisprudence, and it is likely that if an answer to a specific problem were urgently required, Mullan's book could furnish it more rapidly and more efficiently than a full-fledged text. Mullan's work could also help bring a new simplicity to administrative law. There can be no doubt that the great increase in the importance of government, coupled with the sudden interest in theories of fairness and natural justice, has left administrative law in a state of flux. In these circumstances, many have expressed the need for a return to fundamental principles and for the removal of obscure distinctions.[4] What tool could be more useful for this than a clear

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[1] Mullan, *Fairness: The New Natural Justice?* (1975) 25 U.T.L.J. 281; Mullan, *Martineau and Butters* v. *Matsqui Institution Inmate Disciplinary Board: Its Potential Impact on the Jurisdiction of the Trial Division of the Federal Court* (1978) 24 McGill L.J. 92.

[2] Mullan, *Administrative Law* (1973).

[3] The only work with a serious claim to that is Dussault, *Traité de droit administratif canadien et québécois* (1974).

[4] See the judgement of Dickson J. in *Martineau* v. *Matsqui Institution No. 2* (1979) 30 N.R. 119 (S.C.C.) as well as *R.* v. *Wilson* (1977) 32 F.L.R. 399 (F.C. Austr.).

and precise digest drafted as objectively as possible, with very brief evaluations of the contradictory cases?

Mullan's book is in fact the administrative law portion of the Canadian Encyclopedic Digest.[5] There need be no apology for this type of work — it has survived for centuries.[6] Certainly, in administrative law this type of synthesis has become essential and Mullan has filled a very real vacuum.

In an area as complex and as confused as administrative law, the most important decision is the division of the subject into topics. Mullan deals first (and rather briskly) with the character of the decision-maker. Then he covers the manner in which decisions are taken, which he distinguishes from the scope and correctness of decisions. Since the traditional concept of *ultra vires* cuts across these two categories,[7] some may find Mullan's classification unwieldy, but on the whole it does seem to clarify the material, and that is Mullan's purpose. Finally, Mullan devotes a section to traditional common law remedies and to the statutory remedies of Canada and Ontario. Mullan's scheme is not a startling or innovative one, but it maximizes clarity and logic and is therefore admirably suited to a digest.

The content of Mullan's work is on that high level to which he has accustomed his readers. The digest is well-written, incisive, and taut. It is obvious that Mullan was thorough in his research, for the scope of his references is very great and he has used cases from all areas of administrative law. He is particularly helpful on issues of procedure and evidence, which have often been neglected for the more glamorous field of natural justice. For instance, Mullan's treatment of sufficiency of evidence (p. 159) and of affidavit evidence to prove error of law on the face of the record (p. 177) are extremely praiseworthy. One must praise also his approach to the issue of review of subordinate legislation. By reading Mullan's twenty-one pages devoted to this topic, one can rid oneself of much of the uncertainty which has clouded this area of law.

Mullan made a conscious decision to emphasize Ontario law and to discuss Ontario statutes rather than those of other provinces. This may be a very good decision since the other provinces

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[5] C.E.D. (Ont.), 3d ed., vol. 1, title 3.

[6] There is some conceptual similarity between this digest and Justinian's great work. See Kunkel, *An Introduction to Roman Legal and Constitutional History* (1966).

[7] See *Anisminic* v. *Foreign Compensation Commission* [1969] 2 A.C. 147 (H.L.).

tend to use Ontario statutes as a model for legislation,[8] and it is clearly not possible to deal with everything.

Finally, one must thank Mullan for providing not only a list of cases but a list of articles which he consulted. Recent Supreme Court decisions[9] are full of references to such doctrine and show the growing importance of academic writing in complex areas of law.

A work which attempts to cover all of administrative law inevitably misses a few problems. One may regret the absence of discussion of the controversial boundary line between private and public law and the connected issue of domestic tribunals. It is perhaps unfortunate as well that the notion of Crown prerogative was not studied in relation to tort and contract, and that problems arising from such cases as *Manitoba Fisheries* v. *The Queen*[10] were not touched. However, one should not overemphasize these lacunae, because they detract very little from the high quality of the book.

David Mullan has clearly produced a useful and much needed synthesis in a crucial area of law. He has once again demonstrated his great ability and has produced a first-rate work which will be of assistance to practitioners, to students preparing for examinations, and to those who wish a launching pad to a more detailed analysis of the various topics in administrative law.

Julius H. Grey*

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[8] Except Quebec, but Quebec has a somewhat similar work in Ouellette & Pépin, *Précis de contentieux administratif* (1977).

[9] See *Coopers & Lybrand* v. *M.N.R.* [1979] 1 S.C.R. 495 and *Martineau* v. *Matsqui Institution No. 2, supra,* note 4.

[10] [1979] 1 S.C.R. 101.

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Law and Politics, The House of Lords as a Judicial Body, 1800-1976. By Robert Stevens. Chapel Hill: The University of North Carolina Press, 1978. Pp. xviii, 701.

This book is obviously a labour of love. To sit down and read all reported judgements and every accessible unreported opinion since 1830, and then to attempt to organize the materials to demonstrate that contemporary social and political attitudes cannot be ignored in considering the development of the law during this era, is a task of Herculean proportions. Whether or not one is convinced that the author has succeeded in demonstrating that their Lordships are actively engaged in some form of law-making, and that law is not the logical application of principle to a new setting, must ultimately depend on the extent to which one believes that one can discover a man's social and political attitudes by reading his judicial opinions. But whether or not one believes that the thesis is made out, one cannot help but admire the industry and erudition which this work reflects.

The book has its origins in a series of lectures (given in Northern Ireland) which sought to assess the judicial role of the House of Lords as part of British society and British government. These lectures have been expanded by the addition of a large amount of material dealing with developments in the substantive law. This unfortunately leads to excessive footnoting and as a result the book cannot be described as an easy read. Nevertheless, the style is admirably clear, and it is often the footnotes that are the most entertaining part of the book. Thus we are told that Lord Sumner was a bitter man who resented his humble beginnings and early disappointments, that he was widely disliked and that only his wife attended his funeral (n. 125, p. 265). The footnotes also contain intriguing references to unreported decisions which seem to be at odds with generally received views (see, *e.g.*, n. 73, p. 144 on parol evidence, and n. 33, p. 136 on corporate opportunity).

The book is divided into five parts. The Introduction and Part I take us up to 1912 and describe the evolution of the judicial arm of the House of Lords. In many ways this is the most interesting part of the book for it brings home to us, in sharp relief, that the Judicial Committee of the House of Lords evolved in response to naked power politics. In places one can scarcely believe how primitive things once were. For example, until the end of the eighteenth century their Lordships considered it a breach of privilege to report judicial appeals. During the early part of the nineteenth century, justice was meted out in the most extraordinary way in that august

tribunal. What follows is an extract from a pamphlet by Leahy, quoted by Mr Stevens at page 21:

> Two peers are summoned in rotation from a list made out at the beginning of every session, and one different every day. As the Chancellor considers it his peculiar duty to attend to the case before the House, the other Lords, very justly, look upon themselves as only present for the purpose of producing the necessary quorum of appellate authority. The duty of attending appeals is distributed as evenly as can be done amongst all members of the Peerage whose services are desirable; and, therefore, no individual peer attends a second time until all the other peers then in town have had a term at the work. If therefore the hearing of a case continues for three days, it is heard on the first day by Lords A. and B; or, more correctly speaking, *they are present at the hearing.* The Lords summoned for the second day will be Lords C. and D; and for the third, Lords E. and F. When the judgment comes to be delivered, the Lords present, besides the Lord Chancellor, will be Lords G. and H. The Chancellor, on this last occasion, recommends their Lordships to make a certain decree; and to that recommendation an immediate compliance is accorded by the Lords G. and H., who in consequence of the arrangement above stated, have not been present during any part of the hearing.

The book then proceeds to trace the workings of the House from 1912 to the present day. This period is broken up into three parts: 1912-1940 (the rise of the professionals), 1940-1955 (the era of substantive formalism), and 1955-1976 (modern times).

It is impossible, and perhaps undesirable, in a short review to state whether or not one agrees with the author's assessment of the contribution and jurisprudential orientation of individual judges. So much, of course, depends on one's own jurisprudential make-up and on personal interpretations of particular opinions. Looking at my notes at random, I find that I was in complete agreement with the author's assessment of Lord Cairns and Lord Selborne (pp. 115-116), was shocked and dismayed to learn of Halsbury's juggling of panels to ensure the "reversal" of *Allen* v. *Flood* [1898] A.C. 1 (p. 93), considered that the author had been a little too generous to Birkenhead (pp. 235-236), was in broad agreement with the author's assessment of Lord Wilberforce (pp. 555-562), but thought Lord Diplock's long-term impact had perhaps been underestimated.

The book is generally very well produced with few misprints. Towards the end, however, something seems to have gone badly wrong because many of the notes (see, *e.g.*, pp. 591, 592) are only partially completed.

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Les droits des bénéficiaires d'un usufruit, d'une substitution et d'une fiducie. Par Madeleine Cantin Cumyn. Montréal: Wilson & Lafleur Ltée, 1980. Pp. x, 134.

On espère depuis 1950 la publication du quatrième numéro de la collection *McGill Legal Studies.* Heureusement, la qualité du texte choisi fait oublier la longueur de l'attente. Nous sommes d'avis que l'ouvrage de Me Cantin Cumyn apporte une contribution importante à la doctrine québécoise, contribution dont l'intérêt demeurera quoi qu'il advienne des recommandations soumises par l'Office de révision du Code civil. Ailleurs, dans un commentaire sur le *Projet de Code civil,* nous avions l'occasion d'écrire "a new civil law treatise is probably more crucial in the long run than a new Civil Code".[1] Nous entendions, par là, signaler la faiblesse de la doctrine analytique, l'absence quasi totale d'études théoriques dans plusieurs domaines, et particulièrement l'inexistence de textes d'ensemble traitant de diverses institutions réglementées par le Code civil. Cette pénurie d'ouvrages portant sur des matières purement civiles (notamment au niveau du droit des biens) a gêné l'évolution jurisprudentielle, permettant que des solutions juridiquement inacceptables fassent autorité. En effet, sans essai de parallèle entre les institutions juridiques propres au droit civil canadien, on risque, en certains cas, d'en confondre les caractéristiques au point de mettre en danger leur identité même.

Le texte de Me Cantin Cumyn permet précisément d'éviter les difficultés soulignées. Il se veut un examen de "trois institutions pouvant servir de mécanisme pour la réalisation des libéralités qu'un disposant se propose de faire à divers groupes de bénéficiaires, soit l'usufruit, la substitution et la fiducie".[2] Traitant d'une matière foncièrement civile, cette monographie se présente comme une étude approfondie du sujet traité, ne négligeant toutefois pas la nécessaire analyse systématique de plusieurs notions de base tels que le concept de propriété, la distinction entre les droits réels et personnels, les démembrements de la propriété, et l'administration du bien d'autrui. L'ouvrage comprend deux parties principales sans compter, bien sûr, de brèves introduction et conclusion. Dans un premier temps, l'auteur élabore les éléments fondamentaux des trois institutions discutées et les conséquences juridiques qu'ils entraînent. Cet essai de parallèle permet, à la fois, de clarifier les

[1] Macdonald, *Civil Law — Quebec — New Draft Civil Code in Perspective* (1980) 58 R. du B. can. 185, à la p. 202.

[2] Cantin Cumyn, *Les droits des bénéficiaires d'un usufruit, d'une substitution et d'une fiducie* (1980), à la p. 1.

critères servant à les distinguer l'une de l'autre, et de préciser les avantages éventuels que présente chacun de ces modes de confection d'une libéralité. Sont examinés, par exemple, les différents points de départ des droits des bénéficiaires, ainsi que les questions relatives à leur droit respectif de disposer des biens donnés. Une deuxième partie du texte est consacrée à une analyse des divers droits accordés aux bénéficiaires, doublée d'une discussion des similitudes et distinctions à opérer entre les trois institutions à cet égard. L'auteur discute, de plus, certaines questions pratiques telles que la nature d'un usufruit d'actions de compagnie, les pouvoirs de l'exécuteur testamentaire face à chaque institution et la possibilité de cumuler, soit un usufruit et une fiducie, soit un usufruit et une substitution au sein d'une même libéralité. En conclusion, l'auteur discute sommairement les principales recommandations mises de l'avant par l'Office de révision de Code civil, nous offrant une appréciation tant de l'esprit ayant animé la rédaction du *Projet de Code civil* dans ce domaine, que du droit substantif présenté.

Toute monographie destinée à une large audience doit comporter plus qu'un simple texte critique. Me Cantin Cumyn nous fournit, dans cette perspective, de multiples renvois à la doctrine comme à la jurisprudence. Une table des matières détaillée, une excellente bibliographie, en plus des tables usuelles concernant les références aux articles des codes civil canadien et français de même qu'au *Projet de Code civil*, à la jurisprudence et à la législation, complètent l'ouvrage. Somme toute, l'auteur offre à l'étudiant un texte de base pouvant lui être utile dans plusieurs de ses cours de droit; au notaire, une présentation des avantages que comporte chacune des trois institutions traitées; à l'avocat, un outil de référence mettant en valeur les distinctions théoriques à opérer et, à la magistrature, généralement, une source utile à la rédaction de jugements dans ce domaine.

Nous devons, toutefois, signaler quelques omissions. L'auteur aurait pu, par exemple, lorsqu'elle discute de la question de l'énumération limitative des droits réels dans le Code civil, élaborer plus avant ses conclusions.[3] D'autre part, on sait que, dans une société commerciale comme la nôtre, les sûretés se révèlent d'une importance primordiale. Or, la libéralité d'une sûreté, par exemple une hypothèque, un nantissement ou un "trust deed", n'est pas discutée. Enfin, le notaire, notamment, eut pu profiter d'un commentaire de quelques clauses de style employées dans les libéralités.

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[3] *Ibid.*, à la p. 47.

Ces remarques demeurent, cependant, d'importance relative, ne compromettant nullement la valeur de cette monographie.

Cette présentation de trois institutions distinctes, mais voisines, permet d'espérer leur emploi judicieux tant dans nos cours de justice que dans nos facultés de droit. S'il est certaines conclusions que nous ne pouvons partager, notamment en ce qui concerne l'utilité de la distinction entre droits réels et personnels ou encore quant à quelques aspects de la fiducie, il demeure que le texte offre une discussion sérieuse de ces questions, l'auteur motivant les solutions auxquelles elle parvient. Pour ces raisons, nous n'hésitons pas à recommander l'ouvrage de Me Cantin Cumyn à tout juriste québécois, qu'il soit étudiant, notaire, avocat ou juge.

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Reviewing the Codes: A Student Primer

Professor Brian Hogan, the co-author (with J.C. Smith) of the fine English text *Criminal Law*,[1] remarked recently that the plethora of annotated Canadian criminal codes, although of some help in gaining an acquaintance with Canadian criminal law, "were not unlike a street index without an accompanying map".[2] Serious works in Canadian criminal law and its related areas have slowly begun to appear in recent years, most notably Mewett and Manning's *Criminal Law*,[3] but our practitioners and judges still tend to rely rather heavily on the street indexes. This is quite a shortcoming in itself, but adding to the problem is the fact that the annotated codes are many and their quality variable. This holds true within each individual work: marked disparities in quality exist from volume to volume, and from one edition of a given code to the next.

Format is the most obvious difference among the codes. *Martin's*[4] is an annual bound presentation, while *Snow's*[5] employs a loose-leaf format to ensure currency. *Crankshaw's*[6] and *Tremeear's*[7] maintain an encyclopaedic approach and last appeared in complete editions in 1959, although numerous supplements have appeared since then to keep these important works current.

What do the editors of the annotated codes consider the function of their products to be? E.L. Greenspan, the present editor of *Martin's*, expresses the hope in both the 1978 and 1979 editions that readers "will continue to find in *Martin's* a useful and accurate survey of the criminal law of Canada".[8] This is really to hope for too much. None of the codes can truthfully be said to survey all of the criminal law of Canada. These are annotated codes, not comprehensive statements of the law. On the whole they have little to say about the general part of the criminal law, a subject which, by way of contrast, Professor Glanville Williams explores in a

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[1] *Criminal Law*, 4th ed. (1978).

[2] In a review of Mewett and Manning's Canadian text on *Criminal Law* (1978) in (1979) 5 Dal. L.J. 812.

[3] *Ibid.*

[4] *Martin's Annual Criminal Code, 1979*, Greenspan (ed.).

[5] *Snow's Annotated Criminal Code*, 7th ed. (1979), Heather (ed.).

[6] *Crankshaw's Criminal Code of Canada*, 8th ed. (1979), vol. I, Rodrigues (ed.).

[7] *Tremeear's Annotated Criminal Code*, 6th ed. (1964), Ryan (ed.).

[8] *Supra*, note 4, v.

treatise of over nine hundred pages.[9] It is true that the codes in varying degrees flirt with detailed considerations of difficult legal problems, but the breadth of approach militates against completeness, for the codes contain treatments not only of substantive criminal law, but also of criminal evidence and procedure. This is not to deny the obvious usefulness of much that is contained in these codes. What follows is a short review of some of their strengths and weaknesses.

Martin's Annual Criminal Code is the most popular of the portable codes. It has recently been improved by more and better annotations and by new references to many older leading cases that were omitted in previous editions. The strength of this code lies in its reliable presentation of the highest recently-reported Canadian decisions on point. It is weak in its treatment of historical material and comparative jurisprudence. The *Martin's* of 1955 set high, and as yet unequalled, standards in this regard. Regrettably, it is out of print and unavailable as a companion to the present edition. It should either be reprinted and its great usefulness drawn once again to the attention of the profession, or be more heavily exploited by the present editor for resource material.

Snow's Annotated Criminal Code, now in its seventh edition, has in recent years changed to a losse-leaf format,[10] presumably to assist updating as well as to avoid the planned obsolescence of *Martin's* annual bound volume. (*Martin's* even goes so far as to change the colour of its binding from one edition to the next.) The quality and topicality of the annotations in *Snow's* are inferior to *Martin's,* although other features compensate for this deficiency, such as a useful, though limited, section entitled "Where to find your law". Although a complete revision of *Snow's* is in progress, the law is stated as of July 1978, while *Martin's* purports to state the law as at 30 June 1979.

Unfortunately, as "portable" codes, *Martin's* and *Snow's* lack the depth of the other, more encyclopaedic codes. The 1955 edition of *Martin's* demonstrates that ease of carriage and the highest standard of excellence can be achieved together. However, even the more substantial annotated codes do not equal the sustained, integrated and comprehensive inquiry in the better texts.

The last complete revision of *Crankshaw's Criminal Code of Canada* occurred in 1959. Numerous supplements to this fine code

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[9] *Criminal Law: The General Part,* 2d ed. (1961).
[10] Known as the Cumulative Supplement Method.

have been issued in the past twenty-one years, and at last a major revision is beginning to appear. One says "beginning" because the format of *Crankshaw's* has been altered, and the envisaged final product is four loose-leaf volumes which together will form the eighth edition. At the time of this writing, only the first of these, covering sections 1 to 195.1 of the Code, has appeared.

Those familiar with earlier editions of *Crankshaw's* should be warned that this is not the same product. The days of the single editor are gone. No longer do prodigious, solitary labourers like A.E. Popple, L.J. Ryan, James Crankshaw or John Crankshaw devote their energies to this kind of project. *Crankshaw's* eighth edition (volume one) indicates the efforts of a general editor (Gary P. Rodrigues) and four contributing editors. The danger in the multiple-editor approach lies in the potential sacrifice of uniformity and consistency, but a cursory examination of volume one indicates that these pitfalls have been avoided. As regards volume one, Mr Rodrigues is to be congratulated for his rigour and his fidelity to the spirit of the earlier editions.

While the spirit remains, some major changes in substance have occurred. The eighth edition describes itself as "the Criminal Code of Canada with digests of cases, histories of sections, references to articles and annotations and references to related statutes and other sections of the Criminal Code"; the seventh, by contrast, is subtitled "A Commentary on the Criminal Law of Canada: Including an Appendix Containing All Relevant Statutes and Forms and a Comprehensive Index". New to the eighth edition are histories of the sections and the formally segregated and more comprehensive references to related statutes, articles and annotations. Both will be of use to the practitioner or researcher. One can, however, take issue with the utility of bibliographical references which are limited to the Criminal Reports and the Criminal Law Quarterly. Another useful addition would have been the inclusion of references to all relevant Canadian legal periodical material.

What has been said about the seventh edition of *Crankshaw's* may be equally said of the sixth edition of *Tremeear's Annotated Criminal Code*. The extraordinary efforts of L.J. Ryan resulted in a product that is as wide-ranging and comprehensive as that produced by A.E. Popple. But that was 1959, and *Crankshaw's* and *Tremeear's* largely covered the same terrain in the same fashion. No new edition of this code has been produced to date. Since *Crankshaw's* has embarked on a somewhat novel course, we may yet see two distinct and contrasting products of equal stature. In the meantime *Crankshaw's* eighth has the field to itself.

Milligan's Correlated Criminal Code and Selected Federal Statutes (1979) is by far the most novel and, unfortunately, least useful of the codes. This is not truly an annotated code. Its editor has coined a new term, "correlated", to describe his product. His work deliberately contains no reported cases, explanations, or interpretations of the law. He believes these should be the subjects of a separate work; as a former police officer and law instructor he should be aware that they already are. Milligan's work has a limited usefulness, primarily to the dabbler in criminal law. Certainly anyone with a need for knowledge beyond that which can be gleaned from a superficial reading of statutory provisions will have to resort to sources other than this code. In essence Milligan has done what the conscientious law student, practitioner or police officer would have to do in making his way systematically through the labyrinthine procedural and substantive provisions of the Code: he has cross-referenced the text. References to related sections have been provided in marginal notes. Words which have been statutorily defined are underscored and often the statutory definition is reproduced immediately following the section where the key word appears. His method is somewhat more complex and idiosyncratic than this brief description conveys; but the method works, and there is a case to be made for the view that Milligan's innovations should be incorporated into the other annotated codes. Participants in the criminal justice system can hardly rely solely on this code as a guide to a "better and easier understanding of criminal law and procedure in Canada".[11] This code does include several statutes which the other annotated codes could usefully incorporate. Among these are the *Identification of Criminals Act*[12] and the *Interpretation Act*.[13] Milligan also includes the *War Measures Act*.[14] This is good, but having done so one may ask why he has omitted the *Official Secrets Act*[15] and the *Combines Investigation Act*.[16] A more debatable inclusion is a cumbersome system of classification of offences employed by Milligan for purposes of identification and cross-reference.

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[11] *Milligan's Correlated Criminal Code and Selected Federal Statutes* (1979), Introduction.

[12] R.S.C. 1970, c. I-1.

[13] R.S.C. 1970, c. I-23.

[14] R.S.C. 1970, c. W-2.

[15] R.S.C. 1970, c. O-3.

[16] R.S.C. 1970, c. C-23.

Lagarde's *Droit pénal canadien*[17] is a magnificent work that is available only in a French language edition, and thus largely unknown or ignored outside Quebec. It last appeared in 1974 and consists of three large volumes which digest an enormous body of case material, including many unfamiliar Quebec cases. The approach is in some ways comparable to that adopted in the Canadian Abridgment but is more comprehensive. Case summaries are often provided along with histories of the sections. Offences are broken down into their essential elements and analyzed within that context. The text often does not speak with a neutral voice: opinions are expressed and justified. It is very much a commentary on the law as well as a digest of it, and it is a major work that deserves a larger readership.

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[17] *Droit pénal canadien,* 2e ed. (1974), vols. I-III, Lagarde (ed.).

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