BOOK REVIEWS
CHRONIQUE BIBLIOGRAPHIQUE

Law and Learning . By the Consultative Group on Research and Education in Law. [A report to the Social Sciences and Humanities Research Council of Canada]. Ottawa: 1983. Pp. ix, 187.

Seventy-three years ago the Flexner Report on the reform of medical education and research in the United States and Canada appeared.[1] It revolutionized medical teaching and research in North America, calling for the twin missions of medical education and research to be performed in universities. Moreover, it ushered in teaching hospitals affiliated with universities to provide the clinical laboratory to test knowledge in application through patient care, thereby enhancing learning and sharpening research. There are many other factors which have contributed to the remarkable leadership of the United States and Canada in medical education and research in the seven decades since then, but this report, which provided the intellectual foundation for North American medical education and research, was a major contributing factor.

The report *Law and Learning* has the potential for a similar impact upon legal education and research in Canada. Its origins can be traced back at least ten years, to the Symons Report on Canadian Studies.[2] That report was critical of our apparently low research productivity in law, of our habit of borrowing from British and American legal literature and reform principles without determining whether Canadian conditions required some local tailoring and of the absence of a scholarly attack on indigenous Canadian problems. It called for a comprehensive study of legal research and education. Such a study has now appeared. In its general conclusions and fifty-six specific recommendations, it provides a stimulating framework for appraisal and reform initiatives in legal education and legal research in Canada.

The report is centred on law as a university discipline. It calls for a "genuine pluralism" in the curricula of Canadian law schools, for a series of alternative patterns to advance different objectives. More specifically, it concludes that scholarly studies in law cannot flourish if they remain a "peripheral concern of students and faculty members who are primarily preoccupied with preparation for professional practice". It concludes that if the scholarly study of law does not have a specific focus and a secure base,

[1] A. Flexner, *Medical Education in the United States and Canada* (1910) (a report to the Carnegie Foundation for the Advancement of Teaching).

[2] The Commission on Canadian Studies, *To Know Ourselves* (1975) 213 (a report to the Association of Universities and Colleges of Canada).

there will be no substantial changes in the quantity and quality of legal scholarship.[3]

In appraising legal scholarship today, the report concludes that the needs of professional practice and the exigencies of targeted law reform research have been dominant. It ventures further to suggest that this orientation has stifled other research activities such as those directed to fundamental analysis of the values, operations and effects of law.

In its prospectus for reform, the report identifies five strategic elements:

1. Improving the scholarly education of legal researchers;
2. Clarifying and legitimating their role;
3. Establishing optimum conditions for research, especially on theoretical and fundamental questions;
4. Creating a constituency of sophisticated academic, professional and public "consumers" of research; and
5. Improving the dissemination of scholarly writing and of all types of legal research within the academic community, amongst legal professionals and to the public.

Its fifty-six specific recommendations flow from this strategy. They address the three areas of legal education, promotion of research, and professional and public needs. The report points out that resources have been lacking to accomplish these goals but it stresses that more money will not provide any easy solution; in addition to resources, there must be a crusading zeal. The final substantive paragraph emphasizes this concern and underscores two of the fundamental themes in the report: "We wish to end on a note of candour. Adequate funding is a necessary but not a sufficient condition for the development of Canadian legal scholarship. What is indispensible for the cause is imagination, determination and passion."[4]

Those who read the report superficially may be disturbed at its critical and sharp diagnosis. It is true that considerable progress has been made in Canadian legal scholarship, bearing in mind that only in recent decades have all Canadian provinces followed the medieval tradition of making law a university discipline. However, one may fairly ask whether law is yet a mainstream discipline in very many Canadian universities. Some may tremble at the report's prescription that legal education and research must put more

[3] It is timely and pleasant to note somewhat similar observations in the 1981-82 Harvard University Annual Report by President Derek C. Bok, former Dean of the Harvard Law School, who devotes the report to a critical analysis of law and legal education in the United States.

[4] Consultative Group on Research and Education in Law, *Law and Learning* (1983) 150 (a report to the Social Sciences and Humanities Research Council of Canada).

distance between themselves and professional orientation. Indeed, some readers may visibly cringe at its quoted cry that law faculties "make what Robert Gordon calls a 'reverse Faustian bargain': give back the world, regain one's soul".[5]

But to view the report in this defensive way is to do it a grave injustice. It does not suggest that legal education should cease to produce well trained legal professionals. What it does suggest is that legal education must begin a much more focused effort to establish a distinctive and penetrating tradition of legal research with a broad spectrum of methodology and objectives in so doing. And it quite properly proposes that the law schools in our universities must share much more vigorously with other university disciplines, particularly those in the social sciences, in a rigorous analysis of legal questions confronting our society.

This report should become the intellectual framework for new efforts in legal education and research. It should become the source of standards against which resources, curriculum, and research productivity and orientation may be measured. If so, it will have a substantial and beneficial invigorating impact upon the discipline of law and will serve as a beacon for the universities which provide legal education.

If the people who are charged with implementing this report (and this group goes well beyond the professors in Canada's law schools) share its imagination and zeal, we may look forward to an improvement in the administration and the quality of justice in our society, not only through a process of making better rules which are better studied and better understood, but of shaping more cost-effective rules as well.

Those who have watched and welcomed the significant steps forward in the scholarly enterprise of law over the past several decades will rejoice at the appearance of this remarkable document. One hopes that it will serve both as a rallying cry and as a talisman for the attainment of more commanding heights for legal research and legal education in the remaining two decades of this century.

David L. Johnston*

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[5] *Ibid.*, 98.

*Principal and Professor of Law, McGill University. I should declare a conflict of interest in undertaking a review of this report. As Chairman of the Canadian Law Deans' Committee from 1977-78, which Committee along with the Canadian Association of Law Teachers originally proposed the study, and as a member of the Advisory Panel to the Consultative Group on the report from 1980 to its completion, I have been one of its ardent supporters. Nevertheless, I believe that there is some objectivity in the preceding appraisal.

Constitutional Fate [:] *Theory of the Constitution*. By Philip Bobbitt. New York: Oxford University Press, 1982. Pp. xii, 285 [$32.25 U.S.].
The Constitution, The Courts, and Human Rights [:] *An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary*. By Michael J. Perry. New Haven: Yale University Press. Pp. xi, 241 [$24.00 U.S.].

In Search of the Constitutional Grail

With the advent of the *Canadian Charter of Rights and Freedoms*[1] Canada has entered a new age of constitutional adjudication. Entrusted with the crucial task of establishing and controlling the relation between the State and the individual, the enduring problem of constitutional theory has become even more acute and pressing: "can judicial review be reconciled with the fundamental presuppositions of democracy, with its emphasis on the majoritarian political process?"[2] American scholars have wrestled with this question for close to two centuries, yet they are no nearer to any agreement on the most appropriate and persuasive answer. Indeed, in recent years, the intensity of the debate has increased markedly and there seems to be greater disagreement and lack of consensus than ever before.[3] Reluctant to concede that the question may defy solution and to yield to the illegitimacy of judicial review, American jurists proffer ever-more imaginative and ingenious solutions. The recent monographs of Philip Bobbitt[4] and Michael J. Perry[5] exemplify the contemporary genre of American constitutional theory and its failings.

The primary objective of much jurisprudential writing is to legitimize the judicial enterprise within a liberal democracy.[6] Although the enactment of the *Charter of Rights* implies immense confidence in the courts' ability to resolve disputes fairly, the transfer of such power to an unelected and unaccountable institution which lacks any immediate democratic mandate is problematic. The modern response to this apparent dilemma has been to distinguish legal

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[1] Part I of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.).

[2] Monaghan, book review, (1980) 94 Harv. L. Rev. 296, 297.

[3] For a useful bibliographic guide to the contemporary American literature, see Thomson, *Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes* (1982) 13 Melb. U.L. Rev. 597.

[4] *Constitutional Fate* [:] *Theory of the Constitution* (1982).

[5] *The Constutution, The Courts, and Human Rights* [:] *An Inquiry into the Legitimacy of Constitutional Policymaking by the Judiciary* (1982).

[6] See Hutchinson & Monahan, *Law, Politics and The Critical Legal Scholars: The Unfolding Drama of American Legal Thought* (1983) 35 Stan. L. Rev. (forthcoming).

reasoning and decision-making from political reasoning and decision-making. Each writer seeks to describe the institutional limits to the judicial realm and to depict the judges as being engaged in a bounded and rational activity.[7] The most common response has been to argue that, whereas the political world is characterized by its search for consensus and its willingness to compromise competing interests, the judicial process is portrayed as being one in which the judges arrive at rational and politically neutral results based upon a given set of values. The exercise of choice is said to be for political and not legal actors in the governmental drama. However, American jursits do not rely upon any crude version of formalism which holds that constitutional disputes can be arbitrated through "the impartial elaboration of a mechanical legal analytic".[8] Instead, they claim that, while resort must be had to some extra-constitutional precepts, it is nonetheless possible to maintain a viable distinction between legal and political reasoning. Accordingly, the main focus of contemporary attention is centred on the source and legitimacy of those extra-constitutional standards. It is in this search that Bobbitt and Perry claim to make their major and original contribution. They maintain that they have struck upon the solution to the enduring problem of constitutuional theory which has previously eluded generations of judges and jurists.

Both books follow a familiar pattern. The greater part of each is devoted to the discrediting and demolition of competing theories. With punishing perspicacity, they root out the theoretical and practical inconsistencies and failings of the different theories that presently populate the world of constitutional adjudication. Bobbitt identifies and exposes five archetypal instances of constitutional argument: the historical search for the original understanding;[9] the textual analysis of constitutional provisions in the light of contemporary meanings;[10] the derivation of principles from constitutional doctrine and commentary;[11] the contextual application of constitutional wisdom;[12] and the reliance on the structure of constitutional arrangements and

[7] This idea is given its most persuasive and eloquent expression by Owen Fiss. See *Objectivity and Interpretation* (1982) 34 Stan. L. Rev. 739.

[8] Note, *'Round and 'Round The Bramble Bush: From Legal Realism to Critical Legal Scholarship* (1982) 95 Harv. L. Rev. 1669, 1670, fn. 7.

[9] See Bobbitt, *supra*, note 4, 9-24. For an example of such an approach, see R. Berger, *Government by Judiciary* (1977).

[10] Bobbitt, *ibid.*, 25-38. For an example of such an approach, see Black, comments, (1977) 9 Sw. L. Rev. 937 (transcript of a C.B.S. News Special, *Justice Black and the Bill of Rights*, telecast 3 December 1968).

[11] Bobbitt, *ibid.*, 39-58. For an example of such an approach, see H. Hart & A. Sacks, *The Legal Process*, tentative ed. (1958).

[12] Bobbitt, *ibid.*, 59-73. For an example of such an approach, see A. Bickel, *The Least Dangerous Branch* (1962).

institutions.[13] Although reaching the same outcome, Perry takes a different route. He assumes the legitimacy of interpretive review and concentrates on the justifications offered for noninterpretivism, "the determination of constitutionality by reference to a value judgment other than one consitutionalized by the framers".[14] However, he argues convincingly that interpretivism cannot account for the actions of the courts in the protection of human rights.[15] Proceeding to noninterpretivism, he rejects the justifications of "consensus" or "principled interpretation" as being unequal to the task.[16] With some force and conviction, he disposes of the inflated claims of the present kings of the constitutional castle, John Hart Ely [17] and Ronald Dworkin.[18] As critics, both Bobbitt and Perry achieve their chosen objectives. They provide sufficiently cogent arguments to clear the constitutional scene of contempory academic debris. Existing scholarly edifices are razed to the ground, and the preparation for a "new" structure of constitutional theory is completed.

Professor Bobbitt maintains that the whole range of historical, textual, doctrinal, precedential, and structural arguments are employed in constitutional adjudication. Yet they function more as rationalizations than reasons for decisions. He identifies a pervasive and coherent additional form of argument that motivates and dictates constitutional decision-making. He labels this "ethical argument". It is not to be confused with moral evaluations, but refers instead to "argument whose force relies on a characterization of American institutions and the role within them of the American people".[19] Bobbitt explicates and substantiates the nature and use of ethical argument through its application to various *causes célèbres*, such as *Roe* v. *Wade*[20] and *Griswold* v. *Connecticut*.[21] Yet, search as hard as this reviewer has, the precise character of ethical argument remains a mystery. Cryptic clues are offered here and there, but it is difficult to construct any skeleton of the American constitutional ethos, let alone to flesh it out. Like an academic maestro, Bobbitt seems to conjure up legal rabbits out of constitutional hats.[22] He talks of "a legal sense of what is fitting",[23] "legal grammar" [24] and "a

[13] Bobbitt, *ibid.*, 74-92. For an example of such an approach, see C. Black, *Structure and Relationship in Consitutional Law* (1969).

[14] Perry, *supra*, note 5, 11.

[15] *Ibid.*, 61-90.

[16] *Ibid.*, 93-7.

[17] *Democracy and Distrust* [:] *A Theory of Judicial Review* (1980).

[18] *The Forum of Principle* (1981) 56 N.Y.U.L. Rev. 469.

[19] Bobbitt, *supra*, note 4, 94.

[20] 410 U.S. 113 (1973).

[21] 381 U.S. 479 (1965).

[22] For instance, in his discussion of *Roe* v. *Wade*, *supra*, note 20, Bobbitt seems to pull out of mid-air a proposed rule that ""[g]overnment may not coerce intimate acts". *Supra*, note 4, 159.

[23] *Ibid.*, 166.

[24] *Ibid.*, 169.

constitutional motif".[25] At bottom, ethical argument seems to operate simply as a reservoir for the "unarticulated values of a diverse nation";[26] it is a mish-mash of all the other forms of constitutional argument. As such, Bobbitt argues that ethical argument needs no formal justification, for it represents and embodies the evolving relationship between government and citizen. The apparent formlessness of constitutional law is given truthful coherence through the conventions of the ethical constitution:

> Legal truths do exist within a convention. But the conventions themselves are only possible because of the relationship between the constitutional object — the document, its history, the decisions construing it — and the larger culture with whom the various constututional functions serve to assure a fluid, two-way effect on the ongoing process of constitutional meaning. We have, therefore, a participatory Constitution.[27]

Perry finds his inspiration not in the ethos of the American polity, but in the religious essence of American society. He maintains that the American people view themselves as a chosen nation, charged with a special responsibility to fulfil a moral prophecy. Judicial review is the institutionalization of this prophetic evolution:

> The American people still see themselves as a nation standing under transcendent judgment: They understand — even if from time to time some members of the intellectual elite have not — that morality is not arbitrary, that justice cannot be reduced to the sum of the preferences of the collectivity. They persist in seeing themselves as a beacon to the world, an American Israel, *especially in regard to human rights* ("with liberty and justice for all"). And they still value, even as they resist, prophecy — although now it might be called, for example, "moral leadership."[28]

For Perry, adjudication presents an opportunity for moral re-evaluation, growth and development; a chance to transcend the imperfections of the present and strive for moral perfection. Refusing to take moral skepticism seriously in this "post-holocaustal age", he argues for ultimate moral answers.[29] In the slow but steady progress toward such values, he counsels the appointment as judges of men of strong moral fibre and integrity.[30]

The justification for this blatant resort to moral values in the resolution of constitutional disputes is equally inventive and bizarre. Obsessed by the desire for re-election, elected offficials are ill-suited to this mission. However, the judges, by virtue of their very insulation from such political concerns,

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[25] *Ibid.*, 177.
[26] *Ibid.*, 211.
[27] *Ibid.*, 234-5. See also the discussion at 163.
[28] Perry, *supra*, note 5, 98 [emphasis in original].
[29] *Ibid.*, 105.
[30] *Ibid.*, 143.

can engage in this process of moral regeneration and rejuvenation. Furthermore, this moral leadership of judges is subject to effective political control. By art. III, Congress can limit the courts' jurisdiction and, therefore, can retain ultimate power over the moral growth of the American nation.[31] Like Bobbitt, Perry seeks to demonstrate the viability and particularity of his theory in relation to various *causes célèbres* and the recent surge of institutional reform litigation.[32] Predictably, the precise contours and direction of the moral essence of America remain suitably clouded and ethereal. In short, both theories are clearly void for vagueness. Yet there are more substantial objections to the Bobbitt "ethos" and the Perry "religion".

Both writers agree that the judges must reach beyond the extant materials to draw upon a set of values that capture the true character of American constitutional life. This exercise is held to be clothed with democratic legitimacy as the background theory has an objective existence. Each author receives inspiration from a peculiar combination of consensus- and fundamental rights-based theories. They contend that, within the American pluralistic way of life, there exists a coherent body of norms which contain an agenda of rights that inhere within a liberal society. Although these rights are anchored in the American lifestyle, they transcend any particular historical context. Yet independently, and in combination, both these justifications are suspect.[33] Under a consensus model, any agenda is simply a reflection of prevailing political preferences which are of an arbitrary and non-rational character. Moreover, it is so manipulable as to be capable of supporting almost any position. Also, the fundamental rights theorists are trapped in a circle of arguments. Their search is undermined by their own insistence on the ultimate subjectivity of human values. Rights are the product of choice, not its determinants.

Stripped of such objective legitimacy, the Bobbitt "ethos" and the Perry "religion" are revealed simply as political choices masquerading as legal right. They are nothing more than ideologies. Although passed off as objective, universal and factual, their background theories are subjective, historical and value-laden. They provide an intelligible view of the chaos of social life, but the image that they represent is biased and selective. They contain a hidden political programme. Sectarian interests are translated into universal claims. Most importantly, the *status quo* is presented as being natural, necessary and just, rather than as an arbitrary and contingent state of affairs. No matter how benign or well-intentioned their motives, Bobbitt and Perry

[31] *Ibid.*, 128-33. It is ironic, to say the least, that Perry has to resort to interpretivism to justify his noninterpretivist theory.

[32] *Ibid.*, 146-62.

[33] See Hutchinson & Monahan, *supra*, note 6.

contribute to the erection of formidable barriers to social change, and they facilitate the transformation of an arbitrary world of social hierarchy into a natural world of legal right.

Both authors' visions of twenty-first century America are inescapably conservative. They guarantee the preservation and perpetuation of the existing culture. Like Oliver Wendell Holmes Jr, they contribute to the dangerous and self-serving falsehood that "[t]he past gives us our vocabulary and fixes the limits of our imagination; we cannot get away from it".[34] In short, Bobbitt and Perry elevate the conditions of the *status quo,* slightly spruced up and polished to allow room for slight revisionary manoeuvre, to a universal theory of substantive fairness. Their monographs amount to much ado about nothing. Under their regimes of constitutional adjudication, the continuing force and grip of the past is ensured. With unintended perspicacity, Eugene Rostow hit the true symbolic and ideological significance of adjudication: "[T]he judicial opinion is a piece of rhetoric..., intended to educate and persuade".[35]

In American constitutional law, the emphasis is upon the abstract and the procedural rather than the concrete and the substantive. While the legal materials paint a picture of formal equality and justice, the social reality is characterized by substantive inequality and injustice. Political and civil rights dominate; social and economic rights have been largely ignored.[36] Indeed, Perry goes so far as to suggest that the establishment of any socio-ecomonic rights might "press [the judiciary's] institutional capacity...past the breaking point".[37] Yet, the formulation of a scheme of politico-civil rights, however sophisticated, is meaningless and useless without the economic ability to take equal advantage of them. The preoccupation with formal rights draws attention away from and, in a broad sense, legitimates the pervasive substantive inequality in American life. If, like Joyce's Stephen Dedalus,[38] history is a nightmare from which we are trying to awake, Bobbitt and Perry offer another dose of soporific scholarship.

In the new age of Canadian constitutional adjudication, the lesson to be drawn from the American experience is clear and profound: "[T]he controversy over the legitimacy of judicial review in a democratic polity — the historic obsession of normative constitutional scholarship — is essentially

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[34] "Learning and Science" in *Collected Legal Papers* (1920) 138, 139.

[35] *The Court and Its Critics* (1959) 4 S. Tex. L.J. 160, 163.

[36] One of the few scholars to tackle this problem is Frank Michelman. See *Welfare Rights in a Constitutional Democracy* [1979] Wash. U.L.Q. 659.

[37] *Supra*, note 5, 164.

[38] J. Joyce, *Ulysses* (New York: Modern Library, Inc., 1934).

incoherent and unresolvable".[39] Indeed, existing legal discourse over Canadian federalism is in a similar state of indeterminacy, and amounts to nothing more than stylised political decision-making.[40] In this light, the extension of judicial review into the field of human rights and freedoms is a regressive and not progressive step. Deprived of any sustainable background theory of constitutional adjudication, the judges must engage in a blatant political exercise. They are obliged to adjudicate their own value preferences.

Rather than persist in the search for some illusory constitutional grail like our American counterparts, Cnadian scholars ought to devote their energies and intellects to disseminating the vital message that constitutional law is politics. Furthermore, in so far as constitutional adjudication is all about political choices, the central challenge is to expose and criticise the nature of the choices actually made.[41] The judicial community can either opt for candour and come clean with their political preferences, or they can continue to hide behind the discredited rhetoric of legal doctrine. Either way, the judges cannot avoid making political decisions. As in Hans Christian Anderson's fairy tale, the Emperor has no clothes on; the only choice is whether and for how long we pretend that he is fully and appropriately clad.

Allan C. Hutchinson*

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[39] Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship* (1981) 90 Yale L.J. 1063, 1063.

[40] See P. Monahan, *At Doctrine's Twilight: The Structure of Canadian Federalism* (1983) 33 U.T.L.J. (forthcoming).

[41] See H. Glasbeek & M. Mandel, *The Legalization of Political Discourse and The Canadian Charter of Rights and Freedoms* (1983) (unpublished manuscript).

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Fragile Freedoms [:] *Human Rights and Dissent in Canada*. By Thomas R. Berger. Toronto: Clarke, Irwin & Co., 1982. Pp. xviii, 298 [$9.50 softcover].

In *Fragile Freedoms*, Mr Justice Thomas Berger has made an important contribution to the continuing public debate surrounding the *Canadian Charter of Rights and Freedoms*,[1] especially regarding the protection of minority rights. The book is written in a language and style which make fundamental human rights issues clear and understandable to a non-legal audience. Moreover, his passionate and articulate defence of the right to dissent in a multicultural society is compelling, and all too rare in the Canadian literature.

The author's case is put most forcefully in the Introduction and in the Epilogue entitled "Towards the Regime of Tolerance". The intervening chapters deal with eight episodes in Canadian history when minority rights were abused: the Acadian expulsion, the loss of the Métis homeland, the French language school crises in Manitoba and Ontario, the internment of Japanese Canadians in World War II, attempts to eliminate the Communist Party and similar curbs on the freedoms of speech and association, the persecution of the Jehovah's Witnesses in Québec during the Duplessis era, the October Crisis of 1970, and the current native rights and land claims movement.

Although on occasion Mr Justice Berger's description of these incidents risks becoming an over-simplified historical travelogue, taken as a whole it remains a successful device both to remind the reader of earlier injustices and to support the author's ultimate conclusion:

> The confrontations between the institutions of the state and minorities and dissenters reveal the true face of Canadian democracy. They have shown that we must establish safeguards — stronger than those that have existed in the past — to protect minorities and the rights of dissenters.[2]

Underlying this position is a clear belief that social and cultural diversity is "the essence of the Canadian experience".[3] The heir to concepts of self-government acquired from Great Britain and France, "states that have traditionally been ethnically defined", Canada is not such a nation-state.[4] For the author, Canada has rejected the "melting pot" for the "social and cultural mosaic". As a consequence, this country has many active linguistic, racial, cultural, and ethnic minorities. "Each of them will have a claim to collective

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[1] Part 1 of Schedule B, *Canada Act 1982*, 1982, c.11 (U.K.).

[2] T. Berger, *Fragile Freedoms* [:] *Human Rights and Dissent in Canada* (1982) 255 (softcover edition).

[3] *Ibid.*, xiii.

[4] *Ibid.*

as well as to individual guarantees... and each of them has a claim on the goodwill of the majority. For all these minorities the right to dissent is the mainstay of their freedom."[5]

Mr Justice Berger views the new Constitution and the *Charter* favourably, as extending important institutional guarantees for minority rights. He is, however, strongly critical, and rightly so in my opinion, of the s. 33 "notwithstanding" clause and of the rights to "opt out" of the *Charter*. Based upon his examination of our historical experience, he does not "believe diversity is — or dissent is — nor have they ever been, coextensive with provincial rights. Too often, we have seen one province or another insisting upon conformity to some prevailing orthodoxy"[6] belying our multicultural nature, denying an essential element of the Canadian experience.

Given this position, a question might be raised concerning Mr Justice Berger's conclusion that Québec must have a special right of constitutional veto. He defends this view on the grounds that "Quebec is not a province like the others. A veto for Quebec is a means of protecting not merely provincial rights, but minority rights. If there is no veto for Quebec, then there is no assurance that French Canadians will have the power to forestall amendments to the Constitution and Charter calculated to diminish the rights... of French Canadians both inside and outside Quebec."[7] This view pre-supposes an active willingness on the part of the government of Québec to place the rights of French Canadians nationally above its own provincial interests and objectives. But apart from small-scale grants to French Canadian groups outside Québec, there has been little evidence in recent years that any Québec government, of whatever political stripe, is seriously interested in the plight of the francophone minorities in other provinces. The relative lack of interest in Québec about the recently proposed official bilingualism agreement between the federal government and the Province of Manitoba is a good example.

The Québec veto question does, however, underline a significant issue in the current debate which has not been articulated fully. Mr Justice Berger alludes to the problem, but only hints at his preferred solution. Some Canadians clearly see the *Canadian Charter of Rights and Freedoms* as protecting individual rights only. Others, and the author appears to be in this category, with his focus upon "minority" rather than "individual" dissent, stress the *Charter* protection of the collective rights of minorities. The *Charter* itself

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[5] *Ibid.*, xiv.

[6] *Ibid.*, 261.

[7] *Ibid.*, 259. This quotation does not appear in the original hardcover edition published in 1981.

certainly provides grounds for such debate, recognizing both certain individual rights and at least the possibility of some collective rights, such as those recognized for the aboriginal peoples of Canada in s. 25.

If collective rights are now constitutionally recognized, do they prevail over the rights of individuals, or will it be the other way around? The answer to this question will have a profound impact upon the shape of Canada's future and of its institutions. Rooted in the Anglo-American tradition of individual rights, perhaps the Canadian majority, if such a thing still exists, sees the newly-articulated constitutional rights somewhat differently than do various minority interests. The extent to which these different and often conflicting expectations are recognized or denied by the interpretation of the new Constitution in general, and of the *Charter* in particular, will likely provide the focal point for angry political debate for many years to come.

Mr Justice Berger is right when he says that, at the very least, "this exercise in constitution-making has forced us to articulate our idea of Canada".[8] It is probable, however, that the new Constitution represents but one step, albeit a significant one, in an evolving process of reconciling the many different *ideas* of Canada.

Somewhat paradoxically, given the well-publicized rebuke by Prime Minister Trudeau of the public statements by Berger J. regarding the *Constitution Act, 1981*,[9] the author cites Professor Pierre Trudeau with favour on several occasions. In particular, when discussing native land claims, Mr Justice Berger agrees strongly with the earlier Trudeau opinion that the form of federalism established in Canada, that is, how to govern "polyethnic populations with proper regard for justice and liberty... is an experiment of major proportions; it could become a brilliant prototype for the moulding of tomorrow's civilization".[10]

Law students at the University of British Columbia are to be envied their new teacher. As is evident from this compelling book, the continuing constitutional debate will be enriched by this unfettered, strong and thoughtful voice.

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[8] *Ibid.*, xiv.

[9] Schedule B, *Canada Act 1982*, 1982, c.11 (U.K.).

[10] Quoted in Berger, *supra*, note 2, 253.

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Criminal Pleadings and Practice in Canada. By Eugene G. Ewaschuk. Toronto: Canada Law Book Ltd, 1983. Pp. cl, 700. [$90.00].

This prodigious book is the measure of its maker. As Crown prosecutor, professor of law, Director of Criminal Justice in Saskatchewan, federal Director of Criminal Law Amendments, and currently, as General Counsel for criminal law in the federal Department of Justice, where he remains active in legislative reform and appellate litigation, Mr Ewaschuk has had a career of remarkable variety. In these pursuits he has acquired an encyclopaedic knowledge of criminal jurisprudence that extends beyond the *minutiae* to the *scintillulae* of the law. Some of this erudition has now been reduced to print, and the result is a signal enrichment of the literature on criminal law in Canada.

Mr Ewaschuk's objective is to state the law on selected aspects of criminal practice in the form of succinct propositions. These propositions are delivered *ex cathedra* and are supported by citations to representative cases, academic articles and other materials. The result resembles a factum of some six hundred pages. Here, for example, is a specimen drawn from the chapter on the form and content of indictments and informations:

9.70 Defect in form

A count which is double or multifarious constitutes, at most, a defect in form.

R. v. McGloan, [1976] 2 S.C.R. 842, 25 C.C.C. (2d) 498, 62 D.L.R. (3d) 641
R. v. Cotroni: Papalia v. The Queen, [1979] 2 S.C.R. 256, 45 C.C.C. (2d) 1, 7 C.R. (3d) 185
R. v. Edgar and Rea (1962), 132 C.C.C. 396, 38 C.R. 110 (B.C.C.A.)
R. v. Gosse (1973), 11 C.C.C. (2d) 541, [1973] 3 W.W.R. 176 *sub nom. Gosse v. A.-G. B.C.* (B.C.C.A.)
R. v. Graham and Hewitt (1977), 45 C.C.C. (2d) 245, [1977] 4 W.W.R. 84 (Alta. S.C. App. Div.)
Contra. *R. v. Toth* (1959), 123 C.C.C. 292, 29 C.R. 371 (Ont. C.A.)
R. v. Brunet, [1968] 2 C.C.C. 74, 2 C.R.N.S. 264 (Sask. C.A.), revd on other grounds [1968] S.C.R. 713, [1969] 1 C.C.C. 297, 4 C.R.N.S. 202
See Fred Arthur, "Duplicity: Terminal or Curable?" (1972), 16 C.R.N.S. 205
Michael Lipton, "Duplicitous informations charging offences under s. 222 or 223 of the Criminal Code" (1968), 2 C.R.N.S. 274.

And another from the chapter on the arraignment and plea:

14.96 Perjury

Issue estoppel does not necessarily, but may, apply to subsequent proceedings involving a perjury charge arising out of an acquittal at a previous proceeding in respect of another offence.

Gushue v. The Queen, [1980] 1 S.C.R. 798, 50 C.C.C. (2d) 417, 16 C.R. (3d) 39
R. v. Bavn (1932), 59 C.C.C. 89, [1933] 1 D.L.R. 497 (Sask. C.A.)
R. v. Gordon, [1980] 3 W.W.R. 665 (Alta. Q.B.)
Contra. *R. v. Linnen* (1981), 61 C.C.C. (2d) 13, 9 Sask. R. 359 (Dist. Ct.)
D.P.P. v. Humphrys, [1976] 2 All E.R. 497 (H.L.)
See K.L. Chasse, "Issue Estoppel and Perjury by the Accused" (1974), 25 C.R.N.S. 164

But this is not merely a catalogue of lists and annotations; each proposition demonstrates a distillation of the jurisprudence and thus is distinguished from a headnote that describes the content of a particular case or an annotation that recites authorities under chosen headings. Occasionally, however, propositions that cover only the issue and *ratio* of a particular decision are drafted in such a way as to convey the impression that they may have wider application.[1] Moreover, in the preface the author acknowledges that by the very nature of *stare decisis* each proposition of law is in some measure bound to be approximate and provisional. He also notes that references marshalled in support are not necessarily comprehensive or consistent authorities for the statement advanced.[2] Accordingly, the reader is warned that this book is not a substitute for primary research.

The scope of Mr Ewaschuk's book is defined by its title. We are given propositions on rules, practices and problems that arise in the course of the prosecutorial process. As suggested by the word "pleadings", much of the text is devoted to a consideration of issues concerning the documents of criminal process. As intended by Mr Ewaschuk, "pleadings and practice" is a compendious phrase that describes the machinery of criminal procedure, and though the book touches upon almost all aspects of the criminal process, it excludes systematic analysis of the rules of evidence or principles of substantive law. Specifically, the seven parts of the book extend from the commencement of legal process to the final disposition of a criminal prosecution: jurisdiction and venue; search and seizure, protection of privacy, arrest and release from custody; classification of offences, election and re-election;

[1] See, *e.g.*, E. Ewaschuck, *Criminal Pleadings and Practice in Canada* (1983) §25-35:

> Except on grounds of bias, it seems that prohibition will not lie prior to trial on the basis that a preliminary issue, e.g., whether the *Canadian Bill of Rights* renders the offence *ultra vires*, must be resolved only after a trial on the merits.
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> *Re Baptiste and The Queen* (1982), 65 C.C.C. (2d) 510, 134 D.L.R. (3d) 382 (B.C.C.A.)

[2] *Ibid.*, x-xi.

indictments and informations; the trial process (prosecution to sentence); the mentally-disordered offender; and, finally, appeals and extraordinary remedies. At one end of the spectrum, therefore, Mr Ewaschuk has excluded general discussion of criminal investigation, and at the other end he has excluded the law on corrections.

The organization and presentation of the book emphasize ease of reference, and for this reason alone the book should prove immensely popular as a practitioner's manual. For students and scholars too, it will provide a useful source of basic principles in criminal procedure, especially with regard to insights that emerge from years of practice at the criminal bar. For none will this book prove to be a comprehensive digest of criminal law, nor was it intended as such, but all who consult it will save many hours of tiring, and expensive, research.

Nevertheless, given that the book is so highly structured in chapters, headings and sub-headings, and that propositions are numbered sequentially within each chapter, there is no adequate scheme for cross-references. Indeed, there are few references to apposite propositions elsewhere in the text. Such references would be useful, for example, where one discrete proposition invites consideration of a broader range of propositions, as in the relationship between 13.10[3] and the subsequent consideration of extraordinary remedies in Part 7. The index is simply insufficient for this purpose. For example, not only does the index fail to include headings under "presumption", "burden" or "onus", but it entirely omits "evidence" as a separate heading. Propositions relating to general concepts that have multiple applications, such as "reasonable and probable grounds", are not brought together under a single heading. Some entries are simply threadbare, such as "summary conviction".

Despite the declaratory style of the text, the author does not claim infallibility, and it cannot be said that all propositions in the book have been purged of conjecture or opinion. The selection of supporting references is also at times idiosyncratic, sometimes even incomplete. Having cited a particular source once, Mr Ewaschuk usually declines to cite it again, even though further reference would often be quite useful. For example, Mr Archibald's excellent essay on arrest,[4] which is one of the best treatments of the subject in

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[3] *Ibid.*, §13.10 [references omitted]:

> An extraordinary remedy is only available during a preliminary inquiry where the justice either does not have or loses jurisdiction. A writ is not available where the justice errs unless such error is jurisdictional.

[4] Archibald, "The Law of Arrest" in V. Del Buono, ed., *Criminal Procedure in Canada* (1982) 125; Archibald, "Le droit relatif à l'arrestation" in V. Del Buono, ed., *Procédure pénale au Canada* (E. Groffier-Atala, trans. 1983) 143.

Canada, deserves much more frequent reference in Chapter 5. The practical basis for this criticism is that, if the book is to be used as a manual, practitioners seeking guidance on a specific point might miss useful and important information if they do not take the time to canvass other citations in the relevant chapter. Also, quite apart from the frequency of citations, more references to secondary literature would enrich the text. It is perhaps most surprising that the book suffers from a relative dearth of references to texts and articles written in French. The chapter on invasion of privacy, for example, lacks any mention of Daniel Bellemare's many writings in the area. Similarly, the recent text by Béliveau, Bellemare and Lussier[5] is not given the attention it deserves. Particularly in recent years, there have been many valuable and important French-language contributions to the study of criminal law in Canada, and one can only hope that future editions of this book will include more extensive references to these materials. Despite this criticism, it must be said that this remains a book of national importance that will be used across the country. If such plans are not already under consideration, the author and his publishers should study seriously the possibility of publishing a French translation.

It is also to be hoped that in future editions the propositions advanced in the text will be expanded to give some indication of the provenance or evolution of doctrinal principles, especially where there is or has been some division of opinion in the courts. Without such amplification, this book will not become a comprehensive text on Canadian criminal jurisprudence, as indeed it should. As it stands, it will serve the novice as an important guide to other materials; for the master, it will be a reminder of what he knows, or ought to know, already. But if the book is to become a text, it will require not only greater exposition and elaboration; it will also have to include topics not covered in this first edition. The author notes that he has already decided that new chapters are needed on the *Charter*,[6] and on contempt, possession, extradition and defences to criminal charges.[7] To this list one might add a chapter on inchoate offences, another on young offenders, and another on rules of evidence in criminal cases, especially if Bill S-33,[8] now pending before Parliament, is enacted.

The reader is informed in the preface that the publisher is committed to the release of supplements. One assumes, of course, that the publisher is also

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[5] P. Béliveau, J. Bellemare & J.-P. Lussier, *Traité de procédure pénale* (1981), t. 1; P. Béliveau, J. Bellemare & J.-P. Lussier, *On Criminal Procedure* (J. Muskatel, trans. 1982).

[6] *Canadian Charter of Rights and Freedoms*, Part 1 of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.).

[7] See *supra*, note 1, xi.

[8] Introduced in the Senate 18 November 1982. As of 30 June 1983, the Bill remained in Senate committee.

committed to the book as a continuing venture that will evolve through successive editions. Though it might be asked whether a loose-leaf format might serve these purposes more conveniently and economically, the difference between these two styles of presentation is largely cosmetic, although a bound volume imposes natural constraints and a margin of perspective upon what should be considered as significant trends or developments in the law. Once again, such a constraint is one factor that will assist in distinguishing this book from annotation services.

If only by its title, and larcenous price, Mr Ewaschuk's book invites comparison with Archbold,[9] which is now in its forty-first edition. Such a comparison would be invidious if pursued at length, but it is to be hoped that as it grows and matures with successive editions this book will become the Canadian analogue to that great English text. Mr Ewaschuk has set a firm foundation and we are indebted to him for it.

Patrick Healy*

[9] J. Archbold, *Pleadings, Evidence and Practice in Criminal Cases*, 41st ed. (S. Mitchell 1982).

*Of the Law Reform Commission of Canada.

Essays on Legal Education. Par Neil Gold, éd. Toronto: Butterworths, 1982. Pp. xi, 136 [14,95$].

On serait porté à croire que les dissertations sur l'enseignement du droit intéressent seulement les professeurs de droit, mais le recueil d'essais compilés par Neil Gold touche à des sujets tout aussi pertinents pour les praticiens que les enseignants. Ces essais traitent, entre autres, du rôle traditionnel de l'avocat, tel que l'on nous le peint à l'École de droit, et de celui que, plus tard, l'on decouvre en tant que membre d'une association d'avocats.

Toute personne ayant entrepris la pratique du droit se demande, tôt ou tard, si l'École de droit lui a enseigné les "bonnes choses". En droit, la transition de la théorie à la pratique a toujours été des plus difficiles. Ces essais nous invitent à réfléchir sur l'enseignement du droit et nous suggèrent des idées qui pourraient améliorer la pratique du droit telle que nous la connaissons.

Dans son ouvrage, Gold nous présente sept articles d'une vingtaine de pages chacun, ce qui en fait un excellent livre de chevet pour le praticien ou l'enseignant occupé. Chacun y trouvera des articles stimulants.

Le premier article, signé par Paul C. Weiler, titulaire de la Chaire d'études canadiennes MacKenzie King à la Faculté de droit de Harvard, lance un défi aux Écoles de droit, soit celui de produire des diplômés ayant une base académique solide et des connaissances techniques très grandes. Monsieur Weiler fait un bref résumé des changements essentiels qui se sont produits dans l'enseignement du droit depuis 1950, pour conclure que les facultés de droit constituent l'endroit idéal pour enseigner aux étudiants comment trouver des réponses innovatrices aux problèmes auxquels ils auront à faire face quelques années plus tard.

La position défendue par M. Weiler comprend deux volets: d'une part, les facultés de droit doivent pouvoir compter sur des professeurs compétents, et, d'autre part, les cours d'admission aux barreaux et les stages doivent venir compléter l'enseignement universitaire. Les professeurs de droit doivent, pour leur part, rendre l'enseignement du droit intéressant et agréable pour les étudiants. L'étudiant doit apprendre à s'instruire par lui-même. Les associations d'avocats et les facultés de droit doivent travailler en étroite collaboration pour donner aux étudiants une formation complète.

Francis A. Allen, professeur de droit à l'Université du Michigan, parle du manque d'humanisme dans l'enseignement du droit, et, j'en conclus, dans la pratique du droit par la suite. Il est temps qu'on questionne le rôle traditionnel des avocats, suggère-t-il. Le droit est un instrument de réforme sociale qui doit servir l'intérêt public. On doit donc enseigner aux étudiants non seulement ce qu'est la loi mais aussi ce qu'elle devrait être. On doit se

joindre aux autres disciplines, telles la sociologie, la biologie et la psychologie, afin de trouver des solutions aux problèmes plus complexes que nous vivons aujourd'hui.

Monsieur Allen nous recommande de préciser nos valeurs et de ne pas oublier nos liens étroits avec les autres sciences humaines dans la présentation que nous faisons de la doctrine et de la théorie dans les cours de droit. L'on doit souvent se poser les questions: "Pourquoi faisons-nous certaines choses?" et "Devrions-nous les faire?" C'est à l'École de droit que le futur avocat doit apprendre à critiquer la loi et la profession. Si l'on ne se critique pas soi-même, d'autres le feront éventuellement à notre place. Pour bien comprendre la loi, il faut en connaître les buts. De fait, comment peut-on changer la loi si l'on ne sait pas si elle atteint ses objectifs et si ses objectifs sont représentatifs de la communauté?

C'est là un défi d'autant plus exigeant que l'on vit dans une société où les valeurs traditionnelles sont continuellement remises en question. Les facultés de droit doivent préparer des praticiens compétents: pour ce faire, il leur faut savoir accorder l'importance voulue à l'étude des valeurs sociales, que tout juriste doit être en mesure de considérer à l'avenir.

Neil Gold, l'éditeur du recueil, nous fait voir comment l'éducation permanente peut répondre aux lacunes de l'enseignement universitaire. Monsieur Gold est le directeur du cours d'admission au Barreau de la Colombie-Britannique et professeur à la Faculté de droit de l'Université de Victoria. Il est convaincu que l'éducation permanente est absolument nécessaire aux praticiens et pense qu'il est impossible pour un avocat de maintenir un niveau de compétence approprié sans se mettre à jour par l'entremise des cours offerts à l'éducation permanente. Nous devons rendre compte au public, dit-il. Les associations d'avocats doivent répondre aux besoins de leurs membres, et l'éducation permanente est le moyen par lequel les membres des barreaux pourront efficacement traiter, par exemple, des questions de publicité, d'emploi de cartes de crédit, d'autres sources de services juridiques, d'assurance et de conduite professionnelle. En somme, c'est le moyen privilégié pour permettre aux avocats de participer à leur développement professionnel. Le rôle des associations d'avocats est au coeur de la discussion. Les associations ne peuvent se contenter de discipliner sans aussi offrir de la "thérapie". L'on doit d'abord comprendre ce qu'est la compétence et l'on doit améliorer constamment la qualité du travail pour garder le respect du public.

Nous devons donc savoir décrire le travail que font les avocats, leurs aptitudes, leurs attitudes, leurs valeurs, leur savoir et leurs habiletés pour identifier les critères de compétence. Les associations d'avocats doivent s'assurer de la compétence et de la supervision de leurs membres.

L'article de William Twining, *Taking Facts Seriously*, m'a particulièrement intéressé. Monsieur Twining traite de l'enseignement de la preuve et de la recherche nécessaire pour découvrir les faits d'une cause. Il nous démontre comment la loi et les faits sont entremêlés et comment on peut faire erreur en enseignant que certaines choses ne font pas partie du droit, mais constituent de simples questions de fait. Nous ne devons pas oublier que la majorité du temps dévoué à la préparation d'un dossier, en pratique, est consacré à la recherche des faits. Or, nous négligeons dans l'enseignement du droit de la preuve, la recherche des faits. Nous ne préparons pas assez bien nos licenciés pour le travail devant les tribunaux de première instance. Monsieur Twining fait notamment l'historique du développement d'une méthode de recherche des faits.

L'on doit trouver un juste milieu entre l'enseignement de la loi et l'enseignement pratique. L'on doit enseigner non seulement le raisonnement, la rhétorique et la logique, mais aussi l'art de plaider.

Monsieur Twining examine deux tentatives qui ont été faites dans l'enseignement EPF ("evidence, proof and facts"); celle de Wigmore et celle de Rutter. Il discute ensuite la raison pour laquelle on ne met pas le temps requis à préparer l'étudiant à savoir faire la recherche de faits complexes. On néglige aussi le rôle central de l'avocat. Il faut être réaliste; le droit comprend plus que l'étude des lois. Lorsque l'on voit combien de praticiens s'empressent à chaque année à suivre des cours d'éducation permanente sur l'art de plaider, par exemple, l'on est forcé de conclure que Twining a raison.

Andrew Petter examine deux théories de l'enseignement et nous démontre leurs applications. À quel niveau doit-on enseigner le droit? Quels sont les désavantages de la méthode socratique? Monsieur Petter discute aussi de l'enseignement efficace de valeurs, d'attitudes et d'intérêts. La loi est un système de valeurs et l'enseignement des valeurs, présentement négligé, lui paraît important.

David L. Johnston a exercé plusieurs professions: professeur, commissaire à la Commission des valeurs mobilières et officier supérieur dans une université. Il démontre que le rôle qu'il a joué dans le contentieux d'une société commerciale est l'un des rôles les plus importants de sa propre carrière; il croit que c'est là l'un des rôles les plus importants pour la société. En effet, les sociétés commerciales disposent d'un pouvoir aussi important que celui des gouvernements, et il nous rappelle leur extrême importance dans notre système. C'est à nous, avocats, d'alléger la tension qui existe entre les sociétés commerciales et les gouvernements, pense-t-il. Celles-ci doivent être conscientes de leur influence sur la société et sur l'économie. L'auteur discute du rôle de l'avocat du contentieux, de l'avocat dans un bureau privé et de l'avocat qui travaille pour une société commerciale sans toutefois y jouer le

rôle traditionnellement dévolu à celui-ci. À cette époque, nous sommes de plus en plus conscients de notre responsabilité professionnelle; il ne faut pas oublier d'en voir le rôle dans le monde des affaires. Nous avons des reponsabilités importantes relativement à la question de la divulgation de l'informations et de la protection des intérêts des actionnaires; nous avons aussi une certaine influence sur la façon dont les directeurs exercent leurs rôles.

La dernière contribution porte sur la politique d'admission à la nouvelle Faculté de droit de Calgary. Les buts de l'École de droit sont de préparer des avocats qui pourront jouer de nombreux rôles dans la société, sauront prendre des décisions et feront appel à une approche multidisciplinaire. Avec ces objectifs en tête et une politique d'admission innovatrice, ce fut un défi de choisir soixante étudiants parmi un groupe de quelques mille postulants.

Il est encourageant de prendre connaissance d'une partie des réflexions ce ceux qui s'intéressent à l'enseignement du droit. Dans le passé, on s'est contenté de réaliser qu'il existe un problème dans l'enseignement traditionnel, tout en s'arrêtant là. Il faut commencer par cerner le problème, pour ensuite suggérer des alternatives. Cette collection de dissertations n'est qu'un début. L'on ne peut qu'espérer que le recueil invitera d'autres juristes à traiter d'une manière plus approfondie de questions particulières, comme par exemple l'enseignement de l'éthique professionnelle, l'enseignement efficace et la pratique du droit. Le tout, bien qu'il soulève des problèmes, reste général et superficiel. Les enseignants ont besoin d'un meilleur outil. Il n'est pas suffisant de constater l'idéal, il faut être capable de proposer des mesures concrètes pour l'atteindre. La compétence voulue ne sera acquise que si tous participent: membres d'associations professionnelles, enseignants et étudiants.

Yvette Michaud*

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To be a Trial Lawyer. By F. Lee Bailey. Marshfield, Mass.: Telshare Publishing Co., 1982. Pp. xvi, 215. [$14.95 U.S. softcover].

The front cover of this book is inscribed "To be a trial Lawyer by F. Lee Bailey". It is a well chosen title, for its mildly ambiguous wording indicates much of what the book is about. It is not entirely an instruction manual for would-be trial lawyers, so the "how" is properly absent from the title. Missing, too, is the second half of Hamlet's most famous line suggested by the first two words of the title. The author does, however, take up its echo in his introduction, so the value of this book for those who are *not* to be trial lawyers is declared early:

> Among [the young men and women who are considering advocacy] there are those who simply do not possess the innate characteristics of personality, philosophy, endurance, drive, speed, and wit to be comfortable in this line of work, and this book will serve them best by persuading them to seek their fortunes elsewhere. Not everyone is suited to the demands of this calling, any more than everyone is suited to become a jet aircraft test pilot.[1]

This sort of naked enthusiasm for the positive characteristics of a trial lawyer is so pervasive that the title might be interpreted simply as a sigh of complacence from a happy practitioner. Furthermore, the inclusion of the "by" between the title and the author's famous name leads to a small suspicion or hope that the compliant reader will be formed into a particular mould of ability and success.

There can be little doubt that Mr Bailey is an able and successful defence lawyer. His two previous autobiographical works[2] tell of his indefatigable investigative and court-room work in the cases of Albert DeSalvo (The Boston Strangler), Dr Sam Sheppard, Carl Coppolino, Capt. Ernest Medina, and Sonny Carson. His diligent efforts on the behalf of Patty Hearst are well known. He is the author of several other books including one novel, and he spends a fair proportion of his time delivering lectures to various interested groups, among them students at universities and law schools. He says that he is almost always asked during these sessions about the best way for an aspiring trial lawyer to prepare himself for his future profession and that this particular book is intended as his response to such queries. There are no other texts available to provide answers to the depth that he feels these questions demand, given the inexperience and eagerness of those that ask. Harvard professor Alan Dershowitz, in his foreword to the book, sees this work as "a

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[1] F. Bailey, *To be a Trial Lawyer* (1982) xv.

[2] F. Bailey with H. Aronson, *The Defense Never Rests* (1971); and F. Bailey with J. Greenya, *For the Defense* (1975).

giant step toward filling... [a] vacuum in legal education".[3] He regards Mr Bailey as an outstanding advocate who is able to communicate the practical skills of his trade in a way that law professors are rarely able to do because they have neither the experience nor the court-room knowledge to pass on to their students.

To be a Trial Lawyer, then, is directed primarily at the pre-law or law student who needs to know how to train himself to acquire the skills he will later use in the court-room (in spite of Professor Dershowitz's recommendation of the book to all lawyers needing improvement in their trial techniques and Mr Bailey's assertion that it is helpful to parents, educational counsellors and even to clients facing important trials[4]). The distinct patronising tone and occasional platitudes about the law and personal integrity would be somewhat irritating without an understanding that the book is really aimed at the youngest and most inexperienced members of the legal community. For sure, a young person ready to begin his training in advocacy will welcome the fatherly advice "to think and breathe evidence every day from now until... [his] first case in court, and then forevermore"[5] as well as exhortations "never [to] settle for less than the truth from his client, even when the truth hurts"[6] or to understand that "[h]e is the last resort, the last hope for justice".[7] In his "few moments of straight talk" at the very end of the book, the author impresses upon his reader not to be swayed by power or money and always to speak the truth: "Lying should be restricted to telling infants about Santa Claus and elderly people in poor health that they are looking 'better.'"[8] There is a stern warning to develop what he calls "rock-solid personal integrity".[9]

The book is clearly and logically structured. The first part is devoted to the way that a student can early train himself in the skills that he will need to bring to the court-room. Mr Bailey concentrates first upon the general qualities required of a trial lawyer: resourcefulness, initiative and imagination. He suggests a scheme of liberal arts undergraduate study that would help a student develop these qualities. He even throws in the notion that a student air pilot course is a good way for a person to become confident and shine with accomplishment. Into this preliminary section he weaves stories of his own flying career in the United States Navy and Marine Corps as well as extended analogies to chess, warfare and football, all designed to get his message

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[3] *Supra*, note 1, x.
[4] *Ibid.*, xi and xv.
[5] *Ibid.*, 75.
[6] *Ibid.*, 11.
[7] *Ibid.*, 13.
[8] *Ibid.*, 213.
[9] *Ibid.*

across as emphatically as possible. It is precisely this ability to present snippets of anecdotes, hints, formulae, and inside information bound together into a far-ranging but coherent whole that makes his writing easy to read and understand. For the particular admirers of Mr Bailey, it will be a delight. Using the same technique, he moves rapidly on to the ways of gaining and maintaining a command of the language, both written and spoken, and then concentrates an entire chapter on the development of the memory. Mr Bailey believes strongly that a good memory is the key to an efficient court-room performance, so he carefully explains some tricks of memory training. Were they evidently not so effective for him, his elaborate mnemonic devices would be comical even in the context of this book.

The second part of the book, however, enables Mr Bailey to command where he is used to commanding. The account moves the reader logically forward from the general preparatory aspect of advocacy to the action within the court-room itself. There is an amazingly compact chapter serving as a swift introduction to the law of evidence and some useful materials on dealing with judges and working with a jury — all peppered with tales from the author's own considerable experience. At last he gets to his favourite subject and one that is always held up as the mysterious key to a trial lawyer's success: witness examination, expecially cross-examination.

> What is cross-examination? It is many things. It has been described as an engine of truth, and a bulwark of liberty. Some say it is the most devastating weapon man has discovered, including things nuclear. It is a nonviolent substitute for the gun and the sword.[10]

Here Mr Bailey is at his magnificent best as an instructor. The methods and techniques that he has been laboriously teaching in the previous pages are brought together and summarized in list form. He gives a couple of golden rules to the art of cross-examination with reasons, examples and old law school jokes. To illustrate some of his points, he sets up an extended court-room examination with a commentary in which he plays the part of the impeaching examiner so that the reader is able dramatically to appreciate the exemplary hard work and talent of the master advocate. It is a fast-moving, solid section and the following chapter about the final argument before the judge and jury serves similarly as a model of the good trial lawyer's skill in legal persuasion. These latter portions are fine enough to let the author be forgiven for his return to the mundane mode of "Going to Law School" and "Growing After Law School" into which he chooses to sink with his closing paternal admonitions.

All in all, this book is entertaining and readable. It certainly illuminates the techniques employed by one of the best known defence lawyers in the

[10] *Ibid.*, 135.

United States. It may well be a source of useful information for a would-be trial lawyer, a lasting source according to its author:

> It is not meant to be digested at one sitting, or even two. Much of what it contains is subtle, and needs to be examined repeatedly as you mature, grow, and progress if you are to benefit most from the ideas, suggestions, rules, and principles herein."

Most of all, though, it is a lively show of a supremely confident man, one who enjoys and believes in what he does and one who manages to communicate that for him, to be a trial lawyer is the best of all possible lines of work.

Ann Scholberg*

"*Ibid.*, xvi.

*M.A. (Concordia); LL.B. (McGill).

Competition Versus Monopoly [:] *Combines Policy in Perspective*. By Donald Armstrong. Vancouver: The Fraser Institute, 1982. Pp. xxxii, 263 [$15.95].

The author is an economist and a professor of management at McGill University. He has acted as an economic consultant to industry and as an expert witness for various firms sued under the *Combines Investigation Act*.[1] This text is not, therefore, couched in legal terms. It is by way of response to the *Framework for Discussion*[2] released by Consumer and Corporate Affairs Canada in April 1981, which introduced proposals to amend the *Combines Investigation Act*.

There can be little doubt that the proposed Stage II amendments will have a notable impact upon the structure of the Canadian economy.[3] An analysis of the policy considerations underlying the proposed changes — from an economist's perspective — is therefore highly relevant. The author limits himself to a discussion of the suggested monopoly, merger and conspiracy provisions. Nevertheless, he raises some basic questions that should be considered before an intelligent attempt can be made to exact legislative changes. For example, if we wish to protect competitive forces within an industry, what do we mean by "competition"? What is meant by the term "industry"?

Professor Armstrong concludes that the legislation and the proposals reflect the structuralist school's definition of competition. The structuralist (or classical) view of competition in a market system[4] continues to be taught in basic economics texts. It measures competition by the number of firms in an industry. The classical view, as first developed by Adam Smith, revolves around the notion that the individual producer will always exact excess profits from the consumer unless the market for the product is perfectly competitive. A perfectly competitive market, in turn, requires a large number of producers of an homogeneous product all of whom must sell the product at an identical price. That price is determined at the point where the marginal cost of producing an additional unit equals the marginal revenue earned by that unit.

As every student of introductory economics knows, the only basis upon which a producer can compete in such a market is price. In a perfectly competitive market, however, any price adjustment will eventually be followed by the other producers. Thus, nothing would be gained by such a move. Ironically, the perfectly competitive market in equilibrium will experience no

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[1] *Combines Investigation Act*, R.S.C. 1970, c. C-23, as am.

[2] Consumer and Corporate Affairs Canada, *Framework for Discussion* (1981).

[3] M. Flavell, *Canadian Competition Law* [:] *A Business Guide* (1979) 13.

[4] D. Armstrong, *Competition Versus Monopoly* [:] *Combines Policy in Perspective* (1982) 9-32.

competition. Furthermore, the structuralist school maintains that each firm will strive to maximize its profits and will reach the market's equilibrium point while ignoring the potential reactions of rival producers. It is this model, the author concludes, which provides the rationale for s. 32 of the *Combines Investigation Act*. The structuralist contention that a large number of firms is necessary for effective competition, in turn, motivates the prohibition in s. 33 against the formation of a merger or monopoly.

There are serious flaws in this structuralist analysis. First of all, the view of competition that emerges is far removed from what the individual experiences each day in the marketplace. As the author points out, if a boxer were to endeavour to be more competitive in the ring by minding his own business and ignoring his rival, he would meet with little success.[5] Secondly, Armstrong notes that aside from agriculture (in which farmers — through co-operatives — behave in a decidedly uncompetitive manner), no industry seems to exist in which an undifferentiated product is manufactured. In response to buyers' multidimensional needs, the products churned out in a given sector will vary. In fact, if we define an industry in terms of the undifferentiated products made, an argument can be fashioned that each firm is a monopoly.[6] Finally, Armstrong argues that the proposed amendments reflect an economic theory that is now being supplanted in economic circles by the behavioural theory of competition — the Schumpeterian model.[7] It is that school, according to the author, which is more realistic and which reflects more accurately the competitive behaviour that actually occurs in business.

The Schumpeterian school recognizes that few perfectly competitive markets exist and that, generally speaking, price is not the sole factor which differentiates competing offers. The process of innovation and imitation ensures that each offer is a multi-variable package that strives to meet the multi-dimensional needs of consumers. Furthermore, even if price is the sole differentiating factor, the behaviouralists recognize that no single price may emerge in the marketplace. For example, two firms producing an identical widget may start off with identical *pro forma* prices. However, one of the firms may vary the terms of payment so that they are more advantageous to the buyer. If the other firm does not respond, it will lose its clientele to the innovator. In contrast to the classical view, *successful* competitive behaviour under this model (*not* anti-competitive actions) will result in fewer firms. Businesses that had used the now-obsolete technology or terms of contract will lose their market share and close. Furthermore, behaviouralists recognize that, in order to compete successfully, the firm must be aware of and respond to its rivals.

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[5] *Ibid.*, 78.

[6] *Ibid.*, 92.

[7] J. Schumpeter, *Capitalism, Socialism, and Democracy*, 3d ed. (1950) 59-142.

In so far as the number of rivals necessary for effective competition is concerned, the Schumpeterian analysis — because it defines competition in terms of innovative behaviour — suggests that the existence of only one firm may be sufficient for a "competitive" market. The reason for this conclusion is that the innovating firm competes against past firms and products that it has supplanted, as well as against future innovators who, attracted by the higher profits the firm commands because of its initial innovation, will try to usurp this surplus by imitation and new innovation. The only way the first innovator can prevent its own downfall is by continuing to innovate. Therefore, the behaviouralists contend that the key to competition is free entry into the marketplace (that is, free of constraints other than natural barriers such as capital requirements).

The adoption of the Schumpeterian theory over the structuralist school would have far-reaching effects upon anti-combines policy. First of all, because an offer is seen as multi-variate and not differentiated solely on the basis of price, it would be more difficult for two rivals to reach a consensus or agreement on all the elements of an offer;[8] even if competitors were to agree on price, other factors would remain different and the businesses would continue to compete. The behaviouralist, therefore, would be less concerned about the possibility that rival firms might enter into a conspiracy. The notion of conscious parallelism would certainly not disturb a behaviouralist.[9]

Secondly, the number of firms is not central to competition in the behaviouralist model, and consequently, mergers, monopolies and market concentration are not necessarily to be feared. What *is* regarded as important is the quality of the total offer to the consumer. Indeed, Professor Armstrong points out that many of the strategies designed to produce superior performance and better competing offers will, if successful, also lead to increased competition. [10]

Professor Armstrong accepts this analysis wholeheartedly, and even glosses over the one requirement that the behaviouralist model indicates is necessary for effective competition: free entry into the marketplace. One would expect a firm to use the economic clout it gains through innovation to

[8] Armstrong, *supra*, note 4, 209-10.

[9] The term "conscious parallelism" describes the phenomenon of parallel conduct in a few-firm industry or oligopoly. Typically, it is exemplified by price leadership on the part of one firm that is followed by its rivals. For a fuller discussion of conscious parallelism, see Flavell, *supra*, note 3, 169-71. In the past, the phenomenon has caused quite a bit of controversy before the courts. See, *e.g.*, *R.* v. *Armco Canada Ltd* (1976) 13 O.R. (2d) 32, (1976) 30 C.C.C. (2d) 183 (C.A.); and *R.* v. *Atlantic Sugar* (1976) 26 C.P.R. (2d) 14 (Qué S.C.). A résumé of the judgment may be found at [1976] C.S. 421.

[10] Armstrong, *supra*, note 4, 203.

block entry into the market by new innovators. Furthermore, it seems reasonable to question whether a firm with a large bureaucracy and a substantial capital investment in a given technology would itself seek new innovations rather than merely attempt to secure its current position. Armstrong's arguments in this regard lack credibility. He concedes that the firm must maintain a highly-motivated labour force to remain competitive. Using the psychological theories promoted by Maslow and Herzberg, [11] the author concludes that if a freeze is imposed upon innovation, a freeze is also set upon the total offer made to workers to ensure their productivity.

> [T]here are higher needs in the human need hierarchy that lead one to expect managers to struggle to improve through rivalry, rather than to be the same as everyone else through conspiracy. Self-esteem, the need for self-respect, autonomy, status, reputation, self-actualization and so on, all suggest a quest for better performance and achievement. These higher goals are difficult to reconcile with a cartel that prevents or even slows down the rate of offer-improvement, or that freezes a company's position vis-à-vis its competitors. [12]

Unfortunately, Professor Armstrong confuses the typical manager's quest for better performance and achievement with what the behaviouralist would see as better performance by the firm. The two are not logically related. Many major innovations would involve capital expenditure. As the innovating firm expands, the analysis of competing projects vying for fixed capital expenditure dollars and the allocative decision lies, typically, with employees other than the manager proposing the innovation. Factors such as the compatibility of the innovation with current machinery, the amount of capital expenditure necessary, the degree of risk the innovation would involve, and the lack of security of the manager's own position should he recommend adoption of a change that is not met favourably by consumers, all would appear to play a major role.

Ironically, Schumpeter himself concluded that the evolution of big business as we know it would ultimately result in the death of capitalism. He reasoned that big business is conservative and that it lacks daring because it operates through managers (and bureaucracies) who prefer the security of the known entity. [13] This conclusion suggests that an innovative business should not be structured so as to remove control from the individual risk-taking capitalist — a condition that is found rarely in modern-day oligopolies.

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[11] See, *e.g.*, Maslow, *A Theory of Human Motivation* (1943) 50 Psychological Rev. 370; and Herzberg, *One more time: How do you motivate employees?* (1968) 46 Harv. Bus. Rev. 53.

[12] Armstrong, *supra*, note 4, 174.

[13] R. Heilbroner, *The Worldly Philosophers*, 3d ed. (1967) 288-91; and Schumpeter, *supra*, note 7, 61 and 131-4.

Despite Professor Armstrong's enthusiastic endorsement, basic weaknesses exist in the behaviouralist model which make it an unsuitable foundation upon which to build a competition policy. For example, not all markets experience innovation at the same pace. Clearly, the Schumpeterian model is relevant to the "high-tech" industries in which products are developed rapidly, and just as rapidly become obsolete. However, is it realistic to assume, given the products' short life span, that government agencies would be tempted to invest time and effort in the enforcement of anti-combines provisions against such firms? The behaviouralist approach is even less appropriate in markets which experience a slower pace of innovation. Furthermore, even if one recognizes, as Schumpeter teaches, that rival producers do not compete *solely* on the basis of price, it is clear that for many products, price remains the most relevant factor. One has only to spend an evening watching television to recognize the truth of this statement. In a market where price is a dominant factor in consumer choice, at least several firms, acting independently, are necessary for there to be effective competition. One cannot disregard totally the themes proposed by the structuralist school which suggest that some government intervention is necessary, at least in markets where price competition remains a major factor and innovation occurs at a slower pace.

The changes to the *Combines Investigation Act* recommended by Professor Armstrong are of some interest. Contrary to what one might expect as a result of his analysis, he does not advocate abolition of most of the *Act*. Instead, he would leave much of it unchanged. The reason given for this position is that the author feels that the courts have adopted an intelligent interpretation of the *Act*. He notes that at the time the *Canadian Breweries* [14] case went before the Ontario Supreme Court, the accused had bought out thirty-seven competitors and had gained sixty-six *per cent* of the Ontario market. Despite the apparently commanding position of Canadian Breweries at the time of its acquittal under the merger provisions of the *Combines Investigation Act*, it lost approximately one half of its market share over the next decade. [15] Armstrong maintains that the merger programme of the accused was "but an incident in the evolution of an industry from a structure of local oligopolies of small firms to a national oligopoly of large firms". [16] Such *ex post facto* reasoning is comforting, but there is nothing in the judgment itself to indicate that McRuer C.J. had considered the developmental impact of his decision on the beer industry. It is generally agreed, however, that the decision helped cripple the merger provisions, so that a merger must either result in or approach a monopoly before it can be prosecuted. [17]

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[14] *R.* v. *Canadian Breweries Ltd* [1960] O.R. 601, (1960) 126 C.C.C. 133 (H.C.).

[15] Armstrong, *supra*, note 4, 223.

[16] *Ibid.*

[17] Flavell, *supra*, note 3, 195.

Armstrong suggests that the merger prohibitions in the *Act* should no longer constitute criminal offences but should be subject to civil remedies. Such a step, taken alone, would probably result in a greater number of successful anti-merger actions, because the Crown currently must prove detriment to the public "beyond a reasonable doubt". [18] The civil burden of proof would, of course, be lighter. However, the author would also retain the word "unduly", and require that, to be challenged successfully, a merger must "unduly" lessen competition. [19] It seems that Professor Armstrong would maintain the same weak provisions that are found currently in the *Act* and would temper the sanction. The author would also introduce the word "unduly" into the provisions regarding price agreements between firms. [20] The test would therefore be whether the agreement unduly restricts competition.

The problem with these suggestions is that they do nothing to clarify the law. The term "unduly" does not help the average businessman determine whether a proposed merger or agreement will be considered illegal. Indeed, one of the major difficulties with the current law is the great uncertainty under which parties must operate.[21] The point of legislative change must surely be to ameliorate, not worsen, that condition.

On balance, it is apparent that this book is largely a piece of advocacy. It does little to present both sides of the issue. However, it is well worth reading for anyone interested in anti-combines legislation, for it challenges many pre-conceived notions that are assumed by, but undefined in, the *Act*. More significantly, the book raises practical policy questions and is an important step toward promoting a public debate over an issue of great importance for the Canadian economy. Professor Armstrong has a lucid, entertaining writing style; his book can be read easily by those with no training in economics whatsoever.

Theresa M. Siok*

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[18] *Ibid.*, 194.

[19] Armstrong, *supra*, note 4, 224.

[20] *Ibid.*, 228.

[21] Canadian Bar Association, Special Committee on the Combines Investigation Act, *Comments on an Act to Amend the C.I.A.: Bill C-13* (1978). The comments were contained in a submission made by the Canadian Bar Association which was presented to the Standing Committee on Banking, Trade and Commerce on 13 June 1978 in Ottawa. Bill C-13, which concerned proposed *Combines Investigation Act* Stage II amendments, was not passed.

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Legal Research Handbook. By Douglass T. MacEllven. Toronto: Butterworths, 1983. Pp. xxii, 294 [$30.00].

Legal research methology is an uncomfortable topic for many. Rare is the legal researcher, be he student, practitioner or academic, who would not confess to a gnawing concern that somewhere "out there" there might be a case, statute or article critical to his research that he has not found. This is probably the lowest end of the worry scale in the realm of legal research. At the midpoint of the scale is the inefficient researcher who will find most of the relevant law eventually, but only after an excessive amount of time and possibly clients' money has been expended. At the upper extreme is the researcher who feels helpless, who simply does not know where to turn to find the answer to a legal question in a field that is new to him, or, more seriously, who is ineffectual in almost any area of law. Unfortunately it is not solely incoming first year law students who find themselves in this position. Many others can identify with the sense of frustration revealed in the analysis of the etymology of "research" provided by a character in Kurt Vonnegut's *Cat's Cradle*: "*Re*-search means *look again*, doesn't it? Means they're looking for something they found once and it got away somehow, and now they got to *re*-search for it?" [1]

Quite properly then, Douglass T. MacEllven's *Legal Research Handbook*[2] is addressed to practitioners and law students — not only to students in their first year of law school.[3] It has been hailed by the publisher, in advance promotional material, as "the best and the only truly comprehensive legal handbook for Canadian lawyers". Given such lofty praise, I think one is justified in examining the book closely and critically. In my opinion the *Legal Research Handbook* does not live up to its description. I found that certain key material was presented poorly, the treatment of Québec law was completely unacceptable, the discussion of citation rules was superficial, and that, overall, the depth of analysis of many topics was not what I had been led to expect. The fact that this book may, however, be the "best" of such handbooks published to date, as claimed by the publisher, is unfortunately more a sorry comment on the competition than an objective measure of MacEllven's manual. Regrettably, MacEllven does not provide a bibliography of these other Canadian legal research and writing books. The most notable are: *Legal Writing and Research Manual* by Yogis and Christie,[4] *Using a Law Library* by Banks,[5] *Méthode de recherche en droit québécois et*

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[1] K. Vonnegut Jr, *Cat's Cradle* (New York: Dell, 1963) 47 [emphasis in original].

[2] D. MacEllven, *Legal Research Handbook* (1983).

[3] *Cf.* J. Yogis & I. Christie, *Legal Writing and Research Manual*, 2d ed. (1974) v and 1.

[4] *Ibid.*

[5] M. Banks, *Using a Law Library*, 3d ed. (1980).

canadien by Le May,[6] *An Outline of Basic Research Materials for Canadian Law Students* by Craig,[7] *Sources et méthodologie du droit québécois et canadien* [:] *Notes et documents* by Turp and Leavy,[8] *Bibliographical Guide to Canadian Legal Materials* by Brierley,[9] and *La documentation juridique* by Caparros and Goulet.[10] There are also numerous American legal research manuals occasionally useful to researchers in Canada.[11] I would certainly be remiss if I neglected to mention the outstanding Harvard "*Blue Book*",[12] which, though not designed to be a research manual *per se*, is packed full of authoritative information indispensable to American and Canadian researchers.

At first glance, this *Legal Research Handbook* appears very promising. Douglass T. MacEllven has a doctoral level law degree and a masters degree in law librarianship (both from U.S. universities). He is now the Director of Libraries for the Law Society of Saskatchewan, where he oversees the manual and computerized research services offered to practitioners, and has directed the rebuilding of the courthouse library system in the Province. He also teaches at the University of Regina and for the Saskatchewan Bar Admission course. MacEllven authored the chapter on "Canadian Law" in Jacobstein and Mersky's *Fundamentals of Legal Research*.[13] He seems ideally equipped to produce a legal research manual to serve Canadian researchers.

Also at first glance, the contents of the *Legal Research Handbook* seems to hold promise. MacEllven begins with an introductory chapter on "Legal Research Concepts". He then presents two long chapters covering Canadian law reports and their digests and indices. The next two chapters contain discussions of federal and provincial statutes and subordinate legislation. MacEllven devotes a chapter each to statute and case citators, legal encyclopedias, legal periodicals and their indices, and other secondary resources such as textbooks, directories and dictionaries. The book includes a lengthy

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[6] D. Le May, *Méthode de recherche en droit québécois et canadien* (1974).

[7] B. Craig, *An Outline of Basic Research Materials for Canadian Law Students* (1971).

[8] D. Turp & J. Leavy, *Sources et méthodologie du droit québécois et canadien* [:] *Notes et documents* (1981).

[9] J. Brierley, *Bibliographical Guide to Canadian Legal Materials* (1968) (unpublished manuscript; Faculty of Law, McGill University).

[10] E. Caparros & J. Goulet, *La documentation juridique* (1973).

[11] See, *e.g.*, M. Price, H. Bitner & S. Bysiewicz, *Effective Legal Research*, 4th ed. (1979); M. Cohen, *Legal Research in a Nutshell*, 3d ed. (1978); and J. Jacobstein & R. Mersky, *Fundamentals of Legal Research*, 2d ed. (1981).

[12] The Columbia Law Review, The Harvard Law Review Association, The University of Pennsylvania Law Review, and The Yale Law Journal, *A Uniform System of Citation*, 13th ed. (1981) [hereinafter the *Blue Book*].

[13] *Supra*, note 11.

chapter on computerized legal research as well as separate chapters on researching Québec, English, American, and Australian and New Zealand law. There is a chapter entitled "Subject-Area Research Checklists", one on law firm libraries and one on legal citation. Appendices provide a list of the addresses of Canadian and American legal publishers, preferred abbreviations for reports and digests, and MacEllven's "Master Legal Research Checklist" — a basic form for carrying out legal research cross-referenced to concepts discussed in the book. The handbook contains a six page index.

There are many attributes that one might hope to find in a legal research manual, but I would suggest that there are five which are crucial:

(a) *Absolute accuracy*. Even a few mistakes will cause a reader to lose faith in the rest of the book. It is this quality of supreme trustworthiness that has enabled the Harvard *Blue Book* [14] to attain its place as the bible of American legal citation and writing.

(b) *Up-to-date information*. Legal publishing is a fast-changing field. MacEllven notes that over half the Canadian indices and digests he cites have appeared since 1970.[15] Relying on research manuals that are out of date will cause a researcher to be inefficient at best; at worst, to overlook relevant law. Research manuals that are used widely will be revised and re-issued by the publisher to avoid this problem.[16]

(c) *Ease of use*. Very few legal research manuals will ever be read cover-to-cover. They must be designed to be "used" as opposed to being "read". This means that they must have good indices, present all information relevant to a topic with the discussion of that topic (at the expense of duplicating information throughout the book) *or* be well cross-referenced, have a clear, straightforward style of presentation that doesn't require "getting into", provide examples, and strike that fine balance between providing adequate detail without being overwhelming or wordy.

(d) *Comprehensiveness*. Only a legal research manual that consistently provides answers to a researcher's questions will attain that undoubted indicium of success — being habitually carried around by the researcher. In contrast, after only a few successive unrewarding experiences with a manual, a researcher is likely to relegate it to a back

[14] *Supra*, note 12.

[15] *Supra*, note 2, 23.

[16] Outdatedness is a serious shortcoming of most of the other Canadian legal research manuals on the market today. See *supra*, notes 3 to 10 for the dates of publication of their most recent editions. Banks, *supra*, note 5 and Turp & Leavy, *supra*, note 8 are possible exceptions.

shelf. Thus, a wide *scope* of coverage is of the essence. *Depth* of coverage is also important.

(e) *Critical analysis*. There are at least three reasons why people find legal research difficult: (1) they are untrained in proper research techniques, (2) Canadian legal materials are often inadequate [17] (to say nothing of illogical) and (3) law libraries may be poorly designed or maintained. Improvements in this latter field must be made on an individual basis but a good legal research manual should, without doubt, address the first problem, and also, I feel, the second. The author of such a manual is probably the person most competent to criticize our existing legal resources — to point out deficiencies in the system and to make recommendations for change that publishers may heed. Thus, a legal research manual should go deeper than a mere descriptive presentation of how to find the law; it should also analyse critically the existing structure of Canada's system of legal publishing.

It was with this checklist of five essential attributes in mind that I approached MacEllven's *Legal Research Handbook*.

MacEllven devotes over sixty pages to a presentation of Canadian [18] law reports and their digests and indices.[19] Hence, he is able to cover considerably more ground than other research manuals that allot fewer pages to this area.[20] MacEllven is able to consider aspects often overlooked in other manuals, such as duplication between report series, and timeliness of reporting. His survey is up-to-date — publications as recent as the *Canadian Rights Reporter*, dating only from 1982, are listed. Somewhat disconcerting, however, is the fact that the listing of law reports in chapter 2 is not exhaustive — indeed is not intended to be. Many other reports are presented at various places throughout the book, for example in chapter 3 ("Digests and Indexes for Law Reports") and chapter 11 ("Subject-Area Research Checklists") without adequate cross-referencing.

At over fifty pages long, chapter 3 on "Digests and Indexes for Law Reports" is by far the longest sub-division of the book. And, to be fair, it does contain much valuable and detailed information that will be useful to practitioners and academic researchers. However, its presentation is often confusing and unnecessarily drawn-out. MacEllven has designed the chapter around innumerable charts listing features of the various digests or reports grouped

[17] *E.g.*, there is no simple and comprehensive way to "Shepardize" cases and statutes in Canada as there is in the United States.

[18] Excluding Québec. See *infra*, text preceding notes 37 to 42.

[19] MacEllven, *supra*, note 2, chs 2 and 3.

[20] *E.g.*, only fourteen pages in Yogis & Christie, *supra*, note 3, 26-34 and 84-8.

by publisher. This grouping by publisher is not the most desirable scheme from most users' points of view — a geographic or subject-area classification would make more sense. Still, it enables MacEllven to deal in depth with a single "representative title" from a publisher's collection. The reader must then extrapolate the information presented (which includes details on instructions for use and features like case citators, statute citators, secondary literature citators, and words and phrases noted) to other digests by the same publisher. If this description is not clear, perhaps an example will help.[21] Consider MacEllven's heading "Example A: Alberta Reports".[22] Under it are found descriptions of the digesting system contained in other Maritime Law Book reports — the *National Reporter*, *Atlantic Provinces Reports* and six others. Often the ensuing description ends up dealing necessarily in specifics — the *National Reporter* clearly has a different digesting scope than does the *Atlantic Provinces Reports*; similarly, the *Atlantic Provinces Reports* differ in frequency (bound volume issuance only) from the *National Reporter* (weekly or biweekly loose paper issuance). The frequent need for such individual treatment defeats the purpose of the already cumbersome grouping by publisher system. Even more serious, however, is the fact that some desirable individual details are simply excluded. For example, despite the much briefer treatment accorded to reports and digests in the Yogis and Christie manual,[23] it is able to present complete information on the five series of the *Western Weekly Reports* published to date[24] — no attempt to provide such detail is made in the *Legal Research Handbook*. I feel that any researcher who attempts to use chapter 3 to answer quickly a specific question, without having initially read the chapter, will be in store for a very frustrating experience.

Furthermore, many of the charts that MacEllven presents separately could have been consolidated easily. There is no reason, for instance, why one chart could not have served to show (using four columns) which reports and digests have statute citators, case citators, words and phrases citators, and secondary literature citators, rather than spreading this material out over four separate charts[25] each requiring the relisting of the over seventy reports and digests considered.

Another complaint that I have with this part of MacEllven's handbook is that, whereas the scope of coverage may be satisfactory, the level of critical analysis is deficient. After surveying so broadly the field of Canadian law

[21] If even the example does not make this approach clear to you, then I submit that you are in the same position that many researchers who will refer to MacEllven will be — confused.

[22] *Supra*, note 2, 31.

[23] See *supra*, note 20.

[24] Yogis & Christie, *supra*, note 3, 87.

[25] MacEllven, *supra*, note 2, 67-73 (Research Charts E to H).

reports and their digests, he goes no deeper into a critical analysis of the system than his comment that "researchers do not have the luxury of turning to one particular publication in order to conduct thorough research. Researchers must be aware of all potential sources, in order either to investigate them or to make an informed decision not to investigate".[26] The author refuses to point out specific problems with particular publications,[27] and he does not address such issues as where the responsibility for ease or completeness of research lies — with the report publisher or the digest publisher. I do not believe that such issues are beyond the scope of a legal research manual. As noted above,[28] the author of such a manual is probably best equipped to discuss such issues and make recommendations for change.

This lack of critical analysis is far more objectionable in another part of the book: the description of legal dictionaries. All that MacEllven says about the recently published *The Canadian Law Dictionary*[29] is reproduced below:

> This is the first legal dictionary published specifically for the Canadian legal profession. The June 1980 issue of the Canadian Law Information Council's *Legal Materials Letter* is devoted almost entirely to an analysis of this new publication. The Canadian market now has the choice of purchasing a Canadian legal dictionary, and prospective purchasers may want to ask the publisher for citations to additional book reviews on this work.[30]

What is a reader to make of this? If he were to track down and read the CLIC's review (not a very likely prospect) he would find that a committee of four Canadian law librarians [31] blasted the dictionary in no uncertain terms, recommending that "any library that keeps it on its shelves should include in a prominent place on the volume a statement of its limitations".[32] MacEllven's treatment amounts, in my opinion, to nothing short of an abdication of his responsibility as the author of a legal research handbook. One wonders whether he thinks that he is not entitled to have an opinion on the legal materials he describes. Nothing *should* be further from the truth.

Returning to MacEllven's treatment of law reports, one final point bears mentioning. There is insufficient consideration whether a report is official (published by the court), semi-official (sanctioned by the bar) or unofficial (private publisher and unsanctioned). The distinction is important and might

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[26] *Ibid.*, 25.
[27] *Ibid.*, 24.
[28] See *supra*, text accompanying note 17.
[29] *The Canadian Law Dictionary* (1980).
[30] MacEllven, *supra*, note 2, 138.
[31] MacEllven was not among them.
[32] Banks, book review, in Canadian Law Information Council (1980) 3 Legal Materials Letter 1 (No. 10).

affect the choice of subscription of smaller law firm libraries [33] and the legal researcher's preferred citation.[34]

The second major area covered in the *Legal Research Handbook* is statutory research. MacEllven's treatment of federal and provincial (excluding Québec) statutes, and techniques for up-to-date statutory research is good. He includes a useful section on constitutional documents, particularly relevant in light of recent changes, but perhaps he could have been even more explicit. For example, MacEllven says that "the new name of *The British North America Act, 1867*, 30-31 Vict., c. 3 (U.K.) is *Constitution Act, 1867*" [35] but he could have added that it is still cited to 30 & 31 Vict., c. 3 (U.K.). In the same vein, even though all the components of a correct citation for the new *Canadian Charter of Rights and Freedoms* [36] are provided, a full cite would have been convenient for many readers.

As the reader of this review may have guessed by now, in light of the several "excluding Québec" qualifications already noted, MacEllven deals with Québec legal research in a separate chapter. A scant *three* pages are offered without explanation or apology. This is less than half the space the author devotes to Australian law. The chapter is, quite simply, an insult to all researchers of Québec law. One hardly knows where to begin in listing its faults — a representative few will have to suffice.

The French version of the *Revised Statutes of Quebec 1977* is identified incorrectly as "*Statuts Refondus du Quebec*, L.R.Q.".[37] The correct name is *Lois refondues du Québec* — hence the "L.R.Q." abbreviation. The last time "Statuts refondus" was used was in the 1964 revision. Also note MacEllven's carelessness with accents and capital letters. In fact, there is not a single accent in evidence anywhere in the chapter, despite the many times that accents were required in the titles of books [38] and report series cited. This goes beyond carelessness — it is a sign of inattention coupled with a lack of respect. Yet fluency in French seems, in fact, to be a major issue with MacEllven. Consider these two statements:

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[33] The distinction is not discussed in MacEllven's chapter on "Law Firm Libraries" either. Small firm libraries are more likely to subscribe to a general purpose unofficial report series like the *Dominion Law Reports* if they cannot afford more than one.

[34] This issue is referred to only in passing in the "Legal Citation" chapter. See MacEllven, *supra*, note 2, 239.

[35] *Ibid.*, 88.

[36] Part 1 of Schedule B, *Canada Act 1982*, 1982, c. 11 (U.K.).

[37] MacEllven, *supra*, note 2, 175.

[38] One author who likely has no cause for complaint concerning this omission is Denis Le May whose *Méthode de recherche en droit québecois et canadien*, *supra*, note 6, falls victim to the accent purging. Le May has the rather dubious distinction of being acknowledged (albeit under the name "Denny Lemay") as a reader of a draft version of the chapter.

> Researchers *fluent in French* may contact law librarians at law schools, court houses, or law firms in Quebec for bibliographies of current recommended texts and other secondary literature.[39]
>
> This selected listing [of Québec legal publishers] gathers Quebec publishers to facilitate browsing by researchers *not fluent in French*.[40]

Are we to assume that MacEllven believes that there is no one left in Québec who can or will speak English? In his mention of law schools, he seems to forget that McGill University has had, since 1848, a distinguished history of teaching the civil law in English.[41]

There are sweeping omissions in the chapter, a fact which will come as no surprise given its exaggerated brevity. For instance, MacEllven provides the names of two looseleaf versions of the *Civil Code*, but neglects to mention a single bound volume. He notes the existence of the *Index Gagnon*, but not the fact that it has not been published since 1978. The importance of doctrine in the civil law system is not discussed. There are no examples of Québec case citation provided (here or in the citation chapter). French law is never mentioned. I could go on, but instead will only state that this chapter should never have been written.[42]

Not as flawed as the Québec chapter, but still problematic, is MacEllven's chapter on "Legal Citation". The majority of persons doing legal research will also be doing legal writing; it makes sense to include a guide to legal citation and style in a legal research handbook. Even if they are not going to turn out a written product, the starting point for most researchers is a case, article or statute citation. Unless they understand the components of the citation, they will be unable to use it to locate the material cited. For these reasons, despite the existence of several separate citation or style guides,[43] I believe that it is essential to cover these areas in a research manual.[44] The problem with the coverage provided in MacEllven's book is that it is superficial. The chapter on "Legal Citation" was not, in fact, written by MacEllven

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[39] MacEllven, *supra*, note 2, 177 [emphasis added].

[40] *Ibid.*, 245 [emphasis added].

[41] See Frost & Johnston, *Law at McGill: Past, Present and Future* (1981) 27 McGill L.J. 31, 32.

[42] The manual could then have served as a guide to *common law* Canadian legal research, as is for instance the Banks book, *supra*, note 5, which is described as "A Guide for Students and Lawyers in the Common Law Provinces of Canada". Alternatively, MacEllven could have farmed out the writing of the chapter as he did for the "Legal Citation" chapter.

[43] *E.g.*, Caparros & Goulet, *supra*, note 10; J. Samuels, *Legal Citation for Canadian Lawyers* (1968); and *Blue Book*, *supra*, note 12. Most of these works are not devoted exclusively to matters of citation and style — some fundamental research areas are covered as well.

[44] Some other such manuals do. See, *e.g.*, Yogis & Christie, *supra*, note 3, 12-8.

but by the librarian of the Regina Court House. I do not feel that it is well integrated into the rest of the book and it lacks vital information, for example, how to deal with repeated references, how to cite unreported cases and guidelines concerning the use of signals to indicate support, contradiction or comparison with a proposition.

The chapter opens with the words: "Legal citation form has one main objective — to provide the researcher with sufficient information to find references easily."[45] This may, in fact, be the main objective, but a secondary one is undoubtably to economize on what must be printed to identify a source, for example, by using consistent abbreviations, an especially important consideration in journals and texts with extensive footnoting. It comes as some surprise, therefore, to see the recommendation that "[i]f the name of the periodical is cited in full, it should appear in italics".[46] It is a convention in legal writing to abbreviate periodical titles. The *Legal Research Handbook* goes on to say that "if it is abbreviated, it appears in roman type".[47] The example shown is of the *Saskatchewan Law Review* abbreviated to "Sask. Law Rev." Generally "Law" would also be abbreviated to "L." Although it is true that there is no single form of "correct style", the rules set down by this manual are at odds with general usage frequently enough that more extensive explanation is warranted.

It should be mentioned at this point that there are several areas that MacEllven deals with in a very satisfactory manner. His treatment of English, American, Australian, and New Zealand law is complete, accurate, well presented, and entirely sufficient for the purposes of a Canadian legal research manual. The chapter on "Computerized Legal Research" is also good, and it is a feature not found in many of the other Canadian manuals.[48] There is even a glossary of computer terminology in this chapter in which such basic terms as "printer" are defined.[49] The problem with any published discussion of computerized research today is, of course, the speed with which it will become outdated. Thus, this chapter is likely to be of the least enduring value of any in the book, despite its initial merit and relevance.[50]

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[45] MacEllven, *supra*, note 2, 235.

[46] *Ibid.*, 243.

[47] *Ibid.*

[48] Of the sources cited *supra*, notes 3 to 10, only Banks undertakes a comparable discussion.

[49] MacEllven, *supra*, note 2, 142. Unfortunately, MacEllven did not see fit to include a more general glossary to the book as a whole which might have been especially useful to first year law students unfamiliar with such terms as "citators".

[50] In fact, problems are already evident. For example, the McGill University Faculty of Law Library is listed as a centre with computer research facilities (and MacEllven claims that his listing was accurate to June 1982) even though such services have not been offered there for at least two years.

It seems fitting to conclude this review of MacEllven's book with a comment on its final pages — the index. The book itself (including appendices) is 287 pages long. The index is a mere six pages.[51] Yet a comprehensive index is crucial to a legal research manual; generally it will be the researcher's first contact with the book, and, if the topic in which he is interested is not indexed, it might be his last contact as well. None of the following topics are included in MacEllven's index: family law (or any other subject area of law), regnal years, rules of practice or rules of court (the indexing is merely inadequate here — the topic is listed exclusively under "Court Rules"), *Shepard's Citations*, private acts or public acts, nominate reports (except under the broader heading of "English Law"), or *Criminal Codes*.

The arrival of a new Canadian book on legal research was an event anticipated eagerly by many. Now that Douglass T. MacEllven's *Legal Research Handbook* has arrived, much of this eager anticipation will probably fade into disappointment, and Canadian legal researchers will go on with their work without an adequate research manual. Far from being a "truly comprehensive legal handbook for Canadian lawyers", as claimed by the publishers, MacEllven's book is another in a series of mediocre Canadian legal research manuals which are content to confine themselves to a cursory descriptive presentation of how to find the law, without providing any deeper discussion of integrally linked issues (such as the status of various primary sources, and the considerations involved in choosing which to cite), and without analyzing critically any particular publications or the system for finding the law as a whole. Some may argue that such considerations are beyond the ambit of a book like the *Legal Research Handbook*. But where else are such discussions to be found? Even if a limited ambit were justified, I still could not recommend the purchase of MacEllven's manual to anyone who already owns a Canadian legal research handbook. It could be argued, of course, that MacEllven is more up-to-date and that he covers more ground — for example, his treatment of law reports and their digests and indices goes beyond what other manuals offer. But, as described above, his presentation of this area is confusing; it detracts greatly from the usefulness of the information presented. Other deficiencies such as the totally inadequate treatment of Québec law and the serious omissions in the citation chapter would prevent me from giving up a copy of, say, Yogis and Christie despite its own deficiencies, for MacEllven's book. On the other hand, for a first-time legal manual purchaser, the *Legal Research Handbook* is roughly on par with other Canadian manuals available today. One can only hope that someday someone will tackle the job of producing a *truly* good one.

Barbara Ursel*

[51] Compare, for instance, Yogis & Christie, *supra*, note 3, which is only 126 pages long, yet has a ten page index. But the Yogis & Christie index is by no means model. It is probably quicker to find the list of signals set out on page fifteen by leafing through the book than by discovering the index heading — "Introductory signals".

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