BOOK REVIEWS

CHRONIQUE BIBLIOGRAPHIQUE

Vocabulaire bilingue de la* Common Law : *Droit de la preuve.* Ottawa : Association du Barreau cauadien, 1984. Pp. xvii, 294 [16.95 $]. Commenté par l'houorable Louis-Philippe Pigeon.

Le *Vocabulaire bilingue du droit de la preuve* — Les dissidences d'un cousultant

Le *Vocabulaire bilingue du droit de la preuve* qui vient d'être publié par l'Association du Barreau canadien dans le cadre du programme d'administration de la justice dans les deux langues officielles est un ouvrage de grande importance. La présentation générale et la formule adoptées pour ce lexique sont excellentes : les feuilles mobiles sont bien adaptées à ce genre de publication, le format restreint en facilite la consultation et la typographie est très bien choisie. Ce sera donc sûrement un outil précieux, non seulement pour les avocats et juges des provinces de *common law*, mais également pour ceux du Québec. En effet, il ne faut pas oublier que non seulement le droit de la preuve au Québec est en principe celui de la *common law*, en matière pénale de droit provincial comme en matière criminelle de droit fédéral, mais, même en matière civile, ce sont essentiellement les règles de la preuve tirées de la *common law* qui y sont suivies dans les procès qui se font comme dans les autres provinces et non comme en France.

L'établissement d'une terminologie française normalisée du droit de la preuve présente une difficulté particulière. En droit français, il n'y a pas de règles qui déterminent ce qu'un témoin peut dire quand la preuve testimoniale est admissible. De plus l'on n'y connaît qu'une seule norme de preuve en toutes matières civiles et criminelles : celle de « l'intime conviction » qui ne correspond à aucune de celles qui jouent un rôle capital en *common law*. Dans ces conditions, il est bien évident que souvent l'on ne peut trouver dans la législation et la doctrine juridique françaises aucune expression qui corresponde exactement à celles de la *common law*, puisque celles-ci expriment des concepts inconnus en droit français. Il faut donc avoir recours à des équivalences fonctionnelles sur lesquelles on ne saurait toujours faire l'unanimité. Ayant passé en revue les expressions normalisées au sujet desquelles je ne saurais être d'accord, il me paraît à-propos de publier mes dissidences.

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bad cbaracter	**mauvaise moralité**
character	**moralité**
character evideuce	**preuve de moralité**
character trait	**trait de caractère**
character witness	**témoiu de moralité**

La note au mot *character* signale la difficulté.

> Sur le plan juridique, [lit-on] cet équivalent et les termes composés dans lesquels figure l'expression « moralité » auront, en fait, une référence plus large que le domaine de l'ordre moral ; par exemple, ils désigneront aussi, par extension, des traits de caractère qui ne relèvent nullement de la moralité.[1]

Cette conception me paraît très contestable. En France, le dernier alinéa de l'article 331 du *Code de procédure pénale*, ajouté en 1960, dit : « Les témoins déposent uniquement, soit sur les faits reprochés à l'accusé, soit sur sa personnalité et sur sa moralité ».

Le législateur français ne considère donc pas que « moralité » puisse s'étendre à tous les aspects de la personnalité.

Je dois ensuite souligner l'utilisation de « trait de caractère » comme équivalent de *character trait*. Cela a pour conséquence que l'on va appeler « témoin de moralité » celui que l'on fait entendre sur un trait de caractère et son témoignage sera une « preuve de moralité », même s'il s'agit d'un trait de caractère qui ne relève nullement de la moralité. À mon avis, ce manque de symétrie est inadmissible en langage juridique.

Enfin il me faut bien signaler, ce que j'aurais peut-être dû noter d'abord, que « mauvaise moralité » cela ne se dit pas en français. On peut dire « moralité équivoque, douteuse, déplorable », etc., mais jamais « mauvaise moralité ».

circumstantial evidence	**preuve circonstancielle**

Je regrette devoir dire qu'il y a là un exemple de la tendance malheureuse vers l'anglicisme insidieux, le faux-ami, l'équivalent morphologique, contre lequel on se défend bien mal et que l'usage fautif ne légitime pas.

Le seul sens de « circonstanciel » en français, c'est le suivant : « Se dit du complément qui apporte une détermination secondaire de circonstance ».[2]

[1] *Vocabulaire bilingue de la* Common Law : *Droit de la preuve* (1984) à la p. 25 [ci-après : *Vocabulaire bilingue du droit de la preuve*].

[2] Le *Petit Robert* (1981), *verbo* « circonstanciel ».

Dans le cas présent, c'est l'expression utilisée dans le Projet de loi S-33[3] qui est correcte : « preuve indirecte ». Je l'ai d'ailleurs notée également dans le texte suivant :

> La preuve par présomptions est une *preuve indirecte*, qui est la mise en oeuvre d'un raisonnement par induction ; on part d'un fait connu, dénommé *indice*, pour remonter jusqu'au fait contesté.[4]

collateral fact — **fait incident**
collateral issue — **question incidente**

À mon avis, c'est « fait accessoire » et « question accessoire » qui s'imposent.[5] Il me semble évident que l'on ne pourrait pas y substituer « incident » à « accessoire » sans en fausser le sens. Une demande incidente fait partie du litige, c'est *l'antithèse* du *collateral fact* qui y est étranger. On trouve « incident » dans de nombreux articles du *Code de procédure civile.* Il correspond à *incidental* et non à *collateral.* À mon avis, le sens dans lequel le *Code de procédure civile* se sert du mot « incident » fait qu'il ne peut pas convenir pour exprimer une notion différente, parce que le droit de la preuve s'intègre à la procédure dont il n'est qu'un aspect spécial.

credible evidence — **preuve crédible**
credible witness — **témoin crédible**

Dans la première expression, *evidence* ne veut-il pas dire « témoignage » plutôt que « preuve » ? La question de crédibilité ne se pose qu'à l'égard des témoins. Les actes ne mentent pas. On ne se demande pas s'ils sont croyables.

Je pense donc qu'il faut dire « témoignage croyable » ou « témoignage digne de foi ».

« Crédible » ne figure au *Petit Robert* que comme *anglicisme.* À mon avis, l'adjectif français qui correspond au substantif crédibilité est « croyable » et non « crédible ».

Crown privilege — **secret d'intérêt public**
government privilege — **secret de la Couroune**
state privilege

Le premier équivalent est correct pour les trois expressions mais je ne

[3]Projet de loi S-33, *Loi fédérale de 1982 sur la preuve*, 1re sess., 32e Lég., 1980-81-82. (1re lecture, 18 novembre 1982).
[4]Dalloz, *Nouveau répertoire de droit*, 2e éd., t. 3 à la p. 779, no 152.
[5]Voir Commission de réforme du droit du Canada, *Rapport sur la preuve* (1975) aux pp. 105-6.

crois pas que « Couronne » ait en français le sens qu'on lui prête dans le second équivalent.

Crown witness — **témoin de la Couronne**
témoin à charge

Je ne crois pas que « Couronne » ait en français le sens de « poursuite » ou « poursuivant » : « témoin à charge » me semble le bon équivalent. Je ne vois pas l'utilité de l'expression en matière civile, on y dira « témoin de la demande » comme on dit « témoin de la défense ».

declaration against interest — **déclaration contre intérêt**

La syntaxe française ne permet pas cette construction. Il faut se servir de la langue française comme elle est et non pas la refaire sur le modèle de l'anglais ; « acte contre nature » est français mais « déclaration contre intérêt » ne l'est pas.

Il faut dire : « déclaration contre son intérêt », même s'il va de soi que dans certains contextes on dira : « contre l'intérêt », le remplacement du possessif par l'article défini étant un procédé courant.

declaration against penal interest — **déclaration contre intérêt pénal**

Je pense que Fortin et Viau ont raison de ne pas employer « pénal » de cette façon-là. Ils disent : « déclaration [. . .] faite au détriment de ses intérêts juridiques pénaux ».[6] Il ne s'agit pas plus d'un « intérêt pénal » que d'un « intérêt criminel ».

Il faut donc dire « déclaration contre son intérêt juridique pénal ».

evidence in contradiction — **contre-preuve**

« Contre-preuve » ne convient pas parce que, comme il ressort clairement de l'article 289 du *Code de procédure civile* cet équivalent de *evidence in rebuttal* désigne la preuve présentée par la partie qui a le fardeau de la preuve à l'encontre de celle qui a été présentée par la partie adverse. Mais on emploie ordinairement *evidence in contradiction* dans d'autres cas, par exemple quand une partie use du droit de prouver par d'autres le contraire de ce que son propre témoin a dit.[7] C'est une « preuve contraire », non une « contre-preuve ».

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[6]J. Fortin & L. Viau, *Cours de preuve pénale* (1977) à la p. 18.
[7]Voir art. 310 C.p.c.

evidential admission **aveu informel**
formal admission **aveu formel**

Il faut dire : « aveu extrajudiciaire » et « aveu judiciaire » comme aux articles 1243 à 1245 du Code civil.[8]

À mon avis, « aveu informel » est incorrect et « aveu formel » inexact car on s'en sert fréquemment en parlant d'un aveu extrajudiciaire explicite.

examiner (2°) **auditeur**
special examiner **auditeur**

L'équivalent proposé vient à l'encontre de la règle de l'emploi du langage usuel. Un titre supprimé en France en 1830 ne fait pas précisément partie de la langue courante et la fonction à laquelle il se rattachait ne correspond guère à celle de l'*examiner*. De plus, celui-ci a un rôle qui n'est pas passif : en effet, dans l'Ontario, la règle 342[9] le charge de trancher les objections aux questions sous réserve de révision de sa décision par le juge.[10]

En France, « auditeur » sert actuellement à désigner un fonctionnaire débutant au Conseil d'État ou à la Cour des comptes ou encore un élève de l'École nationale de la magistrature, auquel on donne le titre de « auditeur de justice ». On est loin de l'*examiner*. Faute de mieux, j'opte pour « enquêteur ».

fact relevant to an issue **fait connexe**

C'est le Groupe de travail sur la preuve,[11] qui a raison, il faut dire « fait pertinent ». À l'article 22 du Projet de loi uniforme sur la preuve,[12] *relevant* est rendu par « pertinent » et il en est de même dans le Projet de loi S-33.

Je note d'ailleurs que l'on traduit *irrelevance* par « non pertinence », *legal relevance* ou *relevancy* par « pertinence juridique », *relevance* et *relevancy* par « pertinence », *relevant* par « pertinent », *relevant fact* par « fait

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[8]Voir art. 1354-6 C.N.

[9]*Rules of the Practice and Procedure of the Supreme Court of Ontario Made by the Rules Committee*, R.R.O. 540/80. Et depuis le 1er janvier 1985, *Règles de procédure civile*, R.O. 560/84, règle 34.12(1) [version française non officielle].

[10]*Rules of the Practice and Procedure of the Supreme Court of Ontario Made by the Rules Committee*, règle 343. En vertu de la nouvelle règle 34.12(2) des *Règles de procédure civile*, R.O. 560/84 [version française non officielle], la révision des décisions revient au *master* et non au juge.

[11]*La preuve au Canada : Rapport du groupe de travail fédéral-provincial sur l'uniformisation des règles du preuve* (1983) à la p. 296.

[12]Conférence sur l'uniformisation des lois au Canada, *Proceedings of the 63d Annual Meeting*, app. U : Loi uniforme sur la preuve (août 1981) à la p. 351 [ci-après : Projet de loi uniforme].

pertinent », mais *relevant to* par « connexe à ». Je vois là une malheureuse incohérence.

first-hand evidence	**preuve originale, preuve première**
origiual evidence	**preuve originale**
primary evidence	**preuve primaire**

Ces trois expressions sont reconnues synonymes, mais le *Vocabulaire bilingue du droit de la preuve* les traite différemment. Je considère qu'il faut dire « primordiale » comme à l'article 1337 du Code Napoléon.

« Originale » me paraît incorrect dans ce sens et je crois que « primordiale » vaut mieux que « première » ou « primaire ».

foundation witness	**témoin d'admissibilité**

L'admissibilité d'une preuve est une question de droit qui requiert parfois la preuve de faits préalables. Le témoin qui établit ces faits-là ne peut pas, à mon avis, être appelé « témoin d'admissibilité ». C'est un « témoin de faits préalables ».

Au surplus, ce témoignage peut fort bien ne pas être un élément d'admissibilité. En effet, s'il est apporté à l'appui d'une opinion d'expert, celle-ci est recevable sans cela, comme la Cour suprême vient de le juger unanimement dans *R.* c. *Abbey.*[13] Autrement dit, s'il s'agit de *foundation facts* au soutien d'une opinion d'expert, il ne s'agit pas d'une question d'admissibilité mais de valeur de preuve.

Je note que « établir les faits préalables » est donné comme équivalent de *lay (v.) a foundation.* C'est précisément ce que fait le *foundation witness.* L'expression correspondante s'impose donc.

immaterial (2°)	**non substantiel**
material (2°)	**substantiel**
materiality (2°)	**caractère substantiel**

Material et son antonyme *immaterial* ont deux sens dans le droit de la preuve. Dans le premier, *material* est synonmyme de *substantial* dont l'équivalent indiqué est « substantiel ». Dans le second sens, *material* est correctement décrit comme suit : « Terme spécifique servant à déterminer la notion de *relevant evidence* ». Or, comme je viens de le signaler, *relevance* se rend par « pertinence ». Il y a donc une inconséquence inadmissible à donner « substantiel » comme équivalent dans ce sens-là.

[13] (1982), [1982] 2 R.C.S. 24, 138 D.L.R. (3d) 202.

jurat	**constat d'assermentation**

Barbarisme justement dénoncé par Gérard Dagenais.[14] Il suffit de dire « constat de serment », comme on dit « prestation de serment ».

lead (v.) a witness	**diriger le témoin**

À mon avis, l'équivalent indiqué ne rend pas le sens. En Angleterre, ce verbe a pris dans l'usage son acception courante dans le droit de la preuve. En français, il n'en est pas ainsi, il faut donc dire : « poser des questions suggestives », corrélation nécessaire avec *leading question* rendu par « question suggestive ».

legal evidence	**prenve légale**
moral evidence	**preuve morale**

On me paraît ici incliner indûment à l'équivalence morphologique. Puisque la notion du droit français de la « preuve légale » ne correspond pas à celle de *legal evidence*, c'est une erreur que de ne pas en tenir compte car le risque de confusion est particulièrement grave ici. En droit français, sauf les cas où une « preuve légale » déterminée est requise, la « preuve morale » apporte le seul degré de certitude exigé par la loi : « l'intime conviction ». Au contraire, en *common law*, seule la *legal evidence* apporte ce degré de certitude quel qu'il soit, *beyond a reasonable doubt* ou *on a balance of probabilities* ; la *moral evidence* ne l'apporte pas. Elle convaincrait sans doute le juge français auquel la loi ne donne pas d'autre guide que sa conscience, mais elle ne permet pas au juge britannique de tirer une conclusion, *make a finding*.

J'ai noté avec satisfaction que pour *non-juridical fact*, on avait écarté une expression employée en droit français, afin d'éviter la confusion. Cela me paraît *encore plus nécessaire* lorsque, comme dans le cas présent, l'expression en cause est l'équivalent morphologique de l'expression anglaise.

Je crois donc qu'il faut *à tout prix* proposer un équivalent autre que l'expression qui a un sens différent, pour ne pas dire opposé, en droit français. Il s'agit ici d'une preuve valable en conscience et non en droit. Je laisse aux linguistes le soin de rechercher une expression plus courte que cette description.

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[14]G. Dagenais, *Dictionnaire des difficultés de la langue française au Canada*, 2e éd. (1984), *verbo* « assermenter ».

past recollection	**mémoire antérieure**

Il ne s'agit pas de mémoire mais de souvenirs. C'est pour cela que *past recollection recorded* a comme équivalent « souvenirs transcrits ».

Je ne sais trop s'il faut dire : « souvenirs effacés », « oubliés » ou « passés ».

preliminary evideuce	**preuve conditionnelle**

Cette expression est impropre, « conditionnelle » n'a pas le sens qu'on lui prête ici ; « preuve sous réserve » est exact et conforme à l'usage.

prima facie evideuce	**preuve prima facie**
prima facie proof	**preuve prima facie**

Conserver l'expression latine, c'est aller à l'encontre du principe que les lois doivent être rédigées en langage usuel. L'expression *prima facie* ne fait pas partie du français courant et, depuis que le latin ne fait plus partie obligatoire du bagage de connaissances des gens instruits, elle n'est pas intelligible pour ceux qui n'ont pas fait d'études de droit assez poussées. En anglais la situation n'est pas la même : on trouve *prima facie* dans le *Shorter Oxford English Dictionary.* Cela ne veut pas dire que l'on peut considérer qu'il en va de même en français.

Depuis une dizaine d'années, la législation donne effet à la décision d'éliminer les expressions latines qui ne sont pas entrées dans la langue courante. Malgré les difficultés que cela comporte et qui sont soulignées dans l'arrêt *Proudlock,*[15] il ne peut être question de revenir en arrière.

Cependant, ce même arrêt invite à tenter de trouver mieux que « preuve en l'absence de toute preuve contraire ». Il faut évidemment retrancher le malencontreux « toute », comme on l'a fait à l'article 159 du Projet de loi uniforme[16] et dans le Projet de loi S-33.[17] Je crois cependant que ce n'est pas suffisant pour bien rendre le sens de *prima facie.* À mon avis, il faut dire « preuve suffisante jusqu'à preuve contraire » comme à l'article 22 du Projet de loi uniforme.[18] J'admettrais aussi bien l'expression « preuve suffisante en l'absence de preuve contraire » qui a l'avantage de se rapprocher du texte actuel du *Code criminel.* On pourrait aussi dire, en s'inspirant de l'article 1352 du Code Napoléon, « sous réserve de la preuve contraire ». De toute façon, l'addition du mot « suffisante » me paraît indispensable pour rendre pleinement le sens de *prima facie.*

[15] *R.* c. *Proudlock* (1978), [1979] 1 R.C.S. 525, 91 D.L.R. (3d) 449.
[16] Projet de loi uniforme, *supra,* note 12 à la p. 429.
[17] *Supra,* note 3.
[18] Projet de loi uniforme, *supra,* note 12 à la p. 52.

put (v.) in issue **mettre en cause**

À mon avis, il vaut mieux dire « mettre en question » comme à l'article 30 du Projet de loi uniforme.[19] D'ailleurs, l'équivalent de *issue of fact* est « question de fait ». Il me semble souhaitable de réserver « mettre en cause » comme équivalent de *implead* ce qui est, du reste, le sens de cette expression d'après le *Petit Robert*, au mot « cause ».

summiug-up (1°) **résumé**

Ce terme est donné en ce sens comme synomyme de *charge* dont l'équivalent est « exposé au jury ». Je ne puis voir aucune raison de le rendre différemment surtout en se servant du même mot que pour le second sens.

swearing in (s.) **assermentation**

Je donne raison à Gérard Dagenais[20] qui rejette ce « barbarisme ». La nécessité est absente : le *Petit Robert* consacre un paragraphe distinct à la « prestation de serment ». Du reste c'est l'expression que l'on trouve un peu plus loin à *taking of an oath.*

vicarious admission **aveu par délégué**

Je trouve « délégué » mal choisi, il n'évoque pas l'idée : ce n'est pas une affaire de délégation. Un préposé, cas le plus fréquent, n'est pas un délégué.

Le mot « intermédiaire » me paraîtrait préférable à « délégué ». On peut aussi songer, soit à « préposé », soit à « agent ou préposé ».

view **transport sur les lieux**

L'équivalent recommandé se trouve bien, d'une certaine manière, à l'article 290 du *Code de procédure civile*, mais il désigne, non pas l'examen des lieux que vise le terme anglais *view*, mais uniquement le déplacement du tribunal en vue de cet examen. En effet l'article se lit :

> **290.** Le juge peut, au cours de l'enquête, ordonner le transport du tribunal sur les lieux, pour procéder à toute constatation utile [. . .].

et en anglais :

> **290.** The judge may during the trial, order that the court go to the scene in order to make any observation [. . .].

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[19]*Ibid.*
[20]*Supra*, note 14.

Dans le *Petit Robert* on voit : « *Descente sur les lieux* : mesure d'instruction destinée à faire des constatations matérielles ».

C'est donc « descente sur les lieux » qui est l'équivalent correct.

D'ailleurs on notera que, dans l'article 290 du *Code du procédure civile*, l'expression utilisée est « transport du tribunal sur les lieux ». Sans « du tribunal », « transport sur les lieux » est cryptique et équivoque, en outre de ne pas correspondre au terme anglais à traduire.

Qu'il me soit permis en guise de conclusion d'inviter mes lecteurs à ne rien voir dans mes dissidences qui tende à déprécier le travail méritoire du Comité de normalisation. Comme un tribunal, le Comité devait se prononcer sur des questions au sujet desquelles certaines divergences d'opinions sont inévitables. En France, comme en bien d'autres pays, l'on tient que le respect dû à l'autorité d'un tribunal collégial exige qu'il présente une apparence d'unanimité. Au Canada, comme aux États-Unis, on suit la tradition britannique et les dissidences sont publiées. Personne, que je sache, n'en conteste l'utilité, je dirais même, la fécondité, surtout à l'heure où l'on enterre le mythe du *stare decisis* inexorable.

J. Robert S. Prichard, ed., *Crown Corporations in Canada: The Calculus of Instrument Choice*. Toronto: Bntterworths, 1983. Pp. xvi, 475 [$49.95]. Reviewed by Robert D. Cairns.*

This book is one of the latest in a number of collections of papers which seek to advance our understanding of the genesis and characteristics of the many public enterprises at all three levels of government in Canada. According to the Introduction, the aim is to determine the reasons why the Crown corporation may be chosen from among the several policy instruments available to government as a means of carrying out policy. The book accepts the decision by government to make policy in a particular situation as given, and is primarily concerned, not with the reasons for that decision, but rather with the "calculus of instrument choice". The book attempts to synthesize the perspectives of different disciplines into a unified approach.

In reality, however, the book presents three different theoretical frameworks which are more competitive than complementary. The first three papers may be seen as illustrative of the diversity of views which are held regarding the place of the Crown corporation.

The lead article, by lawyers M.J. Trebilcock and J.R.S. Prichard, is consistent with the premise of the book: given the government's decision to intervene, for whatever reason, there is a problem of choosing instruments. The choice is based on the characteristics of the instruments at the government's disposal and the goals the government wishes to achieve. The government, like an experienced carpenter, chooses the best tool in its kit. In the final article of the book, S.F. Borins, a management scholar, applies this approach in a case study of Crown corporations established during World War II.

In the second paper, economist T.E. Borcherding considers the role of the public sector in light of the economic theories of property rights and public choice. These perspectives would lead one to expect a view similar to that of Trebilcock and Prichard. The article does, in fact, begin with a discussion of the choice among alternatives. But "Toward a Positive Theory of Public Sector Supply Arrangments" is a survey of the literature on the efficacy of the whole range of government instruments as compared to the efficacy of the private sector, not a strict analysis of the Crown corporation as compared to other government instruments. The sixth article, by economist J. Palmer and lawyers J. Quinn and R. Resendes, applies this theory to the operations of Gray Coach Ltd, an inter-urban bus company owned by the Toronto Transit Commission.

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The third paper, by M.A. Chandler, begins with a discussion of why political scientists have found the more common explanations of the existence of public enterprise to be unsatisfactory in explaining variations observed across Canada, variations which Trebilcock and Prichard call a "mass of contradictions".[1] Included with the common explanations is the "pragmatic approach", of which the first two papers of the volume would appear to be examples. Basing her observations on an empirical study of provincial Crown corporations, Chandler attributes the characteristics and existence of Crown corporations to the ideology of the political party in power. Her work, in turn, relies upon the data presented in the fifth article by management scholars A.R. Vining and R. Botterell.

If the book can be said to have a focal point, it is Chandler's paper for two important reasons. Hers is the only paper that benefits from and integrates the work of another paper in the volume. Also, by presenting political ideology as an alternative to the economic rationality explanation which underlies the other two theoretical papers, she provides a contrast which is more vivid than the rather tenuous direct connections between them. In a sense, the principal unifying theme of the five other abovementioned papers is the extent to which Chandler's paper serves as a foil to them all.

The remaining paper, by public administration scholars J.W. Langford and K.J. Huffman, is an exercise in categorization of federal Crown corporations. Aside from its comparability to the Vining-Botterell study of provincial Crown corporations, it has no strong links to the other papers.

Each paper brings out points which are worthy of comment. This review presents and criticizes the main theses of the papers, and is arranged according to the intellectual structure sketched above. A brief general conclusion follows.

As noted above, explanations of the genesis of Crown corporations based on pragmatic considerations (such as the particular forces in operation at the time of establishment or the institutional characteristics of the instrument) have been criticised by many political scientists. Trebilcock and Prichard's paper may be viewed as an attempt to put some theoretical flesh on the "pragmatic approach". In their view, the Crown corporation is chosen by government because it is the best instrument at hand for effecting the government's policy purpose. No assessment is attempted of the validity of

[1] M.J. Trebilcock & J.R.S. Prichard, "Crown Corporations: The Calculus of Instrument Choice" in J.R.S. Prichard, ed., *Crown Corporations in Canada: The Calculus of Instrument Choice* (1983) 1 at 5.

the purpose. Comparisons are made to other available instruments, especially government departments and regulation, which are the closest substitutes for the Crown corporation.

Trebilcock and Prichard claim that their analysis is carried out from a lawyer's perspective, and they do consider some of the legal-technical characteristics of the instrument. But for a piece done by individuals whose analytic comparative advantage rests with the legal aspects of the instruments discussed, it contains surprisingly little legal analysis. The legal background provided is no more detailed than one might expect from a non-lawyer doing an institutional paper of this nature.[2]

Rather, the analysis is done from an economic perspective. Trebilcock and Prichard rely heavily on the economic literature,[3] a literature which, for the most part, is the same as that reviewed by Borcherding. For example, they use the theory of property rights in order to explain the structure of economic rights created by various policy instruments. Their view of the political process, as one in which politicians maximize votes at periodic elections by using a rational assessment of policies and instruments, is that of the so-called economic theory of government. In essence, the paper is based on an economic analysis of how interest groups actively use the government as a means of promoting their own economic advantage.

The basic theme of substitutability is a simple concept drawn from cconomics. Elsewhere in economics, for example, the concept is applied to the characteristics of goods (an important idea in microeconomic theory) or the characteristics of financial instruments (in recent times a hotly debated issue in monetary economics). Here, it is applied to the characteristics of policy instruments. Trebilcock and Prichard base their analysis on the comparative advantages of various instruments, or on the benefits and costs of applying one instrument instead of another.[4]

Trebilcock and Prichard do a creditable job, for cobblers away from their lasts. They are able to bring their analysis to bear in a trenchant criticism of a number of recent reform proposals. These include the administrative changes suggested (a) by the Lambert Commission[5] (which the authors claim would reduce the effectiveness of the Crown corporation in many instances, possibly forcing the use of less suitable substitutes at a cost to

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[2]*Ibid.* at 16-22.

[3]*Ibid.* at 26 n. 55.

[4]It is of some interest in this connection to remark that the ideas of this paper formed one chapter of an earlier study of all governing instruments by these two authors in conjunction with two economists. M.J. Trebilcock *et al.*, *The Choice of Governing Instrument* (1982) ch. 3.

[5]Canada, Royal Commission on Financial Management and Accountability, *Report* (March 1979).

effective government) and (b) by those who would "privatize" Crown corporations but still pursue similar policy goals using different instruments. Possible means of privatization considered by the authors are the sale of Crown corporations (in whole or in part) to private interests, and free share distributions to residents of the political jurisdiction in question, a procedure known as "bricing" in reference to the British Columbia Resources Investment Corporation, shares of which were distributed in this manner.[6]

Unfortunately, the bulk of the paper is a long discussion which is more in the unfocussed tradition of pragmatism. Questions regarding the completeness of the theory seem to leap out. For example, the depiction of the nationalization of British Columbia Hydro and Hydro-Québec, as being prompted by the fact that provincial Crown corporations are not subject to federal corporate income tax, does not address the pertinent issue of why they were nationalized so late (the early 1960's), nor why each was nationalized in two stages which came nearly two decades apart. Moreover, the authors note that the Cape Breton Development Corporation (Devco) was established as a last resort, after several other instruments had been tried. If this is true of many Crown corporations, then the calculus of instrument choice would seem to be of little application. In fact, in another of the recent, edited collections studying Crown corporations in Canada, Tupper and Doern observe that the Crown corporation usually *is* a last resort, because Canadian governments have been committed to private enterprise.[7] This predisposition is of clear importance to Chandler's competing view based on ideology.

In addition, the instrument of the Crown corporation is commonly used in conjunction with other instruments. Most Crown corporations are regulated. The National Energy Programme, for example, was a comprehensive strategy by the federal government, applying many instruments to exert some control over the development of the Canadian oil and gas industry. Indeed, this is admitted by Trebilcock and Prichard in their discussion of Petro-Canada: "The complex array of tax incentive measures designed to encourage exploration expenditures is clear evidence of the simultaneous use of substitute instruments in the same industry".[8] The use of instruments as complements rather than as substitutes is also noted in the Introduction to the book in connection with the promotion of Canadian culture. The fact that several instruments may be used at once, or added to one another, would seem to limit the general applicability of the calculus of instrument choice, which envisions the application of one instrument *instead* of another.

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[6]Trebilcock & Prichard, *supra*, note 1 at 87.

[7]A. Tupper & G.B. Doern, "Public Corporations and Public Policy in Canada" in A. Tupper & G.B. Doern, eds, *Public Corporations and Public Policy in Canada* (1981) 1.

[8]Trebilcock & Prichard, *supra*, note 1 at 67.

Borins presents an interesting historical discussion of the federal Crown corporations established during World War II. Of some present interest is his rather ambivalent application of the calculus of instrument choice. He finds: "In these instances, public ownership can be seen as something of a last resort: after trying all other possible policy instruments, the government opted for public ownership. This appears to be the case at the present time as well . . . ."[9] Indeed, the second part of his paper, on privatization, while presented as an ideal test of the calculus because of the shift from wartime to peacetime objectives, instead details the return to a preference for private enterprise as the engine of development. Although C.D. Howe was not opposed to the maintenance of commercially viable Crown corporations by the government, particularly if they were subject to the discipline of competition, and although Polymer was retained subject to this discipline,[10] the thrust described by Borins was toward the private sector. The two privatizations discussed raise an important issue. The aircraft industry was sold off because of the perceived (correctly perceived, according to Borins) need to import technology to keep it viable. Research Enterprises Ltd was first broken up and then sold; this was an ill-advised action, by Borins' analysis, because Howe's inability to recognise the interplay between research and manufacturing and the importance of diversification was responsible for the failure of the privatization. In the spirit of Trebilcock and Prichard, Borins proposes substitute measures — which amount to partial privatizations — as methods by which the failure might have been averted. Borins' analysis of the two privatizations seems to suggest that, without prior careful analysis, it is not valid to proceed with privatization on the basis of preconceived notions about the "rightful place" of the private sector.

This reviewer's conclusion is that the calculus of instrument choice, for all of its interesting economic analysis and thought-provoking conclusions, has limitations as a theory of why Crown corporations are created. The evidence points to there being not a tool kit but a hierarchy of instruments, usually invoked sequentially but at times concurrently, in which the Crown corporation is ranked last.

The second framework study, by Borcherding,[11] is, in his own terms, not a refined theory of public sector supply, but a prologue to such a theory. On the other hand, he does not appear reluctant to have his ideas applied by Palmer *et al.* to Gray Coach, Ltd.

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[9]S.F. Borins, "World War II Crown Corporations: Their Functions and Their Fate" in Prichard, *supra*, note 1, 447 at 459.

[10]*Ibid.* at 465.

[11]T.E. Borcherding, "Toward a Positive Theory of Public Sector Supply Arrangements" in Prichard, *supra*, note 1, 99 at 104.

Borcherding's paper begins with a discussion of the various alternative classes of policy instrument available to government for effecting various purposes, suggesting that some may be more effective than others in a given policy context. This beginning is very much in the tradition of Trebilcock and Prichard's calculus. Then Borcherding reproduces a table which shows the extent of public enterprise in eighteen countries, continuing with a discussion of public provision of goods and services in the United States and Canada. At this point, it is intimated that the subject matter of the paper is more a comparison of all "public sector supply arrangements" to private sector supply arrangements, than a comparison of the various public sector arrangements. For example, long passages in the article are devoted to discussions of education, provided publicly in Canada by government departments rather than Crown corporations. But the departmental organization is compared to the private provision of educational services, possibly subsidized in some way, rather than to services provided by a public firm. Despite the great importance of provincially owned utilities, Borcherding's interesting intellectual history of public utility management and regulation is concerned primarily with the original governmental decision to intervene, and is only tangentially related to the question of the use of the Crown corporation. (The reader will recall that Trebilcock and Prichard, in expounding their view, expressly chose not to examine the original decision.) He observes that there were, in the post-war period, (a) a perception of growing public sector influence on the overall structure of production; (b) a quickly rising *number* of Crown corporations; but (c) a much slower rate of asset growth in the public than in the private sector. This is a period during which government regulation, according to prevailing perceptions, also grew. But there is no discussion of the comparative growth of these two instruments, or others, as one might expect in an instrument choice analysis. Finally, the second-last paragraph of the paper explicitly places Borcherding's findings outside the Trebilcock-Prichard framework: "[A]ny policy will be carried out by 'bits' of each supply institution . . . . More work on the possibility of complementarities as well as substitutions between alternative supply mechanisms is clearly called for."[12]

Basically, the paper consists of a literature review of three views of the differences between (mainly unregulated) private firms and (mainly unregulated) public firms: (1) the property rights literature; (2) the social choice literature; and (3) the literature on the possibility of the existence of unintended government waste and needless inefficiency. All of these literatures hold that institutions "matter" in the sense that they create different types of incentive for self-interested economic actors.

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[12] *Ibid.* at 177.

The first advances the view that different forms of institutional arrangements affect the structure of property rights. The classical, entrepreneurial private firm is organized in order to reap the advantages of team production. In team production, however, because individual contributions to output cannot be measured precisely, there is an incentive to members of the team to shirk, or to put forth less than the amount of effort which they would if their rewards could be precisely linked to their efforts. The solution is to accord to one actor, called the monitor, the rights to the residual outputs of the firm. This property right gives the monitor the incentive to limit shirking. The fact that the monitor has an ownership claim, which can be sold in the capital market, ensures that he always pursues the objective of maximizing the present value of this firm.

When one turns to analyse the modern corporation, however, the argument concerning monitoring and ownership claims becomes thinner. In the corporation, it is the shareholders who are the residual claimants; their wealth is in the hands of managers hired to do the monitoring. Borcherding recognizes the limitations of the argument and responds by noting the "abundance of instruments" which would bring management's interest into line with that of the shareholders. Take-overs, mergers, profit sharing, stock options, appreciation rights and managerial reputation are all mentioned. Also, the transferability of shares in the capital market ensures that shareholders will have an incentive to keep close tabs on management in order to maximize their wealth.

It is a short further step to conclude that those monitoring incentives in the public firm are severely blunted. Shareholders (the body politic) cannot transfer ownership claims, except through migration. Management does not have the inducements provided by profit sharing and the like. Thus, the theory of property rights asserts that the public firm will be less efficient than the private firm. Management and staff will shirk more. Empirical work is cited in support of these expectations.

The social choice literature claims that public firms will have higher production costs and excessive outputs, because bureaucrats in the public sector will direct the enterprise toward satisfying some of their own preferences.

Competition among firms has, since the time of Adam Smith, been considered to be the most effective monitoring device for economic enterprises. In this tradition, several studies comparing the performance of public firms competing against private firms have been done. In many cases, contrary to the expectations discussed above, competition appears to do the job of monitoring: despite the differences in ownership claims, the performance of public and private firms cannot be differentiated where there is competition.

Furthermore, the possibility of the persistent observation of waste represents a philosophic quandary for economists. So-called "mainstream" economic analysis depends on a paradigm by which all economic actors rationally choose the best means available of advancing their economic welfare. But the existence of waste would imply that all possible gains from trade are not exhausted: this would be inconsistent with the rational choice paradigm. Borcherding reviews another literature which, consistent with rational choice, suggests that waste is not present in public sector supply. Rather, outputs have subtle dimensions, and the supposed loss of efficiency in public provision as compared to private provision is reflective of relatively higher emphasis by government on unmeasured characteristics.

This reasoning is the basis for the arguments of the final section of the paper which contains further literature review and some conjectures concerning choices among instruments. Here, Borcherding appears to have in mind, without stating it, a loose ordering of policy instruments, *viz.*, (1) public provision, (2) regulation, (3) contracting out (to private firms), (4) subsidization, and (implicitly) (5) private provision without government intervention in the market. This ordering would be based on: (a) increasing difficulty for the government to monitor activities in an industry; (b) increasing ability of voters to monitor the redistributive policies of government (Borcherding defines politics to be "the social act of one group coercively appropriating to itself the wealth of another under the protection of the state's constitution"[13]); and (c) increasing productive efficiency (based on an analysis of property rights in the economic returns and hence management's monitoring incentives). In addition, the reverse ordering would be that of increasing directness and selectivity in redistribution. The same or similar characteristics would appear to apply to public provision of goods, the order in this case being: (1) departmental organization, (2) Crown corporations, and (3) mixed enterprises (partly owned by government). Presumably, policy implementation in each individual market will require a different combination of monitoring ease, openness, efficiency and selectivity. Somehow, an instrument is selected that provides the best combination. Determining exactly how this selection is made would appear to be the type of result sought in the Trebilcock-Prichard paper. As mentioned before, however, Borcherding's analysis leads him to close by observing that, rather than limiting itself to a single choice, government may employ multiple complementary instruments.

The Borcherding paper may well be viewed by many who read this volume, especially economists, as the major contribution of the book. The paper is a competent review of a diverse economic literature and provides

[13] *Ibid.* at 152.

the reader with a useful bibliography. The paper also provides a tortuous reconciliation of the conflict between the public-choice-property-rights literature, which broadly concludes that public enterprise is wasteful, and the literature which contends that the existence of such waste would conflict with the central paradigm of economics. It is a useful contribution to have these literatures reviewed conveniently in one place.

One of the main problems with Borcherding's suggested direction for research would appear to be the competition between property rights and market structure as predictors of public firm behaviour, a competition discussed by Borcherding early in the paper. That part of the discussion which produces the ordering inferred above is based on the property rights analysis. But, when Borcherding turns to consider distinctions among different types of public supply, market-structure considerations become important: "Crown corporations ... are about as attuned to the market as they are to politics and, given competitive pressures, often differ little from counterpart private firms in their behaviour."[14] His comparison between Hong Kong and Singapore may be seen in this light, even though the key point is relegated to a footnote: more interventionist Singapore's government agencies and departments compete with each other, with salutary effects according to the article which Borcherding cites. Thus competition may collapse the Borcherding ordering in the direction of greater efficiency, irrespective of the property rights established by the instrument. The collapse may take in even government departments as supply instruments. Basing one's analysis solely or mainly on the literature of property rights would, therefore, seem dangerous even in a prologue to a theory.

Moreover, the theory of property rights simply is not sharp enough to identify the differences in incentives to management in modern bureaucratic organizations. In the modern corporation, the shareholder does not have full time to devote to monitoring the performance of a company in which he holds shares. Indeed, optimal portfolio choice dictates that he spread risk across a wide variety of holdings. Many stocks are held by financial institutions, with the ultimate owners being even further removed from the monitoring process. Take-over attempts are subject to severe "free rider" problems: other shareholders who merely hold on to their shares while a new, presumably more efficient management is installed, will reap the full benefit of the take-over. The rules of thumb by which private corporate performance is judged are biased toward short-term expediency rather than the long-term benefit of shareholders. Motivations of pay, power, prestige and the quiet life must surely affect private managers as much as public ones. Managers of public firms which can make a profit (which are not

[14]*Ibid.* at 171.

regulated or directed to make cross-subsidies) have an interest in a healthy "bottom line" to increase their autonomy, *i.e.*, their immunity from "government take-over". The imprecise theory of property rights cannot pretend to measure the effects of these and many other forces in different types of enterprise. Instead of distinctions between private and Crown corporations, the greater divide may be between entrepreneurial and managerial firms, private or public. One might be led to question whether market structure is a more important consideration than property rights. If so, then it might be expected that performance of public and private firms in comparable market structures, including regulated market structures, would be similar. This expectation would also be consistent with the economic paradigm, unlike expectations which contemplate the existence of waste.

The competing bureaucracies of Singapore raise interesting questions. Is competition sufficient to monitor the efficiency of competing public firms, as it appears to be when public firms compete with private firms? A Crown competitor to Petro-Canada was mentioned in the National Energy Programme, but was never established. Would such an arrangement have resulted in a more effective instrument? Would competition increase further if the public firms reported to different ministers, or belonged to different governments?

Another important problem which troubles Borcherding's discussion is the variation between provinces and countries in the use of public enterprise. Comparing Canada to the United States, he argues that one factor in the observed variation may be the ability of disadvantaged resources to flee, noting that nationalized factors at the provincial level are often of the natural monopoly or natural resource sort.[15] This does not explain why natural monopolies in the United States are less likely to be nationalized; nor does it explain why Vining and Botterell's Appendix II shows that nearly all provincial resource corporations (in forestry, mining and oil and gas) have been established only quite recently, since 1970; nor does it explain the irregular temporal pattern of the establishment of provincial power utilities. Differences in levels of government intervention between Hong Kong and Singapore are weakly attributed to external checks by London, but no reason is given as to why highly taxed mobile factors do not leave Singapore for Hong Kong.

Palmer, Quinn and Resendes demonstrate an intimate knowledge of Gray Coach and the interurban bus industry of Ontario. They write in

[15]This statement may be somewhat misleading, or arguably incorrect. Tupper and Doern, *supra*, note 7 at 12, note that natural resource industries, despite their importance to Canada, have only recently been the targets of nationalization. See also R.D. Cairns, "Exhaustible Resources and Public Firms in Canada" in R. Hirshhorn, ed., *Government Enterprise: Roles and Rationales* (1984) 379.

Borcherding's tradition but do not depend upon him: they present their own version of the theory, with a few additions. Their reasoning yields predictions that Gray Coach will: (a) avoid accounting losses; (b) cross-subsidize trips to and from Toronto; (c) be managed so as to maximize the combined size of Gray Coach and the Toronto Transit Commission (TTC), thus implying a lower-than-normal rate of profit; and (d) be managed so as to give managers an easy life, so that, for example, there will be too much capital and labour employed. Examinations of profitability data, productivity data, and regression results lead the authors to conclude that their predictions are borne out.

In the third sentence of this paper, we are told that "[t]he major purpose of this study is to provide some empirical confirmation for a positive theory of managerial behaviour in public enterprise".[16] This scientifically indefensible statement is likely just a poor choice of words. But it does remind one of Posner's charge against writers in this tradition (his own) that the sample of firms or industries chosen to test the effectiveness of theory is often not random;[17] *i.e.*, the firm, Gray Coach, may have been selected by the authors because it appeared to fit the theory, rather than as an independent test of the theory. One question remained at the back of this reviewer's mind throughout, one that was only partially answered in the text:[18] in view of the discussed importance of incentives to TTC management, why was Gray Coach studied rather than the TTC itself?

In the "confirmation for a positive theory", much is made of managerial incentives as a means of expanding the size of public enterprise; managers' rewards, being in terms of pay, power and prestige, are allegedly positively related to the combined size of the TTC and Gray Coach. The paper provides an algebraic demonstration of how transfer pricing techniques between the two can be used to effect this result.

In this demonstration, the authors do address some public policy issues, but not necessarily the ones related to the public firm. According to the presentation, Gray Coach is ineffectively regulated by the Ontario Highway Transit Board. The TTC receives an Ontario government subsidy which is a constant fraction of its costs. Metropolitan Toronto determines the fraction of costs that fares will meet and makes up the TTC deficit with its own subsidy. This subsidy, however, is reduced to an amount equal to (reported) Gray Coach profits. One may conclude that combined TTC-Gray Coach profits are constrained to zero by Metropolitan Toronto; but within this

[16]J. Palmer, J. Quinn & R. Resendes, "A Case Study of Public Enterprise: Gray Coach Lines Ltd" in Prichard, *supra*, note 1, 369 at 369.
[17]R. Posner, "Theories of Economic Regulation" (1974) 5 Bell. Econ. Mgmt Sci. 335.
[18]Palmer, Quinn & Resendes, *supra*, note 16 at 370.

constraint the Ontario government subsidy provides an incentive to increase the size of the TTC system, and the Metro Toronto subsidy provides an inducement to non-profit-maximizing behaviour. (Realistically, however, Gray Coach must show consistent, if small, accounting profits.) Given a zero-profit constraint and ineffective regulation of Gray Coach costs, the incentives provided by the subsidies would be such as to increase Gray Coach costs and to transfer Gray Coach profits to the TTC where they would be used for system expansion. Thus, the effects found by the authors from their productivity and profitability data (which are, they admit, weak) may not be related to the incentives faced by Gray Coach as a public firm, but instead to the subsidy schemes, coupled with the strong regulation of TTC fares and ineffective regulation of Gray Coach fares. Given a zero-profit constraint, incentives to private managers of this combination of policies might not be any different. This type of result was, in fact, anticipated by Trebilcock and Prichard.[19]

The evidence from the regression model presents yet deeper problems. The authors assume a single *linear* demand function for bus service in Ontario, relating trips to fares and other variables. From these results, they draw a number of conclusions. If, instead, one made the equally likely hypothesis that demand was *log-linear*, then in each transport market (origin-destination pair), the price elasticity of demand would be the same and constant. If there is a constant elasticity of demand across markets, and if costs rise by equal percentage amounts in all markets, then Ramsey pricing[20] (once achieved) would dictate equal percentage fare increases in all markets. Ironically, the observation that such fare increases are sought by Gray Coach at hearings is held out by the authors as an example of management's seeking a quiet life![21]

A still more fundamental objection can be made to the model than the observation that a simple, accepted variation of the authors' assumptions could alter their interpretation of an observed practice. The more likely economic hypothesis would be that, rather than there being a homogenous market for bus transportation throughout Ontario, there would be a separate market for each origin-destination pair — possibly even at each hour of the day in various seasons of the year. Each separate market would then have

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[19]*Supra*, note 1 at 27-8.

[20]When constraints on profitability are imposed on a firm producing several commodities, marginal cost pricing is no longer optimal. Instead, deviations from marginal cost pricing are required. Under certain conditions, optimality is achieved by "Ramsey Prices", where the deviation of price from marginal cost, when expressed as a proportion of marginal cost, is related to the elasticity of demand. See, *e.g.*, W.J. Baumol & D.F. Bradford, "Optimal Departures from Marginal Cost Pricing" (1970) 60 Amer. Econ. Rev. 265.

[21]Palmer, Quinn & Resendes, *supra*, note 16 at 413.

different demand parameters, and possibly different cost parameters (*e.g.*, for seasonal or geographic factors). Thus, estimations which point to a distinct difference in the pricing of trips to Toronto might not be evidence of inefficient pricing (Palmer *et al.*'s interpretation), but simply a characteristic of the particular market. Alternative speculations about characteristics of the Toronto market could be made which are consistent with the results but no less conjectural than the authors' speculations about the performance of public enterprise in general, or Gray Coach in particular.

In the multi-firm regressions that involve not just Gray Coach but four private Ontario bus companies, it is not true that the results support the conclusions drawn. It is hard to obtain any firm conclusions from this mixed bag of results. Gray Coach simply does not appear to be as anomalous as the authors claim, especially in the regressions involving fares per kilometre which the authors themselves prefer for institutional reasons which are discussed in the text.

Borcherding writes: "Recent work ... attempt [sic] to model the 'Iron Triangle' between legislature, bureaucracy, and interest group(s), but this richer context is longer in descriptive reality and/or theoretical curiosities than it is in testable implications which conform to a wide range of situations. In any case, almost none of this ... literature lends itself to summary statistics which address themselves to simple efficiency measurements."[22] Clearly, so-called political markets are characterized by interactions even more complex that those of the "iron triangle". One is confident that Borcherding, Palmer, Quinn and Resendes would be among the first to aver that, despite some very interesting insights, positive analyses are not a suitable basis for policy recommendations concerning the public firm.

In the third paper of the volume, Chandler examines the relationship of public ownership to political parties which are at the centre of the political process. She finds that two of the main explanations for state intervention in the Canadian economy — the economic environment and Canadian political culture — cannot explain variations through time and across provinces in the rate of creation of Crown corporations. A third explanation, pragmatism — that the Crown corporation is a response to particular situations rather than the working of a political philosophy — provides no general criterion for analysis, and hence lacks explanatory power. A major assumption running through the three explanations, according to Chandler, is that political institutions have little independent effect. Consequently, political forces have been disregarded in the study of public enterprise. In contrast, Chandler finds that partisanship and ideology are of considerable utility in explaining policy choice.

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[22] Borcherding, *supra*, note 11 at 144.

She assigns each provincial political party into one of two categories: left (New Democratic Party and *Parti québécois*) and non-left or right (Progessive Conservative, Liberal and Social Credit). Then she applies the Vining-Botterell data, finding that, since 1920, governments of the left have been more likely to utilize public ownership as an instrument of policy, and also have done so at a greater rate. Nevertheless, as observed by Vining and Botterell, the parties of the right have created large numbers of Crown corporations. Chandler explains this observation by classifying Crown corporations into three types. This classification, which is by ideological function rather than by ostensible pragmatic purpose, is as follows: (1) those which are *facilitative* or supportive of private sector economic initiatives, for example, infrastructural investments in transportation and communications; (2) those which are *nationalistic*, that is, supportive of interests within the province, in that the province from which investment capital comes is more important than the public-private distinction (but, apart from this, the market still dominates the economy); and (3) those which are *redistributive*, in a way that is explicitly contrary to the dictates of the market. Parties of the right, by Chandler's analysis, are inclined to utilize the first two types of Crown corporation (especially the first) but parties of the left are more inclined to utilize the third type; often, however, redistribution may involve a measure of "nationalism" (provincial regionalism), so that some overlap betwen left and right may occur in the second category.

Analysis on the basis of ideological predisposition stands in dictinct contrast to the analyses of the first two papers. Indeed, the authors of these papers show their discomfort with Chandler's challenge to the extent that they try to ignore it.[23] Ideology as a political force runs counter to the inexorable economic rationality that underpins the former analyses. (One is reminded of theological debates over predestination.) Chandler admits, for example, the possibilities of (a) a greater willingness on the part of some political parties to incur the high costs of monitoring Crown corporations, and (b) an inclination on the part of some individuals, because of their ideology, to become involved in movements favouring redistribution even if they do not stand to gain or lose personally from the redistribution.

However, despite the persuasiveness of the Chandler thesis, some questions remain. In her discussion of the nationalistic Crown corporation, Chandler takes a position which is consistent with positive economic analyses of nationalism. But the positive economist's dilemma regarding rationality again arises: "As with other nationalistic policy-making, although everyone is said to gain, the benefits are in fact less widely distributed than they might

[23]See, *e.g.*, Trebilcock & Prichard, *supra*, note 1 at 5 and 11 n. 37.

appear to be."[24] Nationalism is a persistently observed phenomenon, especially in successful economies. Persistently observed policies must be beneficial (at worst not harmful) to a broad majority, or else one must assume that the majority is persistently fooled. But this assumption runs counter to "rational expectations", one of the foundations of the economic analysis of politics.

A further issue relates to how one might categorize one of the more important interventions of recent years, the intervention in the oil industry. Gélinas observes that energy has been the field in which a second wave of nationalizations has taken place;[25] in most countries, these changes have taken place faster than in Canada. Lewin notes that, in several countries in Western Europe, the state has moved to dominate several strategic sectors of the economy, including energy[26] — Chandler would appear to identify this positive role for the state with the left. Yet Lewin persuasively argues (as does Pratt in the same volume,[27] but from a very different perspective) that the interventions in energy were pragmatic, rather than ideological. Did events catch up with left ideology in the 1970's? Or, were the interventions in the oil industry actually facilitating, the only action motivated by ideology being the Americans' refusal to establish a national oil company?

The major insight of public choice theory is that government may be used by interest groups to redistribute wealth to themselves. Chandler's insight is that redistribution may also be occasioned by ideology of the party in power, rather than solely by a quasi-economic reponse by politicians to forces in the "political market". But an economist would try to penetrate beyond the question of the genesis of the Crown corporation (the subject of this volume) to examine the genesis of ideology. The Chandler analysis takes the ideology as given. Economists, in the tradition of Harold Innis whom Borcherding cites, would try to seek the genesis of political ideologies in objective technological and economic factors. As in the oil industry, pragmatism and ideology may be horns on the same goat.

The paper by Vining and Botterell provides the vital data on which the Chandler paper is based. The authors note that the definition of Crown corporation varies substantially among provinces, and thus that their exercise is an art, rather than a science. However, this conclusion emphasizes

[24] A. Chandler, "The Politics of Public Enterprise" in Prichard, *supra*, note 1, 185 at 214.

[25] A. Gélinas, "Public Enterprise and Public Interest: Independance and Accountability — Summary of Discussions" in A. Gélinas, ed., *Public Enterprise and the Public Interest: Proceedings of an International Seminar* (1978) 14 at 16.

[26] A.Y. Lewin, "Public Enterprise, Purposes and Performance: A Survey of Western European Experience" in W. Stanbury & F. Thompson, eds, *Managing Public Enterprise* (1982).

[27] L. Pratt, "Oil and State Enterprises: Assessing Petro-Canada" in Stanbury & Thompson, *ibid.*

the importance of a theoretical framework to data-gathering exercises. For example, when Vining and Botterell were considering the problem of definition, the Trebilcock-Prichard framework of the substitutability of instruments would have suggested a government inclination to create subtle variations of the Crown corporation and to create hybrid instruments in order to obtain a desired mix of characteristics. Such a tendency would militate against strict classifications. One is also struck by the difference in conclusions regarding the importance of ideology that follow from Vining and Botterell's aggregated study and Chandler's disaggregated study. Because a well-defined theoretical framework for their data collection was not available to them, Vining and Botterell were unable to analyse the significance of some of the statistics gathered. For example, the study fails to account for the fact that the bulk of total Crown Corporation assets are controlled by only a few Crown corporations and the fact that some provinces have higher absolute amounts of Crown corporation assets or higher assets *per capita* than others.

These comments are hardly to be interpreted as unfavourable to the path-breaking work of Vining and Botterell. The merit of their work as a basis for future research is confirmed by the fact that it has already proved indispensible to the Chandler paper. The remarks are indicative of the rudimentary state of our understanding of public enterprise, in which theory and empirical work advance tentatively, each dependent on the other. In retrospect, for example, Vining and Botterell's highly useful Appendix II, in which Crown corporations are listed by functional category (industry classification), might have been even more useful if information such as that provided in Langford and Huffman's Table I had been included (for example, the mandate of each corporation).

Langford and Huffman also have the same difficulty finding a definition of a Crown corporation. Again, Trebilcock and Prichard's conclusion that the definition might vary from one policy context to another would have been a useful starting point. For example, the criticism of the Lambert Commission for not pushing "the development of its approach to the limit" might have been muted by an appreciation of the place of the Crown corporation among other instruments.[28] Langford and Huffman's compilations will, however, be of use to future research on the federal Crown corporations, which were not a focus of study in this volume.

In total, the collection does provide some new perspectives on Crown corporations in Canada. The discriminating reader will come away with a useful series of questions to ask policy-makers respecting, for example, the

[28] J.W. Langford & K.J. Huffman, "The Uncharted Universe of Federal Public Corporations" in Prichard, *supra*, note 1, 219 at 229.

current privatization debate. In considering the privatization of, say, Air Canada, one might ask what the nature of the gain from such a policy would be: whether it would result from the use of a different, now more effective policy instrument; whether efficiency would be served by the change in property rights resulting from a change in institution; whether a policy of deregulation of the Canadian air industry would be more or less efficient than privatization; or whether the main benefit of privatization would be ideological.

But the reader will have to be quite discriminating to reap these benefits at minimum cost. The book appears to have been published with undue haste. The editor has been too indulgent of verbosity. Inexactitude, which could have been easily eliminated by referees, is all too common. As a Quebecer, this reviewer would observe that Hydro-Québec, not Ontario Hydro, is the largest Crown corporation in Canada. As a Canadian, he would question a frequently used metaphor concerning "legislative and executive arms of government"; if the legislature is an *arm*, then the executive (as the name suggests) is better compared to a *hand*. Furthermore, the book is poorly copy edited.[29]

Because the basic concept of the Trebilcock-Prichard paper is uncomplicated, the reader may wish to skip to page seventy-five, where a pointed twenty-two page criticism of reform proposals begins. One may also wish to follow Borcherding's own advice and skip to Section V, where a sufficient distillation of his literature review can be found along with all of his conjectures about public sector supply. Chandler's paper is worth considering critically and in full. The data provided by Vining and Botterell and by Langford and Huffman, as well as their methodologies, will be of lasting value to researchers in the field. The Palmer-Quinn-Resendes paper adds little if anything to Borcherding's paper. Borins succeeds in presenting the lessons of history in a relatively crisp fashion. Treating reading as a instrument, the reader may find that this assessment will encourage the best calculus of instrument choice.

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[29]There are many errors in spelling and in English usage. In addition, all of the papers are inconsistent in their use of Canadian and American spellings; at least once (at page 303) this inconsistency occurs in the same sentence. One would expect, in view of the subject, place of publication, and sponsorship of the book, the use of Canadian spellings alone.

Jnles Deschênes, *Justice et pouvoir — A Passion for Justice.* Montréal : Éditions Wilson & Laflenr — Sorej, 1984. Pp. xiii, 300 [30 $]. Commenté par Yves Ouellette.*

Il faut une robuste assurance pour entreprendre de publier des discours ou des conférences. J'admets au départ entretenir de vieux préjugés à l'égard des recueils de morceaux choisis en général et des collages de conférences en particulier. Les causeries sont faites pour être écoutées et il m'est toujours apparu que ces oeuvres oratoires s'accommodent mal de la lecture, surtout s'il s'agit de discours de fin de dîner, présentés devant des associations de gens d'affaire ou même de personnes savantes.

Le juriste ne résiste pas facilement à l'habitude de tout classifier. On peut, à vrai dire, classer les conférenciers en trois catégories : le lecteur, l'improvisateur et l'acteur. Le lecteur a préparé son exposé minutieusement et se sentirait sans doute diminué s'il laissait croire que son oeuvre n'a pas été enfantée dans la douleur. Les yeux rivés sur son texte, dont tous les passages lui semblent voués à l'immortalité, il semble ignorer superbement son auditoire et s'il a la chance de n'être pas presbyte, ne s'en éloignera ou ne lèvera les yeux vers la salle que pour s'assurer que son public est toujours attentif et ravi. L'improvisateur ne s'embarasse pas des plans savamment construits en deux parties, avec transitions et sous-sections. Naturel et spontané, il sait bien où commencer sa conférence, butine ici et là, s'attarde au hasard sur quelques thèmes inattendus, mais son problème est de savoir comment conclure. L'acteur, lui, veut séduire ou captiver son auditoire, plutôt que lui démontrer qu'il maîtrise parfaitement son sujet. Il recourt tantôt à l'humour ou l'ironie, tantôt aux sentiments ou à la passion.

Le sommet de l'art est évidemment de combiner chez un même conférencier les meilleurs éléments des trois genres. Peu d'orateurs y parviennent. Ayant eu la chance d'entendre quelques-unes des conférences que vient de faire paraître le juge Deschênes, je peux témoigner qu'il est de ceux-là. Publier une conférence, c'est cependant prendre le risque d'exposer à tous les regards le corps sans voile d'une personne imparfaite. Lire une conférence, plutôt que de l'écouter, c'est toute la différence entre étudier la transcription de témoignage et voir un témoin déposer, avec ses hésitations et ses réactions. Mais on a bien publier les discours de Cicéron, les plaidoyers de Maurice Garçon et on publie bien des pièces du théâtre. L'ouvrage que vient de faire paraître le juge Deschênes m'oblige à me réconcilier avec ce genre de publications, que j'ai longtemps considérées, à tort ou à raison, comme servant plus les intérêts des auteurs que ceux des lecteurs.

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L'ouvrage se compose de dix-neuf causeries et communications datées de juillet 1979 à juin 1984, données au Canada et à l'étranger. L'auteur a choisi de les présenter dans leur ordre chronologique, plutôt que de tenter de les classer par thèmes ; compte tenu de l'éclectisme des sujets traités, ce choix apparaît fort justifié et offre l'avantage de permettre au lecteur de suivre le cheminement de sa pensée et de ses champs d'intérêts : l'indépendance de la magistrature, le rôle des avocats, les droits linguistiques et les rapports entre le pouvoir judiciaire et le pouvoir politique. Les textes sont publiés dans leur langue originale, les deux tiers en français. Ces dernières années, le juge Deschênes a tourné les yeux vers la scène internationale et un effort de classement de ses textes conduit à distinguer entre la dimension locale puis internationale de son oeuvre littéraire et de son action.

J'établirais, dans la catégorie de textes d'intérêt local, plusieurs sous-groupes :

A — Texte 1, « Justice et pouvoir », causerie donnée devant la Chambre de commerce française au Canada, à Montréal, le 23 janvier 1980 ; texte 8, « L'indépendance de la magistrature », allocution prononcée devant la Conférence inter-sections du Barreau du Québec à Hull, le 4 décembre 1981 ; texte 11, « Les pouvoirs politique et judiciaire devant la désobéissance civile », communication préparée pour l'Association du Barreau canadien dans le cadre de son assemblée annuelle à Toronto, le 2 septembre 1982.

B — Texte 2, « De la création au jugement dernier *ou* de la liberté créatrice du juge », allocution prononcée lors du dîner du centenaire de l'Ordre des comptables agréés du Québec, à Québec, le 19 novembre 1980 ; texte 4, « Codification : valeurs et langage », conférence de clôture du Colloque international de droit civil comparé prononcée à Montréal, le 3 octobre 1981.

C — Texte 9, « Quelques observations sur la langue des tribunaux », allocution prononcée devant les juges d'expression française des provinces de *common law*, à Val-David, le 2 avril 1982 ; texte 10, « Le bilinguisme devant les tribunaux : Le passé est-il garant de l'avenir ? », communication préparée pour l'Association du Barreau canadien, prononcée au Mont Ste-Marie, Québec, le 5 juin 1982 ; texte 12, « L'évolution historique du statut juridique des langues au Canada », conférence prononcée à l'ouverture du Colloque : « Théorie et réalité de l'égalité juridique des langues au Canada », à Québec, le 4 novembre 1982.

D — Texte 13, « Police et liberté en l'an 2000 », conférence prononcée à l'ouverture du 75e congrès de l'Association canadienne des chefs de police, à Montréal, le 26 août 1980.

E — Texte 3, « La passion de la justice », allocution prononcée lors de la cérémonie de prestation de serment par les nouveaux avocats, à Montréal, le 10 décembre 1980 ; texte 5, « Les dix commandements de l'avocat devant la Cour », allocution prononcée devant l'Association du Jeune Barreau de Montréal, à Montréal, le 4 novembre 1981 ; texte 7, « Étrangers dans leur propre pays : sur la mobilité des juges et des avocats au Canada », causerie prononcée devant l'Association des juristes d'expression française de l'Ontario, à Ottawa, le 21 novembre 1981 ; texte 6, « La piété filiale », allocution prononcée lors de la séance de prestation de serment par les nouveaux avocats, à Montréal, le 19 novembre 1981 ; texte 15, « French Advocacy in North America », causerie prononcée lors du congrès annuel de The Association of Trial Lawyers of America, à Montréal, le 22 juillet 1980 ; texte 17, « Strangers in Their Own Country », conférence prononcée devant The Victoria Bar Association, à Victoria, Colombie-Britannique, le 25 mars 1982.

Je classerais dans une seconde catégorie des textes plus récents qui révèlent que l'intérêt du juge Deschênes le porte maintenant sur la scène internationale :

— Texte 19, « International Law : Its Impact on the Average Canadian », conférence prononcée devant la section albertaine de l'Association du Barreau canadien, à Calgary, le 28 janvier 1984 ; texte 16, « Toward an Independent Judiciary », allocution prononcée lors de la session d'ouverture de la Conférence sur les normes minimales d'indépendance judiciaire, sous les auspices du Comité sur l'administration de la Justice de l'Association du Barreau international, à Jérusalem, le 2 mars 1982 ; texte 14, « London-Edinburgh and Ottawa-Québec : A Study in Parallels », conférence prononcée sous les auspices du Canadian Institute for Advanced Legal Studies, au Queen's College, Cambridge University, le 10 juillet 1979 ; texte 18, « The Challenge from the Executive to the Independence of the Judiciary », allocution présentée devant l'Assemblée générale de la section pratique générale de l'Association du Barreau international, à New-Delhi, le 18 octobre 1982.

La causerie, même une fois publiée, ne se prête pas toujours facilement à des analyses poussées du droit. Même si les textes du juge sont généralement documentés, compte tenu des sujets traités, et dépassent le style éditorial, ses propos sont largement anecdotiques. D'aucuns pourront donc reprocher à l'auteur de ne pas avoir produit une oeuvre doctrinale. Ce n'était certes pas sa prétention et ce qui importe après tout, c'est qu'il ait fait oeuvre utile. L'auteur ruisselle de talents : il a le sens de l'histoire et puise volontiers son inspiration dans les civilisations égyptiennes. Il a le verbe haut et la plume audacieuse.

Si au plan juridique tous les textes ne présentent pas un égal intérêt, j'ai, pour ma part, particulièrement apprécié le premier, « Justice et pouvoir », où l'auteur rappelle aux politiciens québécois leur obligation de respecter l'autorité des tribunaux. Après avoir relevé les propos regrettables de certains membres du gouvernement québécois, suite à des arrêts invalidant certaines dispositions de la Loi 101,[1] le juge écrit :

> Il faut réagir avec vigueur contre une situation propre au Québec où le dédain que le pouvoir civil affiche envers la justice menace d'une dégradation graduelle nos institutions les plus précieuses et, à travers elles, la liberté de chaque citoyen.[2]

La critique est sévère, mais juste. Ce gouvernement qui, aux olympiades de l'*ultra vires*, remporte l'or, l'argent et le bronze se devait d'être rappelé à l'ordre. Il se pourrait bien que les paroles du juge ne soient pas tombées dans les oreilles de sourds. Alors qu'en toute fin de 1984, la Cour supérieure déclarait inopérantes, comme incompatibles avec la *Charte des droits et libertés de la personne* du Québec,[3] certaines dispositions de la Loi 101 sur la langue de l'affichage,[4] le porte-parole du gouvernement exprima, cette fois, ses réactions avec dignité et respect pour le pouvoir judiciaire.

Dans deux autres textes, « La liberté créatrice du juge » et « Codification : valeurs et langage », l'auteur souligne la contribution et l'action vivifiantes des tribunaux dans l'évolution du droit et des valeurs sociales. Cela méritait aussi d'être dit. Face à l'immobilisme du législateur, à la dégradation du processus législatif et à la multiplication des « coquilles législatives », le citoyen doit pouvoir compter sur la protection d'une magistrature bénéficiant d'une longue tradition d'excellence et d'indépendance, et capable, au besoin, d'une certaine forme de *judicial statesmanship*. Il est vrai que le premier architecte de la *Charte canadienne des droits et libertés*[5] est probablement la Cour suprême du Canada, par ses grands arrêts des années cinquante : *Saumur*,[6] *Boucher*,[7] *l'Alliance des professeurs de Montréal*,[8] *Birks*,[9]

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[1] *Charte de la langue française*, L.R.Q., c. C-11.

[2] J. Deschênes, « Justice et pouvoir » dans J. Deschênes, *Justice et pouvoir — A Passion for Justice* (1984) 1 aux pp. 11-2.

[3] *Charte des droits et libertés de la personne*, L.R.Q., c. C-12.

[4] *Ford* c. *P.G. Québec* (28 décembre 1984), Montréal 500-05-002008-843 (C.S.).

[5] *Charte canadienne des droits et libertés*, Partie I de l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c. 11.

[6] *Saumur* c. *City of Quebec* (1953), [1953] 2 S.C.R. 299, [1953] 4 D.L.R. 641, 106 C.C.C. 289.

[7] *Boucher* c. *The King* (1950), [1951] S.C.R. 265, [1950] 1 D.L.R. 657, 96 C.C.C. 48.

[8] *L'Alliance des professeurs catholiques de Montréal* c. *Labour Relations Board of Quebec* (1953), [1953] 2 S.C.R. 140, [1953] 4 D.L.R. 161.

[9] *Birks & Sons* c. *City of Montreal* (1955), [1955] S.C.R. 799, [1955] 5 D.L.R. 321.

Chaput,[10] *Switzman*,[11] *Roncarelli*.[12] On reconnaîtra, par ailleurs, qu'au Québec, l'interprétation littérale des textes et le syndrome du code complet conservent encore une faveur certaine et que de nos jours, comme dans les années cinquante, « l'action civilisatrice des tribunaux » fait encore, et plus souvent qu'à son tour, un coûteux détour par Ottawa.

En outre, dans la tradition canadienne, le rôle créateur du juge, bien que réel et significatif, est tout de même limité. L'intérêt général est déterminé par le législateur et le juge n'a pas à apporter des modifications à la loi, au nom d'une conception de l'équité qui lui est personnelle. La loi exprime le droit et la transgression de la loi risque d'amener l'arbitraire. Cependant, le vacuum laissé par la loi est souvent important et permet alors au juge, dans son rôle constitutionnel d'interprète de la loi, de faire intervenir des considérations d'ordre public ou de *public policy* et d'équilibrer des valeurs sociales parfois contradictoires. Somme toute, la contribution ou « l'action civilisatrice » des juges doit être évaluée comme une composante parmi d'autres, d'un vaste ensemble judiciaire, comme l'a écrit Jaffe :

> The ultimate question should be not what the English judges have made of the law of torts but what English lawmakers as a whole — Parliament and the judges — have made of the law of torts.[13]

Les textes les plus récents du juge témoignent d'un intérêt croissant pour les questions judiciaires de dimensions nationale et internationale. L'homme semble se sentir à l'étroit au Québec et ces textes rendent compte notamment des importants travaux sur l'indépendance de la magistrature, qu'il a menés pour le compte du Conseil canadien de la magistrature.[14] Le juge y défend, avec ferveur et opiniâtreté, un principe qui lui est cher, et c'était sans doute pour lui une façon d'afficher concrètement cette indépendance que de publier les causeries prononcées à Cambridge et à New-Delhi qui, même vues du Québec, peuvent apparaître insolites.

Il est toujours risqué pour un juge de faire des déclarations extrajudiciaires ; s'il traite d'une question en termes juridiques mais dans l'abstrait, il risque de se faire citer par un plaideur, dans une affaire qu'il doit juger ; s'il choisit de traiter d'une question aussi difficile que l'indépendance judiciaire ou la réforme constitutionnelle en termes non juridiques, on suggérera qu'il prend des licences avec l'obligation de réserve, concept dont le

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[10] *Chaput* c. *Romain* (1955), [1955] S.C.R. 834, 1 D.L.R. (2d) 241, 114 C.C.C. 170.
[11] *Switzman* c. *Elbling*, (1957), [1957] S.C.R. 285, 7 D.L.R. (2d) 337, 117 C.C.C. 129.
[12] *Roncarelli* c. *Duplessis* (1959), [1959] S.C.R. 121, 16 D.L.R. (2d) 689.
[13] L.L. Jaffe, *English and American Judges as Lawmakers* (1969) à la p. 5.
[14] J. Deschênes, *Maîtres chez eux : Une étude sur l'administration judiciaire autonome des Tribunaux* (1981).

contour est bien imprécis. Aussi les canadiens se sont habitués à voir leurs juges monter sur le Banc comme sur le Mont Olympe et, selon le mot de Lamartine, se situer ni à gauche, ni à droite, mais au plafond.

Le juge Deschênes s'est acquis non seulement au Québec mais aussi au Canada, dans l'opinion comme sur la scène judiciaire, une stature et une notoriété qui lui permettent sans doute d'avoir son franc parler et, dans un langage toujours correct, de donner des leçons de droit ou de civisme aussi bien aux avocats qu'aux policiers et aux politiciens. En sol québécois, où tout finit par un procès, un grief ou un projet de loi, le droit et la politique, séparés en théorie, se rencontrent et fraternisent volontiers en pratique, et l'on ne se scandalise pas qu'un juge, fusse-t-il alors juge en chef de la Cour supérieure, se porte publiquement et courageusement à la défense de l'autorité et de l'indépendance de la magistrature et dénonce le peu d'égard de certains politiciens pour la règle de droit. Devant le silence des clercs, il est heureux que quelqu'un ait haussé la voix. En territoire étranger cependant, ce genre de déclaration peut être reçu différemment.

Conférencier recherché et auteur prolifique, le juge Deschênes, il faut lui en savoir gré, a eu l'énergie et la persévérance de s'extirper du terrible quotidien et d'avoir livré au public des textes sobres et courageux qui constituent, pour les gens de loi et les politiciens, un véritable examen de conscience. Ce dernier ouvrage du juge Deschênes devrait être offert à tous les nouveaux avocats. Sur les rayons de ma bibliothèque, il est rangé à proximité des oeuvres de Lord Denning.

D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. Toronto: Carswell, 1984. Pp. cxvi, 1240 [$95.00]. Reviewed by David M. Paciocco.*

It is fitting that a favourable review of Waters, *Law of Trusts in Canada*, Second Edition[1] should be published in the *McGill Law Journal*. McGill was the birthplace of the first edition of this remarkable book.[2] To read the book is to acquire unbridled respect for its author. The extent of his understanding and the scope of his work are daunting, even to a trusts teacher. Yet, if there is a problem with the work, it lies in that very fact; Waters, *Law of Trusts in Canada* is an intimidating book. As a result, its use, but not its usefulness, will be diminished.

I want to be very clear here. The above observation is less an indictment of the author than it is a comment on the nature of the practice and study of law. Though time is scarce for most of us, it is a necessary ingredient in the acquisition of a sophisticated knowledge of a subject such as trusts. The book does not provide quick, easy answers, but this is not a criticism of Waters. He is to be applauded for resisting the temptation. In an area like trusts law, quick, easy answers can be, and most often are, misleading. Waters does not mislead.[3] However, in his effort to be comprehensive and

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[1]D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (1984).

[2]The idea of this book "was conceived ... at the University of Saskatchewan". The book was written at McGill. D.W.M. Waters, *Law of Trusts in Canada*, 1st ed. (1974) at v-vi.

[3]In his preface, Waters states that he has endeavoured to provide "a reliable work of reference for the courts and practitioners". Waters, *supra*, note 1 at vii. I think that he has succeeded. I do not always agree with his analysis, but that is as likely attributable to my developing comprehension of the subject matter as to problems with his analysis. The book rarely overstates the law, and its propositions are generally well supported. I did notice, though, that Waters may have overstated the holdings in the cases cited in footnote 10 at page 205. Waters extracts, from these cases, the proposition that before statutory formalities requirements can be avoided by resort to the doctrine that they cannot be used to perpetrate a fraud, "it must be established that the transferee knew or had notice at the time of the conveyance that he was to hold for another". The first two cases cited turn on the fact that there was no indication by the *settlor* that a trust was intended until after the transfer, a very different issue. There is *obiter* support for his proposition in the last case cited in that footnote. Yet, the proposition seems inconsistent with *dicta* in *Rochefoucauld* v. *Boustead* (1896), [1897] 1 Ch. 196 (C.A.) and in *Bannister* v. *Bannister* (1948), [1948] 2 All E.R. 133 (C.A.). At page 1070, Waters notes that variation of trusts legislation which employs the language "who by reason of infancy or other incapacity is incapable of assenting" could be interpreted to include "persons who, though not mentally imcompetent, are of weak intellect or senile". No authority is advanced to support that proposition, and it seems quite untenable.

Another example of potential unreliability occurs at page 359 where Waters refers to *Rochefoucauld* v. *Boustead*, *ibid.*, as a constructive trust case. In that case, Lindley L.J. said at page 208: "The trust which the plaintiff has established is clearly an express trust... ." While Lindley L.J. arguably so held to avoid a limitations statute, I think Waters should have addressed this point. Again at page 130, Waters states the broad proposition that "though Equity accurate, he has compromised his goal of providing "a readable book for students in all situations".[4] The text is well written, and sentence by sentence, it is easy enough to read.[5] But Waters, *Law of Trusts in Canada* is still not a book that can be "read"; it is a treatise that must be "studied".

Some of the book's difficulty can be attributed to the subject matter. Waters is the bearer of bad news; the law of trusts is as conceptual as the law gets, and building bridges between the cases is often an exercise in trying to make sense of questionable judicial reasoning. In part, however, responsibility for the intimidating nature of the work must lie with the author. He has asked his readers to gorge themselves on trust law.

In the preface to his first edition, Waters admitted that his "first intention was to write something of more modest size".[6] He "soon found" that his object of ensuring "that Canadian material saw the light of day"[7] made a more modest book impossible. Yet the imposing stature of the book cannot be explained on that basis alone. In certain places, the book appears to be a teacher's manual, complete with examples that seem to have been selected with instruction in mind.[8] In other places, it appears to have been written for the neophyte trust student. It explains the history of the trust[9] and includes a sizeable introductory section that points to the differences between the trust and other related legal and equitable concepts.[10] Sometimes the book seems to have been written with the specialist practictioner in

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may wish to follow the basic rule that there is no trust until the property is vested in the trustees, it has been inclined to ignore the rule and deem the trust to have come into existence, when it would be inequitable to deny to the would-be donor the sufficiency of his incomplete transfer on trust". I doubt this proposition. The "particular" case cited in support of it, *Re Gardner* (1923), [1923] 2 Ch. 230, is subject to trenchant criticism.

It is perhaps unfair to suggest that there are other cases where statements are not convincingly supported or where errors have arguably been made without pointing to them specifically, but other aspects of the book gave me some trouble. The point is, however, that this author has given us 1200 pages of material, and large sections can be read before there is any room to argue with what he says. The book is as reliable as a work of this magnitude can be.

[4]Waters, *supra*, note 1 at vii.

[5]Many of the sections have been rewritten and, where this has been done, comprehensibility has been improved.

[6]Waters, *supra*, note 2 at v.

[7]*Ibid.*

[8]For examples, see *ibid.* at 3-4, the first two pages of the Introduction and, at 301-4, the discussion of "The Resulting Trust Situations".

[9]This historical discussion is not confined to the introduction, but can be found interspersed with the contemporary law throughout the book. This might irritate the practitioner.

[10]Waters, *supra*, note 1 at 31-87. From a pedagogical point of view, I prefer to see this material blended into the course. I have found it to be an exercise in diminishing returns to try to distinguish a trust from other equitable or legal concepts when students have only a passing familiarity with the trust. Given that this book is intended for students and practitioners alike, it was sensible for Waters to segregate this material as he did.

mind.[11] Elsewhere, it seems to have been dedicated to providing a general survey for the lawyer who does not require a detailed knowledge of the subject matter.[12] It also serves as a bibliography of other literature in the area.[13] Often, the book acts as an annotation service, canvassing in great detail those cases which could justifiably have been mentioned in passing, relegated to the footnotes, or left out completely.[14] At times, it serves as a law reform exercise, offering insightful criticisms and helpful suggestions.[15] And, at times, it takes on the character of a scholarly essay, critically pursuing a specific theme in detail.[16]

While such remarkable diversity hardly seems to be a fair basis for criticism, this diversity does detract from the accessibility of the book's contents.[17] The *Law of Trusts in Canada*, in each of its editions, is, to use Waters' own description, a "treatise". I can recall perusing the first edition as a second year law student. It struck me unfavourably. The book looked like hard work then and it still looks like hard work. I have heard practitioners make the same point. I can only berate myself now for believing that an understanding of the law could be found in the C.E.D.'s, and for

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[11]For example, I found the discussion of the "referential trust" to be beyond my own knowledge and understanding. Waters, *supra*, note 1 at 227-8.

[12]The general description of the taxation of trusts would not generally assist a specialist practitioner, but it does provide an excellent base for alerting the general practitioner to the tax implications of a trust. *Ibid.*, ch. 13.

[13]The footnotes include generous references to related works. Indeed, Waters' survey of the literature includes a relatively detailed explanation of the change made by the editors of *Underhill on Trusts and Trustees* since Waters' first edition regarding the classification of trusts. *Ibid.* at 19-20.

[14]An example is provided by Waters' discussion of "The Resulting Trust, 2(2)(b)(i) Rebutting the presumption — illegality and fraud", where certain lower court and appellate level cases, which have since been dwarfed in significance by more recent developments, are explained in some detail. *Ibid.* at 319-31.

[15]Waters offers many suggestions for reform. The positions he takes are generally convincing, although I disagree with some of them. For example, I disagree that sections 9 and 10 of the *Statute of Frauds*, R.S.O. 1980, c. 481, should be repealed. While section 9 is often avoided by the courts where it comes down to a contest between a beneficiary and the trustee of an informal trust (which is supposed to be utterly void and of no effect), the writing requirement probably lessens the number of cases where a "trustee" is in a position to deny a trust.

[16]The work demonstrates frequently that the trust concept is malleable and can accomodate the needs of a modern society, but strict adherence to its original form unduly diminishes that flexibility.

[17]The *Statute of Frauds* section provides a good example. Waters, *supra*, note 1 at 188-204. It takes over twenty pages to set out what the various provincial statutes require. By writing a book on Canadian trust law, Waters, of necessity, dedicates passages to one province that are of little interest to the typical lawyer or student in another province. The discussions of the varieties of trust legislation and the trustee acts provide further examples. It is all in there. At times, weeding through it can be a task.

expecting Waters to provide me with short, snappy conclusions. An understanding of the law cannot be conveyed so economically, particularly in a subject area like trusts where "bottom-lining" is a euphemism for deception. Waters does come as close as an author reasonably can to providing "one-stop shopping",[18] while retaining the rigour required of such an analysis. The keruel of criticism that remains after the foregoing comments, then, is that many practitioners and students will not do the work that is often required to tap the wealth of knowledge that is contained in the book.

The Second Edition: What Does It Add to the First?

In his preface to the second edition, Waters explains why a new edition of his book was necessary. He cites two general reasons: "the abundance of new publications" dealing with the law of wills, trusts and estate planning, and the occurrence of major changes in the relevant law.[19] In his second edition, Waters takes the opportunity to incorporate references to recent legal publications. In addition, he assesses the changes in the law of constructive trusts, the taxation of trusts, and the matrimonial property legislation along with its impact on the constructive and resulting trusts. He also describes further business and commercial uses of the trust, changes in the law as it pertains to trustees' duties and "other [changes] of a less obvious kind".[20]

When I first read the opening line in Waters' preface ("In the ten years since the first edition of this work much has happened"), I must confess to having experienced a certain unease. As a trust teacher accustomed to beginning my course with the "constants" of trust law (the three certainties, constitution and formalities) where little seems to be happening, and where the typical case for instruction was decided in the context of a succession dispute occuring in England at some time around Canadian confederation,

[18]Frequently, where there is not space to develop a point, Waters refers his reader to other works. It is hard to criticize an author who has given us 1200 pages of text on the ground that he left something out. I would have liked, however, to have seen illustrations of how the Americans use their constructive trust concept. This, I believe, would have added to the discussion. More importantly, I would have expected more on the application of the "is or is not" test for discretionary trusts. The confused state of that test is only partially revealed by Canadian authority. This is one area where Waters' priority in using Canadian material may have unduly diminished the importance of a detailed analysis of the English case law.

[19]Waters takes the opportunity to tighten up some of the textual portions in the first edition which did not require updating. He also improves the cross-referencing to other parts of the book by adding footnotes. Waters, or his editors, also makes minor changes in the footnote style and has italicized the use of foreign legal terms appearing in the text. Neither he nor his editors take the opportunity, as is so often the case with second editions, to inject printing errors into the work. I have read large tracts of the book and have found almost no proofreading errors.

[20]Waters, *supra*, note 1 at vii.

I came to think of the law in my subject as static. Could it be that I had missed a great number of new developments? Mercifully not. My problem was one of perspective. Recent changes had slowly been absorbed into my course without giving me the impression that much of significance was happening.[21] I taught each of these individual developments but, with the exception of constructive trusts, I continued to characterize my subject as one of gift and succession, a course where little old ladies give consols to their husbands' godsons and where marriage settlements cause internecine warfare among aristocratic families. In the second edition, Waters has succeeded not only in incorporating the changes into his book, but also in accomplishing a much more difficult task; he has painted the larger picture, showing how these sporadic developments have re-characterized the law of trusts as a vital and resilient body of doctrine that must be carefully fitted into the contemporary setting. This has affected the way I teach the course and should change the way that practitioners perceive the trust. In short, there is plenty of new material to justify the additional one hundred-sixty odd pages that make up the difference in length between the first and second editions.[22]

The Constructive Trusts Section

I wish to single out Waters' new chapter on constructive trusts for a relatively detailed discussion. The emerging shift in the basis of the constructive trust from an "institutional model"[23] to a "remedial model"[24] is

[21]In part, my surprise at discovering "new" developments can be attributed to the fact that I did not study trust law until 1978, four years after Waters' first edition was published. Much that was "new" to trust law was included in my initial introduction to the subject.

[22]I should emphasize that a 160 page supplement would not have done the job of a second edition. Waters has rewritten some portions of the text and has been able to drop others. The succession and gift tax section has been shortened, a change made possible by the repeal of legislation. Most importantly, Waters has interpreted the new developments in a thematic way that should provide guidance in anticipating how courts will respond, and in predicting further developments.

[23]Under the "institutional model", the constructive trust is conceptualized according to analogies drawn to the express trust. To use Waters' language, courts using the "institutional model" "fell into describing what the position of a person [the constructive trustee] is *like*". Certain situations could be said to be "like the express trust; there was a trustee and a beneficiary, there was trust property and duties with regard to the property which fell upon the trustee". Waters, *supra*, note 1 at 380. In other words, certain classes of cases came to be treated as "constructive trust" situations because they were sufficiently analogous to the express trust to yield to that description.

[24]Under the "remedial model", the constructive trust has the *raison d'être* of preventing unjust enrichment and is not confined to rigid classes of cases. The search for analogies to the express trust is abandoned and the constructive trust is liberated to remedy unjust enrichment.

trust law's most significant development since 1974. Unfortunately, Waters has not treated this major development sufficiently in his second edition. In general, the discussion is clear and helpful, and his elaborate treatment of the traditional English constructive trust is very well conceived. However, his treatment of *Pettkus* v. *Becker*[25] causes me some difficulty. I am concerned that Waters' discussion of this case and of its long-term significance pays too little attention to the impact that the remedial model constructive trust could have upon the creditors, secured and unsecured, of the nominal owner.

To my mind, the only merit of the institutional model was that it proceeded cautiously. It provided the plaintiff with a proprietary right in specific property only where that property could broadly be said to have come to the constructive trustee as a consequence of his relationship with the constructive trust beneficiary. The advantage of this cautious growth was that it increased the odds that a court would impose a constructive trust only where it was desirable to give a plaintiff priority over third parties with respect to trust property; if a general remedial constructive trust develops, the test for its use must take account of the merit in giving the plaintiff such a priority. I see this function as having been played by Mr Justice Dickson's reference in *Pettkus* v. *Becker* to a "causal connection" between the plaintiff and the property.[26] Where it can be said that the constructive trustee probably would not have gained ownership without the involvement of the plaintiff, third party creditors of the constructive trustee who are defeated in favour of that plaintiff have less cause to complain.[27] Yet Waters treats the test for the imposition of the remedial constructive trust as having only three aspects: "there must be an unjust enrichment, a corresponding deprivation and an 'absence of any juristic reason — such as contract or disposition of law — for the enrichment'".[28] Waters then describes the references in the judgment in *Pettkus* v. *Becker* to a "causal connection" between the plaintiff and the property, as Dickson J.'s translation of these three elements.[29] So understood the test loses its sensitivity to the rights of third parties.

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[25](1980), [1980] 2 S.C.R. 834, 117 D.L.R. (3d) 257 [hereinafter cited to S.C.R.].

[26]*Ibid.* at 852.

[27]They are not losing an exigible asset because of the declaration. The assets would not have been available to them in the first place had it not been for the plaintiff, who therefore has higher equities over the property than does the defendant. Still, the defendant's creditors may have been induced to lend money because the asset was in the defendant's name.

[28]Waters, *supra*, note 1 at 385. Waters seems to adopt the criteria as articulated by Mr Justice Dickson.

[29]*Ibid.* at 386. According to this interpretation of the case, a court faced with facts like those in *Deglman* v. *Guaranty Trust Co. and Constantineau* (1954), [1954] S.C.R. 725, [1954] 3 D.L.R. 785 would seem to have jurisdietion to impose a constructive trust and to give the plaintiff priority over the estate's claimants.

Waters does alert his readers (including judges) of the need to bear the interests of third parties in mind when considering the remedial constructive trust.[30] However, he speaks of this needed sensitivity to the interests of third parties only after discussing the case law, and he refers to this concern as a task that "await[s] the courts".[31] I think that Dickson J. was trying to account for the needs of third parties in the test which he applied in *Pettkus* v. *Becker* by insisting on a "causal connection". Moreover, Waters does not take the opportunity to elaborate upon the solutions that he offers; namely, exhausting personal remedies before resorting to the constructive trust where third parties might be affected, and providing the court with discretion to determine whether a particular constructive trust should carry with it the right to trace.[32] Finally, I feel some reluctance in accepting Waters' conclusion that the "constructive trust is now clearly recognized as a remedy, the basis of which is the prevention of unjust enrichment".[33] While this is a logical conclusion from much of what Dickson J. said, his Lordship also noted that the third requirement of the test was met in the case because "one person in a relationship *tantamount to spousal* prejudice[d] herself in the reasonable expectation of receiving an interest in property",[34] a holding that arguably takes on added significance in that it resembles an "institutional model" analysis, drawing support by analogy. Furthermore, before setting out his three part test, Mr Justice Dickson specifically asked: "How then does one approach the question of unjust enrichment in matrimonial causes?"[35] Because of this, I do not think that we can unequivocally rule

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[30]Waters, *supra*, note 1 at 389-95.

[31]*Ibid.* at 394.

[32] I have some problems with these solutions as described by Waters. First of all, he notes that the *Restatement of Restitution* provides for a priority of remedies, suggesting that the *in personam* remedies (such as for money had and received and *quantum meruit*) should be brought first. "Only when these actions are inadequate, usually when the defendant has insufficient or no funds with which to meet his liability, are American courts willing to entertain the equitable propriety remedies, the constructive trust and the equitable lien." Waters, *supra*, note 1 at 391. This is precisely where third parties would be injured by the use of the remedy. Whether Waters endorses this approach is unclear. He says later that "[t]he discretion of the court should always be exercised in favour of localising the dispute and applying a remedy which, while solving that problem, does not create ripples which carry to the edge of the pond." Waters, *supra*, note 1 at 395. What then is his solution? Does he advocate the use of the constructive trust only where third parties are not subjected to the proprietary rights of the plaintiff, or only where they are?

I have difficulty with his second solution as well. Is there value in using the concept of a constructive trust if the beneficiary does not receive a right to possess the specific trust property? Why not just leave him to his personal action?

I have read too much of Waters' work to be confident that I have identified weaknesses in his understanding of the implications of his suggestions. At the very least though, these unanswered questions constitute problems of communication and elaboration in this section of the work.

[33]*Ibid.* at 388.

[34]*Pettkus* v. *Becker*, *supra*, note 25 at 849 [emphasis added].

[35]*Ibid.* at 848.

out the possibility that spousal and quasi-spousal constructive trust cases are *sui generis.*[36]

It would not be unusual to have a vital constructive trust remedy for dealing with unjust enrichment in the spousal context alone. In much the same way, we already have a particularly vital constructive trust mechanism to prevent fiduciaries from taking advantage of their privileged positions. Indeed, proprietary rights arising out of "spousal relationships" have, in recent times, been treated as *sui generis* both by statute and in the case law.[37] Consequently, it is not surprising that the notion of "unjust enrichment" came to be discussed in "spousal property" cases and that the constructive trust was recognized as remedial in this area. The courts had been using the remedial constructive trust analysis for some time but had been reluctant to admit it. Mr Justice Dickson simply ended the charade. This does not necessarily mean that the remedial constructive trust has become a generally-available legal instrument. I believe that, subject to carefully structured protection for third parties, it should be accepted by the courts. Yet, there is always the danger of inaccuracy in generalizing from what may well be *sui generis* developments. As I have noted, Waters is careful to maintain a balanced approach throughout the book; however he may have failed to do so in this instance by being definitive in his reading of *Pettkus* v. *Becker.*

Continuing Change and Development

The law of trusts did not stand still after Waters completed his initial manuscript for the second edition. Accordingly, by inserting an Addendum, he has conscientiously accounted for the changes and developments until the time when the book finally went to press. Even since then, significant

[36] I am not unmindful that His Lordship also said, "[t]he equitable principle on which the remedy of constructive trust rests is broad and general; its purpose is to prevent unjust enrichment in whatever circumstances it occurs." *Ibid.* at 850-1. That can certainly be, and probably should be, interpreted to make the remedial constructive trust generally available. On the other hand, a "principle" is not a rule; the restitutionary principle of unjust enrichment may support other rights such as *quantum meruit.* It can follow from the passage and from the others contained in the judgement that the remedy of the constructive trust is appropriate only where the relationship is spousal or quasi-spousal or in other established categories of "constructive trust".

[37] For example, the initial "spousal property" cases used a resulting trust analysis to concede a spousal interest in property that did not originate in the plaintiff spouse, an unusual application of the resulting trust.

events have occurred, the most noteworthy being the decision of the Supreme Court of Canada in *Guerin* v. *The Queen*[38] which all but makes Waters' section on "Trust and Government Obligation" irrelevant.[39]

Conclusions

I want to close this review as I opened it. This is a remarkable book. Waters has chronicled the development and application of the trust vehicle in Canada, a task that needed doing. Moreover, he has done so with the aid of a masterful understanding of the nature and operation of the trust, and with the kind of general perspective and insight that few can acquire, even after years of study. Finally, he has demonstrated a continuing commitment to the education of "students in all situations" about the law of trusts in Canada. It is only hoped that lawyers and students who encounter trust problems will choose to tap what can only be described as a phenomenal wealth of reliable information.

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[38](1984), [1984] 2 R.C.S. 335, 13 D.L.R. (4th) 321, 55 N.R. 161.

[39]In addition, the Supreme Court of Canada decided *Maroukis* v. *Maroukis* (1984), 54 N.R. 268. Although it does not raise trust issues directly, the Court's holding that a judge has no power under the *Family Law Reform Act*, R.S.O. 1980, c. 252, s. 4 to declare a spousal property interest retroactively, raises the question of whether a constructive trust analysis could enable a judge to hold that a spouse's equitable property rights under a constructive trust arise at the time of an unjust enrichment, and thereby take precedence over the interests of the constructive trustee's judgement creditors who obtain judgement after the unjust enrichment but before the beneficiary sues.

Katherine Connell-Thonez & Bartha Maria Knoppers, *Contemporary Trends in Family Law : A National Perspective.* Toronto : Carswell, 1984. Pp. vi, 327 [45 $]. Commenté par Jean Pineau.*

En mars 1983, la section « Droit de la famille » de l'Association canadienne des professeurs de droit tenait, à Montebello, une assemblée au cours de laquelle plusieurs conférences étaient données. Mmes Bartha M. Knoppers et Katherine Connell-Thouez ont regroupé ces différents textes et les présentent en un volume qui vient d'être publié sous le titre *Contemporary Trends in Family Law : A National Perspective.*

L'introduction rédigée par les « éditeurs » (dans le sens anglo-américain du terme) reflète le contenu de l'ouvrage : onze communications découpées en trois « thèmes » respectivement intitulés, dans l'ordre :

1 — L'égalité conjugale et les droits patrimoniaux

2 — La reconnaissance des droits des enfants

3 — Le rôle de l'État dans la reconnaissance des droits des membres de la famille.

Sous le premier thème, nous trouvons, tout d'abord, le texte de M. Germain Brière, intitulé « Le Régime matrimonial primaire dans le nouveau Code civil du Québec ». L'auteur analyse les dispositions du nouveau Code civil du Québec, que certains appellent malencontreusement « régime matrimonial primaire », qui ne sont que l'expression des effets impératifs et immédiats du mariage. Dans le cadre des droits et devoirs des époux, sont envisagés le principe d'égalité des époux et les conséquences qui en découlent, tant sur le plan patrimonial (contribution aux charges du mariage, obligation aux dettes « ménagères », par exemple) qu'extrapatrimonial (nom des époux, direction morale de la famille). L'auteur s'attaque ensuite aux « quatorze articles qui, dans le nouveau Code civil, tendent à assurer la protection de la résidence familiale »,[1] qu'il s'agisse des meubles affectés à l'usage du ménage ou encore du logement familial (dont l'un des époux est le locateur seul titulaire du bail, ou bien le propriétaire), articles qui viennent considérablement perturber les règles gouvernant les régimes matrimoniaux. On sait, en effet, que le législateur québécois a banni du nouveau Code civil les régimes conventionnels de communauté qu'il considère anachroniques, mais a imposé à tous les Québécois qui choisissent de se marier sous des régimes de type séparatiste, des mesures d'ordre public qui sont de type incontestablement communautaire, ce qui permet de s'interroger sur la cohérence de la politique adoptée.

Le second texte, dont l'auteur est Mme Connell-Thouez, est intitulé

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[1]G. Brière, « Le Régime matrimonial primaire dans le nouveau Code civil du Québec » dans K. Connell-Thouez & B.M. Knoppers, éd., *Contemporary Trends in Family Law : A National Perspective* (1984) 11 à la p. 19.

« Matrimonial Property Regimes in Quebec Before and After the Reform of 1981 : Adapting Traditional Institutions to Modern Reality ». À la lecture du titre, on peut être amené à penser que cette étude porte sur les régimes matrimoniaux et sur l'impact que peuvent avoir sur eux toutes les dispositions d'ordre public, communes à tous les régimes. Or, après un bref historique sur les régimes matrimoniaux en droit québécois, l'auteur traite de la prestation compensatoire, en tentant tout d'abord d'en rechercher les origines qu'elle semble trouver dans l'idée d'une attribution préférentielle du logement familial, qui aurait notamment pour but de préserver l'environnement des enfants, et d'une « reallocation of family resources ».[2] L'auteur fait alors appel à certaines législations étrangères, méthode comparative d'un intérêt incontestable, qui cependant s'avère ici dangereuse, dans la mesure où chacun des régimes juridiques invoqués n'est pas clairement situé dans son contexte particulier : aussi n'est-il pas certain que le lecteur réussisse à s'y retrouver sans se tromper. L'exposé ne nous paraît pas démontrer clairement ce qu'est la prestation compensatoire : la règle de droit essentielle est formulée dans l'article 559 C.c.Q. et non point dans l'article 459 C.c.Q. qui, en définitive, n'offre qu'une modalité d'exécution des articles 439, 533, 559 C.c.Q. et 735.1 C.c.B.-C. ; il ne s'agit pas ici de « protéger » le logement familial. On a également l'impression que, dans les régimes de séparation de biens, le juge pourrait : « reallocate property between spouses in spite of their matrimonial agreement when the facts show that one spouse has enriched the patrimony of the other »,[3] alors que, dans le cadre du régime légal, il serait difficile d'imaginer une telle situation « where unjust enrichment of one party could occur ».[4] Toutefois, aucun éclaircissement n'est donné sur cette notion d'enrichissement injuste de l'un des époux, qui résulterait de l'appauvrissement de l'autre. Or, nous semble-t-il, tout l'intérêt du débat réside précisément dans le contenu de cette notion : si les tribunaux l'interprètent largement, « en équité » ou plus exactement selon l'idée que le juge se fait de l'équité, autant dire alors, que les régimes matrimoniaux, quels qu'ils soient, n'existent plus. Est-il en soit équitable, en effet, que la femme mariée sous le régime légal et qui, par un labeur acharné pendant dix ou vingt ans a accumulé des acquêts, voie la masse de ses biens partagée avec un mari qu'elle a fait vivre durant autant de temps et qui, lui, a dilapidé ce qu'il avait pu gagner ? Si les tribunaux interprètent strictement la notion d'enrichissement et d'appauvrissement corrélatif, la prestation compensatoire ne sera alors qu'une application particulière de l'enrichissement sans

[2] K. Connell-Thouez, « Matrimonial Property Regimes in Quebec Before and After the Reform of 1981 : Adapting Traditional Institutions to Modern Reality » dans Connell-Thouez & Knoppers, *ibid.*, 27 à la p. 38.

[3] *Ibid.* à la p. 47.

[4] *Ibid.* à la p. 48.

cause, qui peut se rencontrer aussi bien dans le régime légal (enrichissement injuste des propres de l'un des époux) que dans le régime de séparation. Il ne s'agit plus ici de « reallocation of family resources ». Ces alternatives n'apparaissent pas dans le texte proposé. Il est loin d'être certain, nous semble-t-il, que par l'intrusion de la prestation compensatoire, le législateur québécois permette une redistribution des biens en tant que telle. En revanche, par l'adoption des articles 449 à 458 C.c.Q., présentés précédemment par M. Brière, le législateur fait souffler sur les Québécois un vent incontestablement communautaire qui perturbe considérablement tous les régimes de type séparatiste, y compris le régime légal.

Sous le même premier thème, un troisième texte nous est proposé : « Policy Objectives of Private Law Spousal Support Rights and Obligations », dont l'auteur est M. Julien Payne. Il s'agit d'une recherche sur les objectifs d'une politique législative en matière de *spousal support*, qui s'appuie principalement sur des études faites par des Commissions d'Angleterre et d'Écosse, ainsi que sur un rapport présenté par The Institute of Law Research and Reform, destiné à la province d'Alberta et auquel l'auteur a participé. Dans un texte dense de trente-huit pages, nous est offert l'éventail des divers objectifs qu'une politique peut se fixer : ce peut être le principe de réhabilitation économique de celui des époux qui dépend de l'autre ; ce peut être le principe du *clean break* — rupture complète, claire, nette et définitive lors du divorce ; ce peut être le maintien de la situation financière des époux lors de cette rupture ; ce peut être l'idée de secours apporté à celui des époux qui en a besoin (*relief of needs*), ou celle d'ajustement équitable des avantages et inconvénients économiques résultant du mariage, ou celle d'indemnisation pour les contributions apportées dans le passé. jectif peut consister encore à replacer chacun des époux dans la situation dans laquelle chacun d'eux se serait trouvé s'il n'y avait pas eu mariage (*restitution*), ou simplement à accorder ce qui est nécessaire aux enfants. Ce pourrait être aussi l'adoption d'une formule mathématique destinée à régler — comme par enchantement — les conséquences d'un divorce, à moins que soit préférée la mise sur pied d'un fonds public ! Le législateur a donc l'embarras du choix, sans oublier les possibilités de combiner plusieurs de ces différents objectifs. L'auteur présente ensuite le droit positif qui régit actuellement la matière en Alberta ainsi que les recommandations faites à la législature et qui touchent quatre objectifs : « 1. fair recognition of the contributions, advantages and disadvantages of the respective spouses ; 2. fair sharing of the economic burden of child care ; 3. fair provision for adjustment to independence ; 4. relief of grave financial hardship. »[5] Sans aucun doute, ces objectifs sont-ils louables, mais encore faut-il les traduire

[5] J. Payne, « Policy Objectives of Private Law Spousal Rights and Obligations » dans Connell-Thouez & Knoppers, *ibid.*, 55 à la p. 99.

en termes juridiques et parvenir éventuellement à les concilier, en particulier ceux qui sont énoncés en première et troisième place.

Vient ensuite le second thème qui est présenté par les « éditeurs » sous l'intitulé : « The Recognition of Children's Rights », qui regroupe apparemment deux « sous-thèmes », l'un portant sur la reconnaissance des droits de groupes particuliers d'enfants et l'autre portant sur les mécanismes procéduraux destinés à protéger les droits des enfants.

Ce sont tout d'abord, MM. F. Murray Fraser et H. David Kirk — dans : « *Cui Bono* ? Some Questions Concerning the 'Best Interests of the Child' Principle in Canadian Adoption Laws and Practices » qui s'interrogent sur ce qu'est le « meilleur intérêt de l'enfant » dans le cadre non point du droit des provinces anglaises sur l'adoption, mais plutôt du droit de la Colombie-Britannique. Les auteurs remarquent que le seul principe de l'intérêt de l'enfant est insuffisant à guider les tribunaux qui doivent prendre en considération un ensemble d'éléments pertinents. Partant de l'idée que le divorce est de plus en plus souvent la cause de dissolution du mariage et que, de plus en plus souvent, le divorce est suivi d'un remariage, ils cherchent à démontrer que la situation et l'intérêt de l'enfant sont différents selon que l'adoption concerne des parents et un enfant qui n'ont entre eux aucun lien par le sang ou au contraire, selon qu'elle est demandée par le nouveau conjoint de l'un des parents. A priori, dans le premier cas, l'intervention d'organismes particuliers (à l'image de nos « sociétés d'adoption ») s'avère nécessaire, alors qu'elle paraît inutile dans le second cas, tout au moins s'il n'y a pas contestation. Tout en comparant ces deux types d'adoption, ils examinent six points particuliers qui visent la question de la confidentialité des dossiers médicaux, celle du caractère illégitime de l'enfant adopté (caractère qui, en règle générale, ne touche pas l'adoption lors d'un second mariage du parent biologique), celle de la connaissance par l'enfant de son état d'enfant adoptif, celle du changement de nom et de l'établissement d'un nouvel acte de naissance, et enfin le problème de la rupture totale et définitive avec la famille biologique ou, au contraire, du maintien de la relation avec celle-ci. Les cinq premiers points évoqués sont esquissés et le sixième est escamoté : c'est tout le problème bien connu aujourd'hui, au Québec, posé par le « Mouvement Retrouvailles ». Les auteurs concluent, enfin, que l'adoption faite par le nouveau conjoint du parent biologique bénéficie davantage au « nouveau » parent adoptif qu'à l'enfant lui-même, ou encore au parent biologique qui trouve là un moyen d'enlever à l'ex-conjoint toute possibilité de maintenir quelque lien avec l'enfant du divorce ! Si tel est le cas — ce qui n'est pas impensable — les auteurs ont raison de souhaiter que la législation soit repensée, surtout si l'on considère que le remariage peut également conduire à un second divorce . . .

La communication suivante porte sur l'exécution des ordonnances relatives à la garde : « The Enforcement of Custody Orders : Current Developments », sous la signature de Mme Christine Davies, et pose le grave problème de l'enfant enlevé par l'un des parents. Partant de la position prévalant en droit commun et qui voulait que l'intérêt de l'enfant fût la considération essentielle, l'auteur note avec raison que, la bonne administration de la justice étant également un élément qui ne doit pas être négligé, il est de bonne politique qu'une ordonnance relative à la garde ne puisse pas être rendue par un tribunal autre que celui que s'est déjà prononcé sur celle-ci, à défaut de quoi la justice attribuerait, en quelque sorte, une prime à l'enlèvement. Une telle position est adoptée par une certaine jurisprudence (ainsi en est-il du Québec), alors qu'une jurisprudence contraire s'appuie sur le concept de « juridiction *parens patriae* » pour justifier l'intervention du tribunal « étranger » (ainsi en est-il en l'Ontario). L'auteur analyse ensuite les « Extra Provincial Enforcement of Custody Orders Acts »,[6] afin de les comparer avec la nouvelle *Loi uniforme*, adoptée seulement par deux provinces,[7] destinée à remplacer le texte législatif précédant et qui fait l'objet de commentaires précis et appropriés. Mme Davies énonce enfin les grandes lignes de la *Convention sur les aspects civils de l'enlèvement d'enfants*[8] et termine son essai par une intrusion dans le droit criminel, à la suite de l'adoption et de la mise en vigueur, le 4 janvier 1983 du Projet de loi[9] qui traite notamment de l'enlèvement des enfants. On le constate, si l'enlèvement n'était pas une chose courante jusqu'aux années cinquante, il est aujourd'hui devenu un réel problème qui exige une intervention législative délicate, mais ferme : la *Loi uniforme* et la *Convention de La Haye* sont des

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[6]Voir pour l'Alberta, *Custody Orders Act*, R.S.A. 1980, c. E-17 ; pour la Colombie-Britannique, *Family Relations Act*, R.S.B.C. 1979, c. 121, art. 38-42 ; pour le Manitoba, *Custody Orders Act*, S.M. 1975, c. 4, abrogée par la *Loi sur l'exécution des ordonnances de garde*, S.M. 1982, c. 27, art. 20 ; pour le Nouveau-Brunswick, *Loi sur l'exécution des ordonnances de garde extra-provinciales*, L.N.B. 1977, c. E-15, abrogée par la *Loi sur les services à l'enfant et à la famille et sur les relations familiales*, L.N.B. 1980, c. C-2.1 ; pour Terre-Neuve, *Custody Orders Act*, S.N. 1976, No. 24, art. 130-2.2 ; pour l'Île-du-Prince-Édouard, *Custody Orders Act*, S.P.E.I. 1975, c. 68 ; pour la Saskatchewan, *Custody Orders Act*, R.S.S. 1978, c. E-18 ; pour la Nouvelle-Écosse, *Reciprocal Enforcement of Custody Orders Act*, S.N.S. 1976, c. 15 ; pour les Territoires du Nord-Ouest, *Custody Orders Act*, O.N.W.T. 1981 (2d sess.), c. 2 ; seuls l'Ontario et le Yukon ne disposent pas de législation analogue.

[7]L'Ontario et le Nouveau-Brunswick : *Children's Law Reform Act*, R.S.O. 1980, c. 68, Part III et *Loi sur les services à l'enfant et à la famille et sur les relations familiales*, L.N.B. 1980, c. E-2.1.

[8]Conférence de La Haye de droit interuational privé [1951-80] Recueil des conventions 264 (conclue le 25 octobre 1980).

[9]*Loi modifiant le* Code criminel *en matière d'infractions sexuelles et d'autres infractions contre la personne et apportant des modifications corrélatives à d'autres lois*, S.C. 1980-81-82-83, c. 125.

tentatives dont l'efficacité reste à prouver. L'exposé de Mme Davies est structuré, clair et convaincant.

Vient ensuite un exposé sur « Education Rights of Disabled Children in Four Canadian Provinces », présenté par M. Donald Poirier qui, s'intéressant au droit qu'ont les enfants handicapés à recevoir une éducation appropriée, examine les lois scolaires adoptées dans quatre provinces : d'une part, la Saskatchewan et l'Ontario qui possèdent une *mandatory legislation*,[10] d'autre part le Nouveau-Brunswick et la Colombie-Britannique[11] qui ont une *permissive legislation*. En effet, si on s'accorde à reconnaître à tous les enfants le droit à l'éducation, toutes les législations n'imposent pas l'obligation de fournir des classes spéciales aux enfants handicapés. L'auteur signale alors l'impact que paraissent avoir les tendances nouvelles du droit administratif qui consacrerait un certain affaiblissement de pouvoir discrétionnaire éventuellement exercé par les commissions scolaires, ainsi que les effets des législations provinciales sur les droits de la personne ou ceux (éventuels ou hypothétiques ?) de la *Charte canadienne des droits et libertés*.[12] Est enfin posée la question de savoir ce que signifie « éducation appropriée » : doit-on mettre l'enfant dans une classe normale et lui assurer une aide spéciale ? Doit-on lui organiser une classe spéciale ? Doit-on lui « apporter », chez lui, l'éducation appropriée ? Autant de questions qui ne connaissent pas des réponses certaines.

Mmes E. Diane Pask et Anne Jayne se penchent également sur un problème particulier à certains enfants : « Child Protection Issues Among the Indo-Chinese Refugees ». Cette communication est extraite d'une étude plus ample dont on nous annonce la publication ultérieure sous forme de livre. Le Canada avait reçu, en 1983, 90 000 réfugiés indo-chinois, le Québec ayant accepté, entre 1979 et juin 1982, 302 mineurs, dans le cadre du « Programme québécois des enfants mineurs réfugiés non accompagnés », auxquels s'ajoutent 56 autres mineurs acceptés antérieurement à la mise sur pied de ce programme. C'est la situation de ces « mineurs non accompagnés » qui est étudiée, enfants ou jeunes gens qui ont réussi à atteindre les camps de réfugiés, séparés de leur famille volontairement ou accidentellement. Les auteurs se demandent si les mesures prises dans le cadre de la protection de ces mineurs tiennent compte de la culture traditionnelle vietnamienne et dans quelle mesure — dans les décisions relatives au placement de ces enfants — on doit prendre en considération les conséquences

[10] Voir *The Education Act, 1978*, S.S. 1978, c. 17 et *Education Act*, R.S.O. 1980, c. 129.

[11] Voir *Loi scolaire*, L.R.N.B. 1973, c. S-5 ; *Loi sur l'enseignement spécial*, L.R.N.B. 1973, c. A-19 ; *School Act*, R.S.B.C. 1979, c. 375.

[12] *Charte canadienne des droits et libertés*, Partie I de l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c. 11, art. 32(2) [ci-après : *Charte canadienne*].

des différences entre les cultures canadienne et vietnamienne. Envisageant d'abord les problèmes de protection que posent ces enfants alors même qu'ils vivent au Canada dans une famille vietnamienne — cette famille pouvant elle-même avoir des problèmes propres à son état de réfugiée — les auteurs relèvent ensuite les difficultés qui surgissent dans le cadre des foyers canadiens qui accueillent ces enfants ; les programmes gouvernementaux prévoient d'ailleurs un taux important de rupture entre ces mineurs et la famille d'accueil. Les raisons peuvent être multiples : les traumatismes nés de la tragique aventure du réfugié et l'incompréhension née des différences culturelles. C'est alors que se pose la question du rôle de la culture dans la protection due à ces enfants : doit-on faire abstraction de leurs origines ou doit-òn reconnaître l'importance de l'identification de l'enfant à une communauté culturelle minoritaire ? C'est cette dernière option qui est privilégiée par les auteurs afin de déterminer quel est le meilleur intérêt de l'enfant. Il s'agit là d'une étude extrêmement sérieuse et documentée qui pose des problèmes aussi vastes que délicats.

Vient ensuite le texte proposé par M. Leonard J. Pollock, « Representation of Children : the Alberta Experience ». L'auteur part de l'ancien principe qui voulait que le père eût un droit quasi absolu quant à la garde de l'enfant, sans que l'intérêt de celui-ci fut pris en considération, pour en arriver à l'initiative prise par le juge Manning de la Cour suprême d'Alberta,[13] qui, dans un contexte familial d'aggressivité, nomma à l'enfant un *amicus curiae*. La Cour suprême du Canada[14] reconnut ultérieurement aux tribunaux ce pouvoir de désigner, dans les espèces touchant à la garde ou à la protection des enfants, un « ami de la Cour » chargé de représenter l'enfant. L'auteur décrit alors les fonctions de l'*amicus curiae*, particulièrement en Alberta, et relève quelques problèmes qui laissent perplexes.

L'intervention judiciaire fait aussi l'objet de l'étude présentée par Mme Bartha M. Knoppers, mais sur un tout autre plan : « From Parental Authority to Judicial Interventionism : The New Family Law of Quebec ». Après avoir tracé brièvement l'évolution législative de la puissance paternelle, l'auteur expose, dans une première partie, « The Impaet of the New Philosophy of Equality Within the Family », et dans une seconde partie, intitulée judicieusement « Towards the Marriage of the Family and the Judiciary », est esquissé le rôle attribué par le législateur aux tribunaux.

Sous le couvert du principe d'égalité, l'auteur invoque tout d'abord la législation nouvelle reliée à l'« identité » de l'enfant, sur le nom de celui-ci, sur son domicile (règle inchangée), sur l'établissement de la filiation de

[13] *Woods* c. *Woods* (1966), Edmonton (S.C. Alta) [non publié].

[14] *Beson* c. *Director of Child Welfare* (1982), [1982] 2 R.C.S. 716, (*sub nom. Re Beson and Director of Child Welfare*) 142 D.L.R. (3d) 20 [ci-après : *Beson*].

l'enfant né dans le mariage ou hors de celui-ci (problème qui en vérité soulève de nombreux points d'interrogation) et sur certaines conditions de l'adoption qui touchent au consentement parental. On en vient alors à examiner la place faite par le législateur au meilleur intérêt de l'enfant : à cet égard, on mentionne les questions de garde, de droit de visite et de *maintenance*.

Quant au rôle des tribunaux, l'auteur relève, en premier lieu, les dispositions nouvelles sur la déchéance de l'autorité parentale et fait état du pouvoir d'appréciation — qu'on peut estimer exorbitant — laissé au juge dans ce domaine. Sont ensuite passées en revue les diverses règles de droit qui font actuellement, ou qui feront ultérieurement du tribunal, le tiers arbitre essentiel à l'appaisement des chicanes.

L'essai suivant, signé par S.I. Bushnell, a pour titre : « The Welfare of Children and the Jurisdiction of the Court Under *Parens Patriae* ». On a déjà rencontré, en Alberta, l'*amicus curiae*, très proche parent du *parens patriae* que l'on trouve maintenant dans la législation ontarienne, mais aussi dans celles de Saskatchewan, de Colombie-Britannique, du Nouveau-Brunswick et de Terre-Neuve.[15] Le but de l'auteur est de tenter de déterminer ce qu'il faut entendre par *parens patriae powers*, le concept paraissant avoir un contenu multiple. Après un bref historique sur l'origine, l'auteur observe qu'en Angleterre, « the power has been with the judiciary since time immemorial »,[16] mais que

> [e]ven if it is considered as part of the prerogative it should be noted that this does not involve any law-making ability. The Sovereign, or agents of the Sovereign, cannot alter the law, but must act within it.[17]

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[15]Pour l'Ontario, *Unified Family Court Act*, R.S.O. 1980, c. 515, art. 4(3) : « The Court has and may exercise the same *parens patriae* powers as the Supreme Court in respect of any matter before it. » ; *An Act to Amend the Children's Law Reform Act*, S.O. 1982, c. 20, art. 71 : « This Part does not deprive the Supreme Court of its *parens patriae* jurisdiction. » Pour la Saskatchewan, *The Unified Family Court Act, 1978*, S.S. 1977-78, c. 41, art. 12(2) : « The Court has and may exercise the same *parens patriae* powers as the Court of Queen's Bench [. . .]. » Pour la Colombie-Britannique, *Family Relations Act*, R.S.B.C. 1979, c. 121, art. 5(3) : « Nothing in this Act shall be construed as limiting or restricting the inherent jurisdiction of the Supreme Court to act in a *parens patriae* capacity respecting a child before the court. » ; *Supreme Court Act*, R.S.B.C. 1979, c. 397, art. 11(5) : « A local judge has the *parens patriae* jurisdiction of the court. » ; *Family and Child Service Act*, S.B.C. 1980, c. 11, art. 21 : « Nothing in this Act limits the inherent jurisdiction of the Crown, through the Supreme Court, over infants, as *parens patriae* [. . .]. » Pour le Nouveau-Brunswick, *Loi modifiant la loi sur l'organisation judiciaire*, L.N.B. 1978, c. 32, art. 9, ajoutant art. 11(9) : « La Division de la famille peut intervenir en qualité de *parens patriae*. » ; Pour Terre-Neuve, *The Unified Family Court Act*, S.N. 1977, c. 88, art. 7(2) : « The Unified Family Court has and may exercise jurisdiction as *parens patriae*. »

[16]S.I. Bushnell, « The Welfare of Children and the Jurisdiction of the Court under *Parens Patriae* » dans Connell-Thouez & Knoppers, *supra*, note 1, 223 à la p. 228.

[17]*Ibid.*

Il nous démontre ensuite ce qu'en font ou tentent d'en faire les tribunaux canadiens : on invoque souvent le concept là où il n'a que faire, mais s'agit-il vraiment d'un *judicial override* ? Dans les affaires *Glover*[18] la Cour d'appel de l'Ontario a eu l'occasion de préciser le sens de *inherent power* : « the reserve or fund of powers which the Court may draw upon as necessary whenever it is just or equitable to do so »,[19] ce qui ne signifie pas, cependant, que ce pouvoir puisse être exercé « in contravention of any statutory provision » ;[20] cette décision qui fut maintenue par la Cour suprême du Canada semblait affaiblir l'existence d'un *judicial override*, même si, selon une opinion dissidente, il y avait un « paramount public interest in the enforcement of custody orders affecting the well-being of children ».[21]

L'auteur étudie ensuite quelques décisions récentes et notamment l'affaire *Beson*[22] dans laquelle, au contraire, la Cour suprême du Canada « used the override power of *parens patriae* », concept de *parens patriae* permettant au tribunal « to fill gaps in legislation and to exercise judicial review when appropriate ».[23] Il fait alors une intéressante et pénétrante analyse comparée entre la position de la Cour suprême et celle de la Chambre des Lords[24] dans une affaire à laquelle réfère et sur laquelle s'appuie le plus haut tribunal canadien qui n'en retient cependant que l'une des conclusions : celle qui lui plaisait. La Cour suprême aura cependant à se prononcer à nouveau dans une affaire délicate, *Re Eve*,[25] qu'ont eu à trancher les tribunaux de l'Île-du-Prince-Édouard et qui est clairement et remarquablement exposée par l'auteur. S'agissant d'une mère qui demande à la Cour d'ordonner la stérilisation de sa fille majeure, handicapée mentale, la question est de savoir qui fait la loi : le juge ou le législateur ?

Dans sa conclusion, l'auteur pose le problème tel qu'il est, réel et inquiétant :

> the heart of the matter is judicial power ; power that is being masked by reference to *parens patriae* and legitimized by the ancient ancestry of the term,

[18] *Glover* c. *Glover (No. 1)* (1980), 29 O.R. (2d) 392, 113 D.L.R. (3d) 160 (C.A.) [ci-après : *Glover (No. 1)*, cité aux O.R.], conf. (*sub nom. Glover* c. *Ministre du Revenu national*) (1981), [1981] 2 R.C.S. 561 ; *Glover* c. *Glover (No. 2)* (1980), 29 O.R. (2d) 401, 113 D.L.R. (3d) 174 (C.A.) [ci-après : *Glover (No. 2)*, cité aux O.R.], conf. (*sub nom. Glover* c. *Bell Canada*) (1981), [1981] 2 R.C.S. 563.

[19] *Glover (No. 1)*, *ibid.* à la p. 399.

[20] *Ibid.*

[21] *Glover (No. 2)*, *supra*, note 18 à la p. 411.

[22] *Supra*, note 14.

[23] Bushnell, *supra*, note 16 aux pp. 233-4.

[24] *R.* c. *Liverpool City Council* (1981), [1982] A.C. 363, [1981] 2 All E.R. 385 (H.L.).

[25] (1980), 27 Nfld & P.E.I.R. 97, et add. 28 Nfld & P.E.I.R. 359, 115 D.L.R. (3d) 283 (P.E.I. C.A.), inf. 10 R.F.L. (2d) 317 (P.E.I. S.C. Fam. Div.).

> although not its meaning. By assuming the vast power the judges are going back before time immemorial to when the will of the sovereign was law ; now it is the will of the judges.[26]

On ne cesse, en effet, d'invoquer l'intérêt public, le meilleur intérêt de l'enfant : quel est-il ? Il est celui que le juge croit qu'il est. Doit-on s'en réjouir ?

Le dernier essai, présenté par les « éditeurs » sous le couvert d'un troisième thème, est intitulé « Family Law and the Liberty Interest : Section 7 of the Canadian Charter of Rights ». Celui-ci aussi a déjà été publié ailleurs sous la signature de MM. Nicholas Bala et J. Douglas Redfearn.

Les auteurs tentent d'analyser l'impact que peut avoir, sur le droit de la famille, l'article 7 de la *Charte canadienne*, selon lequel

> 7. Chacun a le droit à la vie, à la liberté et à la sécurité de sa personne. Il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Selon eux, ce droit à la liberté inclut « a freedom to enjoy family life »[27] et protège les droits des parents contre l'ingérence indue de l'État dans le domaine familial. Aux fins de leur démonstration, ils s'appuient sur la jurisprudence américaine, sur le préambule de la *Déclaration canadienne des droits*[28] et sur les déclarations du Solliciteur général.[29] Ils s'interrogent ensuite sur ce que sont les principes de justice fondamentale, qu'ils assimilent à ceux de justice naturelle et reprennent l'énoncé de certaines règles universellement reconnues, mais, comme le dit le juge cité, « qui ne me viennent pas à l'esprit immédiatement » ;[30] ils épiloguent ensuite sur la notion de *due process* pour en venir à la conclusion, regrettable selon eux, que vraisemblablement la *Charte canadienne* restreint au domaine procédural. Ce sont ces principes que les auteurs vont tenter d'appliquer au droit de la famille : ainsi en serait-il des législations qui refusent au père illégitime ou aux parents nourriciers d'avoir certains droits de contrôle sur le sort de l'enfant lors d'un litige qui affecte celui-ci. Ce serait également le cas des législations relatives au statut juridique des enfants, afin de permettre à ceux-ci de faire valoir leurs droits « fondamentaux » contre l'État ou contre leurs parents : on voit à nouveau le pouvoir judiciaire l'emporter sur le législatif ! Sont

[26] *Supra*, note 16 à la p. 241.

[27] *Ibid.* à la p. 246.

[28] S.R.C. 1970, app. III.

[29] Canada, *Procès-verbaux et témoignages du Comité mixte spécial du Sénat et de la Chambre des communes sur la Constitution du Canada.* (Présidents : H. Hays & S. Joyal) no 41 (20 janvier 1981).

[30] *R.* c. *Elms* (29 septembre 1982) (C.S.) [non publié], M. le juge Lanctôt.

envisagées ensuite les mesures prises par l'État contre les parents, si l'État est justifié de limiter parfois les droits des parents,

> it is wrong to conceive of this as a situation where the court or state is somehow protecting *constitutional* rights of the child. Rather this should be viewed as a situation in which the state limits the constitutional rights of parents, and sometimes those of a child, to promote the welfare of the child.[31]

Les auteurs exposent quelques situations auxquelles, selon eux, la *Charte canadienne* pourrait s'appliquer : ce serait le cas d'une législation trop vague sur des points essentiels, le cas de règles de preuve douteuses et le cas d'arrestation d'un enfant. Il est permis de se demander si les auteurs ne dépassent pas les limites des règles procédurales.

Les auteurs fondent incontestablement beaucoup d'espoir sur la *Charte canadienne*, à la lumière de la jurisprudence américaine. Il reste à savoir si cette *Charte* s'applique au droit civil qui relève des provinces et si son application est vraiment souhaitable en la matière. On en revient à la question précédemment posée : le juge doit-il faire la loi ?

Après avoir lu ce volume de 280 pages, nous ne pouvons malheureusement pas dire que nous nous sentons transportés d'aise : onze sujets trop divers et dispersés, traités par quatorze auteurs qui ont chacun de la « communication » une idée bien particulière. Malgré tout le mal que se sont donné les éditeurs pour apporter à l'ouvrage une idée directrice qui lui communiquerait une certaine unité, le fil est ténu. Certes, on s'y intéresse beaucoup aux enfants et à . . . l'intérêt des enfants ; mais le titre du volume correspond-il vraiment à son contenu ? S'agit-il vraiment d'une « National Perspective on Family Law » ? Il ne nous est guère permis de comparer, d'une province à l'autre, les diverses législations *sur un sujet commun* dans une « perspective nationale » d'évolution ou de réforme. Chaque auteur a traité la question que, vraisemblablement, il lui plaisait de traiter, ce qui rend artificiel le découpage en thèmes et sous-thèmes ; en outre, plusieurs d'entre eux ont déjà publié leur texte ailleurs — d'où l'absence d'inédit — ou nous promettent de le publier ultérieurement. Si une juxtaposition de communications disparates peut faire le bonheur d'une revue périodique, peut-elle faire aussi bien, et si intéressants les exposés soient-ils, l'objet d'un volume qui prétend traiter des tendances contemporaines du droit de la famille ? Le véritable titre, nous semble-t-il, pourrait être seulement : « Family Law Subsection of the C.A.L.T. : Montebello 1983 ». Cela n'enlève aucunement leur mérite,aux éditeurs qui ont peut-être commis l'erreur d'entreprendre une tâche malaisée : colliger onze textes éparpillés et plus encore d'auteurs.

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[31] N. Bala & J.D. Redfearn, « Family Law and the 'Liberty Interest' : Section 7 of the Canadian Charter of Rights » dans Connell-Thouez & Knoppers, *supra*, note 1, 243 à la p. 271.

R. St J. Macdonald & D. Johnston, eds, *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*. The Hagne: Martinns Nijhoff, 1983. Pp. vii, 1234 [$120.00]. Reviewed hy Stephen J. Toope*

In the introductory paper to this outstanding collection of essays, the editors warn that international law is becoming increasingly fragmented. They sense a worrisome "loss of control" within the discipline.[1] Due to the overwhelming complexities of international life, lawyers are "virtually driven to specialization".[2] At the same time, the relentless waves of political change and technological development and the suffocating expansion of information have turned international law into a "reactive" discipline,[3] cut adrift from sound theoretical moorings. This book is an attempt to re-establish those moorings, to re-examine the underlying theories and basic principles of international law. It is a provocative enterprise, engaging the efforts of many eminent contemporary specialists. The scope of the book is enormous. The papers are of a high quality, almost without exception. How odd, then, that the overall effect of these thirty-eight essays is strangely muted, betraying a sense of ennui, of frustration and uncertainty. In the end, this book reveals more about international lawyers than about international law. What it reveals is malaise, but a malaise that is being disturbed all-too-tentatively by occasional flashes of confidence-restoring insight.

The editors, two distinguished professors of international law at Dalhousie University in Halifax, have assembled an impressive group of contributors from around the globe. Included are theorists such as Alfred Verdross, Myres McDougal and Julius Stone. There are international civil servants, including A.O. Adede of the United Nations and Daniel Vignes of the European Community. Most prominently, the community of international legal academics is represented by such scholars as Oscar Schachter, D.W. Bowett, Shabtai Rosenne, and Ian Brownlie. One might sadly conclude, after reading the list of contributors, that international law remains an exclusively male preserve, for no female author is included. The non-Western world is better represented. There are five contributors from less-developed countries and three from socialist nations, including one Chinese academic.

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[1] R. St J. Macdonald & D. Johnston, "International Legal Theory: New Frontiers of the Discipline" in R. St J. Macdonald & D. Johnston, eds, *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (1983) 1 at 3 [hereinafter *Structure and Process*].

[2] *Ibid.* at 1.

[3] *Ibid.*

The editors are to be applauded for broadening the scope of the contributions beyond the all-too-predictable collection of American and Western European writing that often passes for "international" discussion. Indeed, this book must be one of the few recent English-language compendia in which American scholars are, if anything, under-represented.

The contributions are divided into four sections. The first five essays survey the various schools of jurisprudence. By far the most revealing is a paper by the Soviet author, Vladimir Kartashkin, who now serves as a Special Assistant to the Legal Counsel of the United Nations.[4] His essay on the Marxist-Leninist approach to international law is enlightening, relatively frank and largely free of the jargon that befuddles much Soviet scholarship. The contribution by McDougal and Reisman[5] is also useful, being a statement by the present leaders of the "Yale School" that is uncharacteristically straightforward and, as always, thought-provoking.

The second part of the book contains essays which explore connections between international law and the social sciences. In view of various essayists' recurring stress upon the "scientific" nature of international law — a troublesome and ill-defined description — it is unfortunate that no paper attempts in any rigorous fashion to relate international law to scientific method. Whether any such relationship exists in fact is debatable, but it behooves those who talk of a "science of international law" to describe in detail what they mean.[6] The essay by Julius Stone on sociological perspectives in international law is enlightening and cogently argued.[7] His criticism of Professor McDougal's tendency to destroy analytical clarity by burying all ideas in a morass of inter-related "values", "objectives", "processes", and "claims" is well taken.[8] But the characterization of Professor Falk's world order models as ultimately "utopian" is perhaps too dismissive, or, at least, too pessimistic.[9] Indeed, Professor Stone's essay largely reflects the

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[4]V. Kartashkin, "The Marxist-Leninist Approach: The Theory of Class Struggle and Contemporary International Law" in *Structure and Process*, *supra*, note 1, 79.

[5]M. McDougal & W.M. Reisman, "International Law in Policy-Oriented Perspective" in *Structure and Process*, *ibid.*, 103.

[6]See, *e.g.*, the passing allusions to international legal "science" in Macdonald & Johnston, *supra*, note 1; McDougal & Reisman, *ibid.*; and in D. Johnston, "The Heritage of Political Thought in International Law" in *Structure and Process*, *ibid.*, 179. One is inclined to suspect that unsubstantiated allusions to legal "science" may be attempts — perhaps unconscious — to connect law with supposedly "objective" scientific method, thus objectifying essentially subjective evaluations. There is an element of the absurd in such attempts for, at least since the seminal work of Thomas Kuhn, it is trite to observe that even in the natural sciences, the notion of objectivity has been increasingly called into question. See T. Kuhn, *The Structure of Scientific Revolutions*, 2d ed. (1970).

[7]J. Stone, "A Sociological Perspective on International Law" in *Structure and Process*, *ibid.*, 263.

[8]*Ibid.* at 271.

[9]*Ibid.* at 279-81.

spirit of the entire volume, revealing most clearly the pessimism that underlies much of its contents.

In the third section of the book, eleven authors explore "fundamental concepts" in international law, including "subjects", "sovereignty", "custom", "equality" and "state responsibility". Overall, the quality of the contributions is high, although the analysis in this section tends to follow well-worn paths. Bin Cheng's essay on custom includes a critical discussion of Canada's assertion of rights in arctic waters and in an expanded territorial sea which will be of particular interest to Canadian readers.[10] Ian Brownlie's paper on "Recognition" is a refreshingly honest, if sometimes ill-humoured, attempt to deal with a complicated topic, a welcome return to first principles which eschews traditional theoretical categories.[11]

With some exceptions, the contributions to the fourth part of the book, entitled "Some Modern Controversies", are less engaging. The treatment of such important topics as human rights, the future of dispute settlement and the role of coercion in international law are largely descriptive and, therefore, rather predictable. On the other hand, Oscar Schachter's essay on the evolutionary development of the international legal system is magisterial,[12] including as it does a balanced view of the relationship between law and power, a view which recognizes that many factors "of a non-legal character"[13] influence norms and procedures of a legal system, but which challenges the empty assertion that international law is nothing but a creature of power politics.[14] Theodor Schweisfurth's paper on the role of political revolution in international legal theory[15] is also most enlightening, particularly in its description of the evolving views of Soviet legal scholars.

The editors have given the final word to Covey Oliver and he has met the responsibility with bravado. In an admittedly impressionistic essay reflecting the rich experience of a distinguished academic and diplomat, Professor Oliver discusses the future place of idealism in international law.[16]

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[10] B. Cheng, "Custom: The Future of General State Practice In a Divided World" in *Structure and Process, supra*, note 1, 513 at 539-41.

[11] I. Brownlie, "Recognition in Theory and Practice" in *Structure and Process, ibid.*, 627.

[12] O. Schachter, "The Nature and Process of Legal Development in International Society" in *Structure and Process, ibid.*, 745.

[13] *Ibid.* at 747. One could argue further that all factors influencing norm creation are, in some senses, "legal".

[14] For a view which emphasizes the role of sheer force, see G. Schwarzenberger, "The Conceptual Apparatus of International Law" in *Structure and Process, supra*, note 1, 685 at 699.

[15] T. Schweisfurth, "The Role of Political Revolution In the Theory of International Law" in *Structure and Process, ibid.*, 913.

[16] C.T. Oliver, "The Future of Idealism in International Law: Structuralism, Humanism and Survival" in *Structure and Process, ibid.*, 1207.

It is with this essay, coming as it does after some twelve-hundred pages of text, that one begins fully to sense the needs of contemporary international lawyers, primarily the need for reassurance and for hope, a need that has been hinted at throughout this massive collection.

Professor Oliver puts the matter starkly:

> It is all too evident that international law is in serious need of resuscitation today, not only in actual effectiveness but in the very expectation of its being able to be effective.[17]

It is this pessimism about even the possibility of effectiveness that permeates much of the book.

One might well ask, then, whether there is anything in the preceding pages that suggests appropriate means of resuscitation, that points to the underlying value of the work of international lawyers? Given the quality of the contributors, one's instinct is to answer in the affirmative. Yet such is the pessimism revealed that the way forward can only be extrapolated by negative implication. In fact, to extract the real lessons of this book it is necessary to look behind the text, to the authors themselves. There one will find the central, yet unarticulated question, namely, what is the role of the international lawyer in the contemporary world community? It is this implicit question that seems to have conditioned the inquiry of many of the contributors to this volume of essays. If the unarticulated question is liberated from the penumbra of concern and made explicit, the needs of the future might be easier to identify. To describe what it is that international lawyers can and should do is to reveal determinative assumptions about what international law can and should be.

It is not the purpose of this short essay to elaborate exhaustively upon the role of international lawyers and, in any case, the author has no particular credentials to undertake such a task. But it is possible to articulate certain ideas and impressions prompted by the insights revealed in the collection of essays under review. Indeed, one would hope that the appearance of a book such as this one, full of contradictions, antipathetic approaches and critical observations, will prompt wider debate. To frame this debate around the role of the international lawyer would provide structure and, more importantly, might encourage frankness: how better to prompt any group of lawyers to debate freely than to ask them to talk about themselves?

Undoubtedly, there is significant interest in the interuational legal community in such a process of self-evaluation and self-criticism. The seventy-fifth Anniversary Convocation of the American Society of International Law in 1981 was devoted to the awe-inspiring topic, "Order, Freedom, Justice,

[17] *Ibid.* at 1209.

Power: The Challenges for International Law". It is fascinating to note, in the published proceedings, how often the debate, although formally framed around specific issues, nevertheless returned again and again to the role of international lawyers. With but few exceptions, the prevailing mood was pessimistic. Professor Falk took an almost apocalyptic view:

> To restate, never have we needed international law so badly to deal with fundamental problems of order and justice in the world and yet never, at least in this century, has the situation and outlook for international law seemed so bleak.[18]

In this deep malaise, Professor Falk was joined by Burns Weston[19] and Oscar Schachter.[20] On the other hand, some commentators reject such negative evaluations and question the need for introspection, arguing that international lawyers are already too self-absorbed.[21] Given the wide-spread melancholy in the profession, however, it seems that the answer is to share concerns, not to bury them.

What, then, is to be done? First, it must be noted that within the discipline of international law there are at least four sub-categories: academic lawyers, foreign office lawyers, international civil servants, and private international lawyers. Each has a distinct role to play, and although it may be argued that certain basic values should be promoted by all international lawyers (values such as justice, human dignity, the peaceful settlement of disputes), the emphasis here will be upon the role of public international lawyers, and particularly upon their role in relation to their own national governments.

In their introductory essay to the volume under review, the editors note that increasing specialization will transform international lawyers into "experts", thereby undercutting the classical conception of the international "jurist". According to Macdonald and Johnston, the expert will not be expected "to display the same impeccable degree of impartiality that was traditionally expected of the classical 'jurist' in a nominally less politicized age".[22] This matter of expectations is important, for if international legal "experts" come to be seen only as advocates, a major change of emphasis will have occurred within the profession, a change that should not be viewed with complacency. International law does not share an identical legacy with the Anglo-American common law. The founders of the "Law of Nations"

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[18]R.A. Falk, "The Future of International Law" (1981) 75 Proc. Am. Soc. Int'l L. 8 at 10.

[19]B.H. Weston, "Promoting Training and Awareness — The Tasks of Education in International Law" (1981) 75 Proc. Am. Soc. Int'l L. 159.

[20]O. Schachter, Remarks (1981) 75 Proc. Am. Soc. Int'l L. 23. Professor Schachter did manage to summon up a modicum of hope, however.

[21]For example, see Cheng, *supra*, note 10 at 515.

[22]Macdonald and Johnston, *supra*, note 1 at 9.

were steeped in a civilian, but more importantly, in a natural law tradition which influences the structure of the international legal system to this day; it is a system which does not function primarily through processes of third-party adjudication. International lawyers have never been solely barristers. Their idealized role, whether as statesmen or publicists, has always incorporated a consensual perspective rooted in certain global values. Verdross and Koeck point out, for example, that the early Spanish theorists postulated a doctrine of international law "according to which a statesman must, during all his actions, always have in mind the common good of mankind".[23] This is not to say that most, or even the majority of, statesmen always fulfilled their obligation to the world community. Nevertheless, the classical view provided a standard by which to measure the acts of statesmen. It is a valuable standard, not one which should lightly be discarded. It has even greater relevance for Western international legal academics whose role in society is shaped by scholarly values which mesh most comfortably with a legal-theoretical viewpoint that stresses independence and commitment to universal values of human dignity. The need for jurists has not passed, even if growing legal-societal complexity forces them to focus their analysis upon topics of narrower scope. Being an "expert" does not necessarily require a limited, xenophobic outlook.

It would seem, however, that despite the great need for jurists in an era of growing politicization in international discourse and of ominous threats of global destruction, Macdonald and Johnston are correct in describing the attitude of many contemporary international lawyers who, acting as experts, advise their own governments or justify governmental action with little regard to traditional notions of concern for the common good of mankind. Professor Richard Falk has descried this trend:

> International lawyers have not upheld the fundamental mission of their profession. The fundamental mission of international lawyers is to study the means whereby the power of the modern nation-state may be restrained by the rule of law. All too often, lawyers have allowed themselves to become "co-opted geopoliticians", and their main mission becomes to justify, rationalize and, occasionally, to apologize for the nationalistic policies and actions of their governments.[24]

When academic lawyers become mere apologists, they betray both the traditional values of their profession and the essence of scholarship. Even foreign office lawyers should sometimes find it necessary to question the policies of their own government in order to maintain the integrity of their profession. At one stage in his career, Jules Basdevant, later a Judge on the

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[23] A. Verdross & H. Koeck, "Natural Law: The Tradition of Universal Reason and Authority" in *Structure and Process*, *supra*, note 1, 17 at 26.

[24] R.A. Falk, Remarks (1982) 76 Proc. A. Soc. Int'l L. 23.

International Court of Justice, felt compelled to resign his position as Legal Advisor to the French Ministry of Foreign Affairs due to disagreement over general policies.[25]

Judge Basdevant's action is, however, an all-too-rare example of principled role identification. There seems to be an expectation today that the main function of foreign office lawyers is to seek justifications for whatever policy their government chooses to pursue.[26] Concerned academics have noted a growing parochialism and bias even in ostensibly independent international legal scholarship. Preoccupation with this trend is a recurring theme in *The Structure and Process of International Law*. In his contribution, Johnston holds up Grotius as a valuable example to present day international lawyers precisely because "he rarely allowed his cosmopolitan perspective to become blurred by an excessively nationalistic bias".[27] However, Schachter alludes to the contemporary reality "that many of the legal scholars have close links with their official communities and there are often pressures on them, sometimes obvious and sometimes subtle, to conform to the official point of view".[28] This reality has led other scholars to denounce the provincialism and ethnocentrism of much contemporary international legal scholarship.[29] The response to this pressing problem cannot be the abdication of any active, policy-forming role for lawyers. States require international lawyers in their foreign policy bureaucracies. Moreover, academic lawyers sometimes serve a useful function as government advisors, shaping policy in conformity with international law. It is essential, however, for such advisors to recognize that they must remain "outsiders"; they cannot cast off the moral imperatives of their juristic and scholarly role simply because they operate temporarily in a governmental environment. Even state-employed international lawyers are subject to special moral strictures associated with their profession.

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[25]See M. Lachs, "Teachings and Teaching of International Law" (1976) 151 Rec. des Cours 161 at 232 n. 40. It should be noted that Judge Lachs, a present member and former President of the International Court of Justice, served in the Polish Foreign Affairs Ministry from 1947-1967.

[26]See, *e.g.*, Professor D'Amato's response to Professor Falk's pessimism: there is law and there is mere justification. Not all arguments are equal and much legal argumentation — "especially that which is government inspired" — is nothing more than "rationalization", which can be distinguished from authoritative writing. A.A. D'Amato, Remarks (1981) 75 Proc. Am. Soc. Int'l L. 279 at 280. This response is hardly encouraging.

[27]*Supra*, note 6 at 185. Grotius is also, of course, held up as a good example by Professors Falk and Weston. They postulate a contemporary "Grotian moment", the dangers of which call for the same cosmopolitan perspectives brought to bear by Grotius upon the problems of his age. See Falk, *supra*, note 18 at 14 and Weston, *supra*, note 19 at 159.

[28]*Supra*, note 12 at 765.

[29]See, *e.g.*, C.T. Oliver, Remarks (1981) 75 Proc. Am. Soc. Int'l L. 14 at 15; and R.A. Falk, Remarks (1981) 75 Proc. Am. Soc. Int'l L. 278.

The wide sway of parochialism and nationalism is linked closely to the underlying pessimism evident throughout the Macdonald-Johnston volume. There appears to be a fear amongst international legal professionals that state power is not controlled adequately. More worrisome is the stultifying belief that it cannot be controlled. Despite Luzius Wildhaber's simple yet powerful assertion that "[s]overeignty must be mitigated by the exigencies of interdependence",[30] there remains a prevalent belief that, as Wolfgang Friedmann once put it, "[t]oday we are witnessing both the climax and the profound crisis of the era of the national state and of national sovereignty."[31]

The climax of the era of national sovereignty threatens to deprive the international legal profession of its traditional *raison d'être*. The power of the state may be so overwhelming as to appear to represent the natural order of things, an order which is immutable. If national governments seem capable of doing whatever they wish, the international lawyer may feel helpless, his role reduced to that of the *ex post facto* source of "legal" justification. He may accept that role as the only one remaining to him. And yet, "[t]he tendency of States to do anything which they consider themselves capable of doing and likely to get away with, is the very tendency which international law must often resist."[32] To resist effectively, international lawyers must first resist the temptation to become mere technical "experts". They must refuse to become "co-opted geopoliticians". They must reassert their status as jurists, people learned in the law and possessing a vision that transcends national boundaries.

This prescription for renewed confidence has a simple ring, and some might argue that it is but a bold leap into the obvious. Yet this simple idea is being forgotten, most clearly by the prophets of power, but more tellingly by some international lawyers who reject any simplistic view of the identity between law and might. In the concluding essay of *The Structure and Process of International Law*, Professor Oliver makes a plea for modest goals. He argues that international lawyers, particularly American lawyers, tend to overstate their role.[33] This observation is correct as a description of those lawyers who see law as the only mode of social ordering, who preach "autonomy" of the law and neglect the vast range of factors that influence any "legal" decision. But Oliver goes on to recommend that international lawyers become "technicians-after-the-fact" of value choice, implying that val-

[30] L. Wildhaber, "Sovereignty and International Law" in *Structure and Process, supra*, note 1, 425 at 440. See also the strong words of C. Jenks, *The Prospects of International Adjudication* (1964) at 497: "Sovereignty unless treated as the creature of law, is the negation of law."

[31] W. Friedmann, *The Changing Structure of International Law* (1964) 31.

[32] P. Allott, "Language, Method and the Nature of International Law" (1971) 45 Brit. Y.B. Int'l L. 79 at 81.

[33] *Supra*, note 16 at 1209.

ues can be formulated only in a formal political arena. Modesty taken to this extreme would amount to an abandonment of the traditional role of international jurists; they have never been mere technicians, experts in the service of their states' interests alone. International jurists have long strnggled to shape values in an admittedly "political" process that is wider than the formal domain of inter-state politics. Contemporary international lawyers should not allow pessimism to pre-empt that struggle. Indeed, in the nuclear age, international jurists have, to adopt the words of Professor Vlasic, "a special moral and professional obligation" to be active proponents of values that can help to ensure the continued existence of the human race.[34]

The Structure and Process of International Law is not a reassuring book. It reveals all of the doubts and confusions that beset the contemporary international legal profession. The tendency is to submit to the logic, if not the ethic, of *raison d'état* and to limit the role of the international lawyer to that of the expert, defined as a careful technician. It cannot be doubted that international lawyers have every reason to be pessimistic. The glowing optimism of the immediate post-Second World War era has been shattered by ever-increasing international lawlessness, much of it perpetrated or sponsored by states. Any sensitive intellect must feel deep concern. But it is worthwhile to remember Gramsci's dichotomy between "pessimism of the intellect" and "optimism of the will".[35] For the profession as a whole to give in to despair now would be a monumental abdication of responsibility at a time of crisis and of wide public concern. That concern should not be mocked by professional inaction and silence. A former legal counsellor in the British Foreign and Commonwealth Office has asserted the urgent need for careful, confident action:

> It can be argued that it is the duty of the international lawyer, like the moral philosopher and the theologian, not to become so desperate about the state of the world as to feel inclined to move into related, seemingly more practical and everyday, fields. On the contrary, his duty is to insist on the essential, objective element of his craft (law, morality, religion) ever more calmly and firmly as the need of the world for such things, whether or not the world realizes it, increases.[36]

Clearly, *The Structure and Process of International Law* is not all desperation and pessimism. In the face of harsh reality, many international lawyers around the world do get on with the job. Their voices are raised in support of human dignity, justice and peace. This excellent book reflects

[34]I.A. Vlasic, "Disarmament Decade, Outer Space and International Law" (1981) 26 McGill L.J. 135 at 204. See also Vlasic, "Raison d'État v. Raison de l'Humanité — The United Nations SSOD II and Beyond" (1983) 28 McGill L.J. 455.

[35]Quoted in Schachter, *supra*, note 20 at 23.

[36]Allott, *supra*, note 32 at 123.

much valuable experience, both "practical" and "theoretical". It is a useful sourcebook for the review of basic concepts and a challenging attempt to begin a reconstruction of international legal theory. It is important to reiterate, however, that many of the essays were written in a spirit of doubt and diminishing self-confidence. This collection of essays cannot be allowed to foretell the future, for ultimately the sights are set too low. International lawyers must struggle to regain a more expansive vision of their potential role. If they are willing to assert their scholarly independence, their commitment to global perspectives — if, in short, they become jurists once again — the malaise can be defeated. International lawyers can become effective once more.