Book Reviews

Aspects of Comparative Commercial Law. Edited by Jacob S. Ziegel and William F. Foster. McGill University, 1969. Pp. xii, 472 ($17.50).

Il est rare qu'une oeuvre collective procure au lecteur autant de satisfaction intellectuelle que celle-ci. L'importance du sujet, la valeur des participants, la diversité des points de vue (au sens précis de l'image, puisque les participants venaient de plusieurs nations) et des opinions, permettent que le livre se lise avec un intérêt soutenu. Le lecteur n'éprouve qu'un regret: celui de n'avoir pu entendre les discussions qui, au Colloque organisé par le professeur Jacob S. Ziegel à l'Université McGill en septembre 1968, ont accompagné des rapports de si haute valeur et si bien combinés pour donner une vue pénétrante des sujets.

Trois sujets avaient été mis à l'étude: la vente, le crédit à la consommation et les ventes avec sûreté ou réserve de propriété.

L'exposé du professeur John Honnold sur la codification du droit de la vente aux Etats-Unis dans le *Uniform Commercial Code* ouvre l'ouvrage «en beauté»: il permet au lecteur, une fois de plus, d'admirer une belle combinaison de rigueur morale et de vigueur intellectuelle. Dans quelle mesure les dispositions du *Code* relatives à la vente pourraient-elles servir de modèle en Angleterre et au Canada? A la première question, le professeur G.H.L. Fridman apporte une réponse nuancée, cependant qu'à la seconde, le professeur A.R. Thompson répond par un «oui» enthousiaste. Des problèmes contemporains du droit de la vente dans les droits codifiés sont alors examinés: la responsabilité du fabricant en Allemagne, par le professeur Ernst von Caemmerer, la vente à tempérament, la vente de la chose d'autrui en matière d'automobiles et la garantie des vices cachés dans le droit du Québec par le professeur Michel Pourcelet. Sur l'unification internationale du droit de la vente, trois points de vue différents: le Scandinave prudent, l'Américain ironique, mais constructif, l'Allemand chaleureux et pressant — légitimement, croyons-nous, sont présentés respectivement par les professeurs Jan Hellner, E. Allan Farnsworth, Ernst von Caemmerer.

Le crédit à la consommation, deuxième sujet mis à l'étude, fait aussi l'objet de trois catégories de recherches. Les récentes tendances législatives et judiciaires au Canada, en Angleterre, en Allemagne et aux Etats-Unis, sont exposées par les professeurs Jacob

S. Ziegel, l'organisateur du Colloque, R.M. Goode, Wolfgang Frhr. v. Marschall, William E. Hogan. Les deux derniers de ces auteurs étudient ensuite la réglementation du coût de l'emprunt et l'information de l'emprunteur à cet égard aux Etats-Unis et en Allemagne, cependant que le professeur R.E. Olley ajoute sur le sujet le point de vue d'un économiste. Finalement, la situation du créancier et du débiteur, lorsque celui-ci est obéré de dettes, au Canada, en Angleterre, en Allemagne et aux Etats-Unis est observée par le professeur R.C.C. Cuming et John D. Honsberger, Q.C., et les professeurs Aubrey L. Diamond, von Marschall et John A. Spanogle.

Pour les ventes avec sûreté ou réserve de propriété (*secured transactions*), la même question était d'abord posée que pour l'ensemble du droit de la vente: le *Uniform Commercial Code* (en l'espèce, son *Article* 9) est-il «exportable»? Le professeur Albert S. Abel importerait au Canada sa «substantifique moelle», mais en modifiant largement son style et sa présentation et en lui faisant subir de profondes adaptations aux institutions locales. Un long rapport de R.M. Goode et du professeur L.C.B. Gower — membre, faut-il le rappeler, de la *Law Commission* anglaise — est si favorable à l'introduction en Angleterre et dans les pays de *Commonwealth* d'un bon nombre des solutions de fond du *Code*, qu'il énumère en conclusion les lois dont l'abrogation ou l'amendement devrait accompagner celle-ci. Pour ces auteurs, le Code est le document qui peut et doit inspirer un rajeunissement radical du droit anglais des sûretés mobilières. Telle est aussi la conclusion du professeur Byron D. Sher, qui, pour enseigner aux Etats-Unis, n'en connaît pas moins les droits anglais et néo-zélandais de la matière. On comprend que le Dr. Ulrich Drobnig soit plus réservé en ce qui concerne l'Allemagne et les autres nations européennes. Il pense pourtant que le Code pourrait exercer une certaine influence par l'intermédiaire de la doctrine, dans l'effort notamment qui s'impose pour harmoniser en la matière les lois des pays du Marché Commun. Pour le Québec, le professeur Yves Caron rejoint en quelque sorte Albert S. Abel: les solutions de fond seraient en général acceptables, mais sous réserve d'adaptations importantes. L'étude des ventes avec sûreté, à vrai dire, ne se limitait pas à la recherche de la valeur internationale des dispositions du *Uniform Commercial Code* qui s'y rapportent. Quatre rapports la complètent, les professeurs Ian F.G. Baxter, Albert S. Abel, Harry R. Sachse et Ulrich Drobnig ayant eu mission d'exposer les conflits de lois en matière de sûretés, la compatibilité du *Code* avec la *floating charge* (ce privilège général sur l'ensemble du patrimoine tel qu'il se comporte au jour où le créancier devra faire valoir son droit), le droit français comparé

à la *common law* sur les droits du vendeur non payé, les conflits possibles entre vendeur et banquier de l'acheteur.

L'ouvrage se termine par un exposé plein d'esprit et de sagesse — même si un Français peut juger certaines de ses affirmations un peut trop sceptiques à l'égard du droit codifié —: c'est le discours prononcé au banquet de clôture du Colloque par le professeur Grant Gilmore sur l'histoire du droit commercial et de la codification de celui-ci aux Etats-Unis.

Il est classique que le compte-rendu d'un ouvrage collectif exprime la frustration que ressent l'auteur en constatant qu'il n'a pu consacrer que quelques lignes au travail de chacun des participants. Il ne saurait en être autrement en l'espèce. Un lecteur sera plus intéressé par un sujet que par un autre, par tel problème que par tel autre. Mais, qu'il veuille simplement consulter l'ouvrage sur un point précis ou le lire dans son entier, il ne sera pas déçu. Par l'industrie des professeurs Jacob S. Ziegel et William F. Foster, il trouvera dans ce livre, sur quelques-uns des problèmes fondamentaux du droit commercial contemporain, une mine de documentation et de réflexions. Grâce à eux, une fois de plus, le Canada aura été le fécond point de rencontre de l'Ancien Monde et du Nouveau.

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Judicial Review of Legislation in Canada. Edited by B.L. Strayer, Toronto: University of Toronto Press, 1968. Pp. xiv, 275 ($15.00).

In this treatise we have a comprehensive and systematic analysis of the process of judicial review in our federal country, that is, judicial review as the final word on the extent of the legislative competence of the Parliament of Canada on the one hand, and the legislatures of the Provinces on the other. This is the author's primary emphasis, though he does incidentally give some attention to related problems of delegation of powers to subordinate officials or tribunals. Dr. F. R. Scott wrote the foreword, and I agree fully with his general assessment. He says: "Professor Strayer is to be congratulated, not only for giving us the first thorough study of judicial review in Canadian legal literature, but for having done it with a masterful capacity to steer through the vast confusion of the case law that cannot but command the respect of theorists and practitioners alike" (p. vii). One can concur in this, as indeed I do, and yet question certain of Professor Strayer's theoretical points about the roots of the power of judicial review. I will indicate my doubts later, but in any event they are not major ones when we consider the great and overriding virtues of the book, which deserve the primary attention of reader and reviewer alike.

In the first place, the author provides a systematic and detailed analysis of how federal power-distribution issues have been raised, or may be raised, through regular forms of litigation initiated by persons with an interest in the authoritative determination of such issues by the courts. Thus the citizen has a considerable variety of ways in which he may seek to avoid the application of a statutory provision to himself, by alleging it to be *ultra vires* of the enacting parliamentary body, at *any level* in the judicial system. Public officials may also test statutes in some of these same ways. Professor Strayer does point to instances where judicial procedures to raise this type of issue are deficient or missing. Nevertheless, I am left with the impression that these procedural shortcomings are minor ones in the over-all picture of opportunities for judicial review.

In addition, in this connection, the book is particularly noteworthy for a comprehensive and balanced assessment of reference cases in our constitutional history and practice. *The Supreme Court Act* provides that the Government of Canada may put questions

directly to the Supreme Court of Canada by order-in-council. After a proper hearing, the Court is required to answer these questions, with reasons. There are like provisions in the legislation of all the Provinces, conferring the same power on Provincial Governments in relation to their respective provincial superior courts. This power has often been used, by both Federal and Provincial Governments, to obtain important judgments from the courts on federal power-distribution issues. Professor Strayer tells us that in the period 1867 to 1966, a total of 197 federal power-distribution cases were dealt with finally by the Judicial Committee of the Privy Council or the Supreme Court of Canada. Of these, 68 were reference cases. Moreover, as a group, the 68 reference cases were definitely more important in their political, social and economic impact on Canadian society than were the 129 other cases, arising out of actual litigation between parties. Important powers for the Parliament of Canada and the Provincial Legislatures have been established or confirmed by reference cases. Professor Strayer's assessment implies that any politician, provincial or federal, who attacks the authority of the reference cases in our jurisprudence is swinging a double-edged sword.

But neither the Australians nor the Americans permit reference cases in their federal systems. Is Canada better or worse off to have them ? The author discusses the arguments both ways, and concludes that, on balance, the reference by order-in-council is a useful and flexible way to raise federal power-distribution issues for judicial determination. He finds some of the adverse criticisms valid, but would correct these defects by reform of the reference system itself, not by its abolition. For example, he suggests that the questions to the courts should not be too abstract nor should they be put prematurely. Moreover, he argues that greater care should be taken with relevant factual evidence and argument in the hearing of reference cases. Personally I agree with these conclusions and would go a little further. It seems to me that the most satisfactory reference cases have been those in which the Court was questioned about the validity of a fully drafted bill, or a statute already enacted, so that the full text of a proposed or actual law was before it.

Mention of greater care concerning relevant evidence in reference cases leads us to consideration of some valuable general points the author makes about rules of practice and evidence for all federal power-distribution cases. He argues that there is a need for better judicial ascertainment of facts about the legislative effects of a challenged statute and the social context in which it operates. He shows that both the Judicial Committee of the Privy Council and

the Supreme Court of Canada have at times in the past accepted certain rules of practice and evidence that, collectively, would permit improvement in this respect — rules concerning judicial notice, admissions, agreed statements of fact, direct evidence and opinion evidence of experts. His complaint is that the means at hand are not yet being used regularly enough, or systematically enough, by counsel or judges in constitutional cases, including reference cases. Professor Strayer's conclusion is: "A more general recourse to facts, particularly those pertaining to legislative effect, would diminish the importance of other elements in the adjudicative process and yield a more realistic jurisprudence" (p. 181).

I agree with this, but would add a caution about a problem to which Professor Strayer did not address himself. It is all very well to say that the court should explore facts of legislative effects and social context, but where does this stop ? The consequences of consequences could be pursued indefinitely. Clearly a court cannot proceed as if it were a Royal Commission with a large expert staff and years for research, hearings and reports. Here, as elsewhere in the law, the judges must stop with proximate consequences and exclude those that are remote. The judges are accustomed to making this distinction now in tracing the effects of a negligent act in tort, or the extent of damages flowing from a breach of contract, for which a defendant is to be held liable. The extent to which a court admits evidence of the effects of a statute in a federal power-distribution case, as an aid to functional interpretation of the federal distribution of powers, needs the same type of limitation. With this in mind, perhaps Professor Strayer's point could be re-stated this way. The court should be more liberal and systematic with its conceptions of what are the proximate, direct or obvious effects for society of putting the challenged statute into operation, evidence of such effects to be freely admitted. But still, as the evidence of this type offered slips off into areas of unduly remote consequences or other facts, where relevance is very indirect and tenuous, it should be excluded.

Let me turn now to the theoretical doubts I referred to earlier. I do not put these forward as serious adverse criticisms, but they should be mentioned as they do concern the roots of the special power of judicial review in our federal country, with which the book is primarily concerned. While, in the end, Professor Strayer accepts the specially entrenched power of judicial review as part of the basic constitutional law of Canada, he seems to do so with some doubts and reluctance. He thereby seems to imply that there is some element of judicial usurpation, albeit successful usurpation,

in the establishment of this power. On the other hand, in an essay in the Canadian Bar Review in 1956, I argued that this power developed naturally by legitimate constitutional evolution for federal Canada, out of the long history of the common law jurisdiction of the English superior courts, which formed the model for the colonial superior courts. I pointed out as well that the inner logic of federalism pushed in the same direction, requiring as it did some institution for impartial determination of federal power-distribution issues as they arose, under the power-distributing lists of the *B.N.A. Act*, between the Federal Parliament and a Provincial Legislature. Under the influence of both history and logic, it was almost inevitable that the traditional courts should, with general consent, assume this basic interpretative task. It is true that the Provincial Legislatures control the constitution and procedure of provincial courts under section 92(14) of the *B.N.A. Act*, and that the Parliament of Canada has the same control over the Supreme Court of Canada under section 101 of the *B.N.A. Act*. It is also true that in Britain, no court can question the validity of a statute of the British Parliament. Professor Strayer seems to argue from this that I am wrong to say there has been legitimate historical continuity behind the specially entrenched power of Canadian courts to review statutes of the Federal Parliament or the Provincial Legislatures for competence, in relation to the primary distribution of legislative powers in the *B.N.A. Act*. In effect, he says Canadian superior courts cannot claim *by inheritance* a power to review parliamentary statutes for basic competence that their British counterparts never had in relation to the British Parliament, at least since 1688. The flaw in Professor Strayer's argument is that Canadian courts have never been faced by the full equivalent of the British Parliament in Canada or the Provinces, either before or after Confederation in 1867, or before or after the *Statute of Westminster* in 1931. At first, after 1867, the courts reviewed the validity of statutes of the Federal Parliament and the Provincial Legislatures because they were parliamentary bodies in the British Commonwealth *subordinate* to the British Parliament, and the *B.N.A. Act* was a statute of that Parliament, as well as being a federal constitution. In 1931, as I understand developments leading up to the *Statute of Westminster*, and the *Statute of Westminster* itself, the supremacy of the British Parliament was abolished, *but not the supremacy of the B.N.A. Act itself as the Canadian Constitution, distributing basic legislative powers between the parliaments of Canada and the Provinces.* The overriding power of judicial review for competence was already established in 1931 by history, custom, precedent and the needs of federalism in

a British constitutional context. Legally and constitutionally it simply continued after 1931, and will continue, unless and until there is change by constitutional amendment. Such amendment is not within the power of the Parliament of Canada alone or the Legislature of a Province alone. In my view it would require the consent of the Parliament of Canada and all the Provinces. No such amendment is contemplated.

These are very complex questions on which no doubt reasonable men may reasonably differ. But the burden of my complaint against Professor Strayer here is that he chooses to raise the basic issue of the roots of the power of judicial review in a federal system — our system with our history — and then really does not deal with the problem in depth, that is at the level of the first things of our organized community life. It is not good enough to cast doubt on the specially entrenched character of the power of judicial review we are discussing by arguing that the Parliament of Canada, or a Provincial Legislature, could impair or destroy their respective court systems, for this purpose or for other purposes, in a number of procedural or substantive ways. No doubt the Parliament of Canada could repeal the *Supreme Court Act*, the Provinces could repeal their judicature statutes, or Governments could refuse to appoint any more judges. But all this amounts to saying is that there can be no built-in safeguards against these primary ways of committing constitutional suicide. At this level of first things constitutional, if Members of Parliament and Ministers do not understand the rules and principles of the system, believe in them, and do their duty accordingly, chaos and revolution set in. In the United States, in spite of their formal explicit constitutional special entrenchment, the United States Supreme Court could be abolished if the Presidents refused to appoint judges, or the Senate refused to ratify appointments, or the Congress simply repealed the law specifying the number of Supreme Court justices. One must assume that the holders of primary public offices will do their duty according to the basic accepted rules of their society. Otherwise, at this level of first things, all arguments about 'supremacy', 'sovereignty' or 'legitimacy' turn out to be circular.

Perhaps I have misunderstood Professor Strayer's views on the legitimacy of the power of judicial review under our federal constitution, and, if so, there is not really even this difference between us. In any event, in his last chapter, entitled 'The Future of Judicial Review', he does give the legitimate existence and the importance of the power his full and eloquent support. Among other things he says:

> Beyond this rather negative role of policing the federal system lies the broader role of constitutional development. In the process of keeping each legislative body within its own sphere, the courts should constantly re-examine the accepted definitions of legislative power. The need and the opportunity for dynamic constitutional interpretation are both apparent...
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> It is axiomatic that the constitution, like all law, must adjust to changing conditions. Change by formal amendment being a practical impossibility, change by judicial redefinition becomes a necessity. (pp. 208-9).

I agree heartily with this, and recommend Professor Strayer's treatise most highly to all who seek better understanding of our federal constitution.

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