BOOK REVIEWS
REVUE DES LIVRES

Nationalism and the Multinational Enterprise: Legal, Economic ana Managerial Aspects. Ed. by H.R. Hahlo, J. Graham Smith and Richard W. Wright, Dobbs Ferry, N.Y.: A.W. Sijhoff Leiden, Océana Publications Inc., 1973. Pp. X, 373 ($21.00).

Edited by the three principal originators of an international conference on the multinational enterprise, the papers in this volume are those given, and later revised, by one of the most distinguished collection of scholars assembled in recent years to study this important institution. The conference, held in August of 1971 under the joint auspices of the Institute of Comparative Law, the Faculty of Management and the Department of Economics of McGill University, was attended by experts in a variety of disciplines, and the publication of this book is a happy event for all those interested in the effect of multinationals on international economic behavior.

The volume consists of 5 parts, each divided into several chapters; a summing up done with a light hand by Dean Howard Ross of McGill's Faculty of Management; a series of appendices prepared by Professor Clive Schmitthoff as part of his article describing, among other things, the pattern of organization of seven or eight major multinationals; and finally, what is most rare in a book based on papers delivered at a conference, an adequate index.

Part I, entitled "The Multinational Enterprise in its National Setting", deals with the United States, Great Britain, Canada, Germany, France, Belgium and the EEC, and Africa. Each of the 6 chapters in this part is more than a description of the national framework within which the world's major multinationals operate from their home base or with their "associates" abroad. It is in almost every case a quite detailed analysis of the dilemmas and the debates in each country about the problems of controlling this new institutional giant that crosses frontiers in its daily work, sometimes against the combined wills of its jural creators, the nation states themselves. Indeed many of the countries from which these multinationals originate, such as the United States, Britain, France and West Germany, are not always happy with the degree of control they are able to exercise over the offspring

of their own company laws and the economic strength of the progeny.

The simplistic view that the multinationals are necessarily agents of economic imperialism, acting only for the states that play host to the head office, is increasingly untenable under close examination. Part II of the book, with three chapters on the "Costs and Benefits of The Multinational Enterprise", demonstrates the complexity of any balance sheet of the pluses and minuses of this new transnational reorganization of business behaviour. Their sophisticated defence by Professor Harry Johnson does not meet all of the arguments put forward by Canadian critics such as Eric Kierans and Abraham Rotstein — although both stand on somewhat different grounds in their critique of what Kierans calls the "cosmocorporation", and what Rotstein in his essay labels "A Matter of National Survival" as part of the title of the paper itself.

Parts III, IV and V are further demonstrations of both the scope of the conference and the inherent difficulties in the issues. Part III is entitled "Management of the Multinational Enterprise", and considers governmental control by both the home state and the receiving or host state. From its three chapters it is quite evident that while substantial regulation is possible, indeed up to the point of confiscation, rational regulation that balances the varied interests involved and leads to an economic and administratively constructive result is not easy to achieve.

These conflicts are expressed by the very subject matter of Part IV, entitled "Litigation, Arbitration, Securities, Industrial Relations and the Multinational Enterprise". Its four chapters show the inevitable results of attempting to reconcile national laws rarely in harmony and often in conflict with economic policies equally in opposition to each other. It is quite clear from the chapters on Litigation and Arbitration that it is impossible to keep the multinational enterprise from being the subject of substantial domestic litigation and increasing international arbitration or other dispute settlement procedures. Similarly, the intricate rules of many states in regulating industrial relations and the sale of securities provide new sources of irritation and difficulties for management when the multinational must accommodate its behaviour to meet local legislation. Professors Keith Wedderburn and Louis Loss contribute characteristically thought-provoking and lucid articles on these two problems.

In Part V three chapters deal with "Anti-Monopoly Legislation and the Multinational Enterprise" from the vantage point of the United States, Europe and Canada. Of particular interest here is

the extensive and irritating tendency of the United States to apply its domestic law to foreign subsidiaries owned by U.S. multinationals or closely associated with them. The Canadian view tends to be part of its general concern with direct or indirect U.S. intervention into the Canadian economy on the one hand and its quite positive approach toward seeking through OECD and elsewhere some better *international* answers to this global vacuum in the matter of a universal anti-trust policy. Europe, until recently, has been far less familiar with restrictive trade practice legislation. It has now to work out its own new competition policy within the Common Market rules at the same time as it resists the tendency of the United States to give extraterritorial application to its anti-trust (and other) laws.

In his summing up Dean Ross states that "[a]ll through this subject runs the recurring theme of the conflict between economic and political considerations". He confesses to being unable either to understand very clearly, or to be guided wholly, by any of the three main classes of participants at the conference: lawyers, economists and managers. This shrug at the experts cannot satisfy governments that must deal with multinationals. They are an immensely important force and have led to a new structure in international economic behaviour that is transforming patterns of trade, investment, production and money flows. When these activities are performed by "the private sector", they may generally be limited by whatever rules the local nation state may impose; but it is different where a substantial portion of mankind's economic activity is now dominated for better or worse by organizations lying outside the main stream of public control and accountability. It is no accident that various organs of the United Nations, such as the OECD, the ILO and the GATT, are presently examining the significance, benefits and dangers of this new threat to accountability. For neither local law nor loose-knit interstate cooperation can effectively control multinationals which regulate their own transfer prices, investment plans, research and development, crossing or ignoring boundaries in the pursuit of growth and profit.

However, multinationals in theory do have sound classical economic objectives. Their aims are to make decisions which allocate, within a global setting, the world's skills and resources so as to maximize productivity and profitability. On paper there is nothing wrong with this, since it presumably achieves global efficiency in the use of resources with a corresponding net gain to mankind as a whole. But the real difficulties arise when it is realized that a multinational's views may not coincide with those of a state

within which it is located concerning matters such as priorities and equity, or even of a group of nation-states which have banded together to improve their general economic performance.

Some of these questions were forseen at Havana in 1948, but the failure to adopt the Havana Charter left a gap in the international regulation of enterprise that has never been filled — either by GATT or by any of the other regional or universal agencies. Moreover, all perspectives are distorted today by the energy and monetary crises, with their impacts upon normal trading patterns. In the short run the multinational enterprise seemed a threat to sovereign states and their search for "decentralized" (and cooperative) patterns of survival and development. Within recent months these crises have demonstrated that the multinationals may be as vulnerable to the new disorder as states themselves. Indeed, as Professor Vagts points out in Chapter I — a paper written long before the present upheavals — the multinational depends "on the maintenance of a reasonably open economic world". He warns that just as U.S. overseas trading shrank drastically in the economic crisis of the 1930's, the multinational enterprise today could also "shrivel up in a hostile world".

Mankind has greater troubles — economic, monetary, environmental and nuclear — than the health or temporary sickness of the multinational corporation. And while a high priority is still to be given to rationalizing its international accountability, an even higher priority may now have to be given to maintaining a rational, global economic framework. Most states, in due course, may be happy to have the multinational again function with success because that "success", however better controlled, would now indicate the return to a more orderly international economic system.

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The Law of Agency (3d Edition). By G.H.L. Fridman, London: Butterworths, 1971. Pp. lvii, 334 (Hardcover $15.40; Paperback $8.75).

Dean Fridman's [1] latest edition of his book on agency is worthy of comment from a Canadian perspective. Although it is not a Canadian edition, its pages contain several references to Canadian material and thus it is of greater interest to lawyers in this country than other works on this subject.

This edition is identical in format to the second edition. The book is divided into six major parts, each following a relatively traditional approach. The agency relationship is dealt with under the following classifications: nature, creation, scope, obligations, effects and termination. One may ask whether it is desirable to deal with the creation and scope of agency separately. As a result of this division similar material is treated in separate parts of the book. One example of this is found in Chapters Eight and Twelve, where agency of necessity is discussed under both the heads of creation and scope. It seems that nothing would have been sacrificed by combining these two aspects of agency: one necessarily involves a discussion of the other. Conceptually, little appears to have been gained from a student's point of view by divorcing the two.

The major Canadian cases on agency have been cited by Dean Fridman and are, to some extent, discussed in the work. Most of the discussion of this material is relegated to the footnotes. This, however, does not diminish its effectiveness in any way. One must remember that it is still primarily an English textbook. *McLaughlin* v. *Gentles* [2] is cited as Canada's answer to *Watteau* v. *Fenwick*;[3] the recent Supreme Court of Canada decision in *Crampsey* v. *Deveney* [4] and the Ontario Court of Appeal decision in *Campbellville Gravel Supply, Ltd.* v. *Cook Paving Company, Ltd.*[5] are other examples of important Canadian content.

One might have wished to see a more critical discussion of this latter case, which followed the rule in *Greer* v. *Downs Supply Co.*:[6] where an agent makes a contract with a third person in which the identity of the agent is a material element in its formation, a "personal contract" is formed on which the agent's undisclosed principal may not be allowed to sue. In the *Greer* case, the English

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[2] [1919] O.R. 477; 51 D.L.R. 383; 17 O.W.N. 245 (App. Div.).
[3] [1893] 1 Q.B. 346; 67 L.T. 831; 9 T.L.R. 133.
[4] (1969), 2 D.L.R. (3d) 161 (S.C.C.).
[5] (1968), 70 D.L.R. (2d) 354 (Ont. C.A.).
[6] [1927] 2 K.B. 28; 96 L.J.K.B. 534; 137 L.T. 174 (C.A.).

Court of Appeal found that the third party had dealt with an agent only because a debt was owed to him by the latter. The Court held that not only was the principal subject to any defenses the third party had against the agent (*e.g.*, a set-off), but also was in the unfortunate position of having no contract whatever with the third party. He could not recover from the third party amounts owed under the contract, over and above the amount of the set-off.

On its facts, the *Campbellville* case would have led to a similar result had the Court found the principal subject only to the set-off, since it exceeded the value of the main contract. But in addition, Laskin,J.A. (as he then was), citing *Greer* as authority, found a personal contract to exist between the agent and the third party. As a result, even if the amount of the set-off would have been less than the main contract price, the principal could not have sued the third party for the balance, notwithstanding the fact that the latter would have benefited under the contract. Although one cannot expect a detailed analysis of a Canadian case in a non-Canadian text-book, in view of the importance of this decision, a greater emphasis might have been placed on problems created by it.

In examining the ratification of pre-incorporation contracts, it is suggested that Dean Fridman has misinterpreted an important Canadian case. The basic determination to be made in these cases is who, if anyone, is to be liable to a third party on a contract made prior to the incorporation of the company. After discussing the basic rule of *Kelner* v. *Baxter*,[7] in which a company was not held liable on a contract made on its behalf before its incorporation, and the variations of the rule as made by different courts,[8] Dean Fridman cites the Saskatchewan Court of Appeal case of *Dairy Supplies, Ltd.* v. *Fuchs*[9] for the proposition "that the company could be liable for the price [of the goods supplied] when it was incorporated".[10] Although this statement is somewhat ambiguous in itself, a footnote in another part of the book seems to indicate that Dean Fridman is interpreting this case as departing from the established rule in *Kelner* v. *Baxter*. He states that "[o]n incorporation of the company, it was the company, and not the agent, which was liable".[11]

It is certainly true that the Saskatchewan Court of Appeal did not hold the agent liable, but, without more, the company certainly

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[7] (1866), L.R. 2 C.P. 174; 36 L.J.C.P. 94.

[8] *Black* v. *Smallwood*, [1966] A.L.R. 744 (Aust. H.C.); *Newborne* v. *Sensolid (Great Britain) Ltd.*, [1953] 1 All E.R. 708; [1954] 1 Q.B. 45.

[9] (1959), 18 D.L.R. (2d) 408; 28 W.W.R. 1.

[10] Fridman, *The Law of Agency* (1971), 46.

[11] *Ibid.*, 173, f.n.25.

could not be liable either. To be so, the company would have had to have entered into a new contract with the third party. As Martin, C.J.S. stated:

> If the defendant is not liable by reason of the promise of the plaintiff's manager, the plaintiff is left in the unfortunate position of having to resort to the company after incorporation, but cannot resort to it without entering into a new agreement with it.[12]

If the result were otherwise, as Dean Fridman seems to suggest, would not the problem of ratification of a company not yet in existence be substantially solved or at least substantially altered? Would not *Kelner* v. *Baxter* be of much less importance in Canada than it is?[13]

In a review of the second edition of this book, Professor Treitel made valuable comments regarding the use of certain terms to describe types of authority.[14] This is a very difficult matter since the courts have been noticeably inconsistent in their use of "implied authority". Text-book writers also ascribe different meanings to different agency terms. The problems raised by Professor Treitel of the confusing use of implied and usual authority can, it seems, be echoed with regard to the third edition as well. Usual authority is said to be a variety of implied authority which is in turn a variety of real or actual authority.[15] If the principal places a limitation on the agent's authority one can no longer speak of the actual authority of an agent with respect to an act done in contravention of the express reservation. If a principal is held liable in such a situation it would necessarily have to be on the ground of some other type of authority. It might be either apparent or "usual" authority, but the latter is unrelated to actual authority. However, after recognizing this, Dean Fridman goes on to state that "the usual authority of the agent continues to operate, despite the secret limitation".[16] It seems that a secret reservation of the authority relevant to the act in question should deprive the agent of authority, at least of actual authority as this term is used by Dean Fridman, of which implied and usual authority is a variety. This is merely one example of some of the problems the reader has with the terminology used. Professor

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[12] (1959), 18 D.L.R. (2d.) 408, 414.

[13] The problem with pre-incorporation contracts has been substantially solved by statute in some jurisdictions. See *The Business Corporations Act*, R.S.O. 1970, c.53, s.20, and Bill C-213 (Can.), An Act Respecting Canadian Business Corporations, s.14.

[14] (1968) 26 Camb. L.J. 156.

[15] Fridman, *The Law of Agency* (1971), 91.

[16] *Ibid.*, 101.

Treitel has previously pointed out other problems, most of which, it is suggested, still exist in this edition.

As a student text for use in Canadian law schools, Fridman's *Law of Agency* is a good book. As anticipated by Dean Fridman in his preface to the book, the inclusion of Canadian material has made it "more relevant and useful for Canadian students and lawyers".[17] On the whole, the book presents well this complicated subject and contains many refreshing and perceptive views. Perhaps one can soon look forward to a truly Canadian edition of this valuable work.

Daniel Ish *

The Sovereignty of the Law: Selections from Blackstone's Commentaries on the Laws of England. Edited with an Introduction by Gareth Jones, Toronto: University of Toronto Press, 1973. Pp. IV, 254 ($15.00).

The reputation of Blackstone and his *Commentaries* did not sensibly decline until the mid-nineteenth century, despite Bentham's radical strictures in the *Fragment on Government* (1776). His analysis of the English constitution, with its presumed system of checks and balances, was no doubt relevant even during his lifetime, and recent historical opinion has dismissed him rather severely as a member of "a prolific school of constitutional mythologists". His survey of the structure and functioning of English legal institutions withstood the test of time more effectively, and was still drawing warm eulogies from such good judges as Bryce and Maitland in the early years of the twentieth century. The present extracts, taken chiefly from the famous introduction and first book of the *Commentaries* in the eighth edition of 1778 (the last published in Blackstone's lifetime), are not merely a work of piety. In conjunction with the valuable Introduction by the editor, the selections provide a solid base for some fascinating excursions into the legal and constitutional thought of the eighteenth century.

The *Commentaries* have been variously judged as a polished resumé of English law designed to attract "gentlemen of rank and station" into the profession or, less charitably, as a conscious and skilful defence of the existing legal-political order. The two

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[17] *Ibid.*, vii.

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verdicts are not mutually exclusive. Blackstone was indeed troubled by the decline of the Inns of Court, from which "obscure and illiterate persons" emerged as mere legal technicians with no interest in the historical evolution of the common law. Thus one of the strongest sanctions of law and of institutions in general, their immense antiquity, was in danger of submergence. Blackstone, who stood close politically to the squirearchy or "country interest", placed his *Commentaries* in a historical dimension and attempted to combat, by a studied elegance and warmth of presentation, the belief of the gentry that the study of law was an arid and irrelevant pursuit. The immediate political circumstances which prompted Blackstone to publish the first volume of his work are more obscure. Possibly the rising popular enthusiasm for John Wilkes, whom he opposed in the Commons, convinced him of the need for a sober and conservative survey of legal and political institutions.

The *Commentaries* were an instantaneous success. In vain Bentham, and subsequently Austin, exposed the cumbrous and archaic legal procedures which Blackstone had justified in the light of history. When the forces of radicalism and reform gained impetus from the American and French revolutions, Blackstone's dogma of the unmatched excellence of English institutions provided an intellectual base for the defenders of the *status quo*. But he was not an equally entrenched opponent of law reform. The humanitarian influence of Beccaria, the increasing number of crimes regarded as capital felonies, and the consequent reluctance of juries to convict combined to persuade him that the criminal law was in pressing need of amendment. To this end he proposed the appointment of a commission charged with the task of revising the entire criminal code. His suggestion was implemented half a century after his death, when the Criminal Law Commission began its labours (1833).

The editorial Introduction is scholarly and judicious, and consistently seeks the *via media* between Blackstone's admirers and detractors. The adoption of the text of the 1778 edition of the *Commentaries* is wholly justified, since it was the last to be revised by the author's own hand. But a comparison with the parallel text of the first edition of 1765 would have afforded valuable insights into the development of Blackstone's constitutional and legal views during the critical period extending from 1765 to 1778.

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