BOOK REVIEWS
COMPTES RENDUS

Proposals for a Securities Market Law for Canada. By Philip Anisman. with Warren M.H. Grover, John L. Howard and J. Peter Williamson. Volume I, *Draft Act;* Volume II, *Commentary;* Volume III, *Background Papers.* Ottawa: Government of Canada, Dep't of Consumer and Corporate Affairs, 1979.

I. Introduction

This three-volume study signifies that securities regulation, as a separate area of law in Canada, has come of age. Moreover, it is an indication that the study and reform of Canadian business law have rapidly progressed to a high level of sophistication in the last decade.

The *Proposals for a Securities Market Law for Canada* (hereinafter "the Proposals"), like the *Proposals for a New Business Corporations Law for Canada*[1] produced by the same department ten years ago, analyze thoroughly existing legislation, jurisprudence and administrative practice, recognize unique Canadian economic conditions, borrow generously and appropriately from various jurisdictions, particularly federal legislation in the United States, and set forth for public debate a clear and cogent draft bill with detailed commentary. In sum, as an exercise in technical law reform the Proposals are commendable. They are also essentially conservative and organic in that they refine existing legal principles rather than strike bold new approaches. Yet in this derivative approach the Proposals reach a high level of precision and clarity.

As a unilateral venture by the federal government into the field of policy-making, however, the practical success of the Proposals is more questionable. First, the field of securities regulation is now occupied almost exclusively by the provinces and, though the constitutionality of federal or provincial jurisdiction is unclear, the federal government to date has made no comprehensive, sustained attempt to assume jurisdiction. Second, this study was launched without prior discussions with present policy-makers in the field of securities regulation, in particular provincial officials and self-regulating organizations. During the seven years in which the

[1] Dickerson, Howard & Getz, Vol. I, *Commentary;* Vol. II, *Draft Act* (1971) [hereinafter "the C.B.C.A. proposals"].

Proposals were prepared, provincial authorities have worked assiduously and successfully to produce uniform statutes and more coordinated administration. This movement to improve provincial securities regulation culminated with the adoption in Ontario of *The Securities Act, 1978*[2] and the willingness of the other major provincial jurisdictions to adopt essentially similar uniform legislation. Third, there has not been any groundswell of popular support for federal intervention like that which occasioned the two principal U.S. federal statutes, the *Securities Act* of 1933[3] and the *Securities Exchange Act* of 1934,[4] or for broad reform like that which in Ontario spawned *The Securities Act, 1966*[5] and other uniform provincial statutes which followed shortly thereafter. While the Royal Commission on Banking and Finance recommended in 1964 that a federal body govern the securities market, the years of federal inactivity and the development of provincial administrations have blunted the force of that recommendation. Fourth, in the current discussions of a new constitution and particularly the distribution of powers between federal and provincial authorities in Canada, matters more fundamental to the good government of the nation than a federal securities law will occupy the time of policy-makers. The introduction of a substantial federal presence into this domain will presumably not command high priority with federal and provincial authorities. Finally, as much as Canada now needs coordinated securities regulation, duplication of administration would be a particularly painful price to pay at this time. And in spite of impressive efforts in these Proposals to permit concerted action between federal and provincial regulatory bureaucracies, a degree of duplication will nevertheless remain, and it is improbable that provincial authorities will yield the field.

II. The study in general

The study, begun in 1973, was ably led by the Director of Corporate Research in the federal Department of Consumer and Corporate Affairs, Philip Anisman, who returned to academic life at the study's conclusion. He was joined by three eminent scholars, Warren Grover, John Howard and Peter Williamson. These four were assisted by twenty-seven advisers who contributed the fifteen major background studies, published as Volume III of the Pro-

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[2] *The Securities Act, 1978*, S.O. 1978, c. 47 as am.

[3] 48 Stat. 74 (1933); 15 U.S.C. §§ 77a *et seq.* (1964).

[4] 48 Stat. 881 (1934); 15 U.S.C. §§ 78a *et seq.* (1964).

[5] S.O. 1966, c. 142; *The Securities Act*, R.S.O. 1970, c. 426 as am.; repealed by *The Securities Act 1978*, S.O. 1978, c. 47.

posals. This task force reflects a remarkable variety of experience in practice, scholarship, law reform, public service and, in several instances, technical expertise in areas of economic or technology relevant to securities markets. The depth of this advisory team is reflected in the soundness of the legislative result, and the effort to assemble this expert group and to produce such an attractive reform proposal is cause for celebration.

III. Volume I

The first volume of the Proposals contains a draft statute entitled *The Canada Securities Market Act,* and is divided into sixteen parts. It is not radically different in size, organization and philosophy from *The Securities Act, 1978,* in Ontario, although it is of course national in scope. It forges a modest number of original legal principles, clarifies and sharpens many of the concepts of provincial law, and blends some of the important improvements in securities law in other jurisdictions, particularly from the federal *Securities Code* in the United States.[6] At the end of each section within the sixteen parts, the legislative analogue or conceptual source is given. Thus one can easily refer to the specified section of that source.

IV. Volume II

This volume, containing four hundred pages of commentary, elucidates the purpose and background of each section in the draft Act. The *Commentary* analyzes the different sources considered in drafting: it succinctly discusses the merits and demerits of alternative formulations, and specifies reasons for the selection of the particular section. In several particularly interesting parts it sets out minority positions of advisers, and in a few instances candidly acknowledges that a lack of experience does not permit a clear or easy conclusion to difficult choices.

The *Commentary* will serve to accomplish one of the laudable objectives of this method of law reform, that is, to provide informed feedback to the drafters in preparing a revision before a bill is introduced. This format was followed in the C.B.C.A. Proposals in 1971, with beneficial results for the statute as finally enacted and for the practising community who had to apply it.

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[6] American Law Institute, *Federal Securities Code* (Proposed Official Draft (1978)) as am. by A.L.I., Federal Securities Code (Supplement to Proposed Official Draft (1978)) [hereinafter "the A.L.I. Code"]; now A.L.I., *Federal Securities Code* (1980), 2 vols. & Supplement (1980).

The *Commentary* and the detailed background papers may present an interesting evidentiary problem for judicial interpretation of future statutory provisions. Will Canadian courts use these secondary sources as an explanation of the draftsmen's intent (as opposed to the evil which the particular provision was attempting to cure), and therefore as persuasive evidence in attempts to resolve ambiguities? The Act opts for American practice. Section 16.16(1) includes an express provision that legislative history may be considered.

Part I gives the title of the Act and declares its policy. The seven subsections stating this policy identify the broad context in which the securities market functions and the goals to be served by the statute. Section 1.02 neatly summarizes the methods the statute will use to accomplish its task:

> by ensuring the availability of information relating to investment decisions, by protecting investors from fraudulent and deceptive conduct and by ensuring fair competition, all of which can best be accomplished by the creation of an independent public body to regulate the Canadian securities market and the securities market actors over which the Parliament of Canada has legislative jurisdiction in co-operation with similar provincial and foreign public authorites.

Part 2 contains forty-nine different sections, many of them broken into subsections, setting out comprehensive definitions for the Act. These definitions borrow judiciously from Canadian and American sources and reflect a restrained effort to glean the best lessons from comparative study. Like many sections in the Act, they pay tribute to the saw that "an old law is a good law". However, they do clarify many existing provincial law definitions.

Part 3 is the first and the most general of the exemption provisions. It follows the general exempting pattern of existing provincial legislation but refines some of the definitions contained therein. Part 3 exempts specified securities from all or part of the Act. Part 6 exempts certain transactions from prospectus-type requirements. Part 8 provides for exemptions from licence requirements. Finally, the Commission is empowered to make further *ad hoc* exemptions.

Part 4 provides for registration of issuers and introduces an interesting duality. First, issuers that currently meet a threshold of sufficient public holders of their securities to permit active trading must register under the part: they must file an annual registration statement and fulfil their obligation to provide regular and timely information to shareholders. Second, issuers that make a distribution, whether registered or not, must comply with prospectus and prospectus-related requirements. This part adopts a tiering approach to balance the need felt by investors for information and the burden

of compliance. The approach is modelled partly on current Ontario provisions and partly on the A.L.I. Code, while in other respects it is new and unique. An issuer falling below a minimum threshold number of security holders is subject only to enforcement activities. An issuer at an intermediate threshold is subject to all anti-fraud provisions. Issuers at higher thresholds are also subject to registration provisions. Finally, relief from the last-mentioned obligations may be obtained by application when an issuer falls below the threshold level.

Part 5 deals with distribution. Its fifteen sections break new ground and establish a more varied categorization of types of distributions with briefer or more detailed information requirements than current provincial schemes. Furthermore, it borrows from the U.S. Code by recognizing the competence of provincial securities acts for intra-provincial distributions and exempting these. The sensitivity this part shows in tailoring requirements to categories of issuers here and elsewhere in the Act will be welcomed by those who must comply with them.

However, in another important policy provision the Act promotes an interventionist approach. Part 5 continues the existing provincial "blue sky" discretion of the regulator to accept or reject a prospectus, employing the "fair, just and equitable" test from state jurisdictions in the United States. Moreover, it explicitly states this test to make it clear that the Commission may reject a prospectus on basic grounds of fairness, whereas existing provincial acts speak mutely of the exercise of discretion to reject a prospectus in the public interest although their administrators act with "blue sky" authority. The Act thus rejects the less interventionist model of the U.S. federal statute which, since 1933, has used the "full, true and plain disclosure" test for accepting or rejecting prospectuses.

Part 6 contains extensive exemptions from the prospectus requirements in five sections. It does not perfectly mirror the new provincial initiative, but strikes a more conservative position between the new Ontario Act's closed system and the present system in the other provinces, itself modelled on the previous Ontario provisions:

> [it] attempts to ensure that large amounts of securities will not be sold to public investers by means of the exemptions without prospectus disclosure, while permitting the sale of small amounts of securities of reporting issuers by means of anonymous sales into the market and the sale of securities of non-reporting issuers by means of direct transactions. [It] thus achieves a balance which avoids the imposition of restrictions on resale of securities that do not create a risk to large numbers of investers but which preclude the use of the exemptions as a device to

> accomplish a wide distribution of securities without complying with the provisions [p. 93].

Part 7, which deals with continuous and regular disclosure contains twenty-five sections. It requires reporting issuers to make regular and timely reports to their security holders and to the Commission, and imposes disclosure duties on issuers and insiders in connection with certain transactions. It does not depart notably from the *Canada Business Corporations Act*[7] and basic principles in existing provincial acts relating to regular, continuous and timely disclosure, proxy solicitation, insider reporting and takeover bid regulation, but it does contain some interesting specific innovations, all of which will be enthusiastically welcomed by most of those governed by the statute. For example, on timely disclosure it is less interventionist than the newest Ontario initiative. The issuer makes the initial determination of whether public disclosure of a material fact would be unduly prejudicial and, as is not the case under the new Ontario Act, does not have to file a confidential timely disclosure report of the event with the Commission. Rather, the issuer simply informs the Commission that undisclosed material information exists so that the Commission may increase its surveillance of trading in the issuer's securities. For example, the Act adopts "a small trade" exemption, stimulated by but not identical to U.S. Securities Exchange Commission practice empowering the Commission to specify minimum reporting limits to remove from insiders the obligation of reporting on a monthly basis with attendant publication the insider trades of relatively minor amounts. Finally, the Act leaves undecided the treatment of the controversial sale of a controlling block at a premium question. The new Ontario Act requires the purchaser to make a similar follow-up offer to minority shareholders. The *Commentary* justifies the position this way:

> The impetus for the [Ontario] legislation is the apprehended loss of confidence in the market by investers if such transactions are permitted to occur. But the effects ... are still far from clear. As a result the draft act ... leaves [this] for reconsideration in the light of the experience under the Ontario legislation and the comments received on these *Proposals* [p. 124].

Of equal importance will be the experience of the Ontario Commission in exercising its awesome *ad hoc* responsibility in dealing with applications for what is now a rather narrowly circumscribed exemption from the follow-up obligation.[8]

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[7] S.C. 1974-75, c. 33 as am.

[8] See *The Securities Act, 1978*, S.O. 1978, c. 47, s. 99. See also *Re Atco Ltd, IV International Corp. & Canadian Utilities Ltd*, O.S.C. Bulletin, September 1980; *Re Newsco Investments*, O.S.C. Bulletin, July, 1980.

Part 8 contains seven sections which require that "market actors" obtain a licence. It stands in contrast to the pattern of provincial acts. It only requires registration of persons who carry on *business* as brokers, dealers or advisers or act as underwriters, substituting a "business" test for a "trading" test. The *Commentary* concedes that the licencing requirement on market actors is probably "the most difficult element of a [federal] securities law" to justify on constitutional grounds (p. 128). However, it concludes that this requirement is necessary to a comprehensive scheme. The detailed requirements underlying the registration provisions do not differ radically from existing provincial law. Like their provincial analogue they anticipate the substantial content to be found in the regulations or policy statements by giving considerable freedom to the Commission to alter these to meet changing needs.

Part 9 contains fourteen sections which empower the Commission to supervise recognized self-regulatory organizations. Its purpose is neatly summarized:

> the Part, while recognizing and adopting the present Canadian scheme of self-regulation, formalizes the procedures, particularizes the standards for its continued functioning, and subjects the overall scheme to commission supervision. In doing so, it expressly imposes on the Commission the duty of reconciling any conflict between competition policy and the needs of an efficient securities market and the protection of investers and of ensuring fair implementation by the self-regulatory organizations of their functions [p. 149].

The tone of the *Commentary*, coupled with several of the background studies, suggests that the theme of competition will attract more attention in the regulations than under existing provincial law. The concept of fair competition appears twice in the first policy part of the Act.[9]

Part 10 contains eighteen sections, the purpose of which is "to facilitate the development and implementation in Canada of one or more book entry systems for the transfer and pledge of securities whether or not they are evidenced by security certificates" (s. 10.01). This reflects one further step towards the automation of securities transactions. As the *Commentary* explains, "Canadian corporation laws do not generally legitimate book entry transfers of deposited securities or certificateless issues or transfers" (p. 174). Ontario corporations legislation, governing all securities transactions in Ontario and not simply those of Ontario incorporated companies,[10] is the modern exception, and even this provision

[9] S. 1.02(e) and Conclusion.

[10] *Ontario Business Corporation Act*, R.S.O. 1970, c. 53, s. 91.

"legitimates transfer by book entry of deposited securities but does not legitimate *certificateless* issues or transfers" (*ibid.*). Furthermore, provisions authorizing trustees to deposit securities and laws governing the functioning of a depositary are lacking in Canada, thus requiring a maze of amendments to existing federal and provincial laws, or possibly a general enabling law in each province. Delicately premised on the debatable assumption that Parliament is paramount with respect to works for the general advantage of Canada or two or more provinces, and that stock clearing agencies are integral to a national securities market system, Part 10 will permit (though not require) issuers to deposit their certificates with the federal registered clearing agency or to use it in other respects. Thus, Part 10 "provides for the immobilization of securities certificates and its consequences in respect of the issue, the transfer and the pledging of securities by book entry, and for the protection of the interests of beneficial owners, pledgees and execution creditors, and it also expressly declares the rights and duties of a depository and its participants" (p. 175).

Part 11, in thirteen sections, sets out basic rules to govern trading conduct by registrants, with no substantial departures from existing provincial regimes. While it is anticipated that the rules of self-regulatory organizations will provide many of these provisions, since membership in a self-regulatory body is not mandatory under the Act, it is necessary that the Commission hold a residual discretion. This part authorizes the Commission "to deal with the activities of registrants that involve conflicts of interest, with specific types of trading that raise issues fundamental to the integrity of the market itself and with transactions in the over-the-counter market that come within its jurisdiction" (p. 198).

Part 12 contains eleven sections which set out the definitions of fraud and manipulation. Thus it brings together provisions which are now found both in the *Criminal Code*[11] and the provincial securities acts. It applies to all securities other than those exempted from the Act, reflecting the wide ambit of the statute's anti-fraud focus. By contrast the registration-of-issuer requirement has a narrower application. The prohibitions of fraud and manipulation in the part are foundation provisions allowing other parts of the Act to deal with the consequences of breach, in particular Part 13 on civil liabilities and Part 14 on criminal sanctions. This part admirably preserves the core principles governing fraud and manipulation in existing Canadian jurisprudence, primarily derived from British case law, but incorporates important clarifications based on

[11] R.S.C. 1970, c. C-34, s. 340.

recent jurisprudence, academic studies and statutory reform in other jurisdictions. In one area it demonstrates cautious restraint. It does not attempt to deal with manipulative conduct involving "stabilization" in connection with a distribution. It concludes that the issue is complex and that there is insufficent legislative experience for provisions now; then it authorizes "stabilization" to be governed by rule-making by the Commission. This is an audacious delegation of responsibility analogous to U.S. practice. The rule-making authority will permit the Commission to enact regulations authorizing legitimate stabilization activities and proscribing any other conduct that exceeds "stabilization" in connection with a distribution.

Part 13 is one of the longest portions in the second volume, setting out in twenty sections a comprehensive code of civil liability. Any violation of the Act may give rise to civil liability under this part. However, the remedies provided are varied and are tailored to the specific type of transaction involved. This part is a considerable improvement on existing provincial law, not so much because it develops sweeping innovations, but because it codifies an integrated scheme of remedies to clarify much of the ambiguity relating to basic liability and defences in current law.

Part 14 is the criminal analogue to Part 13. It sets out in eleven sections the Commission's authority to initiate enforcement activity with few innovations. This includes the initiation of investigations for detecting violations or gathering information related to quasi-legislative and policy-making functions. It empowers the Commission to issue "cease trade" or "freeze" orders. It permits the Commission to apply to a court for injunctive or other equitable relief. The courts are given broad remedial discretion. Finally, it permits the Commission to initiate criminal prosecutions. It attempts to balance the goal of efficient enforcement of the Act and respect for civil liberties and fair treatment of persons investigated or otherwise affected by the Commission's orders.

Part 15 provides twenty-five sections for the administration of the Act. The regulatory agency is an analogue of existing Ontario or Quebec commissions. However, in an important gesture intended to embrace coordinated rather than overlapping jurisdiction with the existing provincial regimes, "it encourages the Commission to cooperate with other government agencies, federal, provincial and international, where its activities affect institutions regulated by them, and permits a maximum amount of federal-provincial cooperation both in appointments to it and in its activities".[12]

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[12] *Commentary*, 329.

Part 16, entitled "General", contains eighteen provisions which provide for the application of the Act and settles a number of extra-territorial and conflict-of-law provisions. In deference to provincial jurisdiction, the first provision declares that the Act does not apply to a trade that is initiated and completed in a single province, otherwise than through the facility of a registered securities exchange.[13] However, the next provision cuts back modestly on that recognition by specifying that a trade in a distribution by a corporate issuer in a province other than its province of incorporation, is not initiated and completed in a single province.[14] In addition to jurisdictional questions, the part also provides for certain procedures on filing and service of documents, admission of evidence, privileged statements, immunity from liability, records, determination of security holders, receipt of mail documents, and application to the Crown. Finally, it demonstrates a healthy respect for constitutional uncertainties by providing that each provision and part of the Act is severable. If any provision or part is struck down, the remainder of the Act will continue in force.[15]

V. Volume III

The fifteen papers which serve as background to the Proposals, most of which are over one hundred pages in length, provide a remarkably comprehensive analysis of Canadian securities law and policy. They make liberal use of comparative jurisprudence, particularly that of the United States. Most of the papers culminate in specific statutory recommendations which have in large measure been incorporated in the proposed legislation. The 1700 pages in Volume III will serve for years as a well-spring of interpretative guidance to persons interested in securities regulation. Space permits only the barest sketch of each paper.

Peter Williamson's study of Canadian capital markets provides a particularly informative economic framework for consideration of reform proposals. It analyzes savings and capital markets in Canada, examines their efficiency according to the three concepts of allocational, operational and external efficiency, reviews historical rate of return patterns on stocks and bonds, sketches out the movement toward a national capital market system in the United States, and then assesses developments in Canada, particularly the advent of computer-assisted trading systems in the national se-

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[13] S. 16.01.
[14] S. 16.02.
[15] Ss. 16.16, 16.17.

curities market. He draws sound conclusions and policy implications for each section of his study.

Philip Anisman and Peter Hogg have written a shorter but very important paper on the constitutional aspects of federal securities legislation. It justifies cooperative federal involvement in securities regulation on practical and legal grounds. In its pragmatic analysis it argues that securities markets in Canada transcend provincial boundaries, suggests examples of inter-jurisdictional compromise between provincial commissions or stock exchanges necessitated under existing law, observes that recent technological developments reinforce the national character of Canadian securities markets and that increasing internationalization of those markets transcends provincial regulation. It concludes that some form of federal involvement in the regulation of the Canadian securities market is both inevitable and necessary. Some readers may conclude that this series of factors does not establish the case for federal involvement. The *Commentary* (Volume II) picks up this pragmatic justification but it gives rise to the same doubts. It states (pp. 4-5) that cooperation among the provincial commissions alone, although admirably furthered in the past decade and useful in areas such as prospectus clearances, is inadequate to the present task. It suggests this is demonstrated in several recent takeover bid issues such as the development and approval by the British Columbia, Ontario and Quebec commissions of so-called "stock exchange takeover bids" and the competing takeover bids for Husky Oil Limited. It concludes that a nationally coordinated system of regulation that involves cooperation between a federal commission with a federal jurisdiction and provincial and foreign commissions is necessary: "Only such a scheme will permit the establishment on a Canada-wide basis of the minimum standards necessary to ensure investor confidence in the Canadian securities market" (*ibid.*). It is not entirely clear from this statement if the approval of stock exchange takeover bids by the three provincial commissions and the events involving Husky Oil Limited were evils to be remedied or, if they were, how a federal authority would conclusively cure those evils.

In its legal analysis, the Anisman-Hogg study deftly traces the history of provincial jurisdiction over securities and propounds the basis for federal jurisdiction, in particular the power relating to trade and commerce and works for the general advantage of Canada under the *British North America Act, 1867*.[16] The paper concludes that:

[16] 30-31 Vict., c. 3 (U.K.), ss. 91(2), 92(10).

> [The federal Parliament] has clear jurisdiction over interprovincial and international distributions of and trading in securities and likely over the whole of the trading market as well under its authority to regulate trade and commerce, complemented by its power over interprovincial undertakings. It may therefore enact legislation requiring disclosure by issuers both in connection with the distribution and on a continuing basis in regulating the stock exchanges and their members. Such legislation might also apply directly to intra-provincial transactions and, possibly, to market actors if necessary, to ensure its proper administration. And the creation of civil remedies for violation of its requirements would be justifiable on the same basis. In short, Parliament may under the trade and commerce power alone or in conjunction with its jurisdiction over interprovincial undertakings adopt a comprehensive scheme for the regulation of the securities market [p. 219].

Anisman and Hogg recommend the development of a "nationally integrated, comprehensive scheme of securities regulation for Canada through federal-provincial negotiations. Complementary legislation and administration may thus be devised through the customary means of cooperative federalism as it has developed in Canada, including, in appropriate circumstances, the use of interdelegation" (p. 220). It is by no means certain that Canadian courts will resolve difficult constitutional questions in this way in spite of the obvious attempts to permit complementarity with provincial legislation.

Frank Iacobucci's study "The Definition of Security for Purposes of a Securities Act" is a thoughtful and comprehensive analysis of jurisprudence interpreting Canadian and American legislation. His recommendations are faithfully reflected in the broad concept of security defined in the proposed Act. These recommendations essentially reinforce the existing provincial definitional network but provide a welcome clarification of this crucial language.

"Disclosure Requirements" by Warren Grover and James Baillie is remarkable for its depth. It begins with an historical analysis of developments over several centuries in Canada, as well as the United Kingdom and the United States, before proceeding to examination of the purposes of disclosure requirements, expansion of the disclosure technique by the more interventionist "blue sky" rules, a survey of the current Canadian position of prospectus filings, continuous disclosure and exemptions from prospectus requirements, before arriving at recommendations for an appropriate Canadian regulatory pattern for disclosure and dissemination. It recommends a tiered approach which balances the need for information with the size of the company, proposes a more flexible type of prospectus disclosure with more rule-making responsibility in the commissions to tailor rules to specific conditions, effects some revisions with a modest strengthening of exemptions and provides

greater flexibility in methods of dissemination. The paper is particularly sensitive in its assertion that compatibility with existing provincial regulatory systems is essential and that dual and overlapping regulation is to be avoided.

"Continuing Disclosure and Data Collection", by Dleap Hall, is a useful catalogue of the existing sources and methods of government data collection in so far as these concern economic regulation, with some practical suggestions on coordination of these efforts to reduce the burden and to render more useful common methods of collecting and disseminating information. It proposes a centralized agency, controlling one integrated information system in order to bring about a necessary coordination.

The study by Leonard H. Leigh, "Securities Regulation: Problems in Relation to Sanctions", is a wide-ranging consideration of sanctions of a criminal, quasi-criminal and civil liability nature, designed "to raise policy issues for resolution prior to the preparation of legislation." While it is rooted in sanctions in existing Canadian securities law, it discusses selected jurisprudence in the United States and the United Kingdom and focuses on practices of the U.S. Securities Exchange Commission as well as the Ontario Securities Commission. Unlike most of the other papers, it does not attempt to make a comprehensive set of recommendations but allows recommendations and preferences to arise in the context of the discussion of different types of sanctions.

Marvin Yontef's study of "Insider Trading" enters into a comprehensive analysis of the existing Canadian laws dealing with insider reporting and liability before recommending a role for federal regulation. It is quite balanced on this question. For example, it states: "the proposition that additional federal regulation of insider trading would be desirable is debatable" (p. 715), and "although most observers would concede the desirability of regulating insider trading, the commitment of additional resources to satisfy what may be viewed as technical shortcomings is questionable" (pp. 716-7). The author concludes that there is justification for federal initiatives and that the attractiveness of one federal standard which would replace the duplication and conflict which already exists with seven regulatory codes is strong. Moreover, he proposes that the present conflict between corporations and securities laws would be minimized with one regulatory code.

The lengthy study entitled "Canadian Financial Institutions", by Peter Williamson, is a more specific and largely empirical analysis of the study commenced in his first paper. It begins with a general analysis of all major financial institutions in Canada and

then focuses on the securities industry to look at registered participants, self-regulatory organizations, the activities of securities firms, competition policy, the sources and adequacy of capital in the Canadian securities industry, foreign ownership, and broker failures. The paper then turns to a detailed analysis of commission rates and the economics of the Canadian brokerage business. It examines securities-related activities of banks and trust companies and concludes with an analysis of institutions and independent individual investors in the stock market. It is a fountain of information about Canadian practices, uses U.S. comparisons thoughtfully and sharply and, in the conclusions and policy implications drawn at the end of each part, provides an attractive balance of soundness and innovation in its recommendations.

Hugh Cleland, in "Applications of Automation in a Canadian Securities Industry: Present and Projected", provides a detailed progress report on the mechanics and daily operations of the securities market system, on the work to establish a Canadian depository for securities, on trading systems and the development of the computer-assisted trading systems research project at the Toronto Stock Exchange, and ends with a view of the probable shape of a securities market system for 1980-1985. The paper is particularly valuable because it contains much information, based on Mr Cleland's own experience as the senior consultant to the Toronto Stock Exchange, which is previously unpublished and is known only to persons close to future policy developments within the exchange community. The paper will provide a useful basis to consider continued progress towards automation and a national technologically advanced market system in Canada. It will establish a yardstick against which to measure the development of the immobilization or elimination of the stock certificate and computer-assisted trading. In drawing comparisons with the United States, the author concludes that, in general, the Canadian experience has been more successfully innovative than the American. Unfortunately, the paper was largely written in October, 1975 and only superficially updated in July, 1978. Since the pace of progress has been so rapid in this domain, and the developments under discussion are "in train", one feels a sense of frustration that the update is not more comprehensive. This is one paper that existing regnlatory authorities should amend and review annually for the next few years so as to monitor technological progress towards more efficient securities markets.

The paper by Michael Jenkins called "Computer Communications Systems in Securities Markets" is intended to provide some technical background about automation in the securities industry. It is

written to provide vocabulary and concepts for the lay person to help him grasp modern technology as it applies to the securities industry. The author is quite successful. He begins with a simple explanation of computer hardware and software, tracing automation in securities markets in the United States, the United Kingdom and Canada, examining reliability, integrity and security in computer systems and concluding with a glimpse at the future of automated systems in securities markets. The paper provides an attractive companion study to the background study by Mr Cleland and will serve as a primer for anyone interested in understanding how technology has dramatically changed the securities industry.

"International Aspects of Securities Legislation", by Sholto Hebenten and Brian Gibson, comprehensively examines the two broad concepts of extraterritoriality and international enforcement in securities markets, and contains a series of useful recommendations on such topics as outreach of national legal systems permitted by international law under the headings of criminal law, civil actions and economic regulation; extraterritorial application of securities laws; present jurisdictional claims in securities law; Canada's foreign policy and its attitude to national jurisdiction; special characteristics of securities offences; special problems of international offences; obtaining information from abroad; transferring international offenders from one state to another; and enforcement systems other than criminal law.

Mark Connelly's paper, "The Licencing of Securities Market Actors", examines the goals of licencing, specifies the securities-related activities to be licenced, and examines the licencing process. It reviews a series of issues on standards of conduct and their enforcement on which the licence is based and examines questions of public and foreign ownership of securities licences. It concludes with a series of recommendations respecting a federal licencing goal not radically different than the existing provincial regime and evolving provincial policy.

In "Government Supervision of Self-Regnlatory Organizations in the Canadian Securities Industry", Peter Dey and Stanley Makuch set out an analysis of self-regulatory organizations in Ontario. They review the delegation of powers by government or government agencies to self-regulatory organizations, the evolution of statutory recognition of self-regulatory organizations, the rationale for self-regnlation with a consideration of its advantages and limitations, requirements of government supervision of self-regnlatory organizations, and a registration system for such organizations. They postulate the need for government power to make rulings concerning these self-regulatory organizations and a review of their actions,

an appraisal of membership criteria in self-regulatory organizations, a consideration of self-regulation and competition policy, and propose a division of regulatory powers in Canada's scheme of securities regulation. The study is based on the premise that self-regulation has been and will be an integral part of Canadian securities regulation. It does not attempt to determine whether or not self-regulation has operated in the public interest, though the general direction of the paper would suggest that such is the case. The study concludes that the evolution which has given considerable responsibility to self-regulatory organizations in an increasingly complex regulatory environment should continue but with additions to the laws which would provide greater general supervisory roles for government in conferring self-regulatory responsibility on appropriate organizations.

In "Failures of Securities Dealer and Protective Devices", John Honsberger looks at a negative aspect of capital markets, the failure of firms. He compares U.S. and Canadian experiences, recounts some of the specific instances of broker-dealer failures in the two countries, analyses the existing bankruptcy law, reviews existing protection and insurance funds and specifically considers the commodities future options and commodity options markets as special cases. He concludes that the existing and evolving Canadian law does not pose enormous dangers but that certain issues require attention and in some instances the amendment of existing law. The paper itself serves as a rare and welcome textbook of the law and existing practice in an area which is little understood.

The final paper, "Securities Regulation: Structure and Process", by John Howard, is a learned *tour de force* and an appropriate ending to this impressive project. A broad theoretical overview of economic regulation is followed by a comprehensive analysis of alternative models for appropriate securities regulation in one hundred pages. In the author's own words, he "reviews a number of basic assumptions about the Canadian securities market and, more specifically, explains the concept of economic regulation in its application to securities markets, analyzes alternative regulatory mechanisms and proposes the means the federal government can employ to regulate the Canadian securities market if it decides it should regulate the market" (p. 1611). He describes the framework of the contemporary mixed economy as "an inevitable mix of the institutions of both command and market economies to achieve the three basic functions of government: to allocate resources among alternative users, adjust the distribution of income and wealth among individuals, and stabilize the operation of the overall

economy to achieve a high level of resource use with a minimum of inflation" (*ibid.*). He then looks at the economic function of the securities market, traces the development of securities market regulations and appraises different regulatory techniques and considers different institutions of federal provincial cooperation before concluding that one of fifteen different models of securities regulation examined is the most appropriate for Canada with several other related alternative models ranking close. His choice of a model is "an integrated system, based on the idea of delegation of powers from the federal Parliament and the provincial legislatures to one securities commission. This model does not require uniform laws, but because of the single commission, it would tend strongly to the development of such laws and to the development of one disclosure system supported by a common data base" (p. 1617). He justifies his preference as follows:

> It continues reasonable provincial autonomy, permitting each province to establish for intra-provincial transactions its own substantive standards applicable to market entry and its own additional disclosure requirements. It will, because of the centralized policy-making structure, tend strongly to the development of uniform laws and procedures. It also has the advantage that it permits the use of experienced personnel to administer the various laws through completely decentralized administrative offices. And finally, it reconciles central policy making with decentralized administration through a mechanism that, because it contemplates separate federal and provincial laws, is flexible in the sense that it can be responsive to local needs and yet be effective to achieve Canada-wide goals [pp. 1617-8].

The model chosen is similar to the CANSEC proposal made by the Ontario Government as a basis for federal-provincial cooperation in securities regulation a dozen years ago. It is regrettable that the more auspicious times for cooperation of that epoch, two years before the Victoria Charter, have now given way to the much more fractious intergovernmental relations that do not augur well for the adoption of these technically impressive proposals.

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Secured Transactions in Personal Property in Canada. By Richard H. McLaren. Toronto: Carswell, 1979, 2 volumes, loose-leaf. *Secured Transactions in Personal Property in Canada*: Release No. 1. By Richard H. McLaren. Toronto: Carswell, June, 1980. *Personal Property Security: An Introductory Analysis* (a reprint of Part I of the first-mentioned work). By Richard H. McLaren. Toronto: Carswell, 1980.

The law of security on moveable property has undergone major changes in this country in the last decade. At the beginning of that period all of the common law provinces as well as Quebec had what could be broadly described as title-based legal regimes. These regimes were characterized by a multiplicity of separate devices for securing obligations on moveables, tangible and intangible. In the common law provinces the major devices were the conditional sale, the chattel mortgage, the floating charge, the finance lease, the pledge and the assignment of book debts; in Quebec they were the conditional sale, the sale with a right of redemption, the sale with a leaseback, double sales, security under the *Special Corporate Powers Act*,[1] and sales of accounts receivable. In addition to the provincial regimes were federal chattel-security devices, the single most significant of which was undoubtedly the chattel-mortgage type of security, as it appears to a common lawyer, under section 88 of the *Bank Act*.[2] These devices had each their own creation, priority, and enforcement rules, whose combined aspect resembles nothing so much as a tangled jungle of complex, difficult and subtle law.[3] More seriously for those most directly affected by the law, the jungle poorly accommodated the kinds of financing that the modern North American economy demands.[4]

The changes in this picture began with the coming into force in 1976 in Ontario of the *Personal Property Security Act* (the OPPSA).[5] Inspired by the version of 1962 of the secured transactions article, Article 9, of the American Uniform Commercial Code,[6] the OPPSA drew on the title-independent notion of a

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[1] L.R.Q., c. P-16.

[2] R.S.C. 1970, c. B-1. See now *Banking and Banking Law Revision Act, 1980*, S.C. 1980, c. 40.

[3] See Catzman, *Personal Property Security Law in Ontario* (1976), 1; for Quebec, see Macdonald & Simmonds, *The Financing of Moveables: Law Reform in Quebec and Ontario* (1981) R.D.U.S. section 1 & 2 (forthcoming).

[4] See *e.g.*, Macdonald & Simmonds, *supra*, note 3; Ziegel, *The Legal Problems of Wholesale Financing of Durable Goods in Canada* (1963) 41 Can. Bar Rev. 54, *passim* (common law provinces).

[5] R.S.O. 1970, c. 344 as am.

[6] For the official text, see Uniform Laws Annotated, *Uniform Commercial Code*, Vol. 3 (1968), Pamphlet (1978).

security interest, to replace all the old common law devices with a uniform set of creation, priority and enforcement rules. In 1977, Manitoba brought into force its *Personal Property Security Act* (the MPPSA),[7] based in large part on the Ontario model. In 1980, Saskatchewan became the third province with such legislation (the SPPSA),[8] while British Columbia's Law Reform Commission has published a discussion paper[9] foreshadowing its introduction into the province. The Civil Code Revision Office in Quebec has also proposed a secured-transaction law which grew out of an appreciation of Article 9.[10] And the Canadian Bar Association's Model Uniform PPSA Sub-Committee has been working for the cause of nation-wide adoption of uniform legislation, both through its two Model Acts (1970 and 1980) and other efforts.

Against this background, the appearance of Professor McLaren's work (collectively, *Secured Transactions*) is most timely. To be sure, there exists a significant body of American literature on Article 9, of which Professor Gilmore's *Security Interests in Personal Property* (2 volumes, 1965) is the pre-eminent work, being a model analysis of the law and policy underlying both pre-Article 9 American law and the 1962 changes to it. However, Article 9 itself has undergone a number of changes since Professor Gilmore wrote, changes from which the SPPSA and the MUPPSA (1980) have carefully drawn. In any event, the Canadian Acts are far from slavish copies of Article 9 — not least because of important differences in the pre-Act legal positions. In this last respect, Professor McLaren's title is perhaps somewhat misleading, as he does not provide for Canada the kind of comprehensive historical treatment which Professor Gilmore provides for the United States, and which Professor Sykes, in *The Law of Securities* (3d ed., 1978), provides for Australia. However, Professor McLaren has given lawyers in Ontario and Manitoba, and to a lesser extent Saskatchewan, the first textbook on the new Canadian law. Lawyers in other provinces receive a preview of life in the new secured-transactions world.

Professor McLaren's stated objective is to provide a "functional" analysis of the new law "not just for [the] exclusive use of lawyers,

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[7] S.M. 1977, c. 28 as am.

[8] *The Personal Property Security Act*, S.S. 1980, c. P-6.1 (due to come into force on 1 April, 1981).

[9] *Report on Debtor-Creditor Relationships, Part V — Personal Property Security* (1975).

[10] Civil Code Revision Office, *Report on the Quebec Civil Code (Draft Civil Code)* (1977) Book IV, Title 5.

but also for the use of those who grant credit and take security as well as those who may from time to time encounter the legislation in the course of purchasing personal property."[11] He is well qualified to achieve this, having combined an academic's interest with membership on the Ontario Ministerial Advisory Committee on The Personal Property Security Act. The loose-leaf format of the main two-volume work allows it to be kept abreast of a rapidly changing field; Release No. 1, June 1980, is the first addition.

The volumes are divided into eight parts. Part I, entitled "Introductory Analysis," is devoted to a thematic exposition of the law, with a separate treatment for each of the two jurisdictions he covers, Ontario and Manitoba. This part, published separately under the title *Personal Property Security*, and without the most recent updating and supplementary material, serves as an introductory text for law students. Parts II and III, "Registration" and "Searches", respectively, describe the character, the mechanics and the ramifications of the computerized systems on which both jurisdictions rely, including problems of errors in the system and impact on secured-transaction closings and lawyers' opinions. Part IV, "Secured Party Remedies", is a treatment in greater detail of matter forming an element of Part I. Part V, "Transactional Documents", sets out precedents for both commercial and non-commercial security agreements with explanations of the distinctive clauses in each. Part VI, "Legislation & Forms — Ontario", sets out the text of the OPPSA (up to and including 1977, chapter 23), the Regulations (up to and including 547/79), the Forms thereunder, and four very useful Ontario government publications on the legislation. Part VII contains the matching MPPSA materials — the Act (up to and including 1979, chapter 32), Regulations (up to and including 156/78), Forms, and the Manitoba Personal Property Security Registration Guide and the Personal Property Enquiry Guide. And Part VIII, "Personal Property Security Act Cases", contains in full text almost all the decisions on this legislation up to *Re Toyerama*, a judgment rendered June 23, 1980.[12] A treatment for Saskatchewan is missing from the work at present, which in view of the SPPSA's recent passage is quite understandable. One hopes this gap will be filled soon: the SPPSA differs much more from the MPPSA and the OPPSA than the last two do from one another; the SPPSA also seems the likeliest source of the next "wave" of amendments to the other two provinces' laws.

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[11] *Secured Transactions*, Vol. I, vii.

[12] (1980) 1 P.P.S.A.C. 126 (Ont. S.C.).

This format makes possible a quite selective reading, by province and problem area, of the material in the book. It also produces a great deal of duplication, which is more likely to concern the rare reader who tackles the work from end to end than the major users of it. For the lawyer and business user there is at least the beginning of a discussion of those problems they are most likely to encounter: what transactions does this legislation cover? what form of documentation must be used? what documentation should be used? what are the types of secured transaction this new law makes possible which the old law, at least not without difficulty, did not? what is the new priority picture and how does if affect the way commercial secured financing operations should be run? and what are the principal features of the new remedial regime? The law student will find in *Personal Property Security* an overview of the major themes of the legislation, the leading problems in construing it, and its practical effects.

The work is, however, much less satisfactory in at least three ways for the secured transactions specialist lawyer; and these concerns to some extent detract from its undoubted virtues for the other users as well. First, insufficient advantage is taken of the rich U.S. material, potentially of immense assistance in coming to terms with the Canadian legislation. For example, there are no references to the excellent treatise, *Uniform Commercial Code*, by Professors White and Summers, now in its second edition (1980). While hardly as comprehensive as Professor Gilmore's work, to which *Secured Transactions* makes frequent reference, White & Summers in both its editions is more likely to be accessible to users of the Canadian book. Admittedly, the current edition focuses more on the 1972 version of Article 9 and not the 1962 version, on which the present Ontario and Manitoba legislation is based. Nevertheless, many discussions of Code law in the second edition are useful, either because the relevant Code section has not changed in a material respect or because the 1962 section is still discussed.[13] In view of the future direction of Canadian personal property security law, one would hope that this particular deficiency in *Secured Transactions* will be remedied in future.

Second, although *Secured Transactions* has drawn fairly well on the still relatively small Canadian literature on the new legislation (at least when account is taken of Release No. 1), there are some

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[13] See, *e.g.*, White & Summers, *Uniform Commercial Code*, 2d ed. (1980), 883-8, esp. 886-7 (which makes fairly clear the peculiar features of the current Code position).

curious gaps. For example, in the discussion of one of the statutory preconditions to creation, or "attachment" of a security interest (the debtor "has rights in the collateral")[14] there is a reference to a useful American article.[15] But there is no reference to the interesting discussion of the point by the British Columbia Law Reform Commission.[16]

The third specialist concern about the book is one that comes easiest to an academic lawyer: the level of explicit policy analysis. While there is useful analysis by McLaren of some of the difficult issues of commercial policy raised by the legislation, it tends not to go very deep. For example, in explaining the special priority position accorded financiers of the acquisition of discrete collateral (purchase money financiers),[17] a good account is given of the basic argument for this exception to the legislation's first-in-time, first-in-right priority rule. However, that argument, that the debtor should, despite a prior secured creditor's after-acquired property clause, "always [be] able to obtain credit from a new financier if he wishes to make purchases of property [in view of the fact that that prior creditor was] satisfied with the security base without the inclusion of any after-acquired (new) collateral",[18] is susceptible of further elaboration to explain why the debtor should not be remitted to the prior creditor for the new credit. A fuller explanation could make clear not only the situational monopoly created by the after-acquired property clause, but also the reasons for restricting the special priority position to financiers of discrete new collateral.[19]

Of somewhat lesser concern are stylistic and proofreading difficulties with the text, not to mention some substantive errors to which another reviewer has drawn attention.[20] There is some rather awkward prose at a number of points. The word "complimentary" (and "compliment") is used in its obsolete meaning which is today rendered by "complementary"; and "principle" is used where "principal" is meant. The text's proofreader failed to pick up the frequent misspelling of Professor Ziegel's name in the cita-

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[14] R.S.O. 1970, c. 344, s. 12(1)(c).

[15] See *Secured Transactions*, 2-3, n. 6; Hogan, *The Marriage of Sales to Chattel Security in the Uniform Commercial Code: Massachusetts Variety* (1958) 38 B.U.L. Rev. 571. See also White & Summers, *supra*, note 13, 915-7.

[16] *Supra*, note 9, 39-44.

[17] R.S.O. 1970, c. 344, s. 34.

[18] *Secured Transactions*, Vol. I, 6-9.

[19] See the most interesting article by Jackson & Kronman, *Secured Financing and Priorities Among Creditors* (1979) 88 Yale L.J. 1143.

[20] Crawford, *Book Review* (1980) 4 Can. Bus. L.J. 493, 497.

tions to some of his numerous writings on personal property security.

Professor McLaren has done well to gather as much material as he has on the new wave of Canadian personal property security law. The concerns this reviewer has expressed are fairly readily redressable — at least for the purchasers of the two-volume work — due to the wisely chosen loose-leaf format. Its value to all who are professionally interested in this area will only increase as *Secured Transactions* keeps pace with the rate of change in the law and the understanding of it.

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Principes de contentieux administratif. By Yves Ouellette and Gilles Pépin. Montreal: Les Editions Yvon Blais Inc., 1979. Pp. xv, 478.

This text, which first appeared as *Précis de contentieux administratif*,[1] is now well on the way to becoming a full-fledged monograph on judicial review and government liability. Although, being a textbook, it is not comprehensive and occasionally reductionist, it is still a useful work on Canadian administrative law.[2] Focusing on federal law and the law of Quebec, the text makes few references to developments in common law provinces; for example, one finds little on the peculiarities of the traditional judicial review remedies or their statutory reform and consolidation. But this new edition has generally improved upon the preceding version. Intricate points which were treated superficially in previous editions have now been amplified,[3] and administrative litigation is better situated within a broad framework of public administration and administrative law.[4] The authors have attempted to treat the subject as an integral part of the process of modern government, rather than as a subject of legal arcana divorced from any political and social context.[5]

Like its predecessor, *Principes de contentieux administratif* is concise, current, relatively inexpensive, abundantly annotated and generally well written. It includes a detailed table of contents, a comprehensive bibliography, and a thorough case list with an index of judicial references. The choice of typeface and titles, as well as the spacing of the text also contribute to the aesthetic appeal and easy reading of this book. Finally, the clarity and concision of the introductory and concluding sections of most chapters add to the text's value as a teaching manual.

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[1] See *Précis de contentieux administratif*, 2d ed. (1977), reviewed by this author in (1978) 13 R.J.T. 220.

[2] A similar work in English is Mullan, *Administrative Law*, 2d ed. (1979). Other texts include Reid & David, *Administrative Law and Practice*, 2d ed. (1978); Dussault, *Traité de droit administratif* (1973), Vols. I & II.

[3] *E.g.*, sections on reconsiderations, error of law on the face of the record, privative clauses, government quasi-contractual liability and s. 96 of the *British North America Act, 1867* (30-31 Vict., c. 3 (U.K.)) have been expanded.

[4] The lengthy title "La classification des pouvoirs" (pp. 43 *et seq.*) has been substantially rewritten from this perspective. Nevertheless, the authors apparently cite with approval from Schwartz & Wade, *Legal Control of Government* (1972), 324: "the process of applying law to acts of government requires knowledge of law, and knowledge of administration is neither relevant nor helpful."

[5] For this purpose, the Introduction, comprising the first 37 pages of the text, represents a remarkable improvement from the brief nine-page overview of the preceding *précis*.

With a work such as this, one might be tempted simply to congratulate the authors on their efforts and recommend the text to anyone interested in the field; but such a course would not be appropriate in the present context for at least three reasons. First, given the popularity of the book, another edition is likely in the near future: the authors having manifested a desire to improve continually the work, critical comments (even where these relate to the guiding concept of the book) should not be suppressed. Second, although the new text has been styled a handbook of principles, rather than a *précis* of administrative litigation, it remains more in the nature of Mullan's *Administrative Law*[6] than of de Smith's *Judicial Review of Administrative Action:*[7] a further rewriting of the book is necessary if it is to become more than an amplified case citator. Third, while the book is admittedly intended only to elucidate administrative litigation both as to jurisdiction and as to civil liability, this topic forms only a small and parasitic part of administrative law: just as one cannot understand company law solely by focusing on judicial decisions, one cannot understand administrative litigation solely by focusing on reported cases. For these reasons, the remainder of this review will deal with what I consider important omissions in the text.

One complication in this book results from the many purposes it is designed to serve. While a discursive and didactic approach may be appropriate (perhaps even necessary) in a work purporting to be a *précis*, it is not suitable in a text. The authors have preferred to report the result of myriad cases rather than analyze in detail selected important judgments. Significant decisions of the Supreme Court,[8] Federal Court[9] or Quebec Court of Appeal[10] are not sub-

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[6] *Supra*, note 2.

[7] 4th ed. (1980), by John Evans.

[8] *E.g., Bell* v. *Ontario Human Rights Commission* [1971] S.C.R. 756; *Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers* [1970] S.C.R. 425; *Jacmain* v. *A.-G. Canada* [1978] 2 S.C.R. 15; *A.-G. Quebec* v. *Farrah* [1978] 2 S.C.R. 638; *Nicholson* v. *Haldimand-Norfolk Regional Board of Commissioners of Police* [1979] 1 S.C.R. 311; *M.N.R.* v. *Coopers and Lybrand* [1979] 1 S.C.R. 495; *Herman* v. *A.-G. Canada* [1979] 1 S.C.R. 729; *C.U.P.E.* v. *New Brunswick Liquor Corporation* [1979] 2 S.C.R. 227; *Re Harelkin and University of Regina* [1979] 2 S.C.R. 561; *Manitoba Fisheries* v. *The Queen* [1979] 1 S.C.R. 101; *Duquet* v. *Ville de Ste-Agathe-des-Monts* [1977] 2 S.C.R. 1132; *Vachon* v. *A.-G. Quebec* [1979] 1 S.C.R. 555; *Keable* v. *A.-G. Canada* [1979] 1 S.C.R. 218; *Mitchell* v. *The Queen* [1976] 2 S.C.R. 570; *Houde* v. *C.E.C.M.* [1978] 1 S.C.R. 937.

[9] *Inuit Tapirisat* v. *Léger* [1979] 1 F.C. 213 (C.A.), *rev'd* (unreported judgment, 10 October 1980 (S.C.C.)); *Martineau* v. *Matsqui Institution Inmate Disciplinary Board (No. 2)* [1978] 2 F.C. 637 (C.A.), *rev'd* [1980] 1 S.C.R. 602.

[10] *Testulat* v. *Ville de Sherbrooke* [1977] C.A. 312; *Commission de contrôle*

jected to extensive study and explication, and have been treated summarily in a few lines. As a consequence, the common law fabric of administrative law tends to be overlooked and the importance of close textual analysis is understated.[11]

The authors also are unwilling to criticize certain judicial decisions at a fundamental level.[12] In an early section (pp. 32-6) the book explores the creative role of judges in developing administrative law. This being so, it would seem necessary for the authors to abandon their attempt to rationalize (or even merely list) dozens of cases on conflicting points. Perhaps more than other areas of the law, administrative litigation needs to be situated in a policy context and decisions must be understood not so much on the basis of what is expressly *said* in various judgments as on the *results* of individual cases. What distinguishes a good text is the vision of its authors and their ability to impress the raw material of the law with a coherence arising from that vision.[13]

A second problem with *Principes de contentieux administratif* also is inherited from its predecessor. Even though the text purports to be an outline only of administrative litigation — which the authors carefully define (pp. 24-5) — it is impossible to understand this subject without a more general examination of public administration. This point is especially difficult to convey to students, who tend to see judicial review simply as challenges to bureaucratic acts on jurisdictional grounds. Yet judicial review lawyers often are interested in defending the legality of a decision. Obviously those working for agencies will seek to have agency jurisdiction upheld. But, more importantly, in many situations several private parties will be supporting the agency position. For example, in applications for judicial review of a Labour Board decision one usually finds either employer or union defending the impugned decision; in licensing matters, either the applicant or his competitors often seek to have a decision confirmed on judicial review; or, on disciplinary cases, either the accused or prosecutor will likely approve of the act of the tribunal in question. This bi-

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des permis d'alcool v. *Distribution Kinéma Ltée* [1977] C.A. 308; *A.-G. Quebec* v. *Restaurants et motels Chatelaine International* [1977] C.A. 454.

[11] For an excellent example of a detailed analysis of a limited number of cases, see Mullan, "Administrative Law" in (1980) 1 Supreme Ct L. Rev. 1-77.

[12] This is paradoxical in view of the fact that Professor Pépin has already undertaken such an exercise with respect to many such cases: see (1976) 36 R. du B. 453; (1978) 38 R. du B. 818; (1979) 39 R. du B. 1070.

[13] This "legal realist" or "nominalist" approach should not be mistaken for scepticism as to the possibility of finding unifying threads in administrative law. For a more detailed treatment of this theme, see Macdonald & Wydryzynski, "Book Review" (1979) 28 U.N.B.L.J. 234, 234-7 and 251-2.

polarity also arises in matters of tort and contract. Should not the taxpayer, joint tortfeasor and beneficiary of an allegedly tortious act also be interested in having the agency absolved of liability? May not the quota-producer, potential competing supplier and collateral beneficiary, depending on the circumstances, have a congruent interest with the government co-contractant? In other words, administrative lawyers must be able to attack *and* defend the determinations of public bureaucracies.

While jurisdictional challenges may not imply some prior understanding of the science of public administration, the defence of agency determinations usually does. For if administrative law is the body of principles and concepts which arises from the reconciliation of judicial adjudication and the managerial bureaucracies of government,[14] is it not necessary to become acquainted with each of these in order to know their respective limits? From this perspective many, if not all, doctrines of judicial review should not be seen as merely the boundaries of jurisdiction implied by canons of statutory interpretation; they also symbolize the restraints on governmental attempts to implement policy.[15] Hence, the "delegatus" maxim, "acting under dictation", "institutional bias", and "deciding without hearing" illustrate difficulties arising from the nature of public bureaucracies: by whom, to what degree and within what framework are certain decisions to be taken? Again, "jurisdictional facts", fettering discretion by self-created "policy rules" and *functus officio* reflect the problem caused by the lack of finality in political decision-making: when, to what degree and for what purposes should the astringent character of judicial decision-making crystallize the evolution of public values? Issues of "natural justice", "fairness" and "wrong questions" illustrate the limited teleology of adversarial adjudication: there are alternatives to a strictly judicial process of resolving disputes. Successful resistance to jurisdictional challenges thus presupposes a familiarity with the nature, goals and procedures of public bureaucracies.

Finally, one might also criticize the overtly positivistic orientation of Pépin and Ouellette's new book. Administrative law arises principally in administrative agencies, not in courts; and administrative litigation is not just the end result of the administrative process, but part of the process itself. Thus it is important to investigate thoroughly each of the various processes by which agencies operate.

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[14] *Cf.* Willis, *Canadian Administrative Law in Retrospect* (1974) 24 U.T.L.J. 225.

[15] For an elaboration of this theme, see Vining, *Legal Identity* (1978), *passim*, and Freedman, *Crisis and Legitimacy* (1979), *passim.*

While the authors do devote forty pages to legislative powers, six pages to ministerial (managerial) powers and thirty-two to judicial powers, the remaining functions of administration are treated in five pages; powers to negotiate, mediate, prosecute, investigate, and the like, are simply characterized as "administrative", without further analysis. Because characterization of functions continues to have an important bearing on the procedures and the outcome of judicial review,[16] the diversity of administrative processes compels detailed examination.[17] Further, one cannot really appreciate the forms, limits and functions of administrative litigation without consideration of other remedial alternatives: ombudsmen, public inquiries, trusteeship, administrative appeals, reconsiderations, parliamentary control, monitoring by public-interest groups, and press exposure are also components of the legal control of government.[18] That judicial review is a "discretionary remedy" subject to constraints such as ripeness, mootness, political question, exhaustion, more appropriate remedy and the like, reflects judicial attempts to maintain an integrated socio/politico/legal fabric to administrative law.[19]

Despite the tenor of the preceding paragraphs, it should not be assumed that *Principes de contentieux administratif* is a mediocre work. Like its forerunner, it is a good outline of the major themes and concepts in the judicial control of government. But other writings by its authors[20] illustrate their capability to improve the text in subsequent editions, and I trust that the continued reworking of this monograph will result in a definitive treatise on a difficult and elusive field of law. In the interim, Messrs Pépin and Ouellette are again to be congratulated for having produced a useful contribution to the literature of administrative law.

R.A. Macdonald*

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[16] *Cf. M.N.R.* v. *Coopers and Lybrand, supra,* note 8, *per* Dickson J. See also *Inuit Tapirisat* v. *A.-G. Canada* (unreported S.C.C., October 7, 1980).

[17] See Macdonald, *Judicial Review and Procedural Fairness* (1980) 25 McGill L.J. 520; (1980) 26 McGill L.J. 1.

[18] See the observations of Garner, *Administrative Law,* 5th ed. (1979), chs V-IX, who discusses some of these.

[19] See Stone, "Towards a New Model of Court Function" in Bishin & Stone, *Law, Language and Ethics* (1972), 399-402.

[20] Notably Pépin, *Les tribunaux administratifs et la constitution* (1969); *Quelques observations sur la question du caractère efficace ou illusoire du contrôle judiciaire de l'activité de l'administration* (1976) 36 R. du B. 453; Ouellette, *Le contrôle judiciaire sur l'université* (1970) R. du B. can. 631; *La responsabilité civile personnelle du fonctionnaire* (1975) 18 Can. Pub. Ad. 1; *Le pouvoir de surveillance et le contrôle de la sévérité des sanctions disciplinaires ou administratives* (1978) 38 R. du B. 362.

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Théorie de la responsabilité civile. By Jean Pineau and Monique Ouellette. Montréal: Les Editions Thémis Inc., 2d ed., 1980. Pp. viii, 237.

Civil responsibility, usually assessed in damages, is the law's sanction for the inexecution or faulty execution of "obligations" arising from contracts, quasi-contracts, delicts, quasi-delicts or from the operation of the law solely.[1] The book under review deals with civil responsibility arising from delictual and quasi-delictual obligations. Professor Pineau has published another book, *Théorie des obligations,* devoted largely to contractual and quasi-contractual obligations.

A distinction between obligations in general and delictual and quasi-delictual obligations is common in writing about the law of obligations in Quebec. There are sixty-nine codal articles on contracts and quasi-contracts in general[2] and only four articles on delicts and quasi-delicts in general.[3] This difference perhaps justifies treating "obligations in general" and "delictual and quasi-delictual obligations" separately. That method, however, may somewhat distort the unity of the law of obligations and the relationship of its constituent parts. Much can be said in favour of a more global approach to the law of obligations.[4]

Nevertheless, Professors Pineau and Ouellette have devoted three paragraphs of their book to the relationship between contractual and delictual or quasi-delictual responsibility (pp. 5-6, 189-97). In this context, their choice for the régime of *respect* rather than *cumul* or *option* is to be applauded (p. 192). The régime of "respect" means that, with certain exceptions, a contracting party can only invoke contractual rules against his co-contracting party, and not delictual or quasi-delictual ones. *Cumul* describes the right of a contracting party to invoke both contractual and delictual rules against his co-contracting party. *Option* allows that a contracting party may leave the contractual field altogether and invoke solely delictual rules against his co-contracting party. Unfortunately, the authors' review of jurisprudence on this matter lacks an analysis of the Court of Appeal's decision in *National Drying Machinery Co.* v. *Wabasso Ltd.*[5] The case is only referred to in a footnote without further explanation.

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[1] Art. 983 C.C.

[2] Arts 984-1052 C.C.

[3] Arts 1053-1056 C.C.

[4] *E.g.,* Tancelin, *Théorie du droit des obligations* (1975). For the law of France, see H. & L. Mazeaud, *Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle,* 6th ed. by Tunc & Chabas (1965, 1970 & 1978).

[5] [1979] C.A. 279, now in appeal before the Supreme Court of Canada; for comments, see Jobin, (1979) 39 R. du B. 939; Haanappel, (1980) 11 C.C.L.T. 276.

The book consists of two parts: conditions of responsibility and effects of responsibility. In their Introduction, Professors Pineau and Ouellette note three practical differences between delicts (intentional civil wrongs) and quasi-delicts (unintentional civil wrongs) (p. 3). They could have added a fourth one: exoneration from quasi-delictual responsibility is possible, at least in principle, whereas exoneration from delictual responsibility is not.[6] The issue, however, is taken up by the authors elsewhere in the book (pp. 60, 190-1).

The Introduction also contains a study of the theory of risk as a possible basis for civil responsibility. The authors have perhaps too hastily concluded that the theory of risk does not underlie modern jurisprudence on the irrebuttable presumptions of fault, contained in articles 1054(7) and 1055 of the Civil Code.[7] Further, the *Rome Convention* of 1952, mentioned as a legislative incidence of the theory of risk (p. 10), no longer forms part of Canadian law, having been denounced in 1976.[8] Finally, the authors' criticism of the decision in *Lapierre* v. *Procureur Général de la Province de Québec*,[9] which used article 1057 of the Civil Code in order to find strict responsibility in a medical liability case, is overly harsh (p. 12). The authors argue that responsibility without fault, as upheld in *Lapierre*, can never have been the intention of the drafters of the Civil Code of 1866. This may be true, but the law of obligations must grow and develop in accordance with today's social, cultural and economic realities, which sometimes dictate solutions different from those conceived by our nineteenth-century codifiers.

Part I of the book contains chapters on each of the three conditions of responsibility — damage, fault and causality. In the chapter on damage, the authors discuss article 1056 of the Civil Code, which determines who can sue in delict or in quasi-delict for damages suffered as the consequences of the death of another. One misses here a thorough discussion of the recent Court of Appeal decision in *Air Canada* v. *Alice Marier*,[10] dealing with the standing

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[6] *Ceres Stevedoring Co. Ltd* v. *Eisen und Metall A.G.* [1977] C.A. 56; *J.A. Madill* v. *Sommer Building Corp.* [1978] 1 S.C.R. 999.

[7] See also p. 77 on irrebuttable presumptions of fault (presumptions *juris et de jure*); pp. 96-8 on the nature of art. 1054(7) C.C.; pp. 124-5 on the nature of art. 1055(1-2) C.C.; and pp. 128-9 on the nature of art. 1055(3) C.C.: *cf.* Haanappel, *Faute et risque dans le système québécois de la responsabilité civile extra-contractuelle* (1978) 24 McGill L.J. 635.

[8] ICAO State Letter 3/14-76/129 of 23 July 1976.

[9] [1979] C.S. 907.

[10] [1980] C.A. 40.

to sue of a divorcee in a death case. Again, the case is only cited in a footnote (p. 40, n. 41).

In the first section of the chapter on fault, where the authors discuss responsibility for one's personal acts, one finds a paragraph on the defence of *volenti non fit injuria* (pp. 51-2). Although the examples used by authors are well chosen, they fail to answer the two following questions. Is *volenti* in civil law an independent doctrine or merely an application of the doctrine of the fault of the victim (contributory negligence)? And if the defence of *volenti* is successfully advanced, does it exonerate fully the person invoking it?

The first question is harder to answer than the second. Often *volenti* seems an application of the doctrine of one's own fault, as in accepting a lift from a driver whom one knows to be drunk. On other occasions, however, especially in sports events, it is harder to view *volenti* as an application of the doctrine of own fault. Can one say that a participant in a sports event, who voluntarily assumes a risk of injury, commits a fault? Apparently not. In civil law, *volenti*, once established, does not necessarily constitute full exoneration, though it may allow partial exoneration.[11]

In the same section on responsibility for one's personal acts, there is a discussion of the "capacity to discern right from wrong" (pp. 53-7), a necessary element of civil responsibility under article 1053 of the Civil Code. The authors are right to say that under the civil law of Quebec, unlike the French law, this "capacity to discern right from wrong" is an independent element of a delict and there may be objective fault without the subjective "capacity to discern right from wrong", and hence no civil responsibility. One must also agree with the authors' discussion of "omission delicts" (pp. 57-60). According to jurisprudence, there can only be an omission delict if the omission corresponds to a "legal duty to act". This expression should not be taken in the narrow sense of "statutory duty to act", but rather in the wider sense of the general duty of the *bonus pater familiae*.

When looking at the discussion of *troubles de voisinage* and "abuse of rights" (pp. 67-74), one wonders why the authors have dealt with them separately rather than simply considering *troubles de voisinage* to be an abuse of the right of ownership.[12] The authors' efforts to interpret the decision in *Katz* v. *Reitz*[13] as staying within

[11] *E.g.*, *Robert* v. *Paquet* [1961] C.S. 114.
[12] *Cf.* Baudouin, *La responsabilité civile délictuelle* (1973), 61-8.
[13] [1973] C.A. 230.

the framework of fault liability, seem artificial, in that the judgment explicitly excludes fault as the basis of liability.[14]

In the second section of the chapter on fault, dealing with responsibility for the acts of others, the authors state (p. 83) that there can be no such responsibility outside the cases specifically mentioned in paragraphs 2-5 and 7 of article 1054 C.C. The Superior Court decision in the case of *Laverdure* v. *Bélanger*[15] may, however, have opened the road to a *general* régime of responsibility for the acts of others under article 1054(1)) C.C.[16] in the same fashion as there is a general régime under article 1054(1) of responsibility for things under one's care. Much of the discussion of this latter area of responsibility is devoted to the new *Automobile Insurance Act*.[17] With great clarity the authors explain the new régime, as it applies to physical injury and death and to property damage. With the new Act, however, liability arising out of automobile accidents is perhaps more properly studied in a course on administrative and/or insurance law than in a general course on the law of obligations. Also, why single out this Act and ignore two others that are quite similar, the *Workmen's Compensation Act*[18] and the *Crime Victims Compensation Act*?[19]

On the whole, this second edition of the book by Professors Pineau and Ouellette is written with lucidity and the reader is given many well-chosen examples. Footnotes are often more elaborate than in the first edition; they are, however, no longer printed at the bottom of each page, but are collected at the end of chapters or sections of chapters, which makes reading somewhat awkward. In appropriate places, the book indicates where the law of obligations of Quebec differs from that of France. Unfortunately, there are no references to the articles of the proposed *Draft Civil Code*,[20] even where it intends to change existing law. [21] Finally, the book lacks a table of cases and an index.

P.P.C. Haanappel*

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[14] See Baudouin, *supra*, note 12, 66; Haanappel, *supra*, note 7, 637, 643.

[15] [1975] C.S. 612.

[16] *Ibid.*, 619-23. The Superior Court decision was confirmed by the Court of Appeal (Montreal, 09-000 116-756) without reference to this particular point.

[17] L.R.Q. c. A-25.

[18] L.R.Q. c. A-3. *Cf.* Perret, *Précis de responsabilité civile* (1979), 146 *et seq.*

[19] L.R.Q. c. I-6. *Cf. Perret, supra,* note 18, 155 *et seq.*

[20] Civil Code Revision Office, *Report on the Québec Civil Code* (*Draft Civil Code*) (1977), Vol. I.

[21] *E.g.*, Book V, arts 95, 98, 100-103.

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Lawsuit. By Stuart M. Speiser. New York: The Horizon Press, 1980. Pp. v, 617.

Stuart M. Speiser is a senior partner in a firm known nationally and internationally for its success in winning tortious claims, particularly in aviation accident cases. It is one of a few firms which have revolutionized the law relating to the compensation of aviation accident victims, and have contributed substantially to the development of tort law in the United States, especially in the field of products liability.

After serving as a pilot in the United States Army Air Force during World War II, and as an aerial agricultural pilot immediately after the War, Stuart Speiser resumed his legal studies and in 1949 established his own practice with a view to specializing in aviation tort law. At that time it was a primitive discipline but over the years he has contributed to its growing sophistication. He is the author or co-author of a number of articles and books, including *Recovery for Wrongful Death* (2d ed. (1975)) and, with C. Krause, *Aviation Tort Law* (1979).

The career of the author and the role of his firm recommend *Lawsuit* to those interested in aviation law and in the practice of tort law in the United States. In a lucid style, the author provides a history of tort litigation and of the profession of specialized claimants attorneys, a description of the role which that profession plays in the legal process, a strong argument for the contingency fee system and an explanation of the financial aspects of the claimant attorney's business. What is most fascinating to this reviewer, and of great value to students of the subject, is that he has drawn from his broad experience examples to illustrate and educate.

Lawsuit commences with *Ralph Nader* v. *General Motors Corporation.*[1] It discusses events before the initiation of the action and gives a detailed account of the questions of law and fact, litigation strategy, the conduct of the trial and the negotiations between the parties, and concludes with the settlement and the consequences. The same approach is taken to the Grand Canyon Disaster and more recent aviation catastrophes.

This technique enlivens the reported decisions and helps to redress misperceptions induced by those reports. The success of the claimant's attorneys is to a large extent explained by their thorough preparation. In the aviation catastrophe cases, for example, the attorneys repeat the investigations performed by national authorities with a comparable degree of technical sophistication.

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[1] 25 N.Y. 2d 560 (N.Y. 1970).

Lawsuit makes it plain that claimants in the United States enjoy advantages that are not available elsewhere. Three of these deserve mention. The federal multi-district procedure allows a single federal judge to supervise the pre-trial phase of claims arising from a single aircraft accident. It results in a concentration of the claimants' legal resources, giving them additional bargaining strength. This is not possible in Canadian aviation catastrophe cases, except in the unlikely event that all claims can be brought in the same jurisdiction.[2] Another advantage is the availability of extended discovery during the pre-trial phase. The third is the contingency fee system.

For foreign lawyers the most interesting parts of *Lawsuit* are the chapters discussing the international effects of American tort law. Of central importance is the Ermonville accident of March 3, 1974. A McDonnell Douglas DC-10 belonging to Turkish Airlines crashed at Ermonville, near Paris, with the loss of 333 passengers and thirteen crew members. The rear cargo door was not properly closed, due in part to a defect in the design of the locking mechanism. After the aircraft climbed above 11,000 feet, the air pressure in the hull blew the door out; explosive decompression followed, causing part of the passenger cabin floor to collapse, thus severing or jamming the control lines to the rudder, stabilizer and elevators. The aircraft went into a nose-dive from which it was impossible to recover. These circumstances were a virtual replay of a near-accident involving an American Airlines DC-10 in flight near Windsor, Ontario in June, 1972. The aircraft survived because it was lightly loaded and because the pilot-in-command had trained himself on a simulator for such a situation, although he was not required to do so by the airlines' training schedule. McDonnell Douglas subsequently designed a modification to the lock on the cargo door. However, the safety device was not immediately incorporated in operating aircraft. The Federal Aviation Administration did not issue an airworthiness directive because there was a gentlemen's agreement between the Administrator and the Directors of McDonnell Douglas. Although the Ermonville DC-10 was delivered after

[2] S. 23 of the *Federal Court Act*, R.S.C. 1970, 2nd Supp., c. 10 was designed *inter alia* to permit a similar concentration of claims in one court in Canada. This section was decapitated by the Supreme Court of Canada in *Quebec North Shore Paper Co.* v. *Canadian Pacific Ltd* [1977] 2 S.C.R. 1054. This matter has been exacerbated by the equally unnecessary decision of the Supreme Court in *McNamara Construction (Western) Ltd* v. *The Queen* [1977] 2 S.C.R. 654. The results are to be seen in *Pacific Western Airlines Ltd* v. *The Queen in Right of Canada* [1980] 1 F.C. (C.A.). The decisions of the Supreme Court have strengthened the position of liability insurers.

the Windsor incident, only a part of the modification had been incorporated and thus was ineffective.

Most of the passengers were not American citizens. As they were being carried on an international journey, the Warsaw Convention[3] governed, limiting the liability of the carrier for most of them to $20,000 *per* passenger. The manufacturers (General Dynamics had built the hull under contract to McDonnell Douglas) were more attractive defendants than the airline, because no special legislation limited their liability. All suits, involving more than a thousand claims, were brought against both defendants in the United States. Under the Federal multi-district procedure, these were assigned to a retired senior federal district judge in California for pre-trial proceedings. Fortunately, he had had extensive experience in aviation accident cases. By April, 1978 he was able to report[4] that all but a few of the 1123 claims had been settled and that $62,000,000 had been paid out in settlements, most of which exceed what would have been recoverable under the Warsaw-Hague system. The author takes the reader through the whole process, from the marshalling of claims to the settlements, explaining how it was possible to settle so many claims within four years of the accidents.[5]

The author discusses the effect of the Ermonville proceedings upon the approach taken by defendants to claims arising out of the Tenerife accident. In March, 1977 a K.L.M. Boeing 747, in the course of take-off from Tenerife, collided in conditions of poor visibility with a Pan-Am Boeing 747, which was also on the runway. Five hundred and eighty-three persons died and sixty-one were in-

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[3] *Convention for the Unification of Certain Rules Relating to International Carriage by Air* 49 Stat. 3000; T.S. No. 87 (1929) [the Warsaw Convention], as am. by the *Protocol to Amend the Convention for the Unification of Certain Rules Relating to International Carriage by Air* ICAO Doc. 7632 (1955) [the Hague Protocol]. Canada has ratified both of these instruments and has given effect to them in the *Carriage by Air Act*, R.S.C. 1970, c. C-14. However, major Canadian airlines have increased the Warsaw-Hague limits to $58,000 (U.S.) by an appropriate provision in their tariffs; see, *e.g.*, Air Canada International Passengers Rules Tariff No. PR-1, 14th revised page 53, "Liability of Carriers", clause (B)(1)(b), which became effective on July 1, 1977.

[4] For the report of the judge, Hall J., see (1978) 3 Annals of Air and Space Law 615.

[5] It is interesting to compare this with the experience of Canadian claimants in the Canadian Pacific accident in Tokyo, 1966. The Montreal actions gave rise to two appeals in the Supreme Court of Canada: *Montreal Trust Co.* v. *Canadian Pacific Airlines Ltd* [1977] 2 S.C.R. 793 and *Ludecke* v. *Canadian Pacific Airlines Ltd* [1979] 2 S.C.R. 63. The reviewer understands that the last settlements were made in 1980, fourteen years after the accident.

jured. The defendants offered generous settlements to the Dutch and American claimants, and in the case of the Dutch claimants they offered ten to fifteen times the amount which would have been awarded by Dutch courts. By September, 1978, 530 of 644 potential suits had been settled. Mr Speiser's point is that the defendants took this course to avoid litigation in the United States. Furthermore, he suggests that the level of awards has risen since the Ermonville accident. Confirmation is not available because of the individual nature of claims and the fact that liability insurers are understandably reluctant to disclose the details of settlements. Mr Speiser's remarks cause one to speculate on the consequences of a catastrophe involving no American contacts, bearing in mind that there were two, Pan Am and Boeing,[6] in the Tenerife accident. Will settlements be made upon the basis of the Warsaw-Hague system?[7] If so, a substantial group of claimants will be at a disadvantage.

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[6] The K.L.M. aircraft was clearly negligent. The Pan-Am aircraft and Spanish air traffic control service were probably negligent. Boeing may have been liable on a theory of crashworthiness. It follows that, while the carriers in relation to their passengers enjoyed the benefit of the Warsaw-Hague limits, as between each of them and the passengers of the other aircraft, and as between Boeing and the Spanish A.T.C. on one side and the passengers of both aircraft on the other, there was no limitation of liability.

[7] "The Warsaw/Hague system" is a misnomer in so far as it implies uniform limits of liability. If the Warsaw Convention applies, the limit is $10,000 (U.S.). If the Warsaw Convention, as amended by the Hague Protocol, applies, as it does in the overwhelming majority of cases, the limit is $20,000 (U.S.). This situation is mitigated by the following:

a) if the passenger's journey commences in, terminates or contains an agreed stopping-place in the United States, by virtue of the Montreal Agreement of 1966, the carriers' liability becomes strict (in place of the presumption of fault of the Warsaw/Hague system) and the limit is increased to $58,000 (U.S.) exclusive of costs and $75,000 (U.S.) inclusive of costs;

b) a number of airlines, either voluntarily or by reason of the laws of their states, have a limit ranging from $58,000 (U.S.) to $150,000 (U.S.); and

c) in a number of countries where there is no specific legislation, the unit of account used in the Warsaw/Hague system (the gold franc) is converted at the free market price of gold with the result that the limits, depending upon the market, are seven to eight times those mentioned at the commencement of this note.

In fact, in response to other pressures, amending instruments have been opened for signature, the Guatemala City Protocol of 1971 and four Montreal Protocols of 1975. However, none of these have come into force; for a discussion of these and the efforts for reform, see Sözer, *Consolidation of the Warsaw/Hague System* (1979) 25 McGill L.J. 217.

The developments described by Mr Speiser, the flaws in the Warsaw-Hague system, and the tendency to transfer liability for the death or injury of passengers from the carrier to the manufacturer and others have sparked proposals for reform[8] that would allow a reasonable distribution of the loss arising from an aircraft catastrophe among the carrier, the manufacturer and other parties which may be liable.

To the extent that these proposals are prompted by the American Bar, the impetus for them rests upon the continued willingness of American courts to take jurisdiction over actions brought by foreign claimants with respect to accidents occurring outside the U.S.A. Mr Speiser points out that there is a growing tendency for American courts to deny jurisdiction or stay proceedings on the basis of *forum non conveniens*. Should this tendency prevail, the pressure for change will diminish and future claimants will be prejudiced.

Criticism has been directed at the activities of the claimants' attorneys. Some of it focuses on their conduct, which has been likened to that of "ambulance chasers". However, the main thrust of the criticism is directed at the cost of the contingency fee system and the inequity of forum-shopping. As to the contingency fee system, the author provides convincing answers. "Forum shopping" is a phrase that has unwarranted pejorative connotations. In Admiralty, forum-shopping is institutionalized. Lord Morris of Borth-y-Gest made this point in his dissenting judgment in *The Atlantic Star:*

> It is natural and inevitable and, indeed, is an inherent feature of the recognised system that a plaintiff will choose the place where he considers that his legitimate interests will be best advanced. A shipowner knows this and expects it just as a potential plaintiff knows it. If a plaintiff chooses to sue in England and becomes enabled and entitled to sue he knows that the proceedings may be stayed but will only be stayed if they are oppressive or harassing or are brought in bad faith and for no legitimate reason. If the law of one country is more favourable than the law of another country, is a plaintiff to be criticized for choosing the former? ... It is suggested that the matter should be looked at objectively with the interests of justice as the aim to be achieved. But this is only to side-step the problem. It can be assumed that the court in any country will be animated by a desire to do justice. It can be assumed that the court in any country will do justice according to law. But there may be, and presumably are, variations in the law and practice of different countries. As a result there may be advantage for a plaintiff if he proceeds in one country rather than another.[9]

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[8] See Bin Cheng, *Fifty Years of the Warsaw Convention: Where Do We Go from Here?* [1979] Z.L.W. 373; for another view, see Bockstiegel, *Some Recent Efforts for a Fundamental Reconsideration of the International Aviation Liability System* (1980) 5 Annals of Air and Space Law 17.

[9] [1974] A.C. 436, 461 (H.L.).

It is anomalous that forum-shopping is respectable for a class of property for historical reasons but not for death or injury claims. There are signs, however, that attitudes are changing: for example, Lord Justice Shaw in *Castanho* v. *Brown & Root (U.K.) Ltd:*

> If someone who has been reduced to a human wreck can seek amends in a more generous environment, his misfortune is the more offset by that fortuitous circumstances. At least the victim will have the satisfaction of knowing that the destruction of his own capacity to derive enjoyment from physical life has had the consequence of augmenting his family's prospects of living securely on a good standard. It must not be thought that this is to compensate the dependants of the victim. The satisfaction is his, and is an important aspect of the amends he is entitled to receive. The pursuit of that satisfaction is in my opinion to be commended as justifiable, and not condemned as avaricious; and the provision of a munificent measure of compensation is to be applauded and should not be denigrated as extravagant or exorbitant. It would in my view be less than humane to deny such a victim the opportunity to pursue his claim for compensation wherever it will evoke the most generous response.[10]

Stress has been placed in this review on the aviation aspects of *Lawsuit.* This does not do justice to the wide range of questions discussed in the book, such as the deficiencies in the current system of accident investigation and safety regulation, the allowable heads of damages in case of wrongful death and the question of interest on awards running only from the date of judgment and not from the date of the commission of the tort.

This book makes splendid reading. It is stimulating and thought-provoking, and should be read by any person interested in the law of torts generally and particularly in international aviation cases.

M.A. Bradley*

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[10] [1980] 1 W.L.R. 833, 858 (C.A.).

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Quebec and the Constitution 1960-1978. Par Edward McWhinney. Toronto: University of Toronto Press, 1979, Pp. 170.

Le professeur Edward McWhinney a publié plus d'un ouvrage en droit constitutionnel comparé, notamment sur les cours suprêmes et les chambres hautes de certaines fédérations. Sa contribution est d'autant plus précieuse en cette période de renouveau constitutionnel. En effet, il est bon de connaître le fonctionnement des organismes et des institutions qui existent dans d'autres Etats fédérés, avant de les instaurer chez nous. Monsieur McWhinney a résidé au Québec pendant plusieurs années. Il fut l'un des membres de la célèbre Commission Gendron sur la situation de la langue française au Québec. Juriste anglophone, il a acquis une connaissance profonde des problèmes linguistiques au Québec ainsi que des problèmes de "coexistence" et d'interactions culturelles au Canada. Enfin, il fut l'un des conseillers de la Commission Pepin-Robarts sur l'unité canadienne. Son dernier ouvrage traite du Québec et de la Constitution pendant la période dite de la "Révolution tranquille". L'auteur y analyse les rapports de forces Québec-Ottawa et Québec-autres provinces. Il a bien saisi le rôle crucial rempli par les intellectuels au Québec, dans les universités, les média et les partis politiques; cette participation s'est manifestée, au cours des vingt dernières années, plus qu'à aucune autre période de notre histoire peut-être! Il a su mettre en lumière la réaction des francophones et des anglophones aux problèmes constitutionnels qui ont surgi depuis deux décennies. Ami de la langue et de la culture françaises, son expérience en droit comparé et sa connaissance étendue des deux systèmes juridiques de notre pays sont, ici, mises à profit.

Monsieur McWhinney essaie de discerner ce qui est proprement choix et questions politiques, de ce qui est réforme des structures constitutionnelles. On peut faire beaucoup sans changer la Constitution, dit-il, mais vient un moment où cette dernière elle-même doit être révisée. L'ouvrage fait de nombreuses allusions à ce qui se passe ailleurs et n'en devient ainsi que plus utile, car les fédérations ne vivent pas en vase clos, et de leurs expériences respectives, nous pouvons tirer des leçons profitables. En ce sens, le système américain a influencé le fédéralisme canadien; de même pour les fédéralismes allemand, suisse et australien.

Sur l'ensemble des treize chapitres, on ne se surprendra pas qu'il consacre un chapitre aux droits linguistiques au Québec. Il a bien raison, car c'est là un des points les plus importants de la révision constitutionnelle au Canada. La dernière conférence constitutionnelle, qui s'est déroulée à Ottawa du 8 au 13 septembre

1980, fut éloquente à ce sujet. Le premier chapitre situe le problème dans son contexte général, alors que le second illustre l'évolution de la Constitution canadienne; cette synthèse est de lecture agréable et fait sa part à l'histoire. L'auteur consacre son troisième chapitre aux idées "constitutionnelles" de la "Révolution tranquille" et passe en revue les travaux des juristes et des hommes politiques, qui ont écrit sur la question. Au chapitre suivant, il se penche sur les critiques formulées au Québec quant à l'inadéquation du *British North America Act*[1] dans certains secteurs. Il expose, ensuite, au chapitre cinq, le rôle joué par les premiers ministres Pearson et Trudeau sur le plan de la révision constitutionnelle et traite de la *Loi sur les langues officielles,*[2] de la *Charte de Victoria* et du Rapport Molgat-MacGuigan.

Monsieur McWhinney consacre, dans son sixième chapitre, plus de vingt pages à la *Loi sur la langue officielle*[3] et à la *Charte de la langue française,*[4] qui ont eu un impact énorme, non seulement au Québec, mais également sur la scène fédérale et dans plusieurs autres provinces. Selon lui, la réaction des provinces à la "Révolution tranquille" fut lente et est encore très parcimonieuse. L'Ontario fut la première province à sonner le réveil. Au chapitre huit, on analyse, entre autre choses, quelques décisions de la Cour suprême qui ont fait époque en droit constitutionnel, dont le renvoi sur la loi anti-inflation en 1976,[5] les arrêts *Dionne*[6] et *Capital Cities*[7] sur la câblodistribution, ainsi que la décision *Canadian Industrial Gas and Oil Limited*[8] en matière fiscale. Ces jugements se sont avérés cardinaux dans l'orientation du fédéralisme et l'auteur l'a bien souligné. Il analyse enfin les arrêts célèbres impliquant les "Gens de l'air".

L'autorité fédérale prit des initiatives en matière de révision constitutionnelle après celle de Victoria, dont la création de la Commission de l'unité canadienne, et mit elle-même de l'avant un document, *Le temps d'agir,* et un projet d'amendement constitutionnel, le projet de loi C-60.[9] Les chapitres neuf et dix en traitent abondamment, en insistant plus particulièrement sur la réforme du

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[1] Voir 30-31 Vict., c. 3 (U.K.), tel qu'amendé.
[2] Voir S.R.C. 1970, c. O-2.
[3] Voir S.Q. 1974, c. 6.
[4] Voir L.R.Q., c. C-1.
[5] Voir [1976] 2 R.C.S. 373.
[6] Voir *Régie des services publics* v. *Dionne* [1978] 2 R.C.S. 191.
[7] Voir *Capital Cities Communications Inc.* v. *C.R.T.C.* [1978] 2 R.C.S. 141.
[8] Voir *Canadian Industrial Gas and Oil Ltd* v. *Government of Saskatchewan* [1978] 2 R.C.S. 545.
[9] Ce projet de loi fut introduit à la Chambre des Communes le 20 juin 1978.

Sénat et de la Cour suprême; l'auteur aurait, semble-t-il, souhaité un Sénat élu comme aux Etats-Unis et en Australie, par exemple. Il est particulièrement en mesure de parler des réformes des institutions centrales à cause de sa grande expérience et de ses nombreux écrits sur la question. Le chapitre onzième réfère au rôle joué, en 1978, par le Comité du Sénat sur la Constitution et par le *Rapport de l'Association du Barreau canadien sur la Constitution;*[10] sur ce dernier document cependant, la critique paraît fort sévère. Dans son avant-dernier chapitre, l'auteur dit qu'il n'y a pas de solutions faciles au dilemme constitutionnel canadien. Il écrit également:

> To recapitulate one of our opening points, most of the problems of contemporary federal systems, including Canada's are not constitutional but societal, and a constitutional charter will have at best only a marginal effect on those problems.[11]

Il se peut qu'il ait raison en bonne partie, mais il ne faudrait pas minimiser l'effet bénéfique qu'aurait au Québec une Constitution écrite au Canada, par des Canadiens, dans les deux langues officielles. Quelques changements pertinents au chapitre du partage des pouvoirs, et au niveau des institutions centrales, pourraient avoir un effet profond et durable au Québec et au Canada, du moins le pensons-nous. Dans son dernier chapitre, l'auteur passe en revue les conférences constitutionnelles de novembre 1978 et de février 1979 et ne jette qu'un coup d'oeil rapide au rapport *Se retrouver* de la Commission Pepin-Robarts.

En conclusion, nous pouvons dire que même si les juristes et les politologues de langue anglaise au pays sont intervenus dans le débat constitutionnel à des périodes différentes, dont plusieurs avec un certain retard, leur concours, leurs idées et leurs suggestions sont essentielles et toujours souhaitables; le Québec, en effet, attache beaucoup d'importance à leurs recommandations. L'un des tous premiers à intervenir, le professeur Edward McWhinney, a su maintenir sa contribution au plus haut niveau et nous lui en savons gré.

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[10] Voir *Vers un Canada nouveau* (1978).

[11] Voir à la p. 143.

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Vocabulaire de la "common law". Tome I. Moncton: Les Editions du Centre universitaire de Moncton, 1980. Pp. 235.

L'arrivée sur le marché d'un ouvrage comme ce vocabulaire ne peut que réjouir les professeurs qui enseignent la *common law* en français et, sans nul doute, ceux à qui incombe la tâche de traduire les lois du Manitoba. Comme l'indique Me Bastarache, doyen de l'Ecole de droit de l'Université de Moncton, dans sa préface, le vocabulaire a été initialement conçu pour répondre au défi linguistique posé par l'enseignement de la *common law* en français; à cet égard, il constitue un outil d'une valeur incontestable. Néanmoins, l'importance de l'ouvrage demande à être évaluée à un tout autre point de vue: celui de la normalisation du français juridique au Canada, voir même ailleurs. A la lumière de cette optique plus large, on doit appuyer la décision du rédacteur de faire publier ce vocabulaire immédiatement, bien qu'il ne constitue qu'une tranche d'un projet de dictionnaire français de la *common law*. Ce tome traite principalement du droit des biens, domaine plutôt technique où l'on retrouve des termes parfois archaïques. Il n'existe guère d'autre source terminologique à l'heure actuelle. La juridiction fédérale et, par conséquent, les lois fédérales, ne couvrent que certains aspects de ce domaine. La Cour suprême entend peu de causes relevant du droit des biens. Même le Nouveau-Brunswick, seule province de *common law* officiellement bilingue jusqu'à tout récemment, ne l'est devenue qu'il y a quelques années.

Ce même problème de sources juridique et terminologique se reflète dans le vocabulaire. Les lexicographes se sont souvent réfugiés, de façon assez ingénieuse d'ailleurs, dans le vieux français, qui est évidemment à l'origine de plusieurs expressions juridiques présentant des difficultés de taille au traducteur. *Fee* devient alors "fief", *feoffee* est rendu par "fieffé" et *feoffment* par "enfieffement"; de même, *seisin* devient "saisine", ce qui permet au lexicographe de traduire la terrifiante expression *foeffment by livery of seisin*, par "enfieffement par livrée de saisine". Les lexicographes ont cependant évité l'emploi du vieux français dans certains cas, notamment celui de *mortgage*, qu'ils ont préféré rendre par "hypothèque", bien que le terme anglais tire ses racines étymologiques du français normand importé en Angleterre lors de la Conquête.[1] Il ne s'agit pas ici d'une mauvaise traduction de la part d'un traducteur ignorant la distinction entre la notion de *mortgage* en *common law* et d'hypothèque en droit civil, mais bien d'un choix exercé par le lexicographe en pleine connaissance de cause. Il l'explique en disant qu'il vaut mieux,

[1] Voir *Oxford English Dictionary*.

pour éviter un jargon juridique truffé d'archaïsmes, emprunter au droit civil des termes qui, une fois introduits dans le système de *common law*, revêtiront une signification plus ou moins différente de l'originale. On peut être d'accord avec le lexicographe dans la mesure où l'emploi d'un tel mot est restreint au niveau provincial, mais il nous semble que cet usage pourrait nuire à la normalisation du français juridique à travers le Canada. Ce problème présente, en effet, un cas où le français juridique aurait avantage à se montrer plus précis que l'anglais, puisque le mot *mortgage* recouvre deux notions du système canadien de *common law*. Dans les provinces qui n'ont pas adopté le système *Torrens* d'enregistrement des biens fonciers, le mot *mortgage* désigne un transfert du titre au créancier, sujet au droit de rachat (*equity of redemption*) que possède le débiteur, tandis que dans les provinces ayant adopté ce système, le mot *mortgage* réfère à une garantie grevant le bien du débiteur qui reste toujours propriétaire. Cette deuxième signification se rapproche évidemment davantage de l'hypothèque en droit civil. Il n'est pas surprenant que les lexicographes se soient souvent fiés aux lois du Nouveau-Brunswick en vue de normaliser le français juridique dans cette province, d'autant plus que celles-ci constituaient l'une des rares sources disponibles. Parfois, cette confiance entraîne un résultat qui laisse à désirer. Par exemple, *power of appointment* est rendu par "mandat de désignation". A notre avis, le mot "mandat" implique une obligation d'agir; mais la personne dotée d'un *power of appointment* n'est généralement pas tenue d'exercer son pouvoir.[2] Mieux vaudrait, peut-être, décrire cette réalité juridique par "pouvoir de désignation" ou "pouvoir de nomination".

Malgré les quelques critiques que l'on peut lui adresser, ce tome demeure un outil indispensable à tous ceux qui s'intéressent à l'enseignement ou à l'exercice de la *common law* en français. Il devrait aussi servir à engager le processus de normalisation du français juridique et à conférer ainsi au projet de dictionnaire un caractère définitif. On attend avec impatience la parution du prochain tome.

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[2] Voir *McPhail* v. *Doulton* [1971] A.C. 424 (H.L.) et *Re Manisty* [1974] 1 Ch. 17.

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