BOOK REVIEWS

CHRONIQUE BIBLIOGRAPHIQUE

Louis B.Z. Davis, *Canadian Constitutional Law Handbook: Leading Statements, Principles and Precedents*. Aurora, Ontario: Canada Law Book, 1985. Pp. cxxvi, 1056 [195 $]. Commenté par Raynold Langlois, c.r.*

Cette oeuvre monumentale se veut un outil destiné particulièrement aux avocats praticiens confrontés à des problèmes de droit constitutionnel. Comme son titre le laisse entendre, ce « handbook » ne prétend pas être un ouvrage de fond en droit constitutionnel. Il cherche plutôt à nous donner facilement accès aux principes qui ont été formulés par la Cour suprême du Canada à l'égard des questions de droit constitutionnel dont elle a eu à disposer. L'auteur tire ces principes des arrêts rendus par la Cour depuis 1949. Pourquoi avoir choisi l'année 1949 comme point de départ? Me Davis justifie son choix, d'abord par le désir de limiter la taille de son oeuvre et on ne peut guère lui en faire reproche étant donné qu'il nous livre plus de 1000 pages. Ensuite, l'auteur veut nous livrer les fruits de la pensée de la Cour depuis qu'elle est devenue notre tribunal de dernier ressort. Enfin, c'est avec raison que l'auteur mentionne l'abondante moisson de jugements en matière constitutionnelle rendus par la Cour depuis 1949, ce qui lui a fourni l'occasion de revoir tous les principes constitutionnels d'importance.

La méthode suivie par l'auteur consiste à livrer, sur une question donnée de droit constitutionnel, la citation qui lui paraît énoncer le mieux le principe applicable à cette question. Les citations sont données dans la langue d'origine du jugement de telle sorte que l'oeuvre comporte de nombreuses citations en langue française suivies d'une traduction en langue anglaise. L'auteur a disposé ces principes par grands thèmes constitutionnels en suivant, à la méthode d'un répertoire, un agencement par ordre alphabétique de titres de ces thèmes. Par exemple la Partie I de l'ouvrage nous livre les principes énoncés au regard des « Aboriginal and Treaty Rights » jusqu'à « Constitution of Canada ». La Partie II traite des « Constitution Acts » de 1867 à 1982, ainsi de suite jusqu'à la dernière partie, la Partie VIII, qui couvre « Royal Proclamation of 1763 » jusqu'à « Ultra Vires Legislation ».

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À cause de son contenu particulier, un lecteur prudent doit obligatoirement aborder ce livre en consultant l'introduction[1] avant de se lancer, comme c'est trop souvent le cas, directement à la recherche du paragraphe où il est susceptible de trouver la clé de l'énigme à laquelle il est confronté. En effet, dans l'introduction l'auteur explique que son oeuvre laisse au lecteur le soin de vérifier le contexte dans lequel chaque principe a été formulé ainsi que de repérer les énoncés et les références additionnels auxquels fait appel le principe en question. Il nous prévient que les principes n'apparaissent pas toujours évidents à la lecture des citations où ils sont exprimés et que les limites quant à leur application doivent s'établir, entre autres, à partir du contexte — et souvent même de l'époque — où ils ont été formulés. Il y a aussi des principes qui sont, pour ainsi dire, moins importants que d'autres de telle sorte que plusieurs de ceux-ci ne sont pas immuables. D'ailleurs, un des dangers d'une utilisation simpliste de l'ouvrage est qu'elle pourrait conduire le lecteur à conclure que chaque question répertoriée est résolue par l'application du principe ou du passage cité. L'auteur nous met en garde contre cette façon de travailler et il rappelle que la Cour n'a pas toujours exprimé les tenants et les aboutissants du principe formulé à l'occasion d'un litige donné et ce, au nom de la retenue judiciaire. La Cour a souvent eu à rajeunir certains principes en les adaptant à des contextes nouveaux. Il ne faut pas, écrit l'auteur, confondre l'application du principe et le principe lui-même.

Dans sa préface,[2] Me Louis-Philippe de Grandpré, qui fut juge à la Cour, nous rappelle que la jurisprudence de la Cour n'est pas le fruit d'une utilisation machinale des principes pré-établis et je n'oserai pas le contredire sur ce point. Cependant, à cause de son importance, le droit constitutionnel est une des branches du droit où les tribunaux ont pris plus de soin à bien asseoir leur jugements sur des précédents. J'ai vite appris, comme praticien du droit constitutionnel, l'importance de bien circonscrire les faits donnant ouverture à une question constitutionnelle et de prendre grand soin de vérifier les analogies à faire entre le problème de l'heure et les problèmes analogues que la Cour aura à trancher.

L'avènement de la *Charte canadienne des droits et libertés*[3] a posé un problème nouveau à la Cour. Il n'y avait pas de précédent. Cette absence

[1] L.B.Z. Davis, *Canadian Constitutional Law Handbook: Leading Statements, Principles and Precedents*, Aurora, Ont., Canada Law Book, 1985 à la p. cv.

[2] L.-P. de Grandpré, « Foreword » dans Davis, *ibid.* à la p. vii.

[3] Partie I de la *Loi constitutionnelle de 1982*, constituant l'annexe B de la *Loi de 1982 sur le Canada* (R.-U.), 1982, c. 11 [ci-après la *Charte*].

de précédent a fait en sorte que la jurisprudence sur notre *Charte* se développe très lentement, la Cour démontrant une prudence presqu'excessive, un peu à la manière de quelqu'un qui a le vertige. Le livre de Me Davis a l'avantage de nous fournir un outil de repérage rapide et pratique des principes qui sont à la base de l'édifice constitutionnel construit à la pièce par la Cour depuis 1949. Même si la *Charte* est de droit nouveau, elle demeure néanmoins un texte constitutionnel répondant aux normes d'interprétation applicables à la loi suprême de notre pays. Il s'ensuit que ce livre s'avérera d'une grande utilité à l'égard de questions mettant en cause la *Charte.*

Par exemple, dans l'arrêt *R.* c. *Therens*,[4] Monsieur le juge Le Dain reprend les propos du juge en chef Dickson dans l'affaire *Hunter* c. *Southam Inc.*[5] à l'effet que la *Charte*, de par sa nature constitutionnelle, répond à des règles d'interprétation tout à fait différentes de celles régissant l'interprétation d'une loi. En raison même de son caractère constitutionnel, elle doit être considérée comme une nouvelle déclaration des droits et libertés et du pouvoir et de la responsabilité qu'ont les tribunaux de les protéger. Le savant juge avait préalablement exprimé la prémisse de son raisonnement comme suit:

> In my opinion, the premise that the framers of the *Charter* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted is not a reliable guide to its interpretation and application. By its very nature a constitutional charter of rights and freedoms must use general language which is capable of development and adaptation by the courts.[6]

Une fois prévenu des limites de l'ouvrage, le lecteur — le praticien du droit, en particulier — trouvera dans ce livre une mine presqu'inépuisable de réponses à des questions fort complexes auxquelles peu d'ouvrages de droit constitutionnel publiés jusqu'à maintenant donnent facilement accès. Que se soit au titre du fondement constitutionnel du pouvoir des tribunaux de contrôler la légalité des lois, du rôle et des droits des procureurs généraux et du gouvernement, de la qualification des faits pertinents en matière constitutionnelle ou des conventions constitutionnelles et de leur utilité, cette oeuvre contient tous les éléments à la fois d'un traité de droit constitutionnel et d'un traité de droit public fondamental. À la différence de la plupart des ouvrages publiés depuis quelques années sur le sujet (et il y en a eu une manne abondante), l'ouvrage de Me Davis n'est pas concentré sur les prononcés judiciaires découlant des litiges au regard du partage des compétences. C'est sans doute le fruit de son expérience personnelle au Ministère

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[4](1985), [1985] 1 R.C.S. 613, 18 D.L.R. (4th) 655 [ci-après *Therens* cité aux R.C.S.].

[5](1984), [1984] 2 R.C.S. 145 à la p. 155, 11 D.L.R. (4th) 641.

[6]*Therens, supra*, note 4 à la p. 638. Cet extrait est également reproduit dans Davis, *supra*, note 1 aux pp. 881-82.

de la justice du Canada qui lui a fait réaliser la multitude des questions complexes et rarement traitées auxquelles le praticien est trop souvent confronté. Me Davis était au Ministère à l'époque des grands tiraillements constitutionnels de la période 1980-82 et a été à même de constater combien rares étaient les textes canadiens où étaient analysés, par exemple, les principes formulés par la Cour, voire simplement ses énoncés sur le fondement constitutionnel de notre fédération. Pourtant, à l'analyse, ils étaient nombreux, mais cachés dans des milliers de pages dans des rapports judiciaires poussiéreux peu ou insuffisamment répertoriés et traités par nos auteurs.

Je ne peux terminer ce compte-rendu sans souligner l'extrême précision de la table des matières qui facilite l'accès à l'ouvrage. Si la table des matières ne suffisait pas, l'index à la fin couvre soixante pages et ne laisse place à aucun prétexte, pour celui qui cherche, de revenir bredouille. En somme, il s'agit d'un ouvrage bien fait et d'un outil essentiel à placer dans toutes les bibliothèques de droit, même dans les cabinets qui font rarement du droit constitutionnel. D'ailleurs avec l'avènement de la *Charte canadienne*, peu d'entre nous seront dorénavant exemptés d'aborder cette branche du droit.

David Phillip Jones & Anne S. de Villars, *Principles of Administrative Law*. Toronto: Carswell, 1985. Pp. xlv, 489 [$68.00]. Reviewed by David J. Mullan.*

Many books have been written in recent years about judicial review of administrative action. At least seven are Canadian,[1] and the present editor[2] of the monumental English work, *de Smith's Judicial Review of Administrative Action*,[3] teaches at a Canadian law school. It is therefore appropriate to ask of any new text whether it adds to the existing literature in the field. Does it have an approach or focus that is different from the others? Does it draw upon cases or research lacking in the others?

When I ask these questions of the book under review, Jones and de Villars' *Principles of Administrative Law*,[4] I come up with five features that distinguish it from its rivals:

1. Much of the Canadian emphasis is upon Alberta cases, statutes and other materials;

2. The most fully-developed chapter (Chapter 10: "Errors of Law on the Face of the Record") represents a brave and, I think, useful attempt to reconcile the old law to the effect that, absent a privative clause, the courts could review for any error of law on the face of the record with the new judicial approach that there should be deference to tribunal rulings of law even where there is no privative clause;

3. It is more current than all except one of the others;[5]

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[1]R. Dussault, *Traité de droit administratif canadien et québécois* (Québec: Presses de l'Université Laval, 1974), now beginning to appear in updated form in R. Dussault & L. Borgeat, *Administrative Law: A Treatise*, vol. 1, 2d ed. (Toronto: Carswell, 1986); P. Garant, *Droit administratif* (Montréal: Yvon Blais, 1981); J.A. Kavanagh, *A Guide to Judicial Review*, 2d ed. (Toronto: Carswell, 1984); D. Lemieux, *Le contrôle judiciaire de l'action gouvernementale* (Québec: Centre d'éditions juridiques, 1981); G. Pépin & Y. Ouellette, *Précis de contentieux administratif* (Montréal: Yvon Blais, 1979); R.F. Reid & H. David, *Administrative Law and Practice*, 2d ed. (Toronto: Butterworths, 1978); D.J. Mullan, *Administrative Law*, 2d ed. (Toronto: Carswell, 1979), being also Title 3 of Volume I of the *Canadian Encyclopedic Digest (Ontario)*, 3d ed. The teaching materials with which I am associated might also be included in this list: J.M. Evans *et al.*, *Administrative Law: Cases, Text and Materials*, 2d ed. (Toronto: Emond Montgomery, 1984).

[2]Professor John M. Evans of Osgoode Hall Law School.

[3]4th ed. (London: Stevens, 1980).

[4]D.P. Jones & A.S. de Villars, *Principles of Administrative Law* (Toronto: Carswell, 1985) [hereinafter Jones & de Villars, *Principles*].

[5]Dussault & Borgeat, *supra*, note 1 has appeared since the publication of the book under review.

4. Of the Canadian works, it is by far the most explicitly influenced by English cases and approaches; and

5. It is the one most unremittingly favourable to expansive judicial review as an ideal.

Perhaps I should add to this list the ambition expressed in the preface to be "useful to lawyer and layman alike" as another feature setting it apart from its rivals.

But do these differences amount to a sufficient justification for its publication?

First, if I were an Alberta lawyer or teacher, I would certainly want to have a copy of this book. It is a fruitful source of relevant Alberta materials and contains a number of interesting discussions of important recent decisions emanating from the courts in that province. It also serves to bring these Alberta developments to the attention of lawyers elsewhere and, as such, may be a useful repository of ideas for both legislative change and approaches to litigation.

Second, while the chapter about review for error of law has already appeared elsewhere in slightly different form,[6] the argument it puts forward deserves wider exposure than that generally afforded articles appearing in most university law reviews. This feature, too, justifies the book's appearance.

As for currency, the latest work out will always have this advantage. But it is an advantage that will quickly be surrendered with the appearance of a revised edition of one of the other texts or now, as in the case of one of the Canadian publications,[7] the next looseleaf update. Indeed, within a few months of its publication, its statement of the law on at least two important matters was undercut by judicial decision. First, the Supreme Court of Canada decided, contrary to the position taken by the authors, that *certiorari* is still available in aid of *habeas corpus* from the provincial superior courts even where the detention being challenged is at the hands of a federal authority.[8] And second, in a strong judgment, the Ontario Court of Appeal held that a "final and binding" form of privative clause is effective to prevent the courts from reviewing for mere intrajurisdictional error of

[6]See D.P. Jones & A. de Villars, "Certiorari and the Correction of Intra-Jurisdictional Errors of Law" (1984) 22 Alta L. Rev. 362 [hereinafter Jones & de Villars, "Certiorari"].

[7]Lemieux, *supra*, note 1.

[8]As established by *R.* v. *Miller* (1985), 52 O.R. (2d) 585, 49 C.R. (3d) 1 (S.C.C.); *Morin* v. *National Special Handling Unit Review Committee* (1985), 49 C.R. (3d) 26 (S.C.C.); *Cardinal* v. *Director of Kent Institution* (1985), [1986] 1 W.W.R. 577, 49 C.R. (3d) 35 (S.C.C.).

law.[9] Of course, the authors cannot be held responsible for such developments, though their position on the *certiorari*-in-aid issue could have been framed somewhat less dogmatically.[10]

While currency is therefore only a fleeting advantage, it is nevertheless still an advantage. However, it is doubtful whether the final two differences that I have discerned are of any benefit at all. It may well be true, as stated in the preface, that "[a]s in so many areas of Canadian law, it is necessary and desirable to refer to English authorities".[11] Still, this approach can be carried too far, as it is here in the form (most notably at pages 198-208) of long excursions into relatively ancient English authority of dubious relevance. These excursions lead to the virtual exclusion of American authority (now, with the *Charter*, so much more pertinent) and even of any textual discussion of such key Supreme Court of Canada decisions as *Canadian Radio-Television and Telecommunications Commission* v. *CTV Television Network Ltd* (on the delegation of hearing functions and the expectations of existing licence holders)[12] and *Capital Cities Communications Inc.* v. *Canadian Radio-Television Commission* (on policy formulation and fettering of discretion).[13]

As for the obvious merits of judicial review, my own writings have from time to time revealed a disposition towards that position. Nevertheless, to reduce the debate to a single rhetorical question[14] and to ignore the impressive body of Canadian anti-judicial review literature is to downplay, quite

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[9]*Ontario Public Service Employees Union* v. *Forer* (1985), 52 O.R. (2d) 705, 23 D.L.R. (4th) 97. See the authors' formulation of the "better" view in Jones & de Villars, *Principles*, *supra*, note 4 at 419-20.

[10]The authors' assertion of the contrary position in Jones & de Villars, *ibid.* at 361 is particularly surprising in view of the fact that they actually cite the B.C. Court of Appeal decision in *Cardinal* v. *Director of Kent Institution* (1982), [1982] 3 W.W.R. 593, 35 B.C.L.R. 201, one page earlier. The latter decision, affirmed on appeal by the Supreme Court of Canada, *supra*, note 8, rejected the interpretation of *Mitchell* v. *R.* (1975), [1976] 2 S.C.R. 570, 61 D.L.R. (3d) 77, cited as authority by the authors.

[11]Jones & de Villars, *ibid.* at viii.

[12](1982), [1982] 1 S.C.R. 530, 134 D.L.R. (3d) 193. The Table of Cases of the book under review does not reveal even a footnote reference to this decision.

[13](1977), [1978] 2 S.C.R. 141, 81 D.L.R. (3d) 609. This case is footnoted without discussion in Jones & de Villars, *Principles*, *supra*, note 4 at 140 n. 71. Also regrettable is the fact that, by my count, the Selected Bibliographies at the end of most chapters in the book refer to a total of only three works out of the entire body of important academic writing on the subject emanating from Quebec academics in French.

[14]The authors write:

> For more than twenty-five years, England has accepted the desirability of having the courts determine almost all questions of law arising in the course of administrative action — whether intra-jurisdictional or jurisdictional in nature — with no obvious impediment to the efficiency of government. Why do Canadian legislators so fear judicial review that they insist — often futilely — on inserting privative clauses in almost all important pieces of legislation?

Jones & de Villars, *ibid.* at 426; see also *supra* at 437.

inappropriately, a very contentious issue. I am not, of course, questioning the authors' right to put the case for judicial review of administrative action in the strongest terms possible. Their position, however, deserves fuller articulation than is found in the philosophy that emerges throughout the text but which is never explicitly justified, namely that Canadians need the ordinary courts to protect their rights and interests from being trampled on by government. Harry Arthurs, Paul Weiler, John Willis and Roderick Macdonald, to name but a few, merit far more attention than that.[15]

Viewed on its own terms and not simply from the perspective of what sets it apart from earlier efforts, the book under review has both strengths and weaknesses. The strongest parts, notwithstanding the over-reliance on English authority, are undoubtedly Chapters 8 through 10. These are well-written and both thoughtful and careful in their analysis of the relevant principles. They are, in short, somewhat more academic in their approach and not as "digesty" as, for example, Chapters 13 and 14 on remedies. Not coincidentally, Chapters 8 through 10 are based largely upon articles by both David Phillip Jones and Anne de Villars[16] that have appeared previously in Canadian law journals. This fact, coupled with some of my other concerns about the balance of the text, suggests that the book might have benefited from greater reflection about coverage, organization and structure as well as the effective integration of new material with that already published.

For one thing, little attempt is made to incorporate the *Charter* into the work. To raise just a few issues: what do "life, liberty and security of the person" in section 7 mean for administrative law? From a procedural perspective, how, if at all, do the "principles of fundamental justice" differ

[15]It is true that two of Harry Arthurs' articles are listed in the Selected Bibliography at the end of Chapter 16, but Paul Weiler's writings in this area (*e.g., In the Last Resort: A Critical Study of the Supreme Court of Canada* (Toronto: Carswell/ Methuen, 1974) c. 2 and c. 5; "The 'Slippery Slope' of Judicial Intervention" (1971) 9 Osgoode Hall L.J. 1; and "Judges and Administrators: An Issue in Constitutional Policy" in *Proceedings of the Administrative Law Conference, 1979* (Vancouver: U.B.C. L. Rev., 1981) 379 are not referred to at all. Moreover, while there are references to the works of Roderick Macdonald and John Willis scattered throughout the footnotes, there are none that I could find to some of their more important work in the area of judicial review, such as R.A. Macdonald, "Judicial Review and Procedural Fairness in Administrative Law" (1980) 25 McGill L.J. 520, (1980) 26 McGill L.J. 1; R.A. Macdonald, "A Theory of Procedural Fairness" (1981) 1 Windsor Y.B. Access Just. 3; J. Willis, " The McRuer Report: Lawyers' Values and Civil Servants' Values" (1968) 18 U.T.L.J. 351; J. Willis, "Canadian Administrative Law in Retrospect" (1974) 24 U.T.L.J. 225.

[16]Most notably, Jones & de Villars, "Certiorari", *supra*, note 6; D.P. Jones, "Administrative Fairness in Alberta" (1980) 18 Alta L. Rev. 351; D.P. Jones, "Natural Justice and Fairness in the Administrative Process" (1983) 43 R. du B. 441; D.P. Jones, Case Comment (1977) 55 Can. Bar Rev. 718; D.P. Jones, "The National Energy Board Case and the Concept of Attitudinal Bias" (1977) 23 McGill L.J. 462; and D.P. Jones, "Institutional Bias: The Applicability of the Nemo Judex Rule to Two-Tier Decisions" (1977) 23 McGill L.J. 605.

from existing common law principles of "natural justice" and "procedural fairness"? How will review for abuse of discretion be affected by the equality provisions of section 15 of the *Charter*? Admittedly, the *Charter* is still new, but even in the absence of cases, it is unfortunate that the authors chose for the most part not to speculate on such issues, particularly when they themselves acknowledge that the *Charter* will indeed have a significant impact. Incidentally, on the one point on which the authors did speculate, namely that section 7 would come to be interpreted as having substantive as well as procedural aspects,[17] they have already been vindicated.[18]

In the chapter on error of law, drawn from the authors' *Alberta Law Review* article,[19] there is considerable material on jurisdictional error. Here, particularly, this incorporation of earlier work has caused an organizational problem that really gets in the way of their analysis. Rather than examining the closely-related issues of privative clauses and preliminary and collateral error together with jurisidictional error, the three topics are treated separately. Indeed, the study of privative clauses is isolated quite bizarrely in the penultimate chapter of the book. Moreover, as opposed to the generally careful delineation of issues in Chapters 8 through 10, the discussion of preliminary and collateral error degenerates into a series of long extracts from a handful of judgments (a weakness encountered in some other parts of the book, as well), with no real attempt being made to identify the indicators of a preliminary or collateral matter. This is not to imply that this area of the law is straightforward, but some synthesis of the issues and authorities is to be expected on such an important point. Instead, the philosophy of the authors here, to quote from their conclusion on another issue, seems to be a little too dismissive of the prospects for the development of an appropriate theoretical approach: "Perhaps such a test could never be devised, and one must rest content with the ability to canvass the matter before the courts."[20]

There is evidence throughout the work of the absence of a sharp editorial pencil. It is obviously vital in a textbook to re-emphasize certain matters as they become relevant in different contexts. That does not justify, however, the almost word-for-word repetition of pages 39-41 at pages 192-93. Similarly, at page 423, the issue of the constitutionality of privative clauses is said to have been discussed more fully in Chapter 2 when in fact the later discussion simply parallels, again in virtually the same language,

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[17]Jones & de Villars, *Principles*, *supra*, note 4 at 38-41.

[18]*Reference Re Section 94(2) of the Motor Vehicle Act (B.C.)* (1985), [1985] 2 S.C.R. 486, 48 C.R. (3d) 289.

[19]Jones & de Villars, "Certiorari", *supra*, note 6.

[20]Jones & de Villars, *Principles*, *supra*, note 4 at 129, with respect to review for irrelevant considerations and the discerning of a test for what is legally irrelevant.

the earlier treatment of that issue.[21] As a final example, *Bell* v. *Ontario Human Rights Commission*[22] and the House of Lords decision in *Anisminic* v. *Foreign Compensation Commission*[23] are discussed in tandem on three different occasions to make essentially the same point,[24] while the "Canadian *Anisminic*", the very troubling *Metropolitan Life Insurance Co.* v. *International Union of Operating Engineers*, remains undiscussed.[25]

Lastly, the treatment of remedies, particularly in the contexts of standing and the *Federal Court Act*,[26] is highly cursory. Apparently the authors were either in a hurry to finish the book or they underestimated the importance of these issues.

In summary, despite some mildly useful distinguishing features and occasional instances of strong analysis, *Principles of Administrative Law* constitutes a rather uneven effort. Given the authors' previous work, it is to be regretted that the book did not live up to its potential to be something more.

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[21] *Ibid.* at 37-38.

[22] (1971), [1971] S.C.R. 756, 18 D.L.R. (3d) 1.

[23] (1969), [1969] 2 A.C. 147, [1969] 2 W.L.R. 163.

[24] Jones & de Villars, *Principles*, *supra*, note 4 at 52-53, 111-12 and 194.

[25] (1970), [1970] S.C.R. 425, 11 D.L.R. (3d) 336. Admittedly, it is referenced on five occasions, twice in the text itself.

[26] R.S.C. 1970 (2d Supp.), c. 10.

James G. Snell & Frederick Vanghan, *The Supreme Court of Canada: History of the Institution*. Toronto: University of Toronto Press, 1985. Pp. xv, 319 [$40.00]. Reviewed hy Louis B.Z. Davis.*

> Given the relatively lengthy life of the Supreme Court of Canada and given the emphasis of Canadian historians on political history and constitutional development, it is surprising that no basic history of the Court has been written.[1]

Thus begins the preface to this collaboration between an historian and a political scientist. The explanation for this omission emerges gradually from the authors' chronological history of the institution. No one could be expected, of course, to write a history of the institution when it was young. Even some early Supreme Court judges lacked commitment to the new tribunal on which they sat, and "[u]nfortunately for the Supreme Court, the unfavourable image of the institution [became] entrenched by the end of the 1870s".[2] At the turn of the century, "[t]he Court's reputation remained poor; the editor of the *Canada Law Journal* wrote privately that the Supreme Court 'is held in contempt by the profession.'"[3] Worse yet, the Court then fell into a period of decline: "Rather than being seen as an institution apart, enjoying special status at the peak of the national judicial structure, the Court was shown to be what it really was in this period: a political body subject to the partisan political manoeuvrings of the government."[4]

The Court's appeal to historians and political scientists as a worthy research subject could hardly have been encouraged by a continuing government attitude through much of the first part of this century that this "vulnerable institution" should be sheltered by following "[t]he old adage 'let sleeping dogs lie' ... by inhibiting discussion and change".[5] Finally, it is true, the stature and prestige of the Supreme Court began to rise. But is it really surprising that no one was interested enough to research and write the history of this institution when it was still only supreme in name? As appropriately emphasized and elaborated on by the authors, it did not become

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[1] J.G. Snell & F. Vaughan, *The Supreme Court of Canada: History of the Institution* (Toronto: University of Toronto Press, 1985) at xi.

[2] *Ibid.* at 28.

[3] *Ibid.* at 79.

[4] *Ibid.* at 88.

[5] *Ibid.* at 127.

supreme in fact until the 1949 abolition of appeals to the Judicial Committee of the Privy Council.

As late as 1960, it could still be said that most people were barely aware of the Court's existence.[6] Only recently has the Court been in a position "to make itself a truly significant participant in the Canadian polity".[7] Therefore, contrary to the authors' assertion, it is perhaps not so surprising after all that theirs is the first basic history of the Court.

The preface then goes on to state: "This volume is an attempt to fill that gap."[8] To fill such a gap in one volume is a very ambitious undertaking. However, the authors have succeeded in providing a highly selective but carefully documented and well-written historical review.

The book's ten chapters divide the Court's history into as many period pieces, making it easy to follow the large lines of the Court's historical development. These chapters concisely but effectively capture the relevant background of the times while focusing on the Court's particular challenges and problems. These challenges and problems, which have been on-going throughout the Court's history, have included the quality and sufficiency of and relations among its personnel; its status in the judicial hierarchy and in the national polity; its perception by the government, the legal community and the public; its overly conservative, strict constructionist jurisprudence; and, at least until 1946, its lack of an appropriate and functional residence.

The book is much more remarkable for what it does cover than disappointing for what it does not, and it provides a satisfying basic history of the Court. Anyone interested, however, in a deep discussion of the jurisprudence of the Court in its first 110 years, its influence as a law-maker, its role as constitutional adjudicator or more detailed biographies of its judges should look elsewhere.[9] Rather, this book touches on such aspects of the Court's existence as judicial salaries, workload, accommodation problems, constitutional status, method, criteria and quality of appointments and extracurial activities of the judges such as speeches and service on commissions of inquiry. The authors also discuss political use of the Court through references, geographical isolation of the Court from Eastern and Western Canada, weak judicial craftmanship in terms of style and clarity of judgments and various difficulties hindering the achievement of consensus in some cases.

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[6] *Ibid.* at 214.

[7] *Ibid.* at 258. These are the closing words of the book.

[8] *Ibid.* at xi.

[9] See, *e.g.*, (1975) 53 Can. Bar Rev. 459-770.

One of the most interesting aspects of the book is the information it contains about the individual judges who served on the Court. This usually includes the background to their appointments, brief biographical sketches and some insight, anecdotal or otherwise, into their personalities.

The authors found that nine or more Supreme Court judges were appointed primarily on the basis of patronage considerations. At least seven of these are said or very strongly implied to have been appointed on this basis despite lack of obvious merit or competence for such a role. Political partisanship is also put forward as an essential factor in many other appointments, although tempered to varying extents by considerations of legal experience and intellectual ability. Given these findings, it is strange that in their preface the authors refrain from attributing the generally low regard "for the quality of [the Court's] judicial work"[10] to partisan political considerations in the appointment process.

Snell and Vaughan rely heavily on archival documents, government and court records, private papers and related materials. The book is well-documented with references to these sources throughout the text. The authors also conducted a number of interviews with knowledgeable persons. However, in this regard it seems they did not direct sufficient energy to their task. There are many other individuals whose anecdotes would have added personal warmth and charm to the authors' dry account. I can recall, for example, John J. Robinette addressing the Federal Lawyers Club in Ottawa a few years ago on his personal experiences as counsel in the Supreme Court. At least some of his enlightening and often amusing reminiscences and reflections would have provided material worthy of inclusion in this book. Since the authors seem to lack any personal experience with the Court as an institution, those with such experience and with personal feelings about the Court could have sharpened their understanding of their subject.

The book's treatment of the history of the Court over the last ten to fifteen years is not as even or complete as that of earlier periods. To some extent, it is impossible for this to be otherwise. With respect to recent appointments, for example, only a few people know who was on the short list for appointment, what criteria were employed, what the views of the Cabinet were or whether any offers of a position were rejected. This knowledge is, of course, confidential. Similarly, the authors would have been forced to resort to gossip or methods unbecoming their scholarly exposition to inform themselves of any recent friction on the bench, government initiatives underway to improve the Court, discussions of constitutional change or the current relationship on a personal level between the judges and the executive.

[10]Snell & Vaughan, *supra*, note 1 at xii.

Even so, there are omissions that are disappointing. It has been customary for some time now for the Chief Justice, the Attorney General of Canada and representatives of the Bar and the relevant province to address the Court at special ceremonies to mark the occasion of a judge's retirement. These speeches are usually based on careful research and include biographical and jurisprudential information, anecdotes, humour and tributes to the best qualities and contributions of the retiring judge. For instance, when Mr Justice Ritchie retired in 1984, the Attorney General had occasion to note the many areas of law in which he had made major contributions and pointed out that he had rendered the unanimous judgment of the Court in more than 130 cases. It is unfortunate that the authors did not appear to know about or did not have access to any of these speeches. They might have been available from persons who could also have provided the authors with more of the stories which help to humanize the judges and the legal profession. For example, when Mr Justice Spence retired in 1978, then-Attorney General Marc Lalonde throughout his speech mistakenly directed his gaze towards Mr Justice Ritchie. One Court observer joked: "Do you think Ritchie got the hint?"

In the book, long-serving judges such as Judson, Spence, Martland and Ritchie are simply replaced at the end of their tenures, with little if any tribute to or assessment of their contributions to the Court and the law. It is at moments like these that knowledgeable Court followers will discern a certain incompleteness about the book. On the other hand, the book did recently provide accurate and quotable material for the Attorney General of Canada's tribute to the late Mr Justice Pigeon at a special ceremony in the Court and for the Pigeon obituaries which appeared in the press.

Another shortcoming is the book's failure to convey sufficiently the detail surrounding such historic cases as the *Reference Re Resolution to Amend the Constitution*.[11] This was the first case in which any party (the federal government, in this instance) submitted equally official factums to the Court simultaneously in both English and French. It also marked the first time the Court found it necessary to ease overcrowding by issuing tickets for admission. Special arrangements had to be made to accommodate the press, all the lawyers, various persons with particular interests or status and the general public. Those able to secure one of the seventy passes available

[11](1981), [1981] 1 S.C.R. 753, 125 D.L.R. (3d) 1 [hereinafter the *Patriation Reference*].

each day could sense the tension in the courtroom.[12] There was a sense of history unfolding which left a deep imprint on the memories of all those involved. The absence of such details, combined with their unbalanced criticism of the judgment, detracts significantly from the authors' account of the case.[13]

The book touches on but does not delve too profoundly into philosophical considerations of the judicial role. As a general summation of and comment on the Court's jurisprudential history, this work can be described as generally fair and accurate, if occasionally harsh and necessarily superficial and incomplete. Bearing in mind the context and point of the jurisprudential analysis provided, it is sufficiently developed, clearly presented and neatly integrated into the major themes of the book.

It is possible to detect a certain lack of appreciation by the authors of the difficulties inherent in sitting as a judge on questions of major public importance. Judical weighing of major public and private interests involves many factors and can be a personally trying experience. The authors often give the impression, perhaps unintentionally, that this decision-making process really involves no more than a choice between strict legal conservatism, generally favoured by the Court, and judicial innovation, with the latter being more commendable. They would have been well-advised to consider the following observations of Chief Justice Laskin, imparted on the occasion of the Supreme Court's centenary in 1975:

> It is part of our philosophy of adjudication ... that each judge may put his own questions and supply his own answers. Nonetheless, he does so as a member of a collegium, independent of the other members but sharing responsibility with them for the integrity of the institution. Judgment is involved; judgment not only in the disposition of a particular case but also in the method of disposition, in the character, length or brevity of written reasons, in the use of authorities or other sources of reference, in the decision to concur and whether

[12]On the day of judgment, 28 September 1981, television broadcast live for the first time the rendering of a decision by the Court. Chief Justice Laskin had agreed to this coverage despite his aversion to television cameras in the courtroom. At the federal Department of Justice, many lawyers were crowded into the office of the Assistant Deputy Minister (Public Law), watching the television and listening intently. Immediately afterwards the Minister of Justice would have to be briefed on the result and its implications. We leaned forward as Chief Justice Laskin began to render judgment, but at the critical moment we could not make out a word he was saying! Desperately we tried to decipher the garbled audio or read his lips as he pronounced this historic judgment. We turned to other channels, but to no avail. Later we would discover that one of the other judges had inadvertently turned on another microphone or unplugged a wire, thus causing the static that garbled the broadcast.

[13]It is also disappointing that the authors chose not to discuss the follow-up case, *Re A.G. Quebec and A.G. Canada* (1982), [1982] 2 S.C.R. 793, 134 D.L.R. (3d) 719, the so-called Quebec veto case.

> to do so without additional or supplementary reasons, and in the decision to dissent and whether to limit the grounds of the dissent.
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> All of this is part of the anxiety that is constantly, if sometimes also unconsciously, with a judge of a final appellate court. Judges of courts lower in the hierarchy may look over their shoulders, and find some comfort perhaps in knowing that there is someone there, some back-up of a higher court. The judge of a final appellate court like the Supreme Court of Canada who looks over his shoulder for any comfort will find no one there, unless it be his law clerk who, in my experience, cannot always be relied on to be comforting. There is something of the loneliness of the long distance runner in every judge of a final appellate court as he reflects on his work and makes decisions in particular cases, decisions which either expressly or implicitly tell the reader how the judge views the functions and role of the court of which he is a member.[14]

They might then have offered less one-sided comments about, say, Mr Justice Beetz, whose "reputation for indecisiveness"[15] is counterbalanced by his diligence in preparing thoroughly-researched, thoughtful and well-written judgments.

Similarly, in discussing Chief Justice Cartwright's decision in *R.* v. *Drybones*, the authors say:

> In the most astonishing and most open reversal in the history of the Supreme Court, the chief justice repudiated his dissent in *Robertson and Rosetanni* with the confession that he had erred in his reasoning in that case ... . The judgment said little for a judge of Cartwright's stature. His dissent in *Drybones* was an open admission that he had not thought through his judgment in *Robertson and Rosetanni* in 1963.[16]

While in some respects the judgment did "say little" for Chief Justice Cartwright, in other respects it spoke volumes for him. Only a courageous judge with an open mind, a strong sense of humility and intellectual and moral honesty could render such a judgment. More than a few of the judges described in the book were clearly not of such stock and would never have dared reverse themselves so forthrightly.

In closing, as a lawyer reviewing a book written by non-lawyers, it is probably incumbent upon me to quibble over a few technical legal points, if only out of a sense of "*ma profession m'oblige*". The authors refer to "the historic adoption in 1982 of a new constitution in which the Court was virtually entrenched and given a vital new mandate".[17] Contrary to popular usage, the constitutional changes brought about in 1982 did not truly amount

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[14]B. Laskin, "The Role and Functions of Final Appellate Courts: The Supreme Court of Canada" (Address to the Supreme Court Centennial Symposium, Ottawa, 27 September 1975) (1975) 53 Can. Bar Rev. 469 at 469.

[15]Snell & Vaughan, *supra*, note 1 at 226.

[16]*Ibid.* at 220-21.

[17]*Ibid.* at 233.

to the adoption of a "new constitution". More importantly, despite what to the lay person (and some lawyers) appear to be clear words to the contrary, it is not at all certain that the Court has been constitutionally entrenched.[18] And in a statement that will not seem objectionable to the general public, the authors note that in *Hunter* v. *Southam Inc.*,[19] "Chief Justice Dickson seemed to serve notice that the Court was assigning the Charter a major place in the law of the land".[20] Given the *Charter*'s status as part of the Constitution, lawyers may well find this assertion superfluous, to say the least.

The publisher has produced a volume that is pleasing to the eye and contains few typographical errors. The book contains a useful appendix listing all of the judges who have served on the Court and an index which, while certainly helpful, could have been more detailed. For example, it is impossible to find the section dealing with the *Patriation Reference* except by checking all the pages under the entry "References". Overall, as a basic history of the Court the book is both enlightening and enjoyable. It does not fully fill the gap in our national history identified by the authors but, even with all its own shortcomings, it is an ambitious and admirable effort in that direction.

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[18]See, *e.g.*, L.B.Z. Davis, *Canadian Constitutional Law Handbook: Leading Statements, Principles and Precedents* (Aurora, Ont.: Canada Law Book, 1985) at 651-52.

[19](1984), [1984] 2 S.C.R. 145, 11 D.L.R. (4th) 641.

[20]Snell & Vaughan, *supra*, note 1 at 256.

I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 3d ed. Toronto: Carswell, 1984. Pp. lix, 668 [$69.50]. Reviewed by William Pentney.*

Spry's *Equitable Remedies* is an excellent book for a student, practitioner or judge to consult in order to learn about the principles relevant to injunctions, specific performance, rectification and equitable damages. Dr Spry has written a careful, accurate and thorough text which will amply repay close scrutiny.

As explained in the preface, the third edition was necessitated primarily by the recent developments in the law relating to *Mareva* injunctions and *Anton Piller* orders.[1] In the second edition, which was published in 1980, the *Mareva* injunction was dealt with in only six lines,[2] while the *Anton Piller* order was relegated to a footnote.[3] In this edition, twelve pages are devoted to the *Mareva* injunction and three pages to the *Anton Piller* order. The analysis of these developments, like the rest of the text, is concise and reasonably thorough. As well, references to recent cases are incorporated into the new edition and an entirely new chapter on rectification has been added.

Dr Spry has produced a meticulous examination of the principles which guide the exercise of equitable discretion in relation to the principal equitable remedies. The book is very well written and is an impressive work of scholarship. One measure of this is the 43-page Table of Cases, another is the careful attention paid to the historical origins of the principles, as well as the painstaking analysis of the major decisions. Yet another unique measure of the quality of Dr Spry's scholarship can be found in the frequent references in the text to judgments which have cited previous editions with approval.

The reliability of the author's scholarship has been further confirmed by decisions rendered since the preparation of the third edition. For example, the discussion of the doctrine of undue influence or unfairness, as it relates

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[1] I.C.F. Spry, *The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages*, 3d ed. (Toronto: Carswell, 1984) at ix.

[2] I.C.F. Spry, *The Principles of Equitable Remedies: Injunctions, Specific Performance and Equitable Damages*, 2d ed. (London: Sweet & Maxwell, 1980) at 321.

[3] *Ibid.* at 472 n. 94.

to the grant or refusal of specific performance of a contract which was procured by such measures, includes the following assertion:

> [T]he mere existence of poverty, lack of education, drunkenness, or any other such matter is not itself enough to lead to a refusal of specific performance. ... As has been shown in relation to the effects of alcohol, it is necessary that the plaintiff should in some way have taken advantage of the position of inequality or that some similar consideration should have arisen, before a court of equity considers the transaction unfair so that specific enforcement is refused on that ground.[4]

This view of the doctrine of undue influence was confirmed last year by the House of Lords, albeit without reference to the book under review, in *National Westminster Bank* v. *Morgan*.[5]

Impressive as it may be in quantity and quality, the scholarship is nonetheless of the "black letter" variety. This is not a book for those who wish to explore new frontiers in the law of remedies. There is virtually no explicit theorizing,[6] and the author's criticism of decisions and statements of rules is best described as gentle.

The book is curious in several respects. The absence of a chapter on the history of equity seems odd in view of the author's obvious belief that historical analysis is vital to a proper understanding of equitable principles. The treatment of equitable maxims throughout the book is somewhat repetitive; Dr Spry might have been wise to devote a single chapter or sub-chapter to an analysis of the maxims, so that their application in particular areas could be understood in the light of a general discussion of their purpose and significance.

Even more startling, at least to this reader, is the lengthy recitation of judges whose knowledge and understanding of the principles and "technique" of equity command the approval of Dr Spry.[7] It is difficult to see the relevance of comments on the general reputations of individual judges without reference to specific judgments or extra-judicial pronouncements. I do not doubt that Lord Eldon is properly described as "one of the greatest equity judges who at any time sat in the Court of Chancery",[8] but I am unable to fathom what we are to take from this statement in a book which is neither a biography nor a history of the subject matter. Lord Eldon's decisions, like those of any other judge, must stand or fall on their merits, and the quality of reasoning and fidelity to principles and precedents in a

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[4]Spry, *supra*, note 1 at 189-90.

[5](1985), [1985] A.C. 686, [1985] 1 All E.R. 821.

[6]In contrast to the hidden (yet discernible) theorizing which underlies the choice of subject matter and approach.

[7]Spry, *supra*, note 1 at 2-3.

[8]*Ibid.* at 3.

judgment can, it is submitted, easily be measured without reference to the reputation of the judge. These passages hearken back to a different age and reveal a view of the law not commonly encountered in Canada today.

Another stylistic irritant is the author's failure to use or acknowledge the significance of gender-neutral language. Women are never plaintiffs or judges in Dr Spry's equity. Admittedly, though, this comment might seem heretical given the rigidly "traditional" legal analysis undertaken by the author. After all, how could one expect something so "radical" as gender-neutral language from an author who does not even refer to *any* modern authors or commentaries? (I found only one reference to a recent law journal article in the 668 pages of text. That reference is to an article by Dr Spry himself.[9])

For Canadian readers, this book has much to offer, particularly the aforementioned examination of the principles relating to equitable remedies. The author's careful analysis of these principles serves as a useful corrective to the tendency to cling to strict rules unsupported by reason or to the precedents.[10] The book is not a "quick" read, but it is worth studying (at least on a given topic or topics) with some care. One obvious disadvantage of the book for a Canadian reader is the omission of any reference to Canadian cases. While some might see this exclusion as an oblique commentary on the quality of Canadian judgments in the area, a more likely explanation is simple exhaustion. Having undertaken such a thorough analysis of the English and Australian jurisprudence, which was the original purpose he established for the book, Dr Spry can quite justifiably shrug off this last criticism as pure impudence.

Because of the absence of any reference to Canadian authority, the price of the book, the inadequacies outlined earlier in this review and the availability of an excellent current Canadian text,[11] I would not assign this book

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[9] I.C.F. Spry, "The Myth of the Prima Facie Case" (1981) 55 Aust. L.J. 784, cited in Spry, *supra*, note 1 at 449 n. 23.

[10] Many of the most significant recent cases in this area are based on just such an analysis of "supposed" rules. See, *e.g.*, *C.H. Giles & Co.* v. *Morris* (1972), [1972] 1 W.L.R. 307 (Ch. D.); *American Cyanimid Co.* v. *Ethicon Ltd* (1975), [1975] A.C. 396, [1975] 1 All E.R. 504 (H.L.) and the *Mareva* and *Anton Piller* lines of cases (although these are properly viewed as extensions of existing principles).

[11] R.J. Sharpe, *Injunctions and Specific Performance* (Aurora, Ont.: Canada Law Book, 1983). In contrast to Dr Spry, Professor Sharpe has made ample reference to the current literature on the subject. The exhaustive citation of Canadian jurisprudence and thorough discussion of issues of current concern in this country give Sharpe's text an undeniable added advantage over the book under review.

for use in my Remedies course. But the depth and quality of scholarship and the author's clarity of expression have convinced me to keep the book on my shelf and to recommend it strongly as a resource for students, practitioners and judges who are involved in analyzing or applying equitable remedies.