Book Reviews

Studies in Canadian Criminal Evidence, Ed. Salhany & Carter, Toronto: Butterworths & Co. (Canada), 1972, Pp. iii, 392 ($33.00).

Studies in Canadian Criminal Evidence is the fourth volume of Canadian Legal Studies published by Butterworths of Canada and, given the complex nature of the subject and the dearth of Canadian writing in the area, it is perhaps the most ambitious in the series to date. It is therefore disappointing that, as a contribution to legal literature, it is, in the opinion of this reviewer, seriously flawed.

As the learned editors, Messrs Salhany & Carter, point out in the preface, the voluminous nature of the law of evidence required them to be selective in their choice of topics for study. However, the wisdom of their decision to confine these studies to the law of "criminal" evidence is open to serious question. There are certain well-established differences between the common law rules of criminal and civil evidence affecting, in particular, the standard of proof, the competence and compellability of the accused and his spouse, the admissibility of confessions and dying declarations and the rules of corroboration. However, these distinctions are greatly over-shadowed by the basic similarities between the rules of criminal and civil evidence stemming from their common origins in the jury trial and the adversary process, and their common aim of the ascertaining of truth.

The division between the rules of criminal evidence and civil evidence at common law rests less in theoretical distinctions than in the stringency of their general application. In civil trials, the rules of evidence are subject to waiver by the parties: in criminal trials it is the duty of the judge to ensure that the rules of evidence are observed. It is perhaps worthwhile in this context to recall the remarks of Wigmore:

> There is but one system of rules for Criminal and for civil trials. This is the more worth emphasizing for the title "Criminal Evidence" has tended to foster the fallacy that there is some separate group of rules, or some large number of modifications. On the contrary, much is lost in utility by attempting a separate treatment; for most of the large principles of Evidence are equally illustrated in both kinds of trials, and cannot be adequately followed either in theory or in authority, if the precedents in either class of cases are ignored.[1]

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[1] *Wigmore on Evidence*, vol. I, 3d ed. (1940), 16-17.

The artificiality of the division between criminal and civil rules of evidence is illustrated in this volume by frequent references to provincial Evidence Acts and civil decisions.

A second general reservation about *Studies in Canadian Criminal Evidence* is the overall description of the varied contributions as "studies". Without resorting to terminological quibbles, a "study" normally consists of a detailed, critical analysis of a chosen topic documented with adequate citation and collateral references to aid the interested reader in undertaking further research in the area. While some of the chapters in *Studies in Canadian Criminal Evidence* undoubtedly satisfy this suggested criterion and represent valuable contributions to Canadian legal writing, others would be more accurately described as "comments" or "notes" because of their brevity and superficiality.

In the first category, one would certainly include "Admissions and Confessions" written by the Honourable Samuel Freedman, Chief Justice of the Manitoba Court of Appeal, which is perhaps the most satisfactory chapter in this book. In 36 pages, replete with valuable references to Canadian, English and American sources, the Honourable Chief Justice has written a comprehensive analysis of the law governing confessions in Canada, which is characteristically lucid and thorough. Despite the self-imposed limitation of the editors to "the rules of evidence in a criminal trial" in the preface one might have wished to see *R.* v. *Van Leishout*[2] cited for the proposition that the rule in *Ibrahim's* case[3] extends to quasi-criminal offences and some critical discussion of or allusion to the apparent anomaly illustrated by *R.* v. *Towler*[4] and *R.* v. *McLean & McKinley*,[5] whereby the admissibility of a confession obtained by trickery apparently depends on the mode of deception employed. If, as in *Towler*, a person in authority successfully deceives the accused into believing that he is a fellow prisoner rather than a policeman, any resulting statement is admissible without regard to *R.* v. *Ibrahim*. As Macfarlane, J.A. stated in *Towler*[6]: "It cannot be said that his mind was affected by inducements held out by a person in authority when he does not think that the persons who make the inducements are persons in authority". But, if the police falsely tell an accused that his co-accused has confessed and thereby induce the accused to make a confession, the deception by the police will constitute grounds for

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[2] (1943), 52 O.W.N. 746 (Co. Ct.).
[3] *R.* v. *Ibrahim*, [1914] A.C. 599 (P.C.).
[4] (1968), 65 W.W.R. 549 (B.C. C.A.).
[5] (1960), 31 W.W.R. 89 (B.C. S.C.).
[6] (1968), 65 W.W.R. 549, 553 (B.C. C.A.).

excluding the confession (*R.* v. *McLean & McKinley*, see also *R.* v. *Frank*[7]). These cases illustrate the shifting rationale of the *Ibrahim* rule adopted in Canadian Courts. The decision in *R.* v. *Towler* is justifiable upon "The Criterion of Truth" while *R.* v. *McLean & McKinley* is explainable only if "Fairness to the Accused" or "The Due Administration of Justice" are viewed as the underlying bases of the rule in *R.* v. *Ibrahim*. But the distinctions themselves would seem to place too high a premium on the ingenuity of police tactics and demonstrate the need for development of a coherent doctrine of "Entrapment" in Canada.[8]

The study on "Character Evidence" by the Honourable C.P. Hartt of the Ontario Court of Appeal and current Chairman of the Federal Law Reform Commission is also valuable to academics and practitioners. Given the breadth of "Character Evidence" as a topic for critical analysis, the approach of the learned contributor, which consists of a broad analysis of the philosophy underlying the law governing character evidence and a detailed discussion of s. 12 of the *Canada Evidence Act*,[9] is understandable. However, it is regrettable that similar fact evidence gets little mention, since the doctrine is ripe for reappraisal. It might have been preferable if the editors had devoted two chapters rather than one to the important topic of Character Evidence.

The chapter on "Corroboration" by the Honourable A. E. Branca of the British Columbia Court of Appeal is long and detailed but none of the 84 pages is devoted to a statement and a critical evaluation of the rationale of the doctrine. There are few if any references to collateral sources, despite the relative abundance of legal writing in this area, and the extracts reproduced from leading judgments are too numerous and often too long, making the narration difficult to follow in places.

It is unfortunate that this essay was written before two recent decisions of the House of Lords which limit the rule against mutual corroboration to accomplices.[10] These decisions conflict with *Paige* v. *The King*,[11] and if the same willingness to re-evaluate and rationalise the unnecessarily complex doctrine of corroboration is exhibited by the Supreme Court, it seems likely that the law on mutual corroboration as expounded here by the learned Judge will be

[7] (1969), 69 W.W.R. 588 (B.C. C.A.).

[8] E.g. *R.* v. *Pratt*, [1972] 5 W.W.R. 52 (N.W.T. Mag.Ct.); *R.* v. *Pettipiece* (1972), 7 C.C.C. (2d) 133 (B.C. C.A.).

[9] R.S.C. 1970, c.E-10.

[10] *D.P.P.* v. *Hester*, [1972] 3 All E.R. 1056 (H.L.); *R.* v. *Kilbourne*, [1973] 2 W.L.R. 254 (H.L.).

[11] [1948] S.C.R. 349.

changed. *R.* v. *Dyer,* an important Canadian decision concerning the definition of an accomplice, was handed down too late for inclusion in his study.[12]

Among those contributions which one is tempted to categorize as "comments" or "notes" are a five-page statement of the Hearsay Rule by Mr Carter and an eight-page contribution by the Honourable Antoine Rivard of Quebec entitled "The Functions of Judge, Jury and Counsel — Co-operation in Search of the Truth".

Mr Carter's account of the Hearsay Rule is, no doubt, intended to be read in conjunction with his co-editor's chapter of "Exceptions to the Hearsay Rule" which it immediately precedes. But, however one views it, as an exposition of the Hearsay Rule, it is inadequate. While hearsay is properly defined to include assertive conduct (e.g. *Chandra Sekera* v. *The Queen* [13]), no mention is made of the controversy concerning implied assertions by conduct and the Hearsay Rule.[14] Of greater significance is the absence of any account of the ramifications of the Hearsay Rule, which has succinctly been described as extending to "the prattling of a child and the mouthings of a drunk, the encyclical of a pope, a learned treatise, an encyclopedia article, a newspaper report, an unverified rumor from anonymous sources, an affidavit by a responsible citizen, a street corner remark (and) the judgment of a court . . .".[15] The practical consequences of the Hearsay Rule might have been illustrated by a more detailed analysis of the facts and judgments in *Myers* v. *D.P.P.*,[16] which is mentioned in the text.

The usual reasons for excluding Hearsay Evidence are dealt with in a single fifteen line paragraph and there is no attempt to evaluate the foundations upon which this controversial, exclusionary rule of evidence is based. There are no collateral references to the writings of Morgan,[17] Cross,[18] Baker [19] and Wigmore,[20] and one is left with the impression that this chapter is too slight to be of much value.

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[12] (1972), 5 C.C.C. (2d) 376 (B.C. C.A.).

[13] [1937] A.C. 220 (P.C.).

[14] *Cf. Cross on Evidence* 3d ed. (1967), 383-386 and *Phipson on Evidence* 11 ed. (1970), 274-275.

[15] Loevinger, *Facts, Evidence, and Legal Proof,* 9 Western Reserve Law Rev. 154; reprinted in Henson, *Landmarks of Law* (1960) 422, 432.

[16] [1965] A.C. 220 (P.C.).

[17] Morgan, 62 Harv. L. Rev. 177.

[18] Cross, *op. cit.,* 380-458, (1956) 72 L.Q.R. 91.

[19] Baker, *The Hearsay Rule* (1950).

[20] Wigmore, *op. cit.,* vol. V.

The companion study entitled "Exceptions to the Hearsay Rule" written by Mr Salhany, co-editor of this volume, contains some of the detailed analysis which Mr Carter's article lacks. However, it is doubtful whether *R.* v. *Leland*,[21] which held that spontaneous exclamations are not admissible to prove the facts they contain and are thus not exceptions to the Hearsay Rule, would be followed today. It is true that McRuer, C.J.H.C. in reaching this conclusion adopted the views of the editors of the 8th edition (1942) of Phipson in preference to Wigmore who regarded spontaneous exclamations as an exception to the Hearsay Rule. However, the editors of Phipson's current 11th edition (1970), citing *Teper* v. *The Queen*,[22] now agree with Wigmore that spontaneous exclamations are an exception to the Hearsay Rule.[23]

Reference should have been made to s. 30 of the *Canada Evidence Act* as well as to s. 36 (not 35(a)(ii) as appears in the text) of *The Ontario Evidence Act*[24] when dealing with the "business records" exception enacted since *Myers* v. *D.P.P.*

While *Ares* v. *Venner*[25] is mentioned, the possibilities of this Supreme Court decision, which adopted in civil proceedings the minority view of the House of Lords in *Myers* v. *D.P.P.*, thereby reserving a discretionary power to create new exceptions to the Hearsay Rule, might have been discussed in greater depth.

Other chapters include a useful study entitled "Burdens of Proof and Presumptions" by His Honour Judge L. Graburn of the County Court of York, Ontario, which is marred by the constant use of outdated references and was unfortunately published before the interesting decision of the Supreme Court in *R.* v. *Appleby*[26] was available, one on "Documentary Evidence" by Clay Powell, and a study of "Identification Evidence" by Mr Carter.

The two chapters devoted to the privilege against self-incrimination representing the contrasting views of the Honourable Edson Haines of the Supreme Court of Ontario on the one hand and Arthur Maloney and Paul Tomlinson on the other one are disappointing. Mr Justice Haines' article has already appeared twice before

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[21] [1951] O.R. 12 (C.A.).

[22] [1952] A.C. 480 (P.C.), recently followed in *Ratten* v. *Reginam*, [1971] 3 All E.R. 801 (P.C.).

[23] Phipson, *op. cit.*, 80-82.

[24] R.S.O. 1970, c.151.

[25] [1970] S.C.R. 608.

[26] (1972), 16 C.R.N.S. 35 (S.C.); noted in (1972) 7 U.B.C. Law Rev. 107.

its inclusion in this book [27] and the discussion is not as interesting as the exchange of views on the same subject between Professor Rupert Cross of Oxford and Professor Field of Harvard.[28]

There is little attempt by the editors to integrate the individual studies by means of cross-references between related topics, such as "Corroboration" and "Identification Evidence", or "Opinion Evidence" and "Character Evidence".

In summary, while the idea of publishing essays on aspects of Canadian law should be encouraged, the overall quality of *Studies in Canadian Criminal Evidence* is disappointing and makes it an expensive purchase at $33.00.

Saul Schwartz *

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[27] Originally an address delivered to the Academy of Medicine at Toronto (1970), published in The Law Society Gazette (1971), 78

[28] (1970-71) 10 S.P.T.L. (XI) 66.

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International Bibliography of Air Law, 1970-1971, by Wybo P. Heere. Sijthoff, Leiden; Oceana Press, Dobbs Ferry, N.Y.: 1972. Pp. xxvi, 569. ($28.50).

Upon the publication of this most comprehensive bibliography on air law, which Dr. G. F. Fitzgerald characterizes as a labour of love, Mr. Heere has every justification for feeling satisfied. Every entry in it has been closely considered with the aim of reducing time spent by the user in searching through the staggeringly voluminous literature on the subject. The compilation of any comprehensive bibliography, especially one like this, in which the materials are arranged according to an in-depth classification scheme, is a painstaking process, requiring great patience and devotion. Mr. Heere's work demonstrates these qualities and deserves the recognition of the air law community.

No bibliography of a major subject area, consisting as air law does of a tremendous quantity of richly varied materials, can claim to be complete. Mr. Heere's work is no exception, as the entries listed in the name index indicate. As well as those omissions expressly enumerated in the preface, such as space law, case law, legislation, treaty texts and unpublished manuscripts, the work also excludes such materials as national and international documents, contributions of legal societies (such as the International Law Association and the Institut de Droit International) as embodied in their annual reports, and materials on air law which form part of other works not solely devoted to the subject.[1] Furthermore, Heere's coverage of unpublished manuscripts raises queries. An unpublished term paper written by this reviewer in 1963 is listed, while a number of valuable titles, likewise available in the Law Library of McGill University, have been omitted. This reviewer extends a sincere invitation to Mr. Heere to visit this library before producing the supplement to his work.

An unfortunate shortcoming of the work is its superficial coverage of the large amount of valuable material available in scientific journals on aviation and air transport. There are, in these journals, not only articles on national aviation policy and economic regulation of air transport, but also good articles on air law *per se.* For example, the useful discussion of the Warsaw Con-

[1] For example: McDougal, Myres S., H.D. Lasswell and I.A. Vlasic, *Law and Public Order in Space,* (Yale University Press, New Haven: 1963).

vention of 1929[2] which appears in the November 29, 1971 issue of the ITA Bulletin does not appear to be listed in the bibliography; nor do recent articles by Mankiewicz[3] and Venkatramish.[4]

A subject bibliography may be arranged either alphabetically or in a classified fashion, as in Mr. Heere's work. In the latter case, the successful fulfillment of the objectives of the work depends on the accessibility of its analytic index, on the logic of the grouping of topics, and on the conceptual breakdown of the subject matter. To take issue with the classification scheme used in the work, its grouping of the topics, or some of the headings chosen would be merely academic. On the whole, the work conforms well to generally accepted modes of classification, arrangement, and characterization. There is, however, one reservation, namely, the chronological listing of titles under topics. Admittedly, a chronological listing facilitates search for current materials, but it also considerably impairs ease of locating works of a specific author.

The usefulness of any analytic index to material listed in a classified fashion depends, for the most part, on the comprehensiveness of coverage of relevant terms, the intelligence brought to bear on the selection and establishment of categories of subject headings, and the soundness of the characterization of a particular topic as falling within these divisions. With more care and effort, Mr. Heere could have been more successful in accomplishing this basic function. For example, "supersonic aircraft" cannot be found in the main alphabet; nor can the entry be found under "aircraft". Neither can the topics "innocent passage" or "intrusion of aircraft" be located.

Such reservations aside, Mr. Heere's work is a landmark contribution to the progressive development of the law of the air. Its significance and value have already been widely recognized. Improvements along the lines suggested above could enhance its value. This bibliography, even in its present form, however, deserves a place on the shelves of research libraries wherever air transport is of importance — which today means everywhere.

Kuo-Lee Li *

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[2] 137 L.N.T.S., at p. 12.

[3] R.H. Mankiewicz, *La convention de Montréal (1971) pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile,* (1971) 17 Annuaire Français de Droit International 855.

[4] K. Venkatramish, *Does the Chicago Convention Permit Joint or International Registration of Aircraft,* (1971) 11 Indian J. of Int'l. L. 435.

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Expropriation et fédéralisme au Canada, by Andrée Lajoie. Les Presses de l'Université de Montréal: 1972, Pp. xii 328. ($8.50).

Canadian federalism prevents land planning. If the federal government wants to use land for a post office, and the provincial government wants to use the same land for a school, the federal government always wins out. If a company given powers of expropriation by the federal government wishes to expropriate a provincial legislative building, and the expropriation is necessary to the exercise of one of the company's powers, the company may do so. When a province wants to expropriate unoccupied land held by a federal Crown corporation, it is not entitled to do so. A province may not nationalize the property of a federal company in the province, or even a provincial company owned by a federal company, unless the nationalization does not paralyse or prevent the functioning of the federal company. There is no such restriction on a federal nationalization of a provincial company. No organization in Canada establishes priorities for land use. Nor is such an organization possible as long as the *British North America Act,* as interpreted, gives priority to any land use for federal purposes over any land use for provincial purposes.

These are the problems to which Andrée Lajoie addresses herself in her recently published work entitled *Expropriation et fédéralisme au Canada.* The book is not a legal tome on the constitutional law of expropriation. It is, rather, a well documented policy paper. The author has worked in collaboration with the Province of Quebec's task force on expropriation, which reported in 1968. The administrative system she advocates is similar to that proposed by the task force.

The book contains much that one would not expect to find in a legal textbook. There is a substantial discussion of administrative structures necessary for a satisfactory expropriation process. There is a highly speculative presentation of the constitutional law of expropriation in other federal countries that sits easier in a work examining policy alternatives than it would in a book of legal reference. The book also omits some matters one would expect to find in a legal textbook. There is no subject index. Nor is there a table of cases or statutes cited.

On an organizational level the work is analytically exhaustive, posing such questions as whether there can be expropriation by virtue of the royal prerogative, whether the power of expropriation

is limited to immovables, or whether it is limited to goods in the private domain. On a case exegesis level, the work is more controversial. For instance, the author suggests, on the basis of the *Willis* case,[1] that any administrative structure that is established to receive delegated powers of land planning from both federal and provincial governments should not be incorporated. However, the *Bonanza* case,[2] although not a case of delegation, suggests that an incorporated administrative board is even less open to question than an unincorporated board.

The argument of counsel for the respondent in the *Willis* case, as it appears from the judgment of Mr. Justice Rand,[3] is that though delegation of the federal government to a provincial incorporated board is possible, delegation of the federal government to a provincial unincorporated entity is not. Provincial legislative jurisdiction over companies is limited to companies with provincial objects.[4] However, all this limitation means is that the provinces themselves cannot grant provincial corporations powers in respect of objects outside of the province; the federal government can make such a grant to a provincial corporation. Common law corporations created by a grant of a charter or letters patent from the executive authority of a province could receive a grant *ab extra* of powers in respect of objects outside the jurisdiction of the province, where the charter was granted before the province joined Confederation. This power is the executive or royal prerogative, continued after Confederation. A provincial statute might of course limit or remove the royal prerogative to create companies. But the provincial legislatures are no more limited than their executives and may create companies by statute with the same capacities that their executives can or could have created. Since, however, an unincorporated entity created by a province does not have its source in the prerogative, it can have a capacity, according to counsel for the respondent in the *Willis* case, only in relation to local law. This argument, which the Chief Justice, Mr. Justice Rinfret, found "ingenious" was rejected by the Supreme Court. Whether the Board was considered as an entity or as the individuals who composed it, it could receive powers from outside.

Ms. Lajoie's conclusion, that provincial administrative structures with delegated federal power, when incorporated, are legally more

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[1] *P.E.I. Potato Bd.* v. *H.B. Willis Inc.*, (1952) 4 D.L.R. 146 (S.C.C.).
[2] *Bonanza Creek Gold Mining Co. Ltd.* v. *The King*, [1916] 1 A.C. 566 (P.C.).
[3] *P.E.I. Potato Bd.* v. *H.B. Willis Inc.*, (1952) 4 D.L.R. 146, at p. 166.
[4] Section 92(11), *British North America Act, 1867.*

questionable than such structures, when unincorporated, prompts, in part, one of the two major differences in policy recommendations she has with the Quebec Task Force on Expropriation with which she worked. The Task Force recommends that its land planning structure be an office or organization separate from any government ministry and gives the structure powers, viz., the power to acquire and dispose of property, which would require the structure to be incorporated if it were to be distinct from the executive. Ms. Lajoie, on the other hand, recommends that the policy planning part of any land planning structure be a section of a government ministry, responsible directly to the executive. Within the present federal system, there would have to be eleven such policy planning groups, one under the direction of a federal cabinet minister, and one for each of the provinces under the direction of a provincial cabinet minister. Secondly, there should be an administrative structure for each province, independent of political direction, to which both the federal government and the province would delegate. The structure would manage expropriation operations, but would not manage all land planning operations. A land planning management structure would require a legal personality in order to be independent from the executive and cabinet direction because it would have to buy, sell and transfer property. If Ms. Lajoie did not have the reluctance about incorporation she does show, she would probably have continued to recommend that policy planning be separate from administration and be under ministerial direction, but might well have supported a single administrative structure for all of land planning, rather than a separate one for expropriation management.

The main constitutional changes that the author recommends to meet the problems she has posed are that the favoured position of federal government property and of federal companies should be abolished, and that, when there is a conflict between expropriation for federal purposes and expropriation for provincial purposes, rather than the federal expropriation always prevailing, the criterion of public interest should be used to resolve the conflict. The criterion of public interest would be applied by an expropriation administration from which there could be an appeal to a superior court having jurisdiction over both the administration as such and a proposed tribunal dealing at first instance with the rights of those expropriated.

The recommendation that the administrative tribunal rather than the expropriation superior court should be, at first instance, responsible for the control of the administration is the author's

second main divergence from the Task Force recommendations. The Task Force recommended that its proposed administrative tribunal be responsible, at first instance, for deciding questions of both the rights of those expropriated and control of the administration. The disadvantage Ms. Lajoie sees in that proposal is that it would make the tribunal a superior court and give the Governor General of Canada power, by virtue of section 96 of the *B.N.A. Act*, to appoint its judges. However, whether it is worthwhile going through organizational contortions to relocate the appointment power is questionable, since, at least in theory, the same man, the best man available, would be appointed to fill any vacancy that occurred, no matter who was appointing.

According to the author, even the implementation of the changes she recommends still leaves a major obstacle to rational land planning in Canada, i.e., the division of powers between the federal government and the provinces. The *Coughlin* case,[5] which the author refers to as allowing the incorporation of federal laws in provincial laws or the incorporation of provincial laws in federal laws, and the inter-jurisdictional delegation, from the law-making body to an administrative body, of the administration of these incorporated laws, allows more than that. It supports the adoption by one jurisdiction of another jurisdiction's laws as they may exist from time to time and the delegation of the administration of these changing laws to an organ established by the second jurisdiction. As well as a single land planning administrative unit for Quebec established, say, by the province, there could be a single land planning policy unit, established by the province, recommending changes in law and regulations. A federal statute saying that expropriations within federal jurisdiction would be administered by the Quebec unit according to Quebec law as it exists from time to time would appear to overcome the division of powers obstacles.

If, contrary to the previous remarks, the Canadian form of federalism is an insuperable obstacle to the establishment of a single land planning unit for a province, it nonetheless need not be condemned. When a major societal danger is the manipulation by a technocratic bureaucracy of the public for the ends of the establishment, our anachronistic federalism, which may prevent this manipulation and control being imposed with complete efficiency, can be welcomed rather than regretted.

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[5] *Coughlin* v. *Ont. Highway Transport Bd.*, (1968) 68 D.L.R. (2d) 384.

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