The New Family and the New Property. By Mary Ann Glendon. Toronto: Butterworths, 1981. Pp. xvii, 269.

In attempting to understand the relationship between family law developments in a number of industrial countries and broader legal, social and economic changes, Mary Ann Glendon has set herself an extremely complex but quite fascinating task. Given the vast scope of this undertaking, it is scarcely surprising that in many instances, arguments are sketchy, conclusions indefinite, and developments merely described rather than analysed or related to other developments. It is gratifying, however, that the book provides many useful, though tentative, insights into the very broad questions explored.

Glendon begins by describing the "new family", and the legal rules which govern it.

> The 'new family' is a convenient way of referring to that group of changes that characterizes 20th century Western marriage and family behaviour, such as increasing fluidity, detachability and interchangeability of family relationships; the increasing appearance, or at least visibility, of family behaviour outside formal legal categories; and the changing attitudes and behaviour patterns in authority structure and economic relations within the family. It follows from these changes that the new family is *no* family in the sense of a single model that can be ealled typical for modern industrialized societies. The new family is a concept that represents a variety of co-existing family types.[1]

Although Glendon focuses on family law developments in the United States, comparisons are made with the situations in England, France, West Germany and Sweden, with passing references to other countries.[2] She concludes that there has been an attenuation of bonds linking an individual to the wide kinship group which constituted the pre-modern family. The decision to marry now rests with the individual, not parents or other relatives. Succession rights have increasingly recognized the claims of the surviving spouse at the expense of "family lines". Western society has seen the rise of the "companionate marriage", with its strong emotional and erotic ties, but relatively weak economic and legal links. The modern marriage is

[1] M. Glendon, *The New Family and the New Property* (1981), 3-4.

[2] A much fuller treatment of comparative issues is found in an earlier book by M. Glendon, *State, Law and Family: Family Law in Transition in the United States and Western Europe* (1977). See also J. Eekelaar, *Family Law and Social Policy* (1978).

easy to enter, and also relatively easy to leave. In some jurisdictions, such as Sweden and Washington State, there is a legal right to unilaterally terminate a marriage; in others, this right is generally recognized in practice and the granting of a divorce is only rarely the subject of contested litigation. Furthermore, the links between parents and their offspring are becoming attenuated. The parental right to discipline and educate children has been weakened as a result of state involvement; schools, television and community organizations have to a large extent supplanted parents as shapers of children's characters and values. The recognition of the rights of "psychological parents" has reflected a weakening of the legal significance of the biological tie and an increasing fluidity in family relationships.

One of Glendon's central themes is that the basic unit of society has become the individual rather than the family. Society has come to accept the notion that "the family exists for the benefit of the individual, rather than the individual existing for the benefit of the family".[3] The family has become less important as a source of financial and social support, with increasing reliance being placed on government and employment related benefits.

There has been a steady erosion of the old idea that each spouse, or at least the husband, has a continuing economic responsibility for the other after divorce. Spousal support is no longer viewed as a right of an "innocent" party, but rather as an exceptional claim based on need, and it is in practice awarded in relatively few eases. While there is theoretically a universal obligation to support children, in all jurisdictions there are enormous practical problems with enforcement. When a spouse, usually the husband, leaves children in one family he often enters a new one and cannot realistically support the children in the first family. Even if a non-custodial parent has the requisite financial resources, experience shows that child support orders are difficult to enforce.

There is considerable divergence among legal systems in the treatment of rights to property on divorce. Historically, most jurisdictions tended to have regimes of separate property or of community of property, but recently there has been a tendency to adopt schemes giving the courts relatively broad discretion to disregard legal title and divide property in a fair manner, taking various circumstances into account. In remarks which should be of interest to readers in Canada, where all the common law provinces have recently enacted regimes based on varying degrees of judicial discretion, Glendon has argued against such "equitable distribution". Rather, she recommends that "the rule of choice should be the old community property rule of equal division limited to property acquired by gainful activity during the marriage,

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[3] *Supra*, note 1, 36, quoting Sussman, *The Family Today* (1978) 7 (No. 2) Children Today 32, 35.

in the absence of agreement to the contrary."[4] Glendon bases her argument on convenience and predictability, and on the desirability of avoiding the vagaries and expense of the adversarial system, though she totally ignores the litigious issues which can arise in connection with the valuation and replacement of exempt assets, and the tracing and mixing of capital and labour. The author recognizes that one of the arguments in favour of a scheme based on judicial discretion is that a division of assets may be made in a way which minimizes the possibility that a former spouse will become a charge on the public treasury. But she asks rhetorically whether it is "likely that, if divorce were routinely contemplated by marrying couples, they would intend... that a judge should be authorized to range over all their property, however and whenever acquired, and divide it as he sees fit?"[5] In making her argument against schemes based on "equitable distribution", Glendon gives no consideration to the legislative restrictions which structure a court's discretion in dividing matrimonial property.

Glendon argues that the primary concern in dividing marital property has historically been with "old property" — real estate, financial assets, stocks and other traditional forms of wealth. For increasingly large numbers of people, however, the principal type of wealth is "new property",[6] consisting of a profession or employment and such work-related benefits as pensions and insurance, and for others in claims against the government. As Glendon notes, in many American jurisdictions, considerable imagination is shown in dividing such forms of wealth as pension rights, disability payments, goodwill in a business and licences to practice a profession.

Considerable attention is devoted to the transformation of the role of law and government in family life. Upon the dissolution of a marriage, one looks more frequently to public law for sources of support in the form of welfare, day care and public housing. Glendon argues that the traditional private law approach of family law is becoming relatively less significant. In the subsisting family unit, potential caretakers are leaving the home to enter

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[4] *Supra*, note 1, 63. This is basically the scheme which has been adopted in Québec. Spouses are deemed to have a "partnership of acquests", unless they enter into a marriage contract and make alternate arrangements; in particular legislative provisions are made for the selection of a regime of "separation as to property". See the *Civil Code of Québec*, art. 463-524.

[5] *Supra*, note 1, 65.

[6] The term "new property" was made current by Charles Reich, *The New Property* (1964) 73 Yale L.J. 733 and *The Greening of America* (1970). Glendon states, *supra*, note 1, 3: "Reich suggested... that, for most people, their employment or profession, and work related benefits such as pensions, have come to be the principal forms of wealth, and that, for many others, claims against government are the main source of subsistence. Reich argued that these new forms of property, such as jobs or entitlements, are not only our chief forms of wealth, but are also the bases of various statuses in our society and that, as such, they should be accorded legal protection analogous to that which our legal system has offered to more traditional forms of wealth."

the labour force in search of "new property", and the state is coming to share support functions with the family. At the turn of this century, there was a unitary legal conception of the family. The law defined appropriate conduct; the family was patriarchal and marriage-centered with the wife serving as primary care-taker; divorce was granted only for serious cause. Modern family law is more neutral and much less ambitious about promoting any given set of values about how family life should be organized. Gradual legal recognition has been given to unmarried cohabitation; legitimacy is no longer of much legal importance; homosexual parents can obtain custody of their children.

One of the issues Glendon addresses is whether the state can and should have a role in strengthening families. Real difficulty arises in determining appropriate policies and obtaining funding. Further, the ways in which various government policies and laws interact are complex and extremely difficult to predict. Perhaps a more fundamental problem is that such family behaviour seems very resistant to state control; for example, the incentives given in several states, particularly Eastern European countries, to increase birth rates have had very little impact. One program which is apparently advocated in this book is an income maintenance policy. Although Glendon admits that such a policy might tend to increase the divorce rate, "income maintenance furnished by the welfare state at more adequate levels might enable many families to function better by removing a major source of strain".[7] More significantly, such a policy would reduce the "risks" of family life and divorce which one spouse, usually the woman, bears by devoting substantial time to caring for children.

After discussing the rise of the "new family", Glendon turns her attention to the "new property" — employment and government provided benefits. Although generally not alienable, this kind of "wealth" is receiving greater legal protection and is becoming the principal form of economic security for most individuals. It is argued that we have seen the virtual demise of the common law rule that an employer has a unilateral right to terminate employment. As a result of employment standards legislation, civil service regulations, unions, collective bargaining and arbitration procedures, it is becoming more difficult for an employer to fire an employee. Even the common law has changed; for example, some American courts have imposed a standard of good faith and fair dealing in employee dismissal cases. On the other hand, employees are less willing to leave their jobs; concern about loss of security, pension rights and other financial benefits, as well as a fear that one's experience and specialized training may not be useful elsewhere, have tended to bind workers more closely to their jobs than in the past. Thus, the employer and employee are becoming tied to one another to a greater extent.

[7] *Supra*, note 1, 137.

Having considered the new family and the new property, Glendon poses the central problem dealt with in the book:

> As family relationships become more fluid, entry into and exit from them is less formal. Entry into and exit from the labour force, however, is becoming more standardized.... It is hard to know what to make of the apparent exchange of values through which legal norms governing the workplace are increasingly particularistic and personalized, looking toward the continuation of the relationship with adjustments on both sides; while legal norms pertaining to the family are becoming universalistic and neutral, facilitating 'discharge' and 'replacement' when performance does not come up to standards or expectations.[8]

In attempting to determine the relationship between these two developments in the last part of the book, Glendon's argument becomes sketchy, tentative and in places somewhat confusing. Certainly, she never establishes a clear connection between these developments.

Glendon does suggest that both developments are part of a transformation in the field of private law in general, with emphasis increasingly being placed on official regulation of private arrangements and a concomitant replacement of former areas of private law by administrative law. Furthermore, she sees an expanded role for individualized judicial or administrative discretion in particular cases.

A concern is expressed that the attenuation of family ties and the strengthening of ties to employment relationships and to the government expose the individual to impersonal corporate and state bureaucracies. Glendon questions whether we are entering an era of "feudalism of new property", with individuals subject to domination by rigid and all-powerful bureaucracies. She suggests that an analogy to feudalism is inappropriate, as feudal relations were essentially personal, while in the modern era relations are between individuals and organizations. The book concludes by suggesting that we are in a period which might be characterized as one of "obscure and profound gestation".[9] The future may see the bleak "iron cage" of conflict, terror and bureaucratic domination of the individual, or a "golden chain" of human development. Although the author expresses optimistic sentiments, no particular reasons are offered for believing that one outcome is more likely than the other.

On the whole the book makes interesting and worthwhile reading. Glendon's approach is comparative: she contrasts the past with the present, traces developments in various countries and draws on the approaches of different social sciences. Indeed, a major weakness of the book is that too many comparisons, digressions and comments are offered. So many ideas, themes and developments are discussed, that it becomes difficult to follow

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[8] *Ibid.*, 199.

[9] *Ibid.*, 245. Glendon quotes from a description of the twelfth century in M. Bloch, *Feudal Society* (1961), 119.

central arguments. To take one example, one wonders whether a rather lengthy excursus into trends in landlord-tenant law really added much to the book.[10] Another criticism which may be made is that Glendon not infrequently overstates her case, perhaps for provocative effect. For example, she writes:

> Once in place, the welfare bureaucracy cannot perform its job so as to wither away; it needs the welfare clientele. As production jobs move to poor countries, the only 'job' left to many citizens is to submit to the ministrations of the helping professions.[11]

Arguably, such a polemical statement is virtualiy impossible to prove or disprove. A more serious flaw is that little effort is made either to substantiate this statement or even to explain its meaning and significance. Though there are no express references to Canadian developments, readers can make their own comparisons. It is in general quite remarkable how much similarity there is between legal developments in different countries. In fact, one of the more intriguing comparisons in the book is between developments in the United States and the Soviet Union; it is suggested that there will be a "partial legal convergence", with long-term similar tendencies, but some continuing differences.[12]

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[10] *Supra*, note 1, 176-185.
[11] *Ibid.*, 235.
[12] *Ibid.*, 203; see also pp. 133 and 213.
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Anticombines and Antitrust [,] *The Competition Law of Canada and the Antitrust Law of the United States.* By R.J. Roberts. Toronto: Butterworths, 1980, Pp. xxx, 799.

The literature on competition policy in both Canada and the United States continues to represent the most significant example of the interaction of legal and economic thinking and practice to be found in any of the growing fields where these disciplines now intersect. Keeping up to date with the literature in this area has become an exhausting experience for lawyers who must familiarize themselves with the concepts and jargon of economics and for economists who must learn the art of reading a case and interpreting a statute with a serious degree of professional skill. Indeed, one of the ironies of this long record of inter-disciplinary activity in the anticombines-antitrust field is that economists have had little hesitation about pretending to speak knowledgeably on law while lawyers have had equally few inhibitions about occasionally pretentious incursions into sophisticated areas of economic thought.

Mr Roberts' volume is an attempt to analyse all of the major questions in the field as well as the less visible but equally important issues of "resale price maintenance", "misleading advertising" and the many others that now make up the family of the proscribed business practices in the present legislation.

The author has interwoven discussion of American and Canadian eases whenever they lend themselves to comparison. The book does not attempt to deal with both systems independently but rather describes their respective legal policies and methods and how these relate to each other as techniques for the control and policing of competition. Some idea of the nature of Mr Roberts' approach will be gathered from the main structure of the book itself. Part A provides an overview — history, policy and the constitutional road blocks to enforcement. Part B, which deals with criminal prohibitions, includes chapters on monopoly, relevant market, conspiracy or agreement to limit competition, mergers, price discrimination, predatory pricing and re-sale price maintenance. In Part C there is an introduction to the civil review provisions of the Canadian *Act*, non-price vertical restraints, foreign disruptive conduct, and the civil review provisions of the Stage II amendments (now to be replaced by new proposals). Part D provides chapters on regulated industries and labour unions. Part E embraces trade associations and the professions. Part F covers enforcement and remedies in criminal offences, enforcement and remedies that are administratively reviewable, private, class and substitute actions and, finally a program of information and compliance as well as additional civil powers of the Director of Investigation and Research.

The larger policy issues are on the whole successfully broached. Mr Roberts goes a long way toward providing a certain basic minimum of knowledge about the economic debate with which every lawyer in the field

will have to come to terms. For example, he explores the issues raised by the *Report of the Economic Council on Competition Policy* which had so great an influence on the legislative debates of the 1970s and indirectly, perhaps, on the Supreme Court of Canada itself.

Hence the book presents us with perhaps the most complete statement of the Canadian situation in print—despite other and even more recent monographs dealing with Canadian competition legislation and policy.

The Canadian literature in this field is neither as highly developed nor as impressive as that of the United States. Only a handful of articles had appeared in the major Canadian law journals before 1950. Not unexpectedly, Canadian economists gave more thought to issues involving competition than lawyers did during this period and the *Canadian Journal of Economics and Political Science* (as it then was), and other economics-business publications, produced far more important writing in this area.

Issues in competition and anticombines policy, which had lain dormant during World War II, were once again brought into focus in Canada by the work of the McQuarrie Committee and the publication of its *Report* in 1949-50.[1] A special issue of the *Canadian Bar Review*[2] devoted to it had a considerable influence on the debate which followed some of the important changes in the *Combines Investigation Act*[3] resulting from the Committee's recommendations.

Later, the 1960 amendments to the *Act* also raised issues of substantive and technical importance.[4] Perhaps the most important of these was the merger of the *Criminal Code*[5] provisions with the *Combines Investigation Act* to provide a single source of legislative definition for loose-knit multifirm combinations, their conspiracies and collusive behaviour involving, *eg.* price-fixing, market-sharing and the controlling of market entry. However, the questions raised in the 1960s began to address issues dealing with more than merely legal technique. By the end of the decade new concepts were being formulated which involved a re-examination of the very basis of what now came to be called "competition policy", replacing the older anticombines/antitrust terminology in the Canadian debate.

A body of case law decided essentially between 1923 and 1960, which commenced with *R.* v. *Elliott*[6] in 1905 and was first based on the relevant

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[1] Canada: Department of Justice, *Report to the Minister of Justice* [,] *Committee to Study Combines Legislation*, (1952).

[2] (1952) 30 Can. Bar Rev. 549.

[3] S.C. 1952, c. 39, amending R.S.C. 1927, c. 26.

[4] S.C. 1960, c. 45, amending R.S.C. 1952, c. 314 and S.C. 1954, c. 51.

[5] S.C. 1960, c. 45, ss. 12, 17, 19, 21, 22, 23.

[6] (1905) 9 O.L.R. 648 (C.A.).

Criminal Code provisions and then on the *Criminal Code* and *Combines Investigation Act* operating side by side, provided a set of principles that proved reasonably workable with regard to the loosely-defined combinations offences. Indeed, it can be argued that most of the prosecutions of multifirm conspiracies after 1925 were successful because none were undertaken unless the evidence was preponderantly favourable to the Crown based upon the precedent judgments over the years. These judgments in general seemed to suggest that once it was proven that an "agreement" among members of the industry covered about 75 per cent of the market, that was enough to justify the requisite finding of an "undue" limitation of competition.

This amounted to a Canadian version of the American *per se* doctrine — not nearly as simple as that stated in s. 1 of the *Sherman Act*[7] — but nonetheless able to provide results similar to these reached by American courts, albeit without the same degree of refinement. Hence, before *Aetna Insurance*[8] and *Atlantic Sugar*,[9] conspiracies and combinations seemed subject to a predictable enforcement process — at least to most Canadian students.

In the 1960s the debate between government, industry and academics focused on the clearly perceived need to meet the growing complaint that competition policy in Canada simply did not have a good answer to the merger/monopoly problem. Indeed, the general variety of devices developed both in the *McQuarrie Report* of 1950 and in the amendments made to the *Act* in 1960 — to which should be added the proscription of retail price maintenance and the earlier prohibition of price discrimination — altogether failed to meet the many continuing problems of intrusions upon competition to which a free enterprise system was, at least in theory, devoted.

These and other considerations led to the draft bills introduced in the late 1960's and again throughout the 1970s. Not only did civil servants and scholars repeatedly point out the clear inadequacy of the merger/monopoly provisions of the existing law and its application by the courts, but the climate of expectations in the business community was also changing. During the period between 1939-45 co-operative business behaviour was legitimized for purposes of a maximum "war effort". This disciplining of competition to the point of its virtual elimination, thereby reducing the normal insecurity of the market place, appealed to many businessmen and even to some labour leaders. Perhaps a more important development, however, was that some deeper insights were being reached with respect to

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[7] *Act of July 2, 1890*, c. 647, 26 Stat. 209, 15 U.S.C. §§ 1-7 (1976).
[8] *Aetna Insurance Co.* v. *The Queen* [1978] 1 S.C.R. 731.
[9] *Atlantic Sugar Refineries Co.* v. *The Queen* [1980] 2 S.C.R. 644.

the structural character of the Canadian economy itself. It is now recognized that tariffs, geography, the market and later the subsidiary character of much Canadian secondary industry, created an industrial structure that was almost "naturally" oligopolistic. Indeed, the tendency of the few dominant firms in an industry to favour limitations upon new entries was also aided by the classical disposition of Canadian commercial policy, even after World War II, to favour high tariffs, thus keeping the competitive forces of the world from impinging too severely upon them. Canada still receives criticism in many parts of the trading world for the continuing height of its trade barriers.

Competition policy during this period was also complicated by the increasing role of the economic and other forms of regulation in Canadian society. From the limited beginnings of rate-making by the old Railway Commissions to varieties of provincial public boards governing local transport, trucking and private electric power systems, the movement toward regulation, both provincial and federal, accelerated over the years. Communications, for example, began to demand a degree of regulation by the 1970s that could not have been foreseen a decade or two before. Provincial governments were prolific in the creation of new instruments of marketing controls to the point where, in some cases, new entries were virtually barred except under very stringent licensing conditions. New environmental and health and safety regulatory instruments, at both the federal and provincial levels, contributed to the sense of a free enterprise economy now increasingly circumscribed within the domestic regulatory system.

At the same time recognition was being given to the growing economic crisis in post-Keynesian western society, for it now seemed unable to manage the dual phenomena of inflation *and* unemployment using the older demand-side devices that "accepted" economic theory and practice had advocated successfully for three decades. This situation led to new forms of state intervention. The creation of the Anti-Inflation Board and its operations from 1974 to 1978 were among the most powerful interventionist activities of government that had taken place since the demolition of war-time economic controls after 1946.

It was therefore nor surprising to find that throughout the period from 1960s to the mid-1970s, a continuing debate on the future of competition policy formed part of the running battle between government, academics and the business community. Once the Anti-Inflation Board experience was over it was clear that labour would no longer accept regulatory wage mechanisms and that the business community was, generally speaking, unhappy about having its prices and profits monitored too carefully. In general, there was a failure to develop a conceptual framework that recognized all the problems and interests involved. We lacked a body of theory with a unified vision of the economic future.

The amendments to the Canadian legislation in 1975[10] should be seen in this context. They were an attempt to deal with the merger/monopoly provisions of the *Act*, and many substantive and procedural improvements were made through important textual changes. These were directed towards strengthening the conspiracy / combination offences defining new unfair practices, and creating new remedies. It was clear, however, that the passage in 1975 of what was called Phase I would still require a Phase II. Since 1977, various proposals have been put forward only to suffer extinction because of the hostility of business or too little support from the academic community or both. Indeed, there was almost total suspicion in the corporate community towards many proposals that otherwise seemed quite constructive or innocent to many professional students of competition policy. Phase II, has to the present day remained unimplemented, although the effort in the fall of 1981, based on the ministerial paper of April 1981 and its follow-up, suggest a future pattern of non-criminal merger/monopoly controls that may possibly receive wider support than some of the previous ministerial efforts. Even this, however, is doubtful. Professor Roberts is consistently helpful and informative with the details of these Phase II efforts up to 1980.

Perhaps the most striking development has been the decline in the sympathy or understanding of the courts, and notably of the Supreme Court of Canada, in dealing with the issues of competition policy within the existing legal framework. Three Supreme Court judgments have greatly diminished the significance of present legislation. *Aetna Insurance*[11] and *Atlantic Sugar*[12] both had a very adverse effect on the ability to prosecute loose-knit combinations, conspiracies and collusive behaviour arising out of multifirm agreements. The decision in *K.C. Irving*[13] has made it seem virtually impossible to know what degree of control is necessary for the takeover of an industry — in this case all the English language newspapers of New Brunswick — to justify a finding of a merger/monopoly under the *Act*.

Mr Roberts' volume will be of use to lawyers, students, academics and policy makers. It will also aid in the effort to find a median line which would preserve as much competition as possible within the oligopolistic structure of the Canadian economy.

The study raises important questions about that structure and to this extent the book is not merely a professional tool — it also tempts us to consider whether Canadian policies will lead to the optimum allocation of

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[10] S.C. 1975, c. 76, amending R.S.C. 1970, c. C-23.
[11] *Supra*, note 8.
[12] *Supra*, note 9.
[13] *R.* v. *K.C. Irving Ltd* [1978] 1 S.C.R. 408.

resources necessary to render our economy effective at home and competitive abroad. It compels the student of the field to consider the fact that the business community and the public are perhaps no longer as fearful of the concentration and consequent abuse of power that classically underlay much of the original impetus for anticombines law and policy.

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La Fiducie en droit Privé français. By Claude Witz, with a Preface by Dominique Schmidt. Paris: Economica, 1981, Pp. vii, 351.

The modern trust is generally considered to be the most versatile and adaptable legal institution of the common law system. The flexible nature of the trust results primarily from the fact that the general rules governing it are not limited to any particular juridical domain, nor is their application limited to situations in which there is an express or implied intention to create a trust. Thus, in the common law, the trust can regulate commercial and non-commercial transactions in both the public and private domains. It can also be constituted by unilateral declaration or by agreement and can even be imposed by law. Given its virtually unlimited scope and the rigourous nature of the fiduciary duties of the common law trustee, it is not surprising that the trust has been characterized as "the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence."[1] It should be noted, however, that technically the common law trust is founded upon the co-existence of "common law" or "legal" rights and "equitable" rights each of which may be subdivided into real and personal rights.

Within the civil law system, the trust, or at least a unified juridical technique fulfilling the same role as the common law trust, has not received universal acceptance. The principal impediment to the development of a "trust" concept in civil law resides in the rigid civilian dichotomy between personal rights and real rights or rights of ownership, and in the traditional restriction on the creation of new real rights known as "dismemberments of ownership". In other words, according to traditional civilian concepts there is only one notion of ownership and the real rights which constitute this notion can be separated the one from the other only to the extent that is expressly permitted by law. Thus, in the civil law, it is impossible to attempt to duplicate the common law mechanism consisting of the "legal" rights of the trustee and the "equitable" rights of the beneficiary of the trust without modifying or limiting the application of the aforementioned basic concepts. The result is that countries belonging to the system of civil law either adopt the trust in its fullest capacity by means of innovative juridical techniques or adopt it in a lesser capacity by incorporating the trust mechanism into previously existing and more traditional juridical techniques. Within the former class of civil law jurisdictions may be included Liechtenstein, Japan, Venezuela and Germany. In these countries, a unified and generally applicable mechanism simulating the common law trust has been developed. The Province of Québec may be situated somewhere between the two extremes insofar as its trust, *la fiducie*, is limited to the domain of gifts and

[1] F. Maitland, *Selected Essays* (1936), 129.

wills. France, which has no concept of the trust *per se*, belongs to the second category of civil law countries. The adoption of a general trust concept in the law of France is the subject matter and thesis of *La fiducie en droit privé français* by Claude Witz.

The mechanism which Professor Witz recommends to be adopted in French law is defined by him in the following manner:

> La fiducie est l'acte juridique par lequel une personne, le fiduciaire, rendue titulaire d'un droit patrimonial, voit l'exercice de son droit limité par une série d'obligations, parmi lesquelles figurent généralement celle de transférer le droit au bout d'une certaine période soit au fiduciant, soit à un tiers bénéficiaire.[2]

According to this definition, the essential elements of the *fiducie* are a contract between the *fiduciant* and *fiduciaire* or a *mortis causa* disposition by the *fiduciant*, the acquisition by the *fiduciaire* of a patrimonial right and the limitation of the rights of the *fiduciaire* by the imposition of obligations. It is noteworthy that the fiduciary duty of the common law trustee is reduced in the *fiducie* to the purely contractual or personal obligations of the *fiduciaire*. It appears that the *fiducie* cannot be imposed by law, nor can it be constituted by unilateral *inter vivos* declaration.

Professor Witz's thesis — that the *fiducie* exists in substance to a limited degree in the law of France and that it should be recognized as such and extended to fulfill its potential — is supported by a series of well researched and logically presented propositions.

The first of these propositions demonstrates the historical link between the *fiducia* of Roman law and the *fiducie* of the *ancien droit français*, on the one hand, and the *fiducie* as defined above, on the other. The Roman *fiducia*, although limited in its application and its sanctions, is in substance the precursor of the modern French *fiducie*. It was used both as a mechanism for intermediary administration and as a mechanism for real security. The *fiducie* of the *ancien droit français*, on the other hand, is only nominally linked to its modern counterpart. It was an outgrowth of the *fideicommis* or substitution in which the intermediary played the role of a tutor-administrator for the benefit of a minor beneficiary. Despite its misleading and (according to Professor Witz) erroneous nomenclature, the *fiducie* of the *ancien droit français* is correctly included in this study in order to demonstrate a tradition (albeit a somewhat discontinuous one) of intermediary administration mechanisms in the civil law. In general, Professor Witz provides us with an excellent historical analysis which is written in clear and concise language. This analysis should be particularly useful to those interested in the trust in Québec law given the uncertain origins of this latter mechanism.

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[2] C. Witz, *La fiducie en droit privé français* (1981), 15.

The remaining propositions set forth by Professor Witz in support of his thesis concern the role and the juridical analysis of the *fiducie* in modern French law.

Professor Witz evokes the role of the *fiducie* both by examining the existing juridical techniques which in substance duplicate the *fiducie* and by suggesting potential uses for it. With respect to the former, he states that a unified concept would, in form and substance, more accurately reflect the juridical reality in question. In both cases, the author examines alternative mechanisms and concludes that the proposed *fiducie* is or would be more effective than these alternatives. Professor Witz's reasoning, however, is not completely satisfying. For instance, within the domain of liberalities (gifts and wills), he suggests that the term "*fiducie-libéralité*" be used to describe the ostensibly gratuitous juridical act in which the donee or legatee is charged to use the whole gift or legacy for the benefit of a third party.[3] He states that the proposed nomenclature would more clearly signify the onerous nature of the act in question than does the term "*libéralité avec charge*". This latter concept, Professor Witz suggests, should be limited to situations where the donee or legatee charged receives some kind of benefit from the liberality. The only innovation to be found amongst these suggestions is that concerning the use of the term "*fiducie-libéralité*". Otherwise, Professor Witz simply reproduces the present state of the French law in this domain.[4] It is misleading on his part to suggest that such a change in terminology would have any real practical effect.

Nevertheless, he does demonstrate that the law of France is in need of reform with respect to the notion of "*intermédiaire de transmission*" for reasons of both judicial consistency and practical utility. The wide range of topics dealt with by Professor Witz — prohibition to alienate, substitution, usufruct, foundation, leasing agreements, security investment contracts and factoring, amongst others — shows that despite its inherent limitations the *fiducie* can play an important role in commercial and non-commercial settings.

Professor Witz's thesis is less convincingly supported by the juridical analysis of the *fiducie*. According to this analysis, the obligations of the *fiduciaire* are personal or contractual, as are the corresponding rights of the *fiduciant* and the beneficiary of the *fiducie*. Thus, the remedies available for the protection of these latter rights consist only of those remedies presently available in French law with respect to the *libéralité avec charge*, *stipulation pour autrui* and the prohibition to alienate. Professor Witz expressly rejects the notion of *patrimoine d'affectation* as being contrary to

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[3] *Ibid.*, 88-90.

[4] M. Boodman, *Les libéralités à des fins charitables au Québec et en France*, (unpublished doctoral dissertation, University of Paris, 1980), 146-57.

the basic principles of French law. As a result, the terminological and substantial changes recommended by Professor Witz concerning the role of the *fiducie* are not sufficiently supported from the point of view of remedies or sanctions. This imbalance reduces the desirability of his proposals as a whole.

It does not, however, detract from the overall excellence of Professor Witz's work. In *La fiducie en droit privé français*, Professor Witz demonstrates an intuitive understanding of the legal system in question as well as a detailed knowledge of the needs which his proposed changes aim to satisfy. Both of these factors are essential for law reform. His understanding of the civil law system is underscored by his proposal to unify the terminology concerning commercial and non-commercial intermediary administration. It is partly through this type of general taxonomic unification that innovative concepts can be developed in the civil law. The work of Professor Witz should be of particular interest to Québec jurists, not only because of the subject matter, but also because this subject is examined in a European context where there is a constant exposure to new juridical ideas. In this way, *La fiducie en droit privé français* provides an interesting touchstone for comparison with the present and proposed law of trusts in Québec.

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Canadian Sentencing Digest. By Paul Nadin-Davis and Clarey B. Sproule, Q.C. Toronto: Carswell Co. Ltd, 1980.

The *Canadian Sentencing Digest* contains précis of all criminal cases reported since 1970 indexed under their statutory provisions with, in some cases, a brief history of the penalty provisions for each offence. At the moment few, if any, unreported eases are digested, although the authors expect to rely upon such cases in those subject areas where few cases get reported. Only decisions regarding the quantum of sentence, and none regarding the principles or their applieation, are reported. Thus the scope of this book is quite narrow. Unfortunately, in practice, principle and quantum are inseparable from each other in understanding a given result.

Yet this book will provide a useful sketch of the sentences that have been imposed, with the prospect of thereby deducing what the appropriate range of sentence might be for a particular offence and a particular offender. Thus, it will be helpful to the practitioner who does not himself have wide experience and who faces a magistrate or trial judge with a similar problem. The maximum penalties provided in the statute seldom offer real assistance in the course of determining the actual penalties that are likely to be imposed. This book also has the virtue of providing this information simply and quickly—which means it is likely to be used!

One happy result of the fact that for the most part only reported cases are digested is that one can, after a quick perusal of the text, look to the actual report in full. Thus the volume should really be used as a sentencing index which, unfortunately, deals only with quantum of sentence.

The danger in all this is that reported cases are themselves markedly a skewed selection. First, they are chosen for reporting because they usually come from appeal courts, which in itself indieates that they tend to fall on the extreme of either leniency or harshness, or perhaps show some other fcature that justifies selection for appeal in the first place. Second, there is something about such cases that makes them unusual enough that a judge saw fit to give extended written reasons describing and justifying the result. Third, an editor at a later stage had to select this particular ease as being important enough to justify including it in a series of reports where competition for space is keen. Finally, the editors had to select them from this already small sample for inclusion in the book by way of digest. Quite simply, any selection of cases that has come through this unusual process may mislead and may not be typical of what in fact is done by judges in Canada at all.

New Directions in Sentencing. Edited by Brian A. Grosman, Q.C. Toronto: Butterworths, 1980. Pp. xii, 308.

New Directions in Sentencing is a book of essays which flow from a conference held in May 1979 at the University of Saskatchewan in Saskatoon. A partial list of participants is impressive: D.R. Cressey, Chief Justice E.N. Culliton of Saskatchewan, Tanner Elton, E.A. Fattah, Alex D. Gigeroff, Edward L. Greenspan, The Honourable Emmett Hall, K.B. Jobson, N.N. Kittrie, Morris Manning, Q.C., J.W. Mohr, G.O.W. Mueller, and Mr Justice C.F. Tallis. These participants attempted to deal with a number of modern trends in sentencing, principal among them being the move towards fixed or mandatory sentences and the abolition of parole as we know it. The argument regarding these newer proposals is less interesting than the assessment of where we have been, which comes almost as an aside for most of the discussion. Mueller points out that:

> the more important point... simply is that, probably, the rehabilitative model was never put into practice. It has always remained a model, like a plastic toy ship, a model which was never translated and construeted into reality. Or does a prison ward become a rehabilitation centre by putting a sign on a cage which reads 'rehabilitation centre'? And who says that prison is the place at whieh to practice rehabilitation any way?[1]

Indeed, the analysis brought to bear in these essays shows the full gamut of the different approaches in North America to sentencing as a means of social control. The practical element is not excluded. Mr N.N. Kittrie draws upon the analysis provided by Professor Caleb Foote:

> If the mask of individualization and rehabilitation are stripped away, the basic function of discretion in paroling and sentencing practice is revealed: to adjust an impossible penal code to the reality of severe limitations in punishing resources. By an impossible penal code I refer to the fact that, given economic constraints, full or equal enforcement is totally out of the question.[2]

Of particular note is a very thoughtful essay by Keith Jobson who, drawing upon his previous experience with the Law Reform Commission of Canada, helpfully makes clear the limitations to which legislative change is subject in attempting to deal with judicial discretion in sentencing. He maintains that imprisonment and its overuse remain the central issue in sentencing policy and practice, partieularly as regards non-violent offenders against property. In an important argument, he makes the point that to achieve change so as to reduce these unnecessary prison sentences would require change in the community's level of tolerance of these crimes, the

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[1] Mueller, "The Future of Sentencing: Back to Square One" in B. Grosman, *New Directions in Sentencing* (1980), 14.

[2] Kittrie, "The Danger of the New Directions in American Sentencing" in Grosman, *ibid.*, 32.

availability of acceptable sentencing alternatives, and the attitudes of the judges themselves. His pessimistic conclusion can be read with great interest and profit.

Quite simply, *New Directions in Sentencing* is not primarily of interest for the "new directions" — which will soon become yesterday's academic sensation. But the quality of the articles is such that the analysis of these problems produces a longer-lived and intelligent discussion of the fundamental issues surrounding sentencing. This book of essays is simply the most useful such discussion that has ever been produced in Canada.

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Concept of Law in English-Speaking Africa. By Chijioke Og-wurike. New York, London, Lagos: NOK Publishers International, 1979. Pp. xvii, 205.

This book is not what it professes to be. Judging from its title, one expects it to deal with the concept of law in English-speaking Africa or, to be more specific, those African countries which prior to independence formed part of the British Empire and lived under English law. Instead, it turns out to be an elementary text on English jurisprudence, as taught to captive audiences of English law students at English law schools; the position in Africa receives no more than occasional sideways glances. In the tussle between a somewhat outdated English *Volksgeist* and the African *Volksgeist*, the English *Volksgeist* is allocated centre stage. The African *Volksgeist*, in which the reader of this book is primarily interested, is reduced to the role of a walker-on of whom no more than a few, fleeting glimpses are caught.

Neither noticeably better nor worse than the standard English texts on jurisprudence, Mr Og-wurike's work follows well-trodden paths, without adding anything new or exciting. Savigny, Austin, Kelsen, Duguit, D'Entrèves and other great figures in the calendar of legal saints are dealt with, or at least briefly mentioned, and there are references to the American (though not the Scandinavian) realists, but more recent contributors to the science of the law, such as Rawls and Dworkin, do not even receive an honourable mention.

The concept of sovereignty is dealt with on traditional lines, no mention being made of the fact that owing to the establishment of the European Economic Community and other recent developments in the area of public international law, the old idea of sovereignty is as dead as the proverbial mutton.

While the basic concepts of English jurisprudence are, on the whole, adequately dealt with, no attempt is made to deal in depth with the really interesting question: what has happened to them in their transplantation from Europe, where they originated, to African countries? There are occasional references to the metamorphosis of English law in Africa, but one wishes that the author had chosen this topic as the main theme of his book, instead of treating it as a sideline.

The book is well and lucidly written and can be recommended to law teachers at African law schools desirous of instilling the main concepts of English jurisprudence into the minds of their pupils. The fact that it is written by an eminent African law teacher and contains in the notes a

number of useful references to African statutes and cases, will make it more palatable to African students than its English equivalents. The reader who peruses Mr Og-wurike's book in the expectation that he will learn from it how traditional Europcan legal concepts have fared under the African sun is, however, bound to lay it down disappointed.

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