

5-1-1979

The Law of Contract

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Recommended Citation

Paul Thomas, "The Law of Contract", Book Review of The Law of Contract by G. H. L. Fridman, (1979) 5:2 DLJ 398.

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Reviews

The Law of Contract. By G. H. L. Fridman. Toronto: Carswell, 1976. Pp. Iv., 676. Price: \$60.00

The Law of Contracts. By S. M. Waddams. Toronto: Canada Law Book, 1977. Pp. cxviii, 498. Price: \$37.50.

There can be no denying the need for good Canadian legal textbooks. While recent years have seen more home-grown texts on the market there are many important areas left unserved. In the past year two Canadian text books on contract law have been published.

One way of assessing these two books is to ask whether they are suitable replacements for English contract texts which we have had to resort to for the want of anything Canadian. The heavy use of, and constant reference to, Canadian sources, both legislative and judicial, is, of course, a valuable asset. Needless to say, a textbook must be more than just a reference source; it must also offer a clear, accurate, readable and perceptive discussion of the law and the economic, social and political context within which it operates. This is especially so in the contentious areas of the subject covered.

It is inadequate for a textbook to be too general or too elementary. Similarly it will be insufficient if it adds nothing in terms of insight and explanation. If the book is little more than a gazetteer it will be of limited use. Canadian texts, therefore, must attack their subjects in a different, more effective and more imaginative way than their already available English counterparts. The same time-worn discussion of legal principles and rules is unlikely to be of much use just because most or many of the references are to Canadian sources. Replacing one set of details for another will not illuminate an otherwise cloudy area of the law.

The books by Professors Fridman and Waddams must be looked at in the light of these considerations. By any guidelines the book by Professor Waddams must be seen as the better, more useful one. It is clearly written and is interestingly organized. The introduction is informative and ably sets the scene, for a discussion of the law of contract in a modern context emphasising, as it does, the clear tendency of courts to move away from contract law's nineteenth century roots and economic heritage towards a greater recognition of reality. This tendency is well illustrated in the long chapter on unconscionability.

Although there are now a number of good books on the history of contract law it is unfortunate that neither Waddams nor Fridman saw fit to include much more than a few hints of the historical development of the law of contract in Canada. As teachers of contracts to first year law students are aware, difficulties with concepts can frequently be clarified by some discussion of historical origins. Many of the notions and institutions of our law are incomprehensible without some historical background. Both books would have been better with an historical introduction.

Part II of Waddams' book deals with enforceability and is divided into chapters on Bargains and Non-bargains, with chapters also on Intention, Unilateral Contracts and The Statute of Frauds. The former distinction — that drawn between rules applicable to bargains and non-bargains — is a refreshing one for a text book and to my mind works well. Part III deals with Contracts and Third Parties and contains chapters on Agency, Assignment, Third Party Beneficiaries and Mistake and Third Parties. Part IV has chapters on Mistake, Misrepresentations, Unconscionability, Public Policy and Non-Performance and Breach. Capacity is dealt with in Part V and Remedies in Part VI.

This organization has led to some idiosyncrasies but none of any seriousness. In fact they are only odd when compared to traditionally organized textbooks. For instance, consideration is dealt with in three places — in the chapters on bargains, non-bargains and unconscionability. This is perfectly acceptable, indeed preferable, when one considers that the relevance of the doctrine is different in these three contexts. Perhaps Waddams is to be congratulated for pointing the way to the differences and encouraging us to look at an institution such as consideration in context and not in isolation as if with a life of its own. Also, perhaps, the less we talk about consideration, or at least the more skeptical we are about it, the more likely it is that it will be relegated to its proper, rather insignificant, function in the law of contracts. If it was ever needed, Atiyah's paper, *Consideration in Contracts: A Fundamental Restatement* shows the present worth of this so-called doctrine.¹

The grouping of subject matter under the heading of unconscionability is also a valuable contribution to reorganizing our

1. P. Atiyah, *Consideration in Contracts: A Fundamental Restatement* (Canberra: Australian National University Press, 1971)

thoughts on the law of contracts. Public policy, of which unconscionability is merely a reflection, now plays such an overwhelmingly important role in the law of contracts that it must be recognized for what it is. Gone are the days when certainty had the upper hand. The courts are now much more concerned with fairness and equity, and with making decisions based upon their perception of what is in the public interest.

Fridman, in his book, adopts a traditional organization. Part II — Formation of Contract — contains chapters on Intention, Elements of Consent (offer and acceptance), Factors Vitiating Reality of Consent (mistake, misrepresentation and duress and undue influence), Capacity, Consideration and Writing. Part III — The Contents of The Contract — has chapters on Express and Implied Terms and Particular Types of Terms — conditions, warranties fundamental terms and privative (exclusion and limitation of liability) clauses. Part IV, entitled Essential Validity — covers illegality, while Part V is a section on privity of contract and assignment — there is no chapter on agency. Performance, discharge by agreement, breach, impossibility and frustration by operation of law are dealt with in Part VI and Part VII is the remedies section.

So much for the organization of the books — now what of their content. Waddams' is the better book because it is firstly more readable, secondly less general in the level of its discussion and thirdly more intensive — the difficult areas (and there are many in the law of contracts) are dealt with in a probing, investigative manner. There is a clear attempt to give the reader the flavour of conflicting views and possibilities in contentious areas, and to direct the reader to decisions in the United States and other common law jurisdictions. Also, there is valuable discussion on the many statutes affecting contractual rules and principles. Within the limited confines of a textbook Professor Waddams provides a stimulating account of the law of contract.

Professor Fridman's book is almost half as long again as Waddams'. Much of this extra space is taken up in the discussion of a great number of Canadian cases in some detail. In fact in many parts of the book the analysis is of cases, often rather insignificant ones, rather than of principles. While some of the cases are worthy of individual attention one gets the feeling that Fridman has discussed many of them just because they are Canadian authorities. This, it is submitted, is not a sufficient reason. Canada has not

produced a strong jurisprudence in contract law — few cases need to be singled out for special consideration. Fridman's treatment very often avoids contentious issues — perhaps for the reason that there is too much attention to detail and too little to underlying principles, notions, ideas and trends. In comparison Waddams' approach is far more sophisticated and satisfactory.

Fridman's discussion is not only frequently long but it generally fails to come to grips with the real, underlying issues. A good example of this is the treatment of exemption clauses — the inconsistencies and difficulties in the case law are not brought out and there is little or no discussion of statutory interventions in this area. His comments are often inconcise and the cases are discussed one by one rather than as part of a whole scheme.

A further problem with Fridman's book is the rather large number of errors. Some are of a rather simple nature such as mistaking the facts of a case or of what the case is, or can be, authority for. Other errors are more substantial. Some statements can be questioned on the ground that they do not represent what the authorities have in fact stated. For instance, Fridman talks in terms of a promise being required to act to his detriment if he is to be able to benefit from the defence of promissory estoppel. This would almost invariably provide consideration to support the changed promise and, as Lord Denning M.R. has indicated on a number of occasions, for instance in *Alan v. El Nasr Export and Import Co.*,² it is surely only required for the promisee to act and not necessary for him to act to his detriment. This point and case is not even footnoted in Fridman's book.

There are several other examples but perhaps it suffices to mention that the account of what *Suisse Atlantique*³ decided with regard to the doctrine of fundamental breach is most misleading. Perhaps in subsequent editions the difficulties and errors will be ironed out. With more concentration on fundamental and contentious issues and less case by case analysis, Fridman's book would be a better one.

While I would have little hesitation in not recommending Fridman's book as a suitable replacement for an established English text, it nevertheless contains much of value to Canadian common lawyers whether in practice or academia. Waddams' book is one

2. (1972), 2 All E. R. 127

3. [1967] 1 A.C. 361

which I would recommend to both students and teachers and practitioners alike, for it is clear, concise and stimulating, and is a valuable addition to the growing number of Canadian law textbooks.

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Towards a New Canada. By the Committee on the Constitution, the Canadian Bar Association. Ottawa: Can. Bar Assoc., 1978. Pp. xvi, 159 plus French translation. Price: \$10.00

Controversy over the Committee's recommendation that the Queen be replaced as Head of State by a Canadian (which recommendation was leaked to the press while the Queen was visiting Canada) has led to the other suggestions contained in this Report not receiving the consideration which, in this writer's opinion, they deserve.

The federal government has committed itself to reforming by July 1, 1979, aspects of the Canadian Constitution lying within federal jurisdiction. A Constitutional Amendment Bill introduced in Parliament in June, 1978 contained proposals for entrenchment of a Charter of Fundamental Rights and Freedoms, reform of the Senate and Supreme Court and adoption of amending mechanisms. The subsequent Federal-Provincial Conference on the Constitution at the end of October, 1978, revealed that provincial governments object to these significant changes being implemented without their consent. The provinces also made it clear that their consent would only be forthcoming if the federal government agrees, at the same time, to a redistribution of legislative authority between Ottawa and the provinces. Questions have been raised about the constitutionality of the federal Parliament proceeding unilaterally to make these changes and the Prime Minister has agreed to submit the issue of Parliament's authority to reform the Senate to the Supreme Court on a constitutional reference.

Publication in August of the Committee's Report, at the Canadian Bar Association's Annual Meeting, was, therefore, timely. Commissioned by the Association at its 1977 Annual Meeting, the Report was prepared by twelve members (representing all ten provinces) with Dr. Gerard V. LaForest as Director of Research. It

fulfilled, in an admirable fashion, its mandate to define “the essential constitutional attributes of a Canadian federalism” and set forth “. . . proposals for a workable federalism . . . namely one that would meet present-day needs, one that would promote harmony and a strong sense of Canadian identity among all Canadians, and one that would ‘guarantee the preservation of the historical rights of our two founding cultures’.” (p.xvi)

After a preliminary discussion of the need for constitutional reform and how this should proceed, the Report discusses the objectives of a constitution, setting out what the Committee sees as the “basic values sought to be fostered by Canadians through government” (p.10). It argues for an entrenchment of certain political, legal economic, egalitarian, and language rights and freedoms and an express commitment to the alleviation of regional disparities. Proposals are made for preserving a system of responsible, parliamentary, government, for provincial appointment of Lieutenant-Governors (or “Chief Executive Officers”), for abolishing the federal power of disallowance, and for reforming the Senate. Recommendations for the judicial system include: enshrining the principle of the independence of the judiciary; guaranteeing a right to judicial review; and maintaining a single judicial system as apposed to a dual system of federal and provincial courts. Consent of a Judiciary Committee of the reformed Senate (Upper House), working *in camera*, would be necessary for appointment of Judges to the Supreme Court of Canada. The Committee recommends against creation of a specialized constitutional court or a separate civil law chamber of the Supreme Court.

More than one-half of the Report consists of a discussion of the division of powers between federal and provincial legislatures. Although stressing that serious harm to the Canadian nation could flow from “any massive shift of power” (p. 3) from federal to provincial authorities, proposals are made (concerning fiscal matters, economic powers, transportation and communications, international relations, matrimonial matters, and residuary and emergency powers) designed to strengthen provincial control over cultural matters and local affairs (including the management of the provincial economy) while preserving sufficient federal power to manage the national economy, deal with the defence of the country, and generally function as a national government. The Report ends with a proposal for an amending formula — basically the Victoria formula modified to require consent by at least two of the western

provinces including one of the two most populous but not requiring combined populations of at least fifty per cent of the population of all the western provinces.

The Report follows a format designed for easy reading. Recommendations are set out in summary fashion at the beginning of each chapter. These are then fully explained in the accompanying text, policy considerations being clearly articulated in a precise yet penetrating analysis. The complete set of recommendations are then collected together in eleven pages at the end of the Report.

The Report is worth reading if for no other reason than to see how well, in the articulation of policy considerations for each issue, competing values are identified and weighed in the Committee's search for a balanced federalism consisting of strong provinces as well as a strong central government. For example, in discussing jurisdiction over telecommunications, (pp. 119-20) the Report clearly identifies the conflict between the provincial interest in "local concerns", such as preservation of language and culture, and the national interest in maintaining a strong unified broadcasting system to promote a national awareness and sense of unity while avoiding possible manipulation of the media for partisan political purposes. Another issue on which the Committee provides good insight into the competing values at stake is the question of jurisdiction over resources and resource revenue. Readers may disagree, however, with the balance ultimately struck between values in this area. Let us consider the Committee's comments.

Recommendations in the Report concerning resources are generally well thought out. The Supreme Court's decision in the *Potash Case*¹ was still to be delivered. The Committee's discussion of the relationship between provincial ownership of resources and federal competence over trade and commerce (pp. 108-09) clearly anticipates the weaknesses in that decision. Control over the rate of development of resources is essential for proper provincial management of local economic activity and social development. Granted, the federal Parliament must have certain power to regulate interprovincial and international commerce. In the absence of an emergency, however, this should not mean that the federal Parliament can compel the export of a greater quantity of mineral resources than a province is willing to have exported. A province's

1. *Central Canada Potash Co. Limited et al v. The Government of Saskatchewan et al.* (1978), as yet unreported.

control over development of its economy could then be completely frustrated by federal approval of the accelerated exploitation of that province's resources, in return, for example, for tariff concessions of benefit mainly to another province. Control over the rate of development is a very important mechanism for the province in ensuring optimal local enjoyment of spin-off benefits.² A provincial government may want time to train its labour force so that it can participate fully in the resource extraction process. A province may want to give local industry time to develop so as to obtain contracts from the resource developer. In the less-developed provinces, it is difficult to see how provincial governments will ever be able to create industrial bases except through resource development. If the *Potash Decision* stands, these provinces appear doomed to perpetual dependence upon federal aid. The Committee's recommendations recognize this problem and assert the need for provincial control over the rate of development.

The Report does not do as good a job in reconciling the federal taxing power with provincial ownership of resources. It recommends that provincial legislatures should have authority to levy indirect taxes, thereby removing one of the obstacles imposed by the *CIGOL Case*³ and similar decisions, on efficient provincial extraction of economic rent from mineral resource development. The Committee, however, accepts that the provinces should not be permitted to impose taxes that will ultimately be passed on to consumers outside the province (pp. 70-72). Considering the large proportion of provincial mineral resources going into the export market, it is submitted that this broad restriction will severely impede provincial attempts to develop rational and efficient methods for deriving revenue from the sale of their depleting resources. Perhaps the risk of creating "tariff barriers" is outweighed by the potential benefit from improved resource management. At the very least, this should be an area of concurrent jurisdiction so that provincial taxes could be valid until overridden by specific federal export legislation.

The Committee's rejection of anything which can be construed as a "tariff barrier" stems from its belief that there must be free circulation throughout the country of all economic resources,

2. See, generally, Crommelin, "Offshore Oil and Gas Rights: A Comparative Study" (1974), 14 Nat. Res. J. 457 at esp. 484-85

3. *Canadian Industrial Gas & Oil Ltd. v. The Government of Saskatchewan et al. and The Attorney General of Canada et al.* (1977), 18 N.R. 107 (S.C.C.)

commodities, services, labour and capital, so that the whole country can “benefit from the specialization resulting from the comparative regional advantages of productivity” (p. 101). It seems, however, that carried to its logical conclusion, reliance upon this principle would nullify any meaningful attempts to alleviate regional economic disparities. Why shouldn’t there be constitutional recognition of the legitimacy of some forms of economic “affirmative action” where regional disparities exist? Primary resource development, as a mechanism for creating an industrial base within a province, is probably of greater importance to the poorer provinces. Why wouldn’t it be feasible for a new constitution to recognize some exceptions to the rule against tariff barriers where this might legitimize provincial policies (such as preference for local goods and services) which could lead to reduced regional economic disparities? Economists can probably present formidable obstacles to this approach. But the Committee’s analysis does not adequately explain how its preference for “free trade” might be reconciled with its recommendation that “the alleviation of regional economic disparities should be a fundamental purpose of the Constitution” (p.27).

The Committee shows some inconsistency in its recommendations concerning offshore mineral resources and fisheries (pp. 107-110). Although placing more emphasis on international implications than I believe these deserve,⁴ the Committee concludes that these should be outweighed by the way the development of offshore resources will so closely relate to the local economy. Pointing out that people living by the sea regard it as a source of livelihood rather than a barrier, the Report recommends provincial regulatory control of offshore resources out to the edge of the continental shelf. International matters may be dealt with, just as for onshore resources, by Parliament’s competence over defence, customs, international boundaries, and so forth. Why then does the Committee recommend that the federal Parliament have exclusive legislative control over seacoast fisheries? The development of the

4. The Committee appeared to justify the Supreme Court’s decision in the *Reference re Ownership of Off-Shore Mineral Rights (of British Columbia)*, [1967] S.C.R. 792, on the basis of international implications similar to these in the United States and Australian Offshore Resources cases. But in both these countries there exists an external affairs power in the federal government which permits the overriding of state interests. This has not been the law in Canada (*Labour Conventions Case*, [1951] S.C.R. 31) and indeed the Committee recommends it not become the law (pp. 125-28).

fishing industry will have a tremendous impact upon the economy, culture, and social development of the adjacent province. For example, encouragement of offshore fleets to the detriment of inshore fishing will result in many communities in Atlantic Canada becoming unviable. It is submitted that as strong an argument can be made for provincial control of fisheries as for other offshore resources. International implications arising from the migratory nature of some species of fish do not seem to be so important as to outweigh the potential impact of fisheries management upon the social, economic and cultural life of the adjacent provinces — a matter which should be dealt with locally. The federal Parliament could still deal with the international aspects of the fisheries but complete federal control over the resource is not necessary.

One serious gap in the Report, all the more glaring because of the Committee's express recognition of the policy considerations underlying every constitutional issue, is the failure of the Report to deal with the inadequacy of the judiciary's current approach to constitutional decision-making. Stemming from the judiciary's reluctance to admit it engages in value-judgments, its approach to constitutional interpretation can be described as a conclusory or question-begging one, involving the placing of labels upon activities and legislation.⁵ So in the *CIGOL Case*⁶ we see Mr. Justice Martland for the majority label the Saskatchewan tax an "indirect tax" and "directly aimed" at oil exports, matters beyond provincial jurisdiction, because the tax would be passed on to the consumer. In fact, the tax had no impact upon the price to the consumer. That price was the world price for oil, as determined mainly by the price set by the Organization of Petroleum Exporting Countries. The question in the *CIGOL Case* was: who would be permitted to recover the increased economic rent generated by a rise in the international price of oil, the Saskatchewan government or the oil companies? No analysis was made by the majority of the impact their decision would have upon the federal-provincial balance of power within the Canadian federation. Again, in the *Potash Case*,⁷ the Saskatchewan legislation regulating production was characterized as relating to "exports", and therefore beyond provincial

5. See, Weiler, *In the Last Resort* (Toronto: Carswell, 1974) at 51-53, 115-119, 155-185; and Hogg, *Constitutional Law of Canada* (Toronto: Carswell, 1977) at 80-81

6. *Supra*, note 3

7. *Supra*, note 1

jurisdiction, because it dealt with a product which was being exported. No attempt was made to reconcile this decision with provincial ownership of resources. No attempt was made to explain the result in terms of the proper balance of power between the provinces and the federal Parliament.

Some would argue that a loss of public confidence would occur if the "neutral" image of the court were destroyed by revealing to the general public that judges are not mere mechanical appliers of the law but in fact make policy choices or value-judgments in just about every case before them. This writer submits that there is a greater danger of loss of judicial authority should decisions continue to be as artificial and question-begging as they often are today. The labelling approach to judicial reasoning encourages arbitrariness and creates uncertainty. Decisions become sterile exercises in logical derivation having little contact with reality. Opportunities are lost for injecting new life into the law by reference to other disciplines.⁸ The Canadian Bar Association Committee should have dealt with this problem since the value of a new constitution will be seriously reduced if judicial interpretation is going to quickly distort its meaning in any event. Perhaps the solution would be to add a section to the new constitution along the following lines:

While affirming the principle of parliamentary supremacy under this constitution and the system of responsible parliamentary government preserved herein, it is recognized that the inevitable ambiguity of language will force courts to make choices between competing values in attempting to apply the laws laid down by Parliament; accordingly it is declared that judges in interpreting this constitution, and any statutes of federal or provincial legislatures, shall, by reference to the statement of the aims and essential attributes of the Canadian federation earlier set out, and to the probable effect of their decision, fully and clearly articulate the policy considerations underlying their decisions.

There is no way that constitutional amendment can guarantee against poor judicial reasoning but perhaps an approach can be encouraged which will lessen the frequency of sterile, artificial, reliance upon what the layman ever increasingly describes scornfully as "legal technicalities".

8. See generally, McDougal, Lasswell and Miller, *The Interpretation of Agreements and World Public Order: Principles of Content and Procedure* (New Haven: Yale Univ. Press, 1967); Lyon, "A Fresh Approach to Constitutional Law" (1967), 45 Can. Bar Rev. 554

There are other defects in the Report. Its treatment of Native Rights is extremely weak. The two paragraphs dealing with this issue recommend that native people enjoy equality of rights with all Canadians and urge that we “scrupulously abide by our agreements with the native peoples and recognize their claims as they are established” (p. 11). That discussion, framed in what native leaders would refer to as “assimilationist sentiments,⁹ ignores the native peoples’ claim for special status which they say flows from their aboriginal rights. Today the claims of Indians, Metis and Innu, usually include claims for greater political control over their affairs.¹⁰ They condemn many existing treaties as having been obtained by fraud or undue influence from people with little or no bargaining power.¹¹ In areas not covered by treaties they claim that aboriginal rights have been interfered with illegally and without compensation.¹² They say correction of these injustices can be brought about, not by monetary payments but only by the provision of territory within which they will have the ability to preserve their distinctive identity and life-style.¹³ In the *Calder Case*¹⁴ three judges of the Supreme Court of Canada recognized that aboriginal rights may exist and be worthy of protection by the Court even though not flowing from a statute, treaty or Royal Proclamation. Any new constitution which does not recognize that aboriginal rights exist as legal rights, enforceable in the courts, even in the absence of treaties, will not have the respect of our native population and will have failed to recognize what the Canadian Bar Report refers to as “the claims of simple justice” (p. 11).

The Committee’s recommendations for Senate reform raise serious doubts about the course which present constitutional discussions are taking. Negotiations are proceeding between the

9. Brief presented by Harry W. Daniels, President of the Native Council of Canada, to the First Ministers’ Conference on the Constitution, Oct. 30 to Nov. 1, 1978, at p.1

10. See the Metis and the Indian Brotherhood respective proposals to the Federal Government (1978), 1 Canadian Native Law Bulletin, No. 2, at 20-29

11. René Fumoleau, *As Long as this Land Shall Last: A History of Treaty 8 and Treaty 11, 1870-1939* (Toronto: McClelland and Stewart, 1974)

12. For example, the submission made by the Naskopi Montagnais Innu Association of Labrador on Sept. 15, 1978, to the Premier of Newfoundland.

13. Geoffrey S. Lester, “Primitivism Versus Civilization: A Basic Question in the Law of Aboriginal Rights to Land” in the Labrador Innu Association Land Use and Occupancy Study, *Our Footprints are Everywhere* (1977), Appendix One, at 353.

14. (1973), 34 D.L.R. (3d) 145 (S.C.C.)

provinces and federal government on changes to the existing division of powers. But these negotiations are proceeding with little consideration being given to reform of the Upper House. Debate on the Senate is in limbo awaiting the reference to the Supreme Court of Canada, which the Prime Minister has promised, to determine if the Federal Parliament can unilaterally carry out Senate reform. Provinces seem hesitant to suggest limitations on federal power through the mechanism of the Senate, apparently because this is regarded as inconsistent with responsible government. But the Report shows that a reformed Upper House (with provincially appointed members) could be a very useful device for providing greater regional input without dangerously decentralizing the country. The Report recommends placing limitations upon the federal emergency, declaratory and spending powers, for example, by requiring certain Upper House approval. Without a reformed Senate in the picture a very different division of powers would probably result from any process of constitutional review. There is no reason why various methods of Senate reform should not be considered even if jurisdiction to reform is not yet settled. There would be no more inconsistency with responsible government than there is now with present constitutional limitations upon the power of the elected House of Commons. To arrive at the best possible constitution for Canada all aspects of reform, including new roles for the Senate, should be considered contemporaneously with possible new divisions of authority. Otherwise, useful techniques for arriving at a properly balanced federalism will be ignored.

The Committee was aware that in dealing with the Monarchy it was "embarking upon a highly charged emotional issue" (p.34). To its credit it recognized that to ignore the issue would be to fail in discharging its mandate of searching for "the essential constitutional attributes of a Canadian federalism". Quoting the findings of the Joint Committee of the Senate and House of Commons on the Constitution to support its position, the Committee concluded that the Head of State should be a Canadian in order for the office to fulfill its role as "a major symbol of national identity" (p. 34). Reaction to this recommendation by Association members consisted mainly of rising to reaffirm oaths of allegiance previously taken in capacities ranging from Barrister to Officer in the Queen's Own Rifles. Perhaps it was rebellious Celtic ancestry which led this writer to conclude that most speakers were asserting not so much loyalty to the Monarchy as a desire for continued Anglophone

supremacy within Canada.¹⁵ Whether or not this assessment was correct, little consideration was given to the crucial question: will Quebeckers view retention of the Monarchy as evidence that the proposed new governmental structure will be Anglophone dominated?

If the answer to the above question is affirmative (as presumably polls could show), the next question we should be asking ourselves is whether retention of the Monarchy will significantly increase the likelihood of the Parti Québécois winning the proposed referendum on separation (also known as “sovereignty — association”). If this question must also be answered affirmatively, then we should be asking whether our loyalty to the Queen should prevail over our loyalty to our country? Are we willing to sacrifice the symbol of the Monarchy if to do this would be a significant factor in preserving a united Canada?

Unfortunately the courage shown by their Committee in dealing directly with the issue was not reflected in the comments of the majority of members at the Canadian Bar Association annual meeting. The only official position yet taken by the Association has been to refer the Report to Provincial Branches “for study”. The issue does not appear to be one likely to go away. We can only wait to see whether the Association at its next annual meeting will be prepared to fully discharge the responsibility it undertook when the Committee was formed — to make a contribution to the constitutional debate so that the decision about Canada’s future may be an informed one. Setting up the Committee was commendable but only a first step. The Association should now take a position upon the Committee’s recommendations. If fear about the volatility of the Monarchy issue causes the Association to bury the Committee Report, many valuable insights which full debate upon the Report would bring will be lost to the Canadian public.

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15. An attitude apparently detected elsewhere from time to time by Prof. J. A. Corry — see, Corry, “The Uses of a Constitution, [1978] Special Lectures of the Law Society of Upper Canada 1

Power on Divorce and Other Matrimonial Causes. Edited by Christine Davies, 3rd. ed. Toronto: Carswell, 1976. Pp. 1x, 359. Price: \$40.00

The second edition of *Power* edited by Professor Julien Payne antedated the federal *Divorce Act*. It was very much an indispensable practitioner's tool and ran to nearly 1,200 pages including its index. In preparing the third edition, Professor Christine Davies decided to deal with the federal divorce law in a volume of 350 or so pages, with Volume Two, relating to matrimonial causes other than divorce, due out in 1979. Matters such as nullity, alimony, judicial separation, restitution and custody under provincial law should present no particular problems; however, as each province introduces new legislation in the field of maintenance and matrimonial property, it will become more and more difficult for the author to find a common thread running through the legislation to discuss if she attempts to include these matters in Volume Two. The advent of the provincial law commissions has created reforms valuable in themselves, but at a cost of uniformity as between one province and another. It may well be that the answer to the needs of practitioners for a book on maintenance and matrimonial property is a series of loose leaf books in which local contributors set out the position in their particular province.

With all its manifest faults there is no doubt that passage of the federal *Divorce Act* after 100 years of federation effected a great simplification in the law to the great advantage of clients. Australian federal legislation conferred similar benefits. It is all the more disquieting that there have been recent proposals by the Canadian Bar Association Committee on the Constitution to transfer the divorce jurisdiction back to the provinces. There is no doubt that whatever attempts are made to retain a measure of uniformity, e.g., by introduction of a common jurisdictional connecting factor, e.g. domicile, or a full faith and credit clause in the field of recognition, are doomed to failure. Forum shopping and limping marriages seem to be the order of the day for clients, and enrolments in conflicts of laws courses at universities will surely rise. Many family lawyers (who are otherwise states-rights men) feel that the problem of the current division of responsibility in family law between federal and provincial jurisdictions, particularly in the field of matrimonial property, would be better served by treating matrimonial property

division on breakdown of marriage as corollary to divorce and within federal authority. At the moment the diversity of solutions in the provinces to the problems of matrimonial property seems scarcely conducive to the public weal. The division of powers between federally and provincially appointed judges would seem better served by a series of cross appointments along the lines of the Hamilton Wentworth Unified Family Court.

The content of the book seems to be a happy blend of academic and practical matters. The treatment of custody and access provides an example of the former (p. 228 *et seq.*) and that of evidence of adultery of the latter (p. 13 *et seq.*). If there is a matter of regret, it is that Professor Davies did not amplify her treatment of the constitutional problems of the relationship between a *Divorce Act* custody order and the provincial *parens patriae* power as she did in a subsequent article,¹ or the problems of the interrelationship between access orders made under the *Divorce Act* and subsequent adoption orders made under provincial law purporting to extinguish access.² In the discussion of the constitutional problems of granting a wife a lump sum payment secured on the matrimonial home with the proviso that the husband may satisfy his obligation by transferring the home to the wife, it is perhaps regrettable that more was not made about the constitutionality of these orders. In *Connelly v. Connelly*, MacKeigan C.J.N.S. described these orders as seeming to be devices to ensure the equitable distribution of matrimonial assets.³ Surely somebody will act on this revealing statement and appeal one of these orders to the Supreme Court of Canada, provided that the matter is not overtaken by a federal abdication of responsibility in this field.

Were it not for the high cost of this book — \$40 for a book of 350 pages — it might well command substantial sales as a core text for a student family law course which could be supplemented by other materials dealing with matters of provincial family law. However, the approach followed in the case of *Waters on Trusts*, which has been published in a soft edition attractively priced for students, does not seem to have found favour with this book.

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1. C. Davies, *Interprovincial Custody* (1978), LVI Can. Bar Rev. 17.

2. *North v. North*, [1978]3 A.C.W.S. 19; cf. *Re Carter* (1976), 15 N.S.R. (2d) 181

3. (1975), 16 R.F.L. 171 at 177

Every Child's Birthright: In Defense of Mothering by Selma Fraiberg. New York: Basic Books Inc., 1977. Pp. 162. Available through Fitzhenry and Whiteside, Pickering, Ontario at \$11.65.

The United Nations has designated 1979 as the International Year of the Child. In June, 1978, a conference was held in Halifax with the title "International Year of the Child Workshop". It drew over 200 persons from all walks of life from throughout the Province of Nova Scotia, including numbers of young people. Its prime objective was to hear the community's concerns with the role and status of children and to hear from children themselves in this regard. Two universally held concerns which came out of the Workshop were, first, that there is a drastic need to teach "parenting" to parents and to students in our schools and, secondly, a need to take a critical look at our educational system and in particular to re-define parent/teacher and teacher/student relationships.

Selma Fraiberg is Professor of Child Psychoanalysis in the Department of Psychiatry of the University of Michigan and is the Director of its Child Development Project. The title of her little book might be misleading to the casual browser. It is not another epistle from the anti-abortion league. This reviewer would like to regard it as an important fact book on "parenting", although Ms. Fraiberg, in the process, takes uninhibited shots at the legal system's conduct of custody litigation, day care and social assistance programmes operating in the United States.

The author's thesis is simply stated in the first chapter:

This book is intended for all those radicals, like myself, who think that our survival as a human community may depend as much upon our nurture of love in infancy and childhood as upon the protection of our society from external threats. (p. 5)

And in particular:

. . . we have learned that the human qualities of enduring love and commitment to love are forged during the first two years of life. On this point there is a consensus among scientists from a wide range of disciplines. (p. 4)

What, then, does the author see as the essential qualitative element which is necessary during the first two years of life? The answer is the need for "mothering" so that a personal human bond may be forged between baby and mother. Indeed, since bottle feeding has become very common, she says that the nurturing experience has become much more dependent on the personality of the mother and

on whether surrounding circumstances promote intimacy between mother and child. In essence, studies show that unless there is one or more persons who remain central and stable in this early experience of the baby, then the child will be left to the realm of what the author calls "the diseases of non-attachment", the fundamental characteristic of which is the later incapacity of the person to form human bonds. A conscience fails to form, self-observation and self-criticism are lacking as is humour in the personality. Such diseases of the ego result in impulsive, uncontrolled behaviour, a low tolerance level, a tendency to be "distant" and an attitude of total indifference. This condition, further, requires the persons affected to affirm their existence by seeking strong psychic jolts. Such jolts come from drugs or the performance of indiscriminate acts of violence.

What are the backgrounds of such persons? The author is driven to say:

Often the early childhood histories told a dreary story of lost and broken connections. A child would be farmed out to relatives, or foster parents, or institutions: the blurred outlines of one family faded into those of another, as the child, already anonymous, shifted beds and families in monotonous succession. (p. 49)

and again

A mother who is severely depressed, or psychotic, or an addict, is also, for all practical purposes, a mother who is absent from her baby. A baby who is stored like a package with neighbours and relatives while his mother works may come to know as many indifferent caretakers as a baby in the lowest-grade institution and, at the age of one or two years, can resemble in all significant ways the emotionally deprived babies of such an institution. (p. 54)

These conclusions are not new. Numerous studies, over the last thirty years have pointed out these needs.¹ If the results of not having such a figure are as Ms. Fraiberg claims, then her thesis has grave implications for our society's future and the future of the family. Ms. Fraiberg recognizes that not everyone can stay home and care for their children in early infancy, either because of

1. See especially, A. Freud and D. Burlingham, *Infants Without Families* (International Univ. Press, 1944); J. Bowlby, *Maternal Care and Mental Health* (2nd ed: Geneva: World Health Organisation Monograph Series, No. 2, 1952). To Bowlby compare the series of essays entitled *Deprivation of Maternal Care: A Reassessment of its Effects* (Geneva: World Health Organisation, Public Health Paper, No. 14, 1962)

economic circumstances or pursuit of a career. If day care has to be the answer, is quality day care available? Clearly it is not available from the in-depth analysis made by the author. Nor is the situation helped by the social assistance structure in the United States.

From this reviewer's experiences before the courts in child welfare matters, there is much to be said for Ms. Fraiberg's contentions. Lawyers who practice family law should read this book. We must recognize that family problems are as much social problems as they are legal questions. We will be better able to aid our clients, the court and the children involved by having some insight into child development.

This book raises fundamental questions relating to the duties of parents. The implications of Ms. Fraiberg's thesis are obviously far-reaching. If we are to care for our children in the way suggested, there needs to be a re-thinking of the "parenting" role, the decision to have children must be carefully evaluated by the would-be parents and the governmental policies towards day care must change. As one registrant said to this reviewer at the Halifax Conference in June, 1978: "I was happy with the conclusions we came to during International Women's Year, but after the discussions today, I'm really confused."

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