

BOOK REVIEWS

CANADIAN JURISPRUDENCE

Edited by Edward McWhinney

University of Toronto Faculty of Comparative Law Series, Volume 4.

THE CARSWELL COMPANY LIMITED, TORONTO 1958, PP. xvi, 393.

This work is the most recent volume in the Comparative Law Series of the University of Toronto Faculty of Law. Unlike the preceding three volumes, however, it is concerned essentially with a comparative study of law within Canada. Having as its object the "stimulation of legal curiosity, and the promotion of a broader culture in this country of law generally and the two systems within our federalism in particular", this volume constitutes not only a valuable addition to the Series but also a worthwhile asset to any legal library. It attempts to present, for the first time, a survey of the two legal systems within Canada amidst a background of the ethnic-cultural traditions out of which they arose. While the scope of the survey is limited necessarily, by its presentation in one volume, those areas which are covered are done so with a high degree of scholarship and perception.

The book is composed of fifteen essays written by prominent legal practitioners and professors of law in the common law and civil law jurisdictions of Canada. In addition to presenting essays of a comparative law nature, there are three articles of a more national character. These are a discussion of criminal law in Canada by Robert S. Mackay, a brief outline of procedure and judicial administration in Canada by David Kilgour, and a review of international law and Canadian practice by Maxwell Cohen.

While the essays are essentially concerned with legal issues, they necessarily go beyond this. For, as Mr. Justice Rand observes in the foreword, "the study of different systems of law involves not only an acquaintance with positive rules but, equally important, an understanding insight into the mores of the people, the life out of which they have grown; the social organism, the traditional forms of conduct, the philosophies and ideologies, all in a blind way, affected by deep assumptions of the sub-conscious." Consider, for example, the social implications which could arise from the subject matter of Louis-Phillippe Pigeon's essay on "French Canada's Attitude to the Canadian Constitution." Expressing what he believes to be the majority view of the French Canadian population, Me. Pigeon states that an ethnic group, when uniting in a federation such as Canada's, must necessarily relinquish certain powers to a central government; but such a group usually desires an authority of its own; the necessary consequence is the demand for provincial autonomy. The main

difference between the viewpoints of English Canadians and French Canadians is that the former group acquiesces to a considerably centralized government while the latter demands the opposite. He then proceeds to look at the actual interpretation of the British North America Act by the Privy Council and the Supreme Court of Canada. Consider also the social aspects possible in an essay like "Legal Theory and Philosophy of Law in Canada" by Edward McWhinney. Here some of the problems surrounding the development of a truly Canadian jurisprudence are discussed. With keen insight, Prof. McWhinney considers not only significant decisions of the Privy Council and the Supreme Court of Canada but also the climate of legal education and the judicial process in general.

It should not be thought that this is a book devoted entirely to the social and philosophical problems of law, however. The essays consider basic legal principles of the common law and the civil law, not merely the underlying philosophies. "The Devolution of Estates under the Quebec Civil Code" by Eugene Rivard is a concise statement of Quebec law without philosophical undertones. In a similar category is the essay by Wilbur F. Bowker on the common law of succession to property.

In addition to those articles already mentioned, the book includes equally fine contributions in the fields of contract, tort, and property.

This is a study of two systems of law. There are many difficulties present in such a project. And, as the book notes at the beginning, it has not been able to solve all of them. When many people are called upon to provide essays so that both systems are equally represented it is inevitable that some contributions will not be ready in time for publication. Thus, certain gaps will occur with the result that both sides of the law in a certain area are not presented. Also, when different authors approach the same subject they do so in a different manner, lessening to a certain extent the value of the comparison. It is to the credit of those associated with this book that these faults have been kept to a minimum. Besides presenting an excellent group of essays this volume is also to be recommended for the inclusion of both French and English contributions. Reading articles in both languages certainly does convey to the reader the fact that this is a work on comparative law, not only in fact but in spirit.

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SUPPLEMENT AU NOUVEAU CODE CRIMINEL ANNOTE

Irénée Lagarde, J.S.P.,

WILSON & LAFLEUR, MONTRÉAL, 1958, Pp. 356.

In the preface to his *Nouveau code criminel annoté*, Judge Irénée Lagarde, who is also professor of law at the University of Montreal, explained that it was his aim “. . . de fournir un outil de travail à la fois rapide et complet.”

The success which this work has enjoyed since it was published two years ago is ample proof that Judge Lagarde has succeeded in his task, although it must be a matter of regret that more students and practitioners, particularly in the common law provinces, are not able to use the Code to full advantage owing to limitations of language. To this, however, it should be added that Judge Lagarde's attempt “. . . de ‘latiniser’ l'étude d'un droit typiquement anglo-saxon” may leave some common lawyers in that state of temporary bewilderment which a civillian is likely to encounter when he looks at his first case book. But this does not in any way detract from the value of the new Code and, indeed, there will be many who will welcome this change as a refreshing innovation.

Judge Lagarde has now published a supplement to his Code and it shows the same scholarly, yet practical approach to the problems of criminal law. It is a big volume — almost a quarter of the original work — and it covers not only those cases which were reported (and some which were not) since 1957, but it also adds to the original annotations. The *Supplement* is, therefore, an indispensable companion to the original Code, rather than just an up-dater.

If there is one thing which has struck this reviewer in reading this work, it is evidence of the ever-growing divergence between the English jurisprudence and our own. This is not to suggest, of course, that decisions of the English courts are no longer entitled to respect, but one must underline the inherent danger of paying indiscriminate attention to the law of England; neither system of law has been static, and with every amendment — be it to the Canadian Code or to the English law — the provisions grow further apart.

Perhaps the best example can be found in the case of murder. Most Canadian practitioners will recall the confusion which existed for some years with respect to “accidental” killing in the course of a crime, and one need but cite the two leading (and contradictory) judgments of Canadian court of appeal: *R. v. Elnick*,¹ a Manitoba case which held that such an act amounts to murder, and *R. v. Hughes*,² a British Columbia judgment, which ruled that it does not.

¹(1920), 33 C.C.C. 174.

²(1942), 78 C.C.C. 1.

The law of Canada was subsequently changed³ and, quite recently, the English law on homicide underwent even more radical surgery.⁴ One may therefore question the wisdom of devoting a great deal of space to cases, both English and Canadian, which are no longer good authority. This is one of the major faults of the new Crankshaw, and it is refreshing to see that Judge Lagarde does not fall into the same error. Indeed, he takes the bull by the horns and states clearly that, in view of the amendment, the *Hughes* case has become inoperative. And, in the *Supplement*, this observation is followed by a detailed discussion of *Cathro v. the Queen*,⁵ which has now become one of the leading cases on the subject.

There are a good many other instances where the same might be said, among them the sections dealing with confessions, mischief, lotteries and the like. In short, wherever the law of Canada has departed in some material particular from the law of England, caution is needed and, if an annotated code is to provide quick answers (insofar as that is possible), then it should be the editor's task to make this possible.

Since the coming into force of the new criminal code in 1955, we have seen at least five annotated volumes. There is, of course, Snow's *Criminal Code of Canada*, an indispensable little volume which should be every barrister's constant companion. Martin's *Criminal Code* — there have been two supplements since the original work — is a good code and it is particularly useful in comparing the new law with the old. But one cannot help but feel that, as we grow out of the transitional period, this volume will lose some of its usefulness despite the yearly supplement. This reviewer's opinion of the Kingsland code has already been published elsewhere.⁶ More recently, there is the new Crankshaw, and we are told that a new Tremear is also under preparation.

Yet, despite this apparent embarrassment of riches, the choice is not really great, and Lagarde is among the best.

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³Stat. Can. 1947, c. 55, s. 7.

⁴The Homicide Act, 1957.

⁵(1956), 113 C.C.C. 225, 22 C.R. 231.

⁶35 Can. Bar Rev. 581.

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