BOOK REVIEWS
REVUE DES LIVRES

The Legal Point of View, by ROBERT A. SAMEK, New York; Philosophical Library, 1974. Pp. 403 ($15.00).

Jurisprudence is widely and rightfully considered one of the most difficult of the traditional academic legal arts. In Canada, writing in this field is scarce; few seem prepared to run the rigours, in a serious way, of legal philosophy. Professor Samek, who teaches law at Dalhousie University, is an exception. In *The Legal Point of View* he has taken on a big jurisprudential task and has accomplished much of it successfully.

Much of this book is devoted to a fairly conventional account of important legal philosophers and philosophies. Samek describes well, in the manner of a jurisprudence textbook, the philosophies of Hobbes, Blackstone, Bentham and Austin (he terms their philosophies "four command models of law"), of Kelsen (a "norm model"), of Hart (a "recognition model") and of Fuller (an "aspirational model"). (A "model", in its simplest sense, is a representation or interpretation of reality; it is a hypothetical mechanism "designed to explain, to sum up, what you observe".[1] As Wittgenstein puts it in the *Tractatus*, "A picture is a model of reality",[2] or, alternatively, "A proposition is a model of reality as we imagine it".[3]) Samek's straightforward account of the writing of major jurisprudes should prove useful to those beginning the study of legal philosophy.

The more important part of *The Legal Point of View* is Professor Samek's Wittgenstein-based analysis of the problems of jurisprudence. It is his view that much of the "confusion" in jurisprudence is a consequence of an ill-advised search for the "essence" of law. He writes that the question "What is law?" is "a *philosophical* question in Wittgenstein's sense, that is, its persistence and the puzzlement which it generates are due to the alienation of the word *law* from its many successful uses in ordinary language-games..." (p.10). Samek argues that to the extent that

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[1] Ludwig Wittgenstein, *Philosophical Investigations* (trans. G.E.M. Anscombe) (1972), 62e, remark 156.

[2] Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (trans. D.F. Pears and B.F. McGuinness) (1972), 15, proposition 2.12.

[3] *Ibid.*, 37, proposition 4.01.

there is any concept of law, that concept is an expression of a particular family resemblance discerned in language-use. This family resemblance is a consequence of the "bending" in language-use of ordinary concepts so that those concepts accord with the "legal point of view". The notion of family resemblances was first discussed by Wittgenstein. He noted that in games "we see a complicated network of similiarities overlapping and criss-crossing: sometimes overall similiarities, sometimes similarities of detail".[4] Wittgenstein characterized these similarities as "family resemblances" and games as a "family", for, he wrote, "the various resemblances between members of a family: build, features, colour of eyes, gait, temperament, etc., etc. overlap and criss-cross in the same way".[5] Instances of language use, argued Wittgenstein, have no formal unity, but form a family.

The legal point of view is a *particular* point of view; it marks out what Samek calls an "exclusive field of interest" (points of view are, to Samek, mutually exclusive). More precisely, a field of interest is marked out by an understanding or an evaluative model of a point of view. Samek describes an evaluative model as "a model consisting of a set of postulates which express the speaker's pro- or con- attitude to something about which he has formed a considered opinion" (p.26). The question "What is law?" is properly interpreted as a request for the construction of an evaluative model of law.

Professor Samek's "legal point of view", then, provides us with a model concept; since, however, the model concept is an *evaluative* concept, it appears to avoid the dangers inherent in a search for the "essence" of law. Samek claims that "looked at in the light of the new model, the old models will acquire a new meaning and a new value; instead of being condemned for their inevitable failure to capture the *true* essence of law, they will be judged by their success in illuminating certain aspects of law which are of value to the legal point of view" (p.87). How exactly is the new model to be applied to the old models? Let me give one example of Samek's technique.

Kelsen argued that "[i]f a certain behaviour has been made the condition of a sanction, the action is to be regarded as a delict, even by a jurist who may not regard it as detrimental at all...".[6]

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[4] *Supra,* f.n.1, 32e, remark 66.

[5] *Ibid.,* remark 67.

[6] H. Kelsen, *Pure Theory of Law* (translated from the second German edition) (1967), 112.

Woozley has criticized this view on two grounds: first, that even if it is logically true that there can be no offences lacking sanctions, that does not mean that the *reason why* a certain action is a delict is because it entails a sanction (being a reason why is not the same as being a criterion of its being the case); second, that the view obliterates any distinction between penal sanctions and acts of administrative coercion dependent on previous conduct (since, according to Kelsen, all that makes certain conduct a delict is a coercive act provided as the consequent of that conduct).[7] Samek rejects Woozley's first criticism in this way:

> If... we interpret Kelsen merely as putting forward a model concept of delict as part of his evaluative model, then Woozley's first criticism ceases to hold; for the only question then is whether his model is fruitful for the purpose in hand. His definition of a delict can in that case be neither true nor false. (p.193)

However, Samek finds Woozley's second criticism to be valid; he writes that Kelsen "cannot say on the one hand that a delict is merely a condition of a sanction, and on the other hand that it is the social value of the behaviour which is crucial" (p.194). The dilemma is to be resolved, says Samek, by introducing the legal point of view:

> ...from the legal point of view certain kinds of behaviour are *delicts* because they are made subject to that mode of institutional social control which is enforced through the effective application of a norm-system by courts or tribunals acting as norm-authorities of the system. According to Kelsen, legal significance is reducible to effective enforcement through a normative order, and consequently the only *legal* value of delicts is that they are so enforceable. According to my model, on the other hand, the field of interest marked out by the legal point of view is more restricted. We must look at the *content* of the norms of the system as well as the mode of social control. This compels us to look at the moral and social values protected by a norm-system in determining whether it qualifies as a *legal* norm-system. For Kelsen, the character of the behaviour regulated is legally irrelevant. There is nothing to prevent a gang of robbers from establishing a legal order, provided that it is sufficiently effective in space and time, even though the values enforced are diametrically opposed to those which are normally protected by a legal system. According to my model, on the other hand, such a system would not qualify as a legal norm-system. (pp.194-5)

This, apparently, is how the evaluative model works.

What can we say of Samek's exposition of the "legal point of view"? First, his discussion is on many occasions complex to the point of obscurity; only the most diligent and patient reader, and one with some philosophical knowledge, can hope to grasp the

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[7] See A.D. Woozley, *Legal Duties, Offences, and Sanctions* (1968) 77 Mind 461.

analysis. Secondly, a significant part of Samek's discussion of his evaluative model is devoted to material not clearly relevant to his main theme; Samek has failed, for example, to show us clearly the wider significance of his account of P.W. Taylor's theory of normative discourse, or of G.H. von Wright's description of norms. Finally, Samek's integration of his own theory with his discussion of other philosophies is unconvincing; too often the attempt at integration consists only of a few concluding remarks following a lengthy summary of another man's philosophy. The consequence is that the full implications of the "legal point of view" are not revealed, and many troublesome questions are left unanswered. Surely, for example, to consider as relevant the moral and social values protected by a norm-system is not a useful addition to or explanation of Kelsen's theory, but rather a denial of that theory. How is a theory clarified or improved by adding to it precisely what the theorist sought to eliminate?

But these rather general criticisms should not obscure the merits of *The Legal Point of View*. Professor Samek has provided a useful account of some major legal philosophers and has given us an interesting theory of his own. In so doing, he has made one of the few significant Canadian contributions to modern jurisprudence.

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Traité de droit administratif canadien et québécois, by RENÉ DUSSAULT, Québec: Les Presses de l'université Laval, 1974. Pp. xvi, 2016 ($36; student price: $25.40).

Canadian texts in Administrative Law are so rare that their mere appearance is occasion for comment. René Dussault's immense new *Traité* is even more welcome. Not only is it of high intellectual calibre (as would be expected from a former student of the late Professor S.A. de Smith), but it rather successfully escapes from the lawyer's natural tendency to dwell too much on judicial review. Thus, Volume I starts off with a broad look at the general principles of governmental structure and organization in Canada. Then it examines in some detail the law relating to the public service, public property, various regulatory powers necessarily conferred on modern governments, and contracts by public bodies. All of these topics are discussed primarily in the context of the federal and Quebec governments. But — because the Administrative Law in all jurisdictions in Canada is public law, and thus was inherited from England — frequent reference is made to the situation in other provinces.

Clearly, even a book the size of Dussault's could not cover all the Canadian (and English and Commonwealth) jurisdictions on every point. But comparison is frequently the best criticism, and the fastest road to reform. For example, Dussault refers to the federal *Statutory Instruments Act*[1] which provides for the publication of certain delegated legislation, as well as for its scrutiny by a joint committee of the House of Commons and the Senate. By comparison, in Quebec the *Provincial Secretary's Department Act*[2] has been repealed, and there now is no general requirement for the publication of delegated legislation, let alone for its orderly scrutiny by the National Assembly. Numerous other examples of differing details of governmental structure are given.

Still, the central part of Administrative Law is judicial review, and perhaps lawyers will be forgiven for concentrating their attention on Volume II. Essentially updating the author's earlier work, *Le contrôle judiciaire de l'administration au Québec*,[3] this volume provides a valuable discussion of the principles of judicial review. In my view, the *Traité's* greatest asset is its compilation of Canadian authorities, much as de Smith's encyclopaedic work[4] has done in

[1] S.C. 1970-71-72, c.38, as amended by R.S.C. 1970 (2d supp.), c.29.
[2] R.S.Q. 1964, c.54, repealed S.Q. 1969, c.26.
[3] Québec, Les Presses de l'université de Laval, 1969.
[4] S.A. de Smith, *Judicial Review of Administrative Action* 3d ed. (1973).

England. This, coupled with its comprehensive bibliography, will make it indispensable to Canadian lawyers and students alike. Further, Dussault expands his previous work by analyzing the first few cases decided under the new supervisory jurisdiction contained in sections 18 and 28 of the *Federal Court Act*.[5] This clearly is important.

Nevertheless, one might make a few suggestions for the next edition. On a purely technical level, the method of citing cases is incorrect: square brackets are generally omitted in favour of parentheses. In a printed text, this improper standardization should not be necessary. Secondly, many of the footnotes make cross-references to other footnotes, often pages away. To say the least, this is awkward if one has left the other volume at home!

On a more substantive level, a reader from outside Canada might be confused by the following statement:

> Contrairement aux pourvois extraordinaires, ou brefs de prérogative, qui sont directement issus de la common law britannique, *les pourvois ordinaires présentent généralement un caractère plus authentiquement canadien ou québécois.* Il s'agit de l'action directe en nullité, propre au Québec, de la demande d'examen et d'annulation, propre au fédéral, et, s'appliquant aux deux niveaux d'administration, *de la requête pour jugement déclaratoire et de l'injonction.*[6]

Certainly, the direct action in nullity in Quebec and the supervisory powers of the Federal Court of Appeal derive from statutory provisions peculiar to these jurisdictions. But surely declarations and injunctions originated in the courts of equity in England.

Likewise, a reader from outside Quebec would profit from a more critical analysis of the direct action in nullity. On the one hand, Dussault refers to cases where the direct action has been used as a remedy separate from the normal supervisory ones found both in Quebec and in other jurisdictions.[7] Yet the author also adopts Le Dains' view[8] that, historically, article 33 of the Code of Civil Procedure really only selects the Superior Court to exercise the supervisory powers dealt with elsewhere in that Code. Undoubtedly Dussault's text reflects the general confusion on this point which exists in the Quebec courts. But this departure by the courts from what would appear to be the clear statutory construction of article 33 does bear further comment.

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[5] R.S.C. 1970 (2d supp.), c.10.

[6] At p.1022 (italics added).

[7] *Ibid.*

[8] Le Dain, *The Supervisory Jurisdiction in Quebec* (1957) 35 Can. Bar Rev. 788.

Similarly, although a whole chapter is devoted to discussing the liability of public bodies, the thorny problem of Crown privilege is hardly raised. How does section 41 of the *Federal Court Act*[9] affect previous jurisprudence? What about the decisions by the House of Lords in *Conway* v. *Rimmer*[10] and *Duncan* v. *Cammell Laird?*[11] And what is the position in Quebec?

Finally, one might query the author's criticism of section 96 of the *British North America Act,* 1867:

> Malgré les adoucissements apportés aux rigueurs de l'article 96 de l'*Acte de l'Amérique du Nord britannique* par ce second courant jurisprudentiel qui lui donne une interprétation étroite, cet article constitue néanmoins nne restriction à la souveraineté législative des états membres dans les domaines qui relèvent de leur juridiction, ce qui est difficilement conciliable avec les principes d'un sain fédéralisme... . La prétendue protection que les dispositions de l'article 96... sont censées apporter à l'indépendance des juges est un mythe qu'il est temps de cesser de perpétuer... .[11a]

To comment that Canada is not a perfectly federal system is one thing; to suggest it should be, another. Perhaps it only reflects a different perception of the likelihood of improper interference by provincial officials, but a substantial number of people are more comfortable with section 96 the way it is. Certainly one can speculate whether the outcome of *Roncarelli* v. *Duplessis*[12] would have been the same if section 96 were different. Although this difference of opinion basically concerns the ideal constitution for Canada, the practical importance of section 96 in light of the Supreme Court's decision in *Chicoutimi Seminary* v. *City of Chicoutimi*[13] must not be underestimated.

But these are minor points. The *Traité* obviously accomplishes its aim: to provide a complete and structured view of Administrative Law.[14] Of course, its primary focus is federal and Quebec law, so the field is wide-open for a similar work for use in other provinces. Nevertheless, Dussault's *Traité* is by far the most intellectually exciting work on the subject to appear in Canada.

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[9] R.S.C. 1970 (2d supp.), c.10.
[10] [1968] A.C. 910.
[11] [1942] A.C. 624.
[11a] At pp. 1135-36.
[12] [1959] S.C.R. 121.
[13] (1972) 27 D.L.R. (3d) 356.
[14] See p. xii.
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Canadian Law of Planning and Zoning, by IAN MCFEE ROGERS, Toronto: The Carswell Company Limited, 1973. Pp. xxi, 282 ($27.50).

The law of planning and zoning in Canada is gradually acquiring independent status, distinct from the law of property and municipal law. Legislative history provides one sign of this. For many years the statutory provisions governing planning and zoning were lost among the many and diverse articles of the various Municipal Acts; but over the last quarter-century the trend has been to remove them and to place them in special Acts. This has resulted in a reorganization and expansion of these provisions and their presentation as a logical, coherent whole.

Another indication of this coming of age is the appearance of Mr Rogers's *Canadian Law of Planning and Zoning*. From his well-known general treatise on *The Law of Canadian Municipal Corporations*[1] the author has extracted those chapters relating specifically to the law of planning and zoning, and in the process has considerably expanded and reorganized them. Thus we have the first Canadian textbook devoted solely to the law of planning and zoning.

The book contains nine chapters, devoted successively to the author's introductory remarks, the planning authority, the plan, subdivision control, zoning, building construction by-laws, building permits, enforcement, and appeals and remedies. Thus the book deals with most topics of interest. The only omission worthy of note is that of the problem of attacking by-laws. Although the grounds for attack are raised in an incidental fashion throughout the chapter on zoning, this reviewer would find the book more useful for teaching purposes were the subject — and particularly the questions of the procedure for attack and the interest of the petitioner — treated in a separate chapter, similar to Chapter XXIII of *The Law of Canadian Municipal Corporations*.

Throughout the book, and in contrast with his earlier work, which heavily emphasizes Ontario law, Mr Rogers has made a considerable effort to describe the law in every Canadian jurisdiction. The general arrangement of each subject is that of an initial overview or survey of Canadian law followed by a more detailed exposition of the law in each province. Although the inclusion of unnecessary detail in the general part sometimes mars the coherency of the discussion and leads to needless repetition, this arrangement enables the reader both to obtain a general picture and

[1] Toronto, The Carswell Co. Ltd., 1st ed. (1959); 2d ed. (1971).

to consult easily the jurisdiction in which he is particularly interested.

The discussion of the law in the common law provinces, and notably that of Ontario, is extremely comprehensive and thorough, and students and practitioners alike will find the book an invaluable research tool. As well, Mr Rogers is to be congratulated for his inclusion of Quebec law, especially in view of the fact that documentation in this area is not always readily available.

There are, however, several questions relating to Quebec law to which Mr Rogers might consider giving a fuller treatment in his second edition. Firstly, although it is correct that in Quebec "limited planning powers are conferred by the *Municipal Code* and the *Cities and Towns Act* and there is no separate enactment",[2] reference ought perhaps to be made to the numerous city charters which often supplement or even derogate from these general Acts. For example, in contrast to the two general Acts, the Charter of the City of Montreal does not provide for a referendum before a rezoning takes place.[3] Another example is the possibility of "freezing" land pending the adoption or amendment of a zoning by-law, which the Charter of the City of Montreal specifically permits [3a] although the *Cities and Towns Act* [4] does not. Hopefully, however, this problem of a multitude of enabling statutes in Quebec will be resolved in the near future. It has recently been criticized by *La Commission de Refonte des Lois Municipales,* which recommends the enactment of one general enabling act of universal application.[5] As well, there is still the possibility that the 1972 *Avant-projet de Loi de l'urbanisme et de l'aménagement du territoire,*[6] also conceived to be of universal application, will become law.

Secondly, Mr Rogers ought perhaps to have made reference to the several Urban Community Acts in Quebec, as he has with the new Ontario regional municipality legislation.[7] Thirdly, Mr Rogers is of the opinion that the legal effect of the Council's declaring a plan to be "obligatory" under article 429(8) of the *Cities and Towns Act* is to make the plan binding on local authorities and other public agencies — and perhaps even on private citizens. It ought perhaps to be mentioned that the La Haye Commission

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[2] At p.4.
[3] Art. 524(3a). See the discussion at p.178.
[3a] Art. 106(o). See p.228.
[4] *The Cities and Towns Act,* R.S.Q. 1964, c.193.
[5] See *La Presse,* Montreal, September 10, 1974, p.A-2.
[6] Quebec, Minister of Municipal Affairs, December 1972.
[7] At p.42.

felt that a declaration under this ambiguous clause does no more than make the plan "official".[8] Finally, there is the question of the enforcement of by-laws, with respect to which this reviewer expected to find a discussion of the effects of the *Dasken* case[9] upon the right of an individual to enforce municipal legislation.[10] Moreover, Mr Rogers states that Quebec may impose penalties of up to only forty dollars for infractions of by-laws, while in fact the *Cities and Towns Act* provides for fines of up to one hundred dollars and the Charter of the City of Montreal establishes upper limits of one hundred, five hundred and one thousand dollars for first, second and subsequent offences.[11] In addition, Quebec should be added to the list of those provinces where the imposition of a penalty for each day a violation continues is expressly authorized by statute.[12]

However, it is easy to quarrel with minor points in any comprehensive treatment of a subject. And the value of the *Canadian Law of Planning and Zoning* lies in its comprehensiveness. It is indeed a welcome addition to the library of all those interested in the law of planning and zoning, and its utility will be considerable in all Canadian jurisdictions.

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[8] *Rapport 1968* (Quebec, Comm. prov. d'urbanisme), ch.4, p.3. See pp.62-63 of Mr Rogers's book.

[9] *Propriétaires Jardin Taché Inc.* v. *Entreprises Dasken* (1971) 26 D.L.R. (3d) 79 (S.C.C.).

[10] At pp.250,258.

[11] *Cities and Towns Act*, s.398; Charter, s.462. The maximum penalty under the Municipal Code is twenty-five dollars (s.371). See the discussion at p.255.

[12] *Cities and Towns Act*, s.398. See p.257.

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