
BOOK REVIEWS

CHRONIQUE BIBLIOGRAPHIQUE

Snsan Maidment, *Child Custody and Divorce: The Law in Social Context*. London: Croom Helm, 1984. Pp. xii, 324 [£16.95]. Reviewed by Snsan B. Boyd.*

It is difficult to deny that efforts to integrate the discipline of law with the other social sciences have progressed further in England than in Canada. A recent example of such efforts in England is *Child Custody and Divorce* by Susan Maidment, a Senior Lecturer in Law at the University of Keele who has engaged in earlier empirical research on custody and access.¹ Indeed, Maidment positions her book squarely in the recent tradition of acquainting lawyers and judges with the relationship between law and other social sciences. Her specific interest is to elaborate upon the effect which other social sciences, such as psychology and sociology, can and should have on legal decision-making, particularly in the area of custody decisions. She wishes to "make available to lawyers this large body of knowledge about the social process in which the legal process played only a small part", as well as to contribute positively to the legal decision-making process and "make possible 'better' decisions, decisions that [are] more in accord with informed social science understandings of the problem".² More broadly, Maidment wishes to dispel scepticism in the legal profession "that a desire to incorporate current social science understandings about children and families into legal decision-making founders on a recognition that such understandings may be incomplete, controversial, speculative or time — and culture — bound".³

Maidment's purpose is narrower than that which characterizes other recent works emanating from England. For instance, Carol Smart's *The Ties That Bind*⁴ examines the reciprocal effect which law and society have on one another, emphasizing the role which law plays in reproducing patriarchal

*Of the Department of Law, Carleton University.

¹S. Maidment, "Access Conditions in Custody Orders" (1975) 2 Brit. J.L. & Soc. 182; S. Maidment, "A Study in Child Custody" (1976) 6 Fam. L. 200.

²S. Maidment, *Child Custody and Divorce: The Law in Social Context* (London: Croom Helm, 1984) at vii [page numbers in Preface are not indicated].

³*Ibid.* at 81-82.

⁴C. Smart, *The Ties That Bind: Law, Marriage and the Reproduction of Patriarchal Relations* (London: Routledge & Kegan Paul, 1984).

relations. In comparison to Smart and others such as Julia Brophy,⁵ Maidment is concerned primarily with exploring the effect which other social sciences should have on the law, as opposed to the effect which law has on society. The reciprocal effect is implicitly if uncritically acknowledged,⁶ but a concrete analysis of the ideological content of law is absent, a point to which I shall return.

Maidment has certainly succeeded in making accessible to the legal profession a large body of social science knowledge, and she has woven such information around discussion of the legal issues involved in custody decisions both past and present. One of her main contentions is that "the welfare principle ... is essentially a value-laden tool for focussing on the child in an attempt to resolve disputes between its parents".⁷ After introducing the concept of "the welfare of the child" (Chapter 1), she outlines the legal structure surrounding English custody decisions (Chapter 2) and the practical means for determining the welfare of the child, and thus determining custody (Chapter 3). Two historical accounts follow, the first concerning the judicial creation of the welfare principle (Chapter 4) and the second the relationship between the women's rights movement and the development of the welfare principle (Chapter 5). A social perspective on custody law and especially the welfare principle is developed in Chapter 6, which focuses on studies which have examined whether children of divorce are "at risk". The next three chapters analyze, in both their legal and social contexts, three main considerations in custody decision-making, namely the parents (Chapter 7), the status quo in terms of relationships and environment (Chapter 8) and the wider family, including siblings, grandparents and step-parents (Chapter 9). The remaining substantive chapters deal with two topical issues, access and joint custody. Maidment not only presents the legal structure surrounding all of these topics, but also looks at the law in practice and in social context. Whether the fragmentation of the analysis of the various custody issues into their various contexts and perspectives results in a coherent and smoothly-flowing whole is questionable; some redundancy is evident, often leaving the reader with a sense of *déjà vu*. On

⁵J. Brophy, "Child Care and the Growth of Power: The Status of Mothers in Child Custody Disputes" in J. Brophy & C. Smart, eds, *Women in Law: Explorations in Law, Family and Sexuality* (London: Routledge & Kegan Paul, 1985) 97.

⁶See, e.g., Maidment, *supra*, note 2 at 72, 147 and 281.

⁷*Ibid.* at 90.

the other hand, the detail provided in each chapter more or less counter-balances the problem, which may simply be one of editing.⁸

Of most interest to the Canadian legal and "helping" professions may be the presentation of studies (primarily psychological and American) which challenge the notion that children of divorce are necessarily "at risk".⁹ If children of divorce are not particularly "at risk" and if factors such as the quality of a continued relationship with both parents can mitigate the effects of divorce,¹⁰ then judges may be wrong to assume that giving custody to one parent over another will avert the "dangers" of stress and emotional disruption which these children face. Judges are urged to recognize that "their own views of the needs of children, which they are in the privileged position to be able to impose, are the product of particular social interests".¹¹ Assumptions sometimes made by judges that young children are better off with their mothers or that a child's present caretaker is his or her only "psychological parent" are rebutted,¹² foreshadowing Maidment's later embrace of a version of the joint custody approach: "[O]ne of the most important indicators of success is the quality of post-divorce relationships with *both* parents."¹³ The conclusion drawn from empirical studies which indicate strong psychological ties with the "non-caretaker" parent is that while the environmental status quo and stability are very important to children, psychological relationships with both parents should be retained in all possible cases.

One unusual aspect of Maidment's plea for a form of joint custody is her argument that the legal system must impose a responsibility on parents to continue in their roles as parents after divorce.¹⁴ This responsibility would match the correlative right of children "to be protected against the damage caused by losing one parent".¹⁵ Such a scheme raises questions about the freedom of adults and families from state intervention and is diametrically opposed to the thesis of Goldstein, Freud and Solnit¹⁶ that children are best

⁸Given the minor errors and omissions found in the text, as well as the not infrequent lapses into sexist language, one may well wonder how much attention the editors devoted to the text.

⁹Maidment, *supra*, note 2 at 161-72. It should be noted that the main focus of Maidment's discussion is admittedly "ordinary" divorces with "good" parents and that she presumes that these constitute a majority of divorces: *supra* at 278.

¹⁰*Ibid.* at 171.

¹¹*Ibid.* at 11.

¹²*Ibid.* at 211.

¹³*Ibid.* at 215.

¹⁴*Ibid.* at 279.

¹⁵*Ibid.*

¹⁶J. Goldstein, A. Freud & A.J. Solnit, *Beyond the Best Interests of the Child* (New York: Free Press, 1973); J. Goldstein, A. Freud & A.J. Solnit, *Before the Best Interests of the Child* (New York: Free Press, 1979).

left in the unfettered control and custody of one parent. Maidment's legal imposition of an ongoing parental responsibility on divorcing parents would be achieved not by creating a presumption of joint custody as in California, but rather by making access or parental contact "a mandatory consideration and a presumption in all children of divorce cases, whether contested or not, and whether the parent applies for an access order or not".¹⁷ A "children's residence order" which dictates only the physical care of the child would replace current orders for custody; the rights of custody other than physical control and care would continue to reside in both parents.¹⁸

Child Custody and Divorce clearly has a much wider significance than simply as a treatment of the English law on custody and access, and it therefore merits a place on the shelves of those Canadians who desire easy access to recent empirical studies and debates on custody. Still, some concerns regarding Maidment's theoretical framework must be raised. First, while Maidment continually stresses that she wishes to present the law in its social context, the studies presented are predominantly psychological or psychoanalytical in nature. Indeed, in the conclusion to Chapter 5 on the historical connection between the legal emancipation of women and the reform of custody laws, she states that "[t]his historical account of the erosion of the 'sacred right of the father' ... has been a formal analysis" and that "[i]t must be left to sociologists and social historians to fill in the details of family organisation both within the subsisting marriage, and on its breakdown".¹⁹ Surely such a statement is inconsistent with Maidment's stated intention to provide a social context to the law and ignores the latest work by both sociologists and lawyers on the relationship between the law, family and society.²⁰ The exclusion of recent contributions which analyze the roles which the state and the legal system play in reproducing gender relations leads Maidment to a rather naive optimism about the capacity of judges to assimilate social science knowledge, which, coupled with their "empathy and intuition", is supposed to lead to better decisions.²¹

Similarly, the exhortation of state-enforced equal parental rights and duties after divorce raises questions about the capacity of the legal system to effect social change, barring wider changes in social attitudes and the removal of structural obstacles to equal parenting both before and after divorce. While the ideological role of the law is admittedly very powerful,

¹⁷Maidment, *supra*, note 2 at 279.

¹⁸*Ibid.* at 280.

¹⁹*Ibid.* at 143.

²⁰See, e.g., M. Barrett & M. McIntosh, *The Anti-social Family* (London: Verso, 1982); M.D.A. Freeman, ed., *State, Law, and the Family: Critical Perspectives* (London: Tavistock, 1984); Brophy & Smart, *supra*, note 5.

²¹Maidment, *supra*, note 2 at 153.

we cannot overestimate its potential for leading society away from the ideology of motherhood. It is all very well to argue that the law should not discriminate against fathers in custody orders and orders for possession of the matrimonial home,²² but attention must still be paid to the living standard of most women and their dependents, which usually plummets on divorce.²³ In fact, most mothers continue to sacrifice their working careers to child-rearing to some extent both during and after marriage.²⁴ Maidment's argument for equal treatment of fathers²⁵ and her call for research on the family as a group rather than on individual parent-child relations²⁶ fail to recognize the gender inequalities and oppression which are inherent in the nuclear family and which cannot be eradicated simply by the goodwill of a "children's residence order" symbolizing equal rights and duties of parents.²⁷

In conclusion, despite some arguably misleading assumptions, this book contains many valuable insights, a clarification of much recent empirical research and, especially, an effort to integrate law and at least one other social science. For these reasons, it merits examination by Canadians interested in child custody and divorce.

²²*Ibid.* at 179.

²³M. MacLean & J. Eekelaar, "The Economic Consequences of Divorce for Families with Children" in J.M. Eekelaar & S.N. Katz, eds, *The Resolution of Family Conflict: Comparative Legal Perspectives* (Toronto: Butterworth, 1984) 488.

²⁴P. Armstrong & H. Armstrong, *The Double Ghetto: Canadian Women and Their Segregated Work* (Toronto: McClelland & Stewart, 1978) at 75-86.

²⁵Maidment, *supra*, note 2 at 179.

²⁶*Ibid.* at 150-51.

²⁷See Brophy, *supra*, note 5 at 109 for similar criticisms. It should also be noted that Maidment's assumption of a "bi-nuclear family system" of "two inter-related households, maternal and paternal" excludes the social fact of gay parents from consideration in her proposed legal framework. Maidment, *supra*, note 2 at 267.

Jacques L'Heureux, *Droit municipal québécois: Tome 1 L'organisation*. Montréal: Sorej, 1981. Pp. xxiv, 280 [\$30.00]; Jacques L'Heureux, *Droit municipal québécois: Tome 2 Pouvoirs généraux-fiscalité-urbanisme*. Montréal: Wilson & Lafleur/Sorej, 1984. Pp. xxvii, 487 [\$50.00]. Reviewed by Jane Matthews Glenn.*

In a sense, a review of these two volumes is both past due and premature: past due because the first volume appeared five years ago and the second, now two; premature because the final volume of the projected three-volume work has not yet been published. Yet this review is timely because the volumes that have appeared cover substantial ground, including those areas — such as regional government, local democracy, municipal taxation and land use planning — in which the legislator has been particularly active in recent years.

When eventually completed, Professor L'Heureux's study will provide a synthesis of the law of Quebec governing local municipalities. The first of two major parts, dealing with municipal organization, comprises the initial volume. The second part, on municipal powers, was originally intended to form the second volume, but the subject matter proved so extensive that the author felt constrained to spread its treatment over two volumes.¹

The existing second volume contains a general discussion of the powers of a municipality as well as a closer look at those relating to taxation and land use planning. As would be expected, the discussion of the former centres on the *Act Respecting Municipal Taxation*² and the latter, the *Act Respecting Land Use Planning and Development*.³ In neither case, however, is this concentration exclusive. The planning section, for example, also considers the role of a municipality in regard to demolition control, heritage preservation, urban renewal and agricultural zoning. The discussion of specific powers (in this case, those relating to public services and municipal contracts) is slated to continue in the third volume, which will also contain a final chapter on administrative and judicial control of municipalities as well as a general conclusion on the decentralization of Quebec municipal authority.

*Of the Faculty of Law and School of Urban Planning, McGill University.

¹J. L'Heureux, *Droit municipal québécois: Tome 2 Pouvoirs généraux-fiscalité-urbanisme* (Montréal: Wilson & Lafleur/Sorej, 1984) at vii [hereinafter: L'Heureux, vol. 2].

²S.Q. 1979, c. 72 as am. R.S.Q. c. F-2.1.

³S.Q. 1979, c. 51 as am. R.S.Q. c. A-19.1.

The scope of the study is therefore ambitious. The author — Professor of Law at Laval University, member of the Bar of Quebec, lecturer in its professional training programme and author of numerous articles in the field — is one of the few Quebec jurists qualified to carry it out successfully. The scholarship throughout is meticulous, as the numerous footnote references attest. The citation of Quebec material, which is exhaustive, is supplemented by more selective reference to, and occasional analysis of, leading cases from other Canadian provinces. This feature, coupled with the fact that Quebec law in the area is similar in principle to the law elsewhere in Canada, statutory differences aside, makes this study of greater interest to readers outside Quebec than its title might initially suggest.

While the approach is basically descriptive (the first volume setting out the law as of 30 June 1981 and the second, as of 1 January 1983), the author does not hesitate to point out various lacunae or incoherencies in the legislation,⁴ to suggest the correct approach from among opposing lines of jurisprudence,⁵ to criticize vigorously particular decisions,⁶ to disagree with other authors⁷ or to condemn the action of government officials.⁸

Both volumes are handsomely produced and remarkably free of typographical errors. Neither contains an index, table of cases or bibliography, but these are scheduled for inclusion in the third volume⁹ — together with, one hopes, a table of legislation.

Three observations appear appropriate, however: two directed to substance and one to form.

Firstly, and more technically, while it would seem that *City of Ottawa v. Boyd Builders Ltd*¹⁰ remains available in Quebec to justify a municipality's refusal to issue a building permit when it is in the process of modifying its zoning by-law *simpliciter*,¹¹ it is questionable whether this decision can

⁴See, e.g., J. L'Heureux, *Droit municipal québécois: Tome 1 L'organisation* (Montréal: Sorej, 1981) at 87 [hereinafter: L'Heureux, vol. 1] (ineligibility to stand for election because of non-payment of municipal taxes); L'Heureux, vol. 2, *supra*, note 1 at 627-31 (conformity of municipal plans and by-laws).

⁵See, e.g., L'Heureux, vol. 2, *ibid.* at 287-91 (content of notices of motion), 338-41 (criterion of municipality's public domain) and 695-98 (enlargement and extension of non-conforming uses).

⁶See, e.g., *ibid.* at 571-79 (opinion of the Commission nationale de l'aménagement on conformity of plan and by-law).

⁷See, e.g., *ibid.* at 752-53 (harmonization of agricultural zoning and general planning legislation).

⁸See, e.g., *ibid.* at 641-42 (exercise of disavowal powers).

⁹*Ibid.* at vii.

¹⁰(1965), [1965] S.C.R. 408, 50 D.L.R. (2d) 704 [hereinafter *Boyd Builders*].

¹¹L'Heureux, vol. 2, *supra*, note 1 at 703-12.

be invoked when the amendment is coupled with the adoption or modification of a regional or local plan. To put it another way, it would no longer seem correct to look upon *Boyd Builders* as offering an indirect method of giving legal effect to plans.¹² This is so, it is suggested, because of the provisions in the Quebec statute for interim development control.¹³ *Boyd Builders* represents a judicially-sanctioned freeze on development until an anticipated by-law can be put into force. Interim development control constitutes, in the case of the adoption of a plan (regional or local), a statutorily-instituted freeze lasting from the time a municipality first decides to commence the planning process until it implements the plan by by-law. In the case of a subsequent modification to one or other plan, interim development control is equivalent to a statutorily-authorized freeze running from the date the first draft is approved until the change is put into effect by amendment to the by-laws.¹⁴ These provisions would seem so extensive as to preclude any recourse to *Boyd Builders*, but we would have welcomed Professor L'Heureux's analysis of this particular question.

Secondly, and more generally, some fuller explanation of the reasons behind individual rules or regulations would have been desirable. To take but one example, the discussion of regional county municipal structure¹⁵ could have been enlivened by a consideration of the political realities that militate in favour of, say, a veto being given to a particular component municipality. The presence of incisive and provocative conclusions regarding the land use planning powers¹⁶ makes one regret all the more keenly the absence of similar observations elsewhere.

A final comment goes to form. This study grapples with a basic problem inherent in any comprehensive treatment of Quebec municipal law. For essentially historical reasons, Quebec has a patchwork of local and regional municipalities, each operating under a separate statute. Although the various legislative frameworks are similar in principle, they differ from each other in detail. Rural local municipalities come under the aegis of the *Municipal Code*,¹⁷ urban municipalities, the *Cities and Towns Act*.¹⁸ County municipalities, also governed by the *Municipal Code*, are giving way to regional county municipalities created under the *Act Respecting Land Use Planning and Development*,¹⁹ but the latter nevertheless retain some of the former's

¹²*Ibid.* at 621-24 (regional plans) and 632-34 (local plans).

¹³*Supra*, note 3, ss 61-75 (regional plans) and ss 111-112.1 (local plans).

¹⁴*Ibid.*, s. 48 (regional plans) and s. 109 (local plans).

¹⁵L'Heureux, vol. 1, *supra*, note 4 at 72-73, 140-41 and 220-28.

¹⁶L'Heureux, vol. 2, *supra*, note 1 at 754-57.

¹⁷R.S.Q. c. C-27.1.

¹⁸R.S.Q. c. C-19.

¹⁹*Supra*, note 3.

Code powers. Professor L'Heureux has wisely defined his subject so as not to make the legislative mosaic even more intricate, confining his study to legislation of general application and excluding from consideration the Charters of the Cities of Quebec and Montreal and the legislation governing the three Communities (the Urban Communities of Montreal and Quebec and the Outaouais Regional Community).²⁰ He has carefully threaded his way through the various statutes to present a comprehensive, and comprehensible, picture. In doing so, however, he has sacrificed a measure of readability. He has opted to organize the material in such a way that the discussion of a particular point under each statute stands on its own, with a minimum of cross-references. Thus we have a comprehensive examination of the dispositions of the *Municipal Code*, followed by a separate but equally complete treatment of the corresponding provisions of the *Cities and Towns Act*, governing such questions as municipal annexation,²¹ voter approval of by-laws²² or the sale of property for tax arrears.²³ This same organizational principle has been carried through in other areas, such as the discussion of the distinction between regional plans, local plans and by-laws, a discussion which appears in slightly different form four times in all.²⁴ This arrangement undoubtedly makes the text more accessible as a reference tool, but it does so at the cost of repetition.

The work will prove indispensable to the Quebec practitioner and may be read with profit by those whose interest in the subject is of broader dimensions.

²⁰L'Heureux, vol. 1, *supra*, note 4 at ix.

²¹*Ibid.* at 53-58 (*Municipal Code*) and 58-64 (*Cities and Towns Act*).

²²L'Heureux, vol. 2, *supra*, note 1 at 294-98 (*Municipal Code*) and 298-305 (*Cities and Towns Act*).

²³*Ibid.* at 520-41.

²⁴*Ibid.* at 566-68 (content of regional plans), 570-79 (content of local plans) and 606-09 and 626-28 (conformity).

Margaret Carter, compiler, *Early Canadian Court Houses*. Ottawa: Environment Canada, 1983. Pp. 258 [\$13.95]. Reviewed by Philip L. Webster.*

Has Canada developed a unique court house type as a result of her geography, customs or mixed legal system? What was the significance of court houses in early Canadian society? Was there a stylistic and morphological development of Canadian court houses as the country blossomed and came of age? What were the influences, especially in terms of foreign architectural developments, on Canadian courts of justice? And finally, what can a reader interested in the law learn from a study of early court houses?

These are some of the questions which a perusal of *Early Canadian Court Houses* first brought to mind. The front cover superimposes the profiles of three ever-larger, stylistically different yet clearly inspiring buildings, thereby whetting the appetite of the architectural historian, while the inside cover announces that the work falls under the auspices of the "Studies in Archaeology, Architecture and History" sponsored by the National Historic Parks and Sites Branch of Parks Canada. However, old adages about books refuse to die: many of these questions and issues are ignored or insufficiently addressed, the expectations engendered by the cover are not fully met and the book must ultimately be judged incomplete, falling short of its objective of making a significant contribution to Canadian architectural history and criticism. This is not to say, however, that the book does not achieve some of its more modest goals.

In 1980, when Margaret Carter first suggested for publication a series of essays on court houses in each region across Canada, she outlined clearly the scope and intent of the study. She wrote:

Court houses are among the most conspicuous public buildings in Canada. Their prominence reflects the importance Canadians have long attached to their courts as instruments of justice and symbols of social stability. This study examines the early surviving examples of this building type within the context of the court systems they were built to serve, the choice of designs and means of construction employed in various parts of the country during its formative years, and the roles the buildings subsequently performed within their respective communities.¹

As the above passage promises, and in keeping with her position as Head, Architectural History, Canadian Inventory of Historic Building, Carter has

*Auxiliary Professor, School of Architecture, McGill University.

¹M. Carter, compiler, *Early Canadian Court Houses* (Ottawa: Environment Canada, 1983) at 4.

in fact compiled a richly illustrated inventory of a specific type of historic Canadian building — the court house. As such the cataloguing is complete, yet she remains vague about why, in such an inventory, the study had to be limited to “early” court houses. There is but a single reference to this limitation, and that not until the conclusion:

One further limitation placed on the work was the imposition of a cut-off date, since the intention of the study was to discuss only early court houses. At first, the Canadian Inventory of Historic Building's pre-World War I cut-off date of 1914 was applied across Canada; however, this limitation included most eastern court houses but excluded a substantial proportion of western court houses. To balance the contents of the study, the cut-off date in western Canada and northern Ontario was therefore extended to 1930.²

The rationale for these two differing cut-off dates appears to lie in the sanctified Canadian concept of regional equalization: it would be unconscionable for the West to be under-represented — even though the examples simply do not exist. Still, either “early” means pre-World War I as arbitrarily defined and this definition should have been adhered to, or else all later examples should have been analyzed as well. Since the author acknowledges that few court houses have been built since 1914 in the East or since 1930 in the West, it is regrettable that these latter edifices were not included. Certainly “Early Canadian Court Houses” has a quainter ring than “Canadian Court Houses” would have had. However, as we are all affected by the buildings around us — especially if we find ourselves living or working in them — is not the building completed in 1980 as influential a part of our cultural heritage as a long-since destroyed example from 1880?³ Ironically, the most important Canadian court house, the Supreme Court of Canada (built in Ottawa in 1938-39 to the design of one of Canada's pre-eminent architects of the era, Ernest Cormier⁴), is mentioned only as a building whose construction post-dates the study and thus must be omitted from consideration! For the most part, the few post cut-off examples are extremely significant court houses (*e.g.*, Montreal, Toronto and Ottawa), prominent both architecturally and historically. As major centres of jurisprudence, they ought to have been included in any inventory of this building type.

²M. Carter, “Conclusion” in Carter, *ibid.*, 199 at 199.

³An example of this phenomenon is Maison Alcan, the Alcan Aluminum Ltd head office in Montreal completed in 1983. Maison Alcan incorporates several noted historical buildings with a modern new structure, a concept which has already influenced other North American cities' treatment of their existing architecture.

⁴Ernest Cormier is best known in Montreal as the designer of the University of Montreal's main buildings in 1925, for his collaboration with L.A. Amos and C.J. Saxe on the Nouveau Palais de Justice of 1926 (now home to Quebec's Ministry of Cultural Affairs) and for his stylistically integral *Art Nouveau* house on Pine Avenue in which former Prime Minister Pierre Elliott Trudeau now resides. For an appreciation of the Trudeau house, see S.M. Alsop, “Architectural Digest Visits: Pierre Trudeau” *Architectural Digest* (January 1986) 106.

The book comprises six individual regional essays by a combination of authors,⁵ bracketed by Carter's overview and conclusion.⁶ Each essay starts with the earliest recorded meeting place for the administration of justice in the region under study and proceeds chronologically, discussing representative examples until the applicable cut-off date. As each region is studied in a virtual vacuum, continual back-tracking and repetition of historical data and analysis proves necessary.

For readers with only limited knowledge about the development of Canadian judicial administration, the book is most informative and interesting. The underlying theme is not so much a historical analysis of the architecture but rather an examination of the changes in and development of the judicial system. As stated by G.E. Mills in introducing his chapter: "This study will examine the history of British Columbia's judicial system, and the types of buildings that housed its courts during successive phases before 1930."⁷

Judicial history becomes interpreted through architecture. Each chapter thus analyzes the distinctive judicial system of its region and explains why court houses were built in certain localities at given times. The analysis of each court house focuses more on cause and function than on its place in the region's architectural history.

In an attempt to lend coherence to the separate studies, Carter distinguishes three basic types of early court houses and labels them "simple, compound and complex".⁸ The simple court houses are typically small one-storey structures serving the needs of an inferior circuit court but not usually occupied year-round for judicial purposes. They may also serve for municipal meetings and entertainment and are found throughout Canada except on the Prairies. The compound court houses generally contain the inferior courts of a district or a county town and share their premises with other institutions of local legal administration such as jails, sheriffs' offices, registry offices, law libraries and judges' chambers. The complex court houses are usually for superior courts and are located in large urban centres. They are generally large structures which house numerous court functions, often in

⁵R.R. Rostecki, "Early Court Houses of Newfoundland" in Carter, *supra*, note 1, 21; C.A. Hale, "Early Court Houses of the Maritime Provinces" in Carter, *supra*, note 1, 37; A. Giroux, "Early Court Houses of Quebec" in Carter, *supra*, note 1, 78; K. Crossman & D. Johnson, "Early Court Houses of Ontario" in Carter, *supra*, note 1, 100; G.E. Mills *et al.*, "Early Court Houses of the Old Territorial North West and the Prairie Provinces" in Carter, *supra*, note 1, 130; G.E. Mills, "Early Court Houses of British Columbia" in Carter, *supra*, note 1, 169.

⁶M. Carter, "The Canadian Court House: An Overview" in Carter, *supra*, note 1, 7 [hereinafter: Carter, "Overview"]; Carter, *supra*, note 2.

⁷Mills, *supra*, note 5 at 169.

⁸Carter, "Overview", *supra*, note 6 at 11.

conjunction with government offices. The old Toronto City Hall at Queen and Bay Streets, which was also home to the York County Court House, is an important example of a complex court house. Examples of the three types of court houses in the province of Quebec include, respectively, the Brome County Building of 1859, the Sherbrooke Court House of 1839-41 designed by William Footner (who also designed Montreal's Bonsecours Market in 1845) and the second Montreal court house of 1851-57 designed by John Ostell and H. Maurice Perrault.⁹

The other means of classification adopted by Carter is according to the authority responsible for court house construction. These break down essentially into two main categories: local (or county) level and central (usually provincial) level. The type of authority varied by region, by period and with specific changes in judicial administration. For instance, the passage of a series of statutes¹⁰ in 1849 reorganizing Upper Canada's system of local government resulted in twenty-one of the forty court houses constructed in Ontario before World War I being built in the eighteen-year period to 1866. These buildings all came under the aegis of local authorities and show great diversity of style and functional complexity.¹¹ At the other extreme, the Quebec architect F.P. Rubidge, chief architect of the Board of Works, prepared a standard plan which was followed with only minor variations in fourteen district court houses throughout what is now Quebec from 1857 to 1866. The court houses of St Jean, Beauce, Joliette, Terrebonne, Richelieu, Rimouski, Montmagny, Arthabaska, St Hyacinthe, Bedford, Iberville, Beauharnois, Saguenay and Chicoutimi all follow Rubidge's plans.¹² Between these two extremes lay other manners for the exertion of local or central authority. Most common was a method of "control through approval", whereby design and construction were delegated to local architects and builders by a central provincial architect, Board of Works or Department of Public Works.¹³ In other cases a chief architect with his own staff designed individual court houses for a centralized authority. The Morden (1904-05), Brandon (1908-10) and Winnipeg (1912-16) law courts designed under the

⁹John Ostell, one of the most prominent architects in nineteenth-century Montreal, also designed the towers of Notre Dame Church in the 1840s and the Grand Seminaire of 1854. His nephew and partner, H. Maurice Perrault, continued his practice and was the architect of the 1873 Banque du Peuple just off Place d'Armes, the 1878 City Hall and the 1894 Monument National.

¹⁰*Upper Canada Municipal Corporations Act*, S. Prov. C. 12 Vict. (1849), c. 81; *Act for Abolishing the Territorial Division of Upper-Canada into Districts, and for Providing for Temporary Unions of Counties for Judicial and Other Purposes, and for the Future Dissolutions of Such Unions, as the Increase of Wealth and Population May Require*, S. Prov. C. 12 Vict. (1849), c. 78, s. 11.

¹¹Crossman & Johnson, *supra*, note 5 at 112.

¹²Giroux, *supra*, note 5 at 83-84.

¹³Carter, "Overview", *supra*, note 6 at 17.

supervision of the first chief architect of Manitoba, Samuel Hooper, are examples of such centralized authority.¹⁴ Similarly, Kivas Tully, the noted Toronto architect who was chief architect for the Department of Public Works between 1867 and 1896, and his successor Frank R. Heakes produced court houses in northern Ontario of ever-increasing complexity and grandeur

As Carter states in her overview,

The authority responsible for court house construction is, then, one of the general factors responsible for the nature of Canadian court houses. This was not a factor operating in isolation, but rather through the medium of men who were themselves subject to the prevailing conditions and ideas of their times. As a result, there were other, less direct historical trends that influenced the type of court house buildings that appeared in Canada.¹⁵

Unfortunately (at least from the point of view of architectural history), too much emphasis is placed on studying and documenting the responsible authority and not enough attention is paid to the other factors, "the prevailing conditions and ideas of the time" — specifically the effect of general architectural trends both in Canada and abroad and the influences of previous court houses upon their successors. Just as the common law evolves continually through new precedents, so too does virtually all architecture.¹⁶ Very few buildings represent truly new departures; those that do should be given special attention when they incontestably influence future architecture. Conversely, the precedents for most buildings can usually be determined. Since any building which is not a mere copy rests on a continuum of stylistic change, it is the challenge of architectural historians to analyze buildings against this progression. With very few exceptions, this is not attempted in *Early Court Houses of Canada*.

The York County Court House/Toronto City Hall mentioned earlier, designed by E.J. Lennox and constructed between 1889 and 1900, is a case in point. It is recognizable as one of the seminal buildings of Canadian architecture: its size, dual function and location at the centre of the then-rapidly expanding city of Toronto would alone be enough to ensure its place in the city's heritage. More significant historically, however, is the fact that it embraced so strongly the Romanesque Revival style developed by the American Henry Hobson Richardson.¹⁷ The Toronto building is closely modelled after Richardson's Allegheny County Building in Pittsburgh, which was completed after his death in 1886 and described by Mariana Griswold

¹⁴Mills *et al.*, *supra*, note 5 at 147-48.

¹⁵Carter, "Overview", *supra*, note 6 at 19.

¹⁶For a comparison of the role of precedent in law and in architecture, see P. Collins, *Architectural Judgement* (Montreal: McGill-Queen's University Press, 1971).

¹⁷Richardson has another connection with American legal history: he was also commissioned in 1881 to design Austin Hall, the main building at Harvard Law School.

Van Rensselaer at the time as “the most magnificent and imposing of [Richardson’s] works”,¹⁸ its tower “beautiful as a piece of design and ... appropriate as expressing the civic power which has its throne beneath these roofs”.¹⁹ The Toronto City Hall/Court House ranks as one of the best examples of Richardsonian Romanesque in Canada and clearly influenced other court houses of the time, specifically the St John’s Court House of 1901-04 by William H. Greene and the Nelson Court House in British Columbia by Francis Mawson Rattenbury of 1907-09. This is but one example of how a foreign prototype was introduced into Canada and then became part of our architectural heritage.²⁰ But since each region is studied independently, these cross-provincial connections are not drawn (although each building is acknowledged as “Romanesque Revival”). The absence of any such pan-Canadian analysis seriously detracts from the book’s cohesion.

In fairness to Carter, she makes no pretence of being overly concerned with historical stylistic influences. Rather, in discussing “less direct historical trends that influenced the type of court house buildings that appeared in Canada”, she brushes aside the whole issue in this manner:

Among these trends were the contemporary ideas about court house construction that came to Canada through other countries. These ideas encompass exterior style, interior arrangement, use of materials and building siting. They appear to have originated in several countries including Britain, France and the United States, and neither their origin nor their vogue on an international level is difficult to demonstrate. What has proven awkward to identify in Canada is the means by which they entered the country; such vague explanations as “through the experience of immigrants and travellers,” and “in the pages of international magazines” are unsatisfying unless they can be linked to specific people, articles and buildings. Indeed, although some court houses clearly follow the modes set by international arbiters, many more do not. Apparently other, more immediate factors were often a determining influence. In any case, even when international fashions in court house design did influence decisions on a particular building, these must be regarded in relation to local conditions; consequently, such incidents have been discussed in their more immediate regional contexts.²¹

With the exception of Kelly Crossman and Dana Johnson’s “The Early Court Houses of Ontario”,²² where a real effort is made to document the various influences on Ontario court houses, there are very few instances

¹⁸M.G. Van Rensselaer, *Henry Hobson Richardson and His Works* (New York: Dover, 1969) at 93.

¹⁹*Ibid.* at 92.

²⁰For a discussion of Richardson’s influence on Canadian architecture, see A. Gowans, *Building Canada: An Architectural History of Canadian Life* (Toronto: Oxford University Press, 1966) at 134-38.

²¹Carter, “Overview”, *supra*, note 6 at 19.

²²*Supra*, note 5.

where "their origin or their vogue on an international level" is demonstrated. While such a demonstration might not be difficult, Carter has left the task to other architectural historians.

Another important concept which is left largely unexplored is that of the role of the court house in the life and image of Canadian towns and cities. The authors are content to affirm the connection between a "public" style of architecture, the notion of justice and the public's active participation in an open judicial system. Unlike the secrecy of the unofficial legal system in Franz Kafka's *The Trial*, in which courts were located in the back rooms of apartment houses or approached through the attics of apparently ordinary houses, Canadian judicial buildings serve as a "physical symbol of law and order [and] constitute a familiar form of public building Court houses were often consciously created to evoke images of justice and stability by their architects and builders."²³ However, on another level they play a major role in the creation of civic centres. They help to establish the heart of an urban setting and add distinction and importance to a given town. This is especially true in Ontario, where local authorities vied with each other to establish pre-eminence in a region.

Two of the best examples of court houses being marshalled as expressions of local importance rather than of the power and stability of the law are the towns of Cobourg and Niagara-on-the-Lake. Victoria Hall, formerly the seat of the Northumberland County Court House in Cobourg, designed by Kivas Tully and erected between 1856 and 1860, is the "most extravagant example of the judicial building as symbol",²⁴ a monument to the municipal council's high expectations for the town's future importance subsequent to the completion of a new railway. Unfortunately, Crossman and Johnson report that "in spite of its magnificence, the court house was not a financial success; it plunged the town into near bankruptcy when the expected economic boom collapsed with the failure of the railway".²⁵ Likewise, the court house became central to the rivalry between Niagara-on-the-Lake and St Catharines. In 1847, the County of Lincoln, in one of its last acts towards its original seat of government, built a court house in Niagara to the design of William Thomas. However, with the building of the second Welland Canal, St Catharines prevailed economically over Niagara and the St Catharines town hall, designed by Tully in 1849, was enlarged and designated the Lincoln County Court House. The Niagara building, in turn, slipped back to mere town hall status.²⁶

²³Carter, *supra*, note 2 at 199.

²⁴Crossman & Kelly, *supra*, note 5 at 117.

²⁵*Ibid.* at 120.

²⁶*Ibid.* at 112-14; see also P.J. Stokes, *Old Niagara on the Lake* (Toronto: University of Toronto Press, 1971) at 88.

The importance of the court house on the townscape of young and growing Canadian municipalities cannot be underestimated. Its location was almost always central and dominant, and in most cases it was the principal provincial presence outside the provincial capital. Court houses, writes Harold Kalman in "Canada's Main Street", were "imposing buildings which expressed the power of the law and added to the quality of the town; they were usually designed in a classical mode and built of local materials".²⁷ They competed for civic prominence and recognition with the federal government's post office or "federal building" (combining post office with customs house, Department of Agriculture offices, etc.), the municipal government's town hall and sometimes the local public library. Collectively, they enhanced the main streets of our growing towns, stretching federal and provincial institutions and hence presence across the land. As Hector Langevin, Minister of Public Works in the Macdonald government, asserted in 1886, a growing nation had to have "public offices on a scale commensurate with the wealth and extent of the city".²⁸ While Langevin was referring particularly to federal buildings, the same notion clearly permeated the thinking of provincial and county authorities in the design and construction of court houses. Crossman and Johnson show this developing grandeur in Ontario, as does Mills in British Columbia. This phenomenon was not as pronounced in Quebec or the Atlantic provinces and is therefore not analyzed by André Giroux,²⁹ C.A. Hale³⁰ or R.R. Rostecki,³¹ while in the West and in northern Ontario many of the most flagrant examples were built after the World War I cut-off date imposed in the East.

Another concept unpursued in the book under review is that of the court house as a distinct building type, recognizable as a "public" building and yet clearly distinguishable from a church, theatre or post office. Nikolaus Pevsner, the eminent British architectural historian, devotes an entire chapter of his encyclopedic *A History of Building Types* to law courts, grouping them with town halls as "government buildings from the eighteenth century".³² It is thus apparent that this particular combination is not a uniquely Canadian phenomenon. Pevsner shows that early European law courts most often were held in town halls, just as early Canadian courts did not have their own buildings but shared their premises with other institutions. The Old Barrington Meeting House of 1765, built in Barrington, Nova Scotia

²⁷H. Kalman, "Canada's Main Street" in D. Holdsworth, ed., *Reviving Main Street* (Toronto: University of Toronto Press, 1985) at 18.

²⁸*Ibid.*

²⁹Giroux, *supra*, note 5.

³⁰Hale, *supra*, note 5.

³¹Rostecki, *supra*, note 5.

³²N. Pevsner, *A History of Building Types* (Princeton: Princeton University Press, 1976) at 53-62.

in the distinctive New England salt-box style of Cape Cod and Nantucket, served simultaneously as court house, religious meeting hall and local community centre, as did many of the “simple” early Canadian court houses.³³ Pevsner contends that “[s]eparate monumental buildings for law courts began in the English provinces of York ... in 1705” and in France only in the late eighteenth century with the megalomaniacal designs of E.L. Boullée.³⁴ Only in the mid- to late 1800s did a court house “type” develop in Europe, and even then this form of civic building remained closely aligned morphologically with the town hall from whence it developed.

The essays in *Early Canadian Court Houses* omit any examination of the common characteristics of this form of building. Despite great variation, the “style” of numerous court houses of this eclectic period of architecture — whether Neo-Classical, Romanesque Revival, Neo-Gothic or simple folk vernacular — contains certain strong constants. They are seen as public and therefore dominant buildings in their communities; they perform a strong civil function and are important to the cultural life and prestige of the municipality; they are imposing “frontal” buildings which symbolically represent the authority of the government and by extension the power and importance of the law; they are grand and inspiring yet welcoming and public.

Much has been made in this review of what *Early Canadian Court Houses* fails to tell us, or what could have been learnt from the raw information presented in the study. Admittedly, these criticisms and concerns are the product of a subjective viewpoint, that of an architect. The most interesting and informative feature of the book, as it stands, is not what we learn about architecture, but rather what we learn about history — especially the development of judicial institutions throughout Canada. An understanding of the co-existence of Canada’s disparate regional institutions can be gained by looking at the changes in judicial administration in the various provinces. Newfoundland’s judicial system, for instance, began with trials held aboard ships, before taking root in small settlements throughout the island. Under the influence of William Henry Churchill, architect and superintendent of public building, a number of similar yet distinct wooden court houses were built in numerous centres, thereby appearing to entrench a decentralized legal system. However, as Rostecki concludes:

Churchill retired in 1927 and in 1933 official reports recorded approximately twenty-six court houses on the island. After World War II, improved transportation reduced the need for so many buildings. Once-thriving centres, such as Trinity and Burin, lost their status as judicial centres, and their court houses were converted to other purposes. Others, such as the Twillingate Court

³³Hale, *supra*, note 5 at 46-48; see also Gowans, *supra*, note 20, plate 51.

³⁴Pevsner, *supra*, note 32 at 53.

House (1884), burned down. Lastly, newer and more efficient structures replaced often ill-maintained, poorly lit and inadequate structures such as the Bell Island Court House (1900). As a result, only nine court houses remain in Newfoundland in 1977, and this figure will probably be reduced in the next several years, for most of these are aging wooden structures and not all have borne the marks of time well. This is the end product of a court system that maintained approximately forty court houses at the turn of the century.

Today, court premises are sometimes rented, and it is not unknown for court cases to be held aboard the magistrate's launch. In some ways judicial facilities in Newfoundland have turned full circle — today as in the eighteenth century, courts occur in large centres and aboard ship.³⁵

Similarly, while the judicial system in Prince Edward Island was decentralized in the nineteenth century, it is now being concentrated in Charlottetown as a result of improved transportation. By contrast, most of the regional court houses of Quebec, Ontario and British Columbia continue to serve a largely decentralized judiciary. The history of the legal institutions in each province being so varied and unique, the structures erected to house these institutions inevitably reflected provincial and regional characteristics.

Let us now return to the original queries. It has been seen that Canadian court houses, especially when viewed regionally rather than nationally, developed distinctive characteristics as a result of geography, time of construction and cultural influences, not to mention provincial legislation and the authority responsible for their construction. They played a key role as symbols of justice in a young but rapidly developing country, coming to stand as important civic monuments adding prestige, sophistication and a sense of "place" to emerging regional centres. The early court house was a distinctly recognizable building type which was greatly influenced by architectural styles both in Canada and abroad.

Judges, clerks and many lawyers spend considerable time in court houses. Those interested in history and in their physical surroundings will enjoy *Early Canadian Court Houses*. They may chuckle at the financial embarrassment of the town fathers of Cobourg over the construction of Victoria Hall, come to appreciate the similarities between the court houses of Joliette and Chicoutimi, learn more about the development of various judicial institutions in each province of Canada and discern the stylistic influences of Osgoode Hall on the Montreal Court House of 1851-57.

Finally, some jurists may pause as they enter a contemporary court house, such as the one in Montreal designed by David, Barrett and Boulva and completed in 1971. They may look around this building and ask themselves whether it constitutes a distinctive building type or is indistinguishable from an office tower. Does it evoke "an image of justice and stability"

³⁵Rostecki, *supra*, note 5 at 36.

as does its neighbour and predecessor, or does it imply that law is just another business activity like, say, life insurance? Does this courthouse contribute to a sense of "place" in the urban fabric of Montreal or might a visitor stroll right past it in search of Cormier's Nouveau Palais de Justice, with his magnificent bronze doors? Perhaps some architects will ask themselves similar questions; perhaps they will search for precedents and turn to the inventory of *Early Canadian Court Houses* for source material. They may then determine how these lost qualities exhibited by earlier court houses can be recaptured and integrated into future court house designs.
