Book Reviews

Condominium in Canada. Edited by Alvin B. Rosenberg. Toronto: Canada Law Book Limited. 1969. Pp. xix, 17. looseleaf chapters. $18.00.

L'ouvrage de M. Rosenberg vient assez tôt dans l'histoire de la copropriété immobilière dans notre pays, et nous nous en réjouissons. Trop souvent nous avons à nous passer de doctrine dans un domaine nouveau, ou déjà plus nouveau du tout, pendant que les tribunaux élaborent tant bien que mal leur interprétation des lois récentes. De là à dire que les juges feront un usage abondant de la doctrine du seul fait qu'elle existe serait sans doute présomptueux, mais il n'en demeure pas moins nécessaire de fournir aux praticiens et aux tribunaux des outils de travail dans leur tâche d'appliquer et d'interpréter les lois nouvelles.

Dans le cas qui nous occupe, l'auteur autant que le législateur a pu bénéficier de la doctrine étrangère sur le sujet de la copropriété immobilière, et en particulier de l'expérience américaine. Il s'agit donc d'un sujet neuf au Canada, mais ce n'est pas le cas partout ailleurs. L'ouvrage s'attache aux lois des provinces de la Colombie britannique, de l'Alberta, de la Saskatchewan, du Manitoba, de l'Ontario et de la Nouvelle Ecosse, les autres provinces n'ayant pas encore adopté de loi à cette époque. Le titre « Condominium in Canada » peut dès lors sembler abusif puisque le volume ne s'attarde qu'à une fraction du pays, mais il est à espérer qu'il sera modifié pour inclure toutes les dispositions provinciales, le cas échéant. Pour l'instant, les dispositions de droit civil, y compris l'article 521 C.c. sur la propriété par étages, se situent au niveau de l'historique de la copropriété (Chap. 2).

Condominium in Canada est une oeuvre de type exégétique: cette caractéristique est assez prévisible dans le cas d'un sujet aussi nouveau. Il se divise en douze chapitres et trois appendices, dont la substance peut être regroupée en trois titres principaux: une introduction générale (ch. 1, *Introduction;* ch. 2, *History;* ch. 3, *General considerations*), la mise en oeuvre d'un contrat de copropriété (ch. 4, *Creation of a Condominium;* ch. 5, *Interpretation of Statute and Documents;* ch. 6, *The Units;* ch. 7, *The Common Elements;* ch. 8, *The Owners' Organization;* ch. 9, *Destruction, Obsolescence, Expropriation, Termination and Sale;* ch. 10, *Insurance*) et les droits résultant d'une copropriété (ch. 11, *Representing the Developer;* ch. 12, *Representing the Purchaser or Mortgagee;* ch. 13, *Miscel-*

laneous Problems; ch. 14, *The Future of Condominium.* Le tout se complète d'un glossaire des termes propres au condominium.

Les Appendices sont particulièrement intéressants pour le praticien et pour l'intelligence générale du mécanisme de la copropriété: ils comprennent une liste de «choses à faire» *(checklist)* tant pour le promoteur que pour l'acheteur (Appendix «A»), plusieurs formules relatives à la déclaration de copropriété, les règlements, l'hypothèque et les transferts, entre autres (Appendix «B») et des notes de pratiques relatives à la loi de trois provinces (Appendix «C»). Le lecteur se serait attendu à voir reproduit le texte d'au moins l'un des statuts provinciaux sur la copropriété: les multiples références à ces statuts tout au long de l'ouvrage nécessitent la reproduction du texte de loi lui-même.

Cette remarque se justifie d'autant plus que ce livre s'adresse autant au praticien qu'à l'étudiant ou au tribunal. L'auteur procède à y faire une revue assez complète des dispositions applicables et des problèmes soulevés par la copropriété immobilière. Le lecteur parcourera avec intérêt les chapitres de l'introduction générale qui situent le problème de la copropriété dans leur contexte historique et social, quoique trop brièvement dans certains cas; cette contribution est louable dans un ouvrage qui eut pu n'être que technique et orienté vers la solution immédiate des problèmes de la copropriété.

La plupart des autres chapitres traitent des divers éléments de la copropriété selon la présentation qui en est faite par les différents statuts et des divers problèmes qui se soulèvent à l'occasion de la création d'une copropriété par le promoteur, de l'achat et de la disposition de droits par l'acheteur et de relations avec les tiers. Le style en est simple, direct, facile à comprendre et bien présenté; le plan est détaillé et les références à la loi nombreuses; la présentation sous forme de fascicules permettra la mise à jour périodique du volume et assurera d'en maintenir la valeur.

L'un des meilleurs moyens d'éprouver un tel volume et d'en juger la valeur est de le soumettre aux problèmes de servitude, d'hypothèques et de privilèges créés tant sur les parties exclusives que sur les parties communes, d'expropriation et de taxes municipales, qui sont parmi les plus cruciaux. Si l'on ne tient pas compte des dispositions statutaires relatives à ces domaines, et qui peuvent d'ailleurs varier d'un statut à l'autre (la loi de la Nouvelle-Ecosse apparaissant définitivement inférieure aux autres), le livre soutient assez bien le test des questions. Par contre, le lecteur se butte à la méthode exégétique qui veut donner une analyse des textes avant d'en faire la synthèse et de répondre aux difficultés qui ne s'y trouvent pas complètement résolues. Ce phénomène se retrouve plus

particulièrement dans le cas des questions posées ci-dessus (voir les paragraphes 704, 707 et 903, en particulier), où le lecteur cherche en vain une explication autre que celle strictement donnée par les statuts et où l'opinion de l'auteur ne perce pas particulièrement. Cette méthode donne aussi l'inconvénient que les questions sont traitées séparément, et que les liens naturels entre elles ou entre les solutions proposées ne sont pas toujours établis.

Pour nous du Québec, cet ouvrage devrait être un stimulant: il est un précieux instrument de droit comparé et nous présente une vision abordable de problèmes de common law en un langage plus simple que le jargon habituel du droit des biens anglo-américain. Il devrait aussi servir d'exemple à nos juristes qui ont longtemps négligé la production de livres de doctrine et à notre législateur qui est en train d'étudier l'adoption d'un projet de loi sur la copropriété immobilière (*Bill* 29). La version du *Bill* 29 que nous a présenté le législateur à l'automne de 1968 et qui a été revisé à la suite des travaux de la commission parlementaire en 1969 aurait sans doute bénéficié d'un test comparatif avec les lois des autres provinces canadiennes, en plus de l'adaptation de la loi française, d'ailleurs sujette à revision.

Il est particulièrement étrange de voir comment la loi française utilise le concept de personnalité morale pour l'appliquer aux copropriétaires et comment la loi ontarienne fait de même en édictant que l'enregistrement de la déclaration de copropriété crée une corporation dont les membres sont les copropriétaires, alors que le projet de loi québecois (*Bill* 29) introduit une nouvelle notion d'«administrateur», qui ressemble au mandat ou à la fiducie mais qui ne leur est pas identique, et fait reposer la propriété des parties exclusives sur une base si fragile qu'elle s'avèrera vraisemblablement une source de litiges ou tout au moins de difficultés jurisprudentielles comparable à celle que nous a léguée l'article 981a C.c. sur la fiducie.

L'étude des autres lois provinciales nous fait envier l'usage de la corporation aux fins de la copropriété, de même que celui des servitudes (*easements*) dans l'organisation des parties communes et des parties exclusives (art. 8, Ontario), la définition des droits des parties dans les parties communes et exclusives (art. 6-7, Ontario) et généralement les rapports statutaires entre les copropriétaires et entre eux et la corporation, en particulier en ce qui est des obligations d'entretien, des modifications à apporter aux parties communes et à l'extinction partielle ou totale de la copropriété (*e.g.* art. 18, Ontario). La possibilité d'un arbitrage (en vertu de la loi

des arbitrages) relativement à la détermination de la valeur d'une partie commune est particulièrement heureuse.

Dans ce contexte, l'ouvrage de M. Rosenberg nous est d'une aide précieuse, et il s'avère essentiel à quiconque prétend s'intéresser à la copropriété. Il s'avèrera utile au praticien québecois en plusieurs façons, puisqu'il synthétise le droit applicable à des problèmes communs à tous les régimes de copropriété, qu'ils soient de droit civil ou de common law. Il est à espérer que l'auteur tiendra sa promesse en ce qui a trait aux mises à jour et qu'en temps et lieu, la copropriété immobilière québecoise sera traitée tout comme ses soeurs canadiennes.

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The Freedom of the Air. Edited by Edward McWhinney and Martin Bradley. Leyden: Sythoff. Dobbs Ferry, New York: Oceana Publications, Inc. 1968. Pp. 259. $7.50.

As this review is being written — Halloween 1969 — a TWA jetliner is flying across the Atlantic at gunpoint, due to land any minute in Shannon, then on to Cairo, unless the United States Marine in control decides instead to go to Rome or some other point. The morning newspaper reports that the special fare conference of the International Air Transport Association, called in response to Alitalia's breach of the Transatlantic fare agreement, has broken down. All week long full page advertisements by the international carriers have played what one line — apparently intending a pun — called "Europe's fare game". Clearly all is not well with civil aviation.

It is interesting, therefore, to see how a conference of the aviation community — plus a few alumni and outside observers — views the problems of the industry. Some problems are deliberately excluded. There is no talk here of noise or air pollution; there is only the barest mention (by the President of the Council of ICAO) of the continuing controversies over carriers' liability to passengers in case of accident; and the financial demands of the next generation of aircraft, and the consequent questions in even the richest countries about competing priorities, receive hardly any attention. Still, under the flexible rubric of *Freedom of the Air*, the contributors to this volume cover a fairly large number of topics, and give a good picture of what issues are of most concern to the aviation community.

Number one seems to be the rise of charter, non-scheduled, or supplemental airlines. This reviewer had followed with interest the long battle between the scheduled and non-scheduled airlines in the United States, shifting back and forth between the Congress, the courts, and a Civil Aeronautics Board increasingly sympathetic to the supplementals. But the news that upwards of 25 per cent of all intra-European air transport is performed by supplemental carriers (compared with less than 10 per cent within the United States and across the Atlantic) was to me a big surprise. One can understand why the establishment air groups — notably IATA — are worried. The focus of the discussion on this topic, however, seemed to me disappointing.

No less than four contributors discuss Article 5 of the *Chicago Convention* dealing with non-scheduled flight, and one, the able

General Counsel of IATA, Julian Gazdik, devotes nearly his entire paper to this point. There is no question about it: Article 5 is ambiguous. After clearly establishing transit and non-traffic rights for non-scheduled flights, the article says aircraft engaged in such services may take on or discharge passengers, cargo or mail, "subject to the right of [the landing state] to impose such regulations, conditions or limitations as it may consider desirable". No one knows just what this means. On the one hand are flights by supplemental carriers, arriving almost every day with a load of persons who (whatever their formal ticketing arrangements) are basically commercial passengers, "non-scheduled" for purposes of Article 5? On the other hand, as pointed out in this volume by Dean Jack Richardson of the Australian National University, does a complete system of economic regulation, or even total prohibition of non-scheduled flights fit within any fair reading of Article 5? It is plain that, in 1944 at Chicago, the dimensions of the problem were not foreseen. One can argue about whether Article 5 ought to be amended or interpreted, and, in either case, which way. One can also discuss the development from single charter to "split charter", "affinity group charter" to "I.T. charter" and various other forms of hypocrisy. But the underlying questions raised by non-scheduled or supplemental services seem to me much more interesting and worthy of exploration.

From the point of view of the CAB, for example, it seems the supplemental carriers offered a way to gain a measure of influence over international fares, especially after it lost the test of wills with IATA over the so-called "Chandler fares" in 1963. From the European carriers' standpoint, it would seem worthwhile to ask what the rise of the non-scheduled carriers suggests about the efficiency of government-owned versus independent air lines. For the leading aviation countries, it might seem useful to explore the outlines of bilateral agreements concerning non-scheduled services. For IATA, the question might at least be raised whether the "independents" do not have a place in the organization. This reviewer has been away from the aviation world too long to venture substantive comments on any of these points. But if he were a client — airline, government, or international organization — the above questions are what he would want his lawyers to be thinking about.

The second most absorbing topic of concern seems to be the system of bilateral agreements for the grant of commercial rights that emerged after the Chicago Conference failed to arrive at a viable multilateral agreement. In particular, there is a good deal of discussion about the so-called "Bermuda principles", whose some-

what Delphic formulation in the 1946 agreement between the United Kingdom and the United States has found its way into nearly all bilateral agreements to which the United States is a party (the one with the Soviet Union being a notable exception) and into many other bilateral agreements as well.

It has always seemed to this reviewer that the United States interpretation of the capacity articles has more to commend itself from the point of view of aviation economics and experience than in terms of the text itself. The United States position has been that there must be no predetermination of frequency or capacity of services over a route. Further, the ground rules for *ex post facto* review are deferred until someone complains and tries to initiate a review proceeding. Thus, there is no advance agreement on such questions as the period under review, the ratio of primary to secondary justification traffic ("third" and "fourth" to "fifth" freedom), the definition of who is a fifth freedom passenger (*e.g.* as between United States and Italy, what is a passenger originating in New York, stopping over in Paris, then continuing Paris-Rome), appropriate rates of return or load factors, often even how or whether records are to be kept. The result of this position has been that there have been very few meaningful exercises of "*ex post facto* review". Also, and probably more important, the result has been that airlines, left to their own devices, have competed harder, expanded their market faster, and accomplished equipment change-overs more rapidly than would have been the case under something more near the compromise between the American and British positions on control that was thought to have been achieved at Bermuda.

The text supporting this development could have meant all things to all people: "fair and equal opportunity..."; "the interest of the airlines of the other contracting party shall be taken into consideration so as not to affect unduly..."; "the air services made available... shall bear a close relationship to the requirements of the public..."; "general principles of orderly development..."; and so on. To this writer, the practice under such a vague framework is one more fascinating example of the legal process in the international area. I would have liked to see one of the commentators take this up in some detail. Instead, I was dismayed to see Professor Jiménez de Aréchaga take Professor Otto Riese to task for discussing the negotiating history of the Bermuda agreement in his decision in the United States-Italy arbitration of 1965. The United States-Italy agreement and many of the other agreements following Bermuda could be criticized because they were not really bargains between equals. Indeed Italy subsequently denounced the agreement

subject of the arbitration. But to say that the negotiations and comments surrounding Bermuda, well known and referred to by these two and other parties, are "irrelevant" to interpretation of the capacity provisions, seems to me to opt for a narrow legalism out of place in air law as in most other law.

I do not wish to be too hard on Professor Jiménez de Aréchaga, even as he takes his seat in the International Court of Justice; he makes at least one other point that seems to me very interesting. Bermuda, he argues, was not really a compromise between the restrictionist and the laissez faire views that had been in conflict at Chicago. From the point of view of the smaller countries, Bermuda was the two giants of aviation carving up as much of the world as possible between them, and hence trying to establish a model agreement with lots of room for fifth freedom traffic. Having been imbued with the prevailing intorpretation of Bermuda, and indeed having presented in the role of advocate for the United States the interpretation adopted by the Tribunal in the United States-Italy arbitration, this reviewer confesses he never thought of Bermuda in the way suggested by Jiménez de Aréchaga. He hopes, however, that the implied drive to a kind of bilateralism already endemic in parts of Latin America — with fixed percentages of traffic for each country's carriers — is not advocated too seriously. If regionalism takes hold in Latin America and the regions start playing the bilateral allocation game with pooled resources, freedom of the air in Latin America could be set back by much more than it already is.

By far the most instructive paper in the volume is the explanation by Frank Loy of the United States' calculation of the value of a route exchange — the assumption under Bermuda being that the exchange should be of equal value for both sides. The question is, what is meant by equal. For example, if the United States and Austria negotiate an agreement, is the route New York-Vienna for carriers of both sides an equal exchange? At first view, one would think yes — the routes are reciprocal and equal. But as Loy points out, without the agreement an American flag carrier could transport a passenger desiring to travel from New York to Vienna as far as, say, Munich or Zurich, leaving only the last few hundred miles to be performed by another carrier. In contrast, Austrian Airlines could take the New York bound passenger at most as far as London. The United States carriers would get one more stop in Europe from the proposed agreement, to add to twenty-five to thirty others; for the Austrian carrier, the agreement would take it across the Atlantic. Moreover, in New York, Austrian Airlines

would have access to a much larger market — Loy says 50 times as large — as would an American carrier in Vienna.

Isn't this the problem of every country smaller than the United States? In part, the answer is yes. Loy points out, perhaps thinking of the failure by the Dutch to secure access to the United States West Coast or of the failure by Canada to achieve more than selected penetration of the United States, that accidents of geography determine the value of most franchises.

There are some ways to even the equation. To return to our example, the route might be described: United States to Vienna for United States carriers; Austria to New York for Austrian carriers. The appearance of reciprocity is preserved, but there are probably no alternative international airports in Austria, whereas an American carrier under this formulation could originate in Chicago, Washington, Los Angeles, or a dozen other cities. Also, the United States might exact "beyond" rights — *e.g.* beyond Vienna to Eastern Europe, or to Russia, or just beyond without restriction. To some extent all beyond rights, as the French and Italians in particular have argued, cut into the national carriers market. How much this is true is again a part of the art of calculating, complicated by the assumption of Bermuda that beyond or fifth freedom rights are "secondary justification". I think, though I am not sure, that this means a fifth freedom passenger — say Vienna to Istanbul on a United States carrier — counts for more (at least per mile) than a New York-Vienna passenger. If there is an answer on this point Loy does not give it — wisely so long as he is in charge of United States policy in this area. Loy also avoids another probably relevant point. The United States nearly always insists in route exchanges on the phrase "an airline or airlines designated by each contracting party". Unlike the United States, most foreign countries have only one international airline, or at least avoid competition between their own carriers over international routes. Thus one foreign airline may find itself in competition with more than one United States carrier — and indeed with no guarantee of how many. How this consideration fits into his equations Loy does not say, though he has heard the point many times in his negotiations. But he cannot cover everything, and this subject, in particular, was and remains very sensitive in the context of the trans-Pacific case, which was in full bloom at the time of the conference recorded in this volume. In terms of analysis, examples, and even a schematic diagram, Loy goes further than any public statement this reviewer has seen in presenting a rational explanation of how route exchanges are assessed, at least by the United States.

Like most conference records, the quality of *The Freedom of the Air* is uneven. It has a number of good pieces, not all of them mentioned in this review. The collection, it seemed to me, could have used some more editing, particularly of the contributions by those for whom English is not the normal working language. Why the two contributions by Professor Valladao of Brazil appear in French I do not know. I almost thought there might be an effort to hide for English readers his put down of that marvelous master of British overstatement Sir William Hildred. In all, however, the volume is worth reading, both to see what lawyers are doing for international aviation, and to see how much more could be done.

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The Road from Runnymede: Magna Carta *and Constitutionalism in America.* By A.E. Dick Howard. Charlottesville, Virginia: University Press of Virginia. 1968. Pp. xv, 533. $10.00.

One might ask what an American law professor is doing, in the 1960's, trying to link constitutionalism in America to *Magna Carta.* After all, America chose, through revolution, to sever its links with England and to create a new nation in which the just powers of government are derived from the governed.

The explanation is found in the author's view that "the American Revolution is a kind of oddity among revolutions. It was fought to preserve old values — indeed to preserve values which had sprung from the very country rebelled against, but which that country had somehow forgotten."

This thesis, and the historical analysis it stimulated, are especially relevant to the Canadian legal order today. The Supreme Court's decision in *Regina* v. *Drybones,*[1] may mark the beginning of a comparable legal revolution to restore and preserve values that have somehow been forgotten in Canada.

The interplay between legalism and natural law that gave birth to the United States Constitution finds human expression in Professor Howard's narrative through the two Adams brothers, John and Samuel.

> John was always more concerned with constitutional principles, Samuel more attuned to results. In 1770, when Boston was aflame with passion over the so-called Boston Massacre, the contrast between the two men was marked. Sam and his associates put moral and physical pressure on the court to get on with the trial of Captain Preston and his soldiers, even though a fair trial was unlikely until tempers cooled. John, on the other hand, agreed, at obvious expense to his own popularity in Boston, to undertake Preston's defense.

Yet John respected his older brother, Professor Howard tells us, and had a very high regard for his writings on the dispute with England. The fact that each of these men made a major contribution to the founding of American constitutionalism may tell us something, for the great distinguishing feature of that system is its deliberate attempt to reconcile humanism with legalism within the philosophical framework of the constitution.

With *Drybones,* we may be embarked on a like undertaking, and it will involve a truly agonizing re-appraisal of our legal theory

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[1] Delivered on November 20, 1969, not yet reported.

and the assumptions on which it is built. That the task is necessary is clear beyond doubt, and even in England we can now observe an emerging trend of increased judicial activism in such decisions as *Ridge* v. *Baldwin*,[2] *Conway* v. *Rimmer*,[3] and in the House of Lords Practice Statement on *stare decisis*.[4]

How much can be learned from Professor Howard's account of the way in which the fundamental values of the English constitution were translated into judicially — applied constitutional documents? It is true that the *Canadian Bill of Rights* is an "ordinary" statute in the sense it can be repealed at any time by Parliament, but this is also true of the *Criminal Code*, which provides the main protection of many important fundamental rights.

A recurring theme that appears throughout this book is due process of law, which the author traces back to *Magna Carta's* "law of the land".

> As American courts began to develop a jurisprudence of due process, implementing the guarantees of federal and state constitutions, it was natural that, given the inclination of American judges to respect the English law and given the historical "halo effect" surrounding due process as a fundamental guarantee of the English constitution, the American cases should look to the English common law to decide whether due process had been afforded in a given case. The earlier cases were largely concerned with procedure, the standard for which was the procedure allowed by the English law.

Professor Howard goes on to examine the history of due process — the coat of many colours, as he calls it — in the United States. As he does so, the distinction between Canada's evolutionary constitutional development and the American revolutionary path seems increasingly irrelevant to this point in Canada's history. The first section of the *Canadian Bill of Rights* gives this same expression "due process of law" to Canadian judges as a central criterion for judicial review, and they must now give some content to these words. The history of a similar interpretative process in the United States, over nearly two hundred years, must have some lessons in it.

The organization of the book is chronological. From the early colonial charters, with their references to the "liberties, franchises, and immunities" of Englishmen, we are taken through the pre-revolutionary period when English laws, lawbooks, and legal education were transplanted to the American colonies. We see William Penn, of whose trial, Howard states

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[2] [1964] A.C. 40.
[3] [1968] A.C. 40.
[4] *Practice Statement (Judicial Precedent)*, [1966] 1 W.L.R. 1234.

> it is fair to say that Penn was more on trial for these [Quaker] beliefs than for what the indictment termed 'disturbance of the peace of the said Lord the King',

going to America and fighting for the establishment of the principles embodied in *Magna Carta*. We are taken painstakingly through the processes of constitution-writing in the States and before the Philadelphia Congress, then the incorporation of English Statute law and common law into these new legal orders, and finally due process of law, *Magna Carta's* great legacy to America and still the battleground, and at the same time the central nexus, between natural law and legalism.

As I read the cumulative evidence to support Howard's thesis of a revolution fought to preserve old values first set down in *Magna Carta* but "somehow forgotten" with the *Stamp Act* and other repressive measures, then looked to the state of human rights jurisprudence in Canada, I was reminded of the story of the prodigal son. There is a message here for Canadian lawyers, in a book that was conceived in relevance and executed in style. A measure of that style can be sensed from the author's description of John Adams drafting the Constitution of the State of Massachusetts:

> The scene is easy to reconstruct. There sits John Adams, pen and paper in hand, surrounded by an untidy assortment of books — *Magna Carta*, the *Bill of Rights*, Locke's *Second Treatise*, the constitutions of sister States, other sources. A veteran of all those years of a war of words for the rights of Englishmen, Adams knows his way around the English documents as if he had written them. Settling down to his work, he turns first to one, then to another familiar source as he selects what he wants to put in his draft. The results: the distillation of two decades of legal learning since Adams sat in the courtroom in Boston and heard James Otis denounce the writs of assistance and a succint statement — perhaps as neat a list as exists in any American document — of what rights the American colonist had in mind in the 1760's and 1770's when he claimed the "liberties of Englishmen".

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