Les Cahiers de droit

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d'une indemnité forfaitaire (n° 249). À son habitude, la Cour suprême donne en ce domaine ses directives à partir d'affaires originant des provinces de common law, ce qui n'amène pas chez l'auteur les mêmes commentaires négatifs exprimés à propos du traitement accordé aux pertes non pécuniaires (n^os^ 274 à 276).

Un dernier mot relatif aux nombreux index et tables, qui occupent plus du tiers du volume. Ceux-ci sont très complets et détaillés, même si la table de jurisprudence est artificiellement doublée par la décision de rapporter chaque arrêt sous le nom du demandeur et du défendeur. En toute déférence, nous soulignons cependant notre désaccord total avec l'idée de reproduire des « Tableaux des indemnités accordées ». Ceux-ci sont malheureusement utilisés par les avocats de pratique privée pour « évaluer » l'indemnité d'un client victime d'un préjudice corporel, en comparant la nature des blessures et les montants obtenus dans des cas supposément semblables. Cette méthode très « française » d'évaluation, qui revient en fait à perpétuer l'évaluation « au point » du préjudice, est inacceptable au Québec, alors que tant d'efforts ont été faits pour rendre le système moins arbitraire et plus personnalisé. L'auteur ne devrait pas faciliter le développement d'une telle pratique.

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Canadian Perspectives on Law & Society: Issues in Legal History, W. WESLEY PUE et BARRY WRIGHT, éditeurs, « Carleton Library Series, No. 152 », Ottawa, Carleton University Press, 1988, ISBN 0-88620-078-3.

This book consists of a collection of essays about law, history and sociology in a Canadian context. In their preface to the book, the editors write :

> [...] what is offered here is a representative sampling of Canadian work that explicitly attempts to locate the history of law in a broader framework of social and political history and in which the authors have attempted to "make" Canadian legal history in ways that are responsive to some, at least, of the broader theoretical concerns affecting the social sciences in Canada during the late twentieth century. The extent to which we have individually or collectively succeeded in this task is best left to the reader to judge. (p. 1.)

In my view, they have succeeded rather well on both counts.

The book is divided into four parts : Introduction ; Theory and methodology ; Social welfare and labour relations ; Criminal justice and civil liberties.

Each part is divided into chapters of which there are fifteen in all. These range from "An Introduction to Canadian Law in History" (chapter I) to "Maternal Feminism, Legal Professionalism and Political Pragmatism : The Rise and Fall of Magistrate Margaret Patterson, 1922-1934" (chapter VI) to "The Canadian Magistracy and the Anti-White Slavery Campaign, 1900-1920" (chapter XV).

I especially enjoyed chapters V, VII and XIII, which are entitled : Dialogical Jurisprudence (chapter V) ; Very Late Loyalist Fantasies : Nostalgic Tory History and the Rule of Law in Upper Canada (chapter VII) ; The General Court Martial of 1838-39 in Lower Canada : An Abuse of Justice (chapter XIII). This is not meant to be a negative reflection on the other chapters, all of which are well written, researched and very interesting. The subject matter of every chapter could be the subject of a whole book. But, as in everything, there are always favorites.

In chapter V, David Howes argues that Quebec jurisprudence until around 1920 was mainly "dialogical" in character, in comparison to today's Quebec jurisprudence and doctrine which are mainly "monological". After saying that the term "dialogical" is borrowed from Mikhail Bakhtin. David Howes explains it as follows :

> [...] refers to the propensity to look for connections among diverse texts or languages, as opposed to cut-offs between their differences. The dialogician is committed to "multiplying the sources of legal dialogue" and therefore tends to be nomadic (or catholic) instead of sedentary (or exclusivistic) in the kinds of authorities s/he chooses to discuss. Such sensitivity to variety, or concern to accommodate the viewpoint of "the other" through an openended dialectic, contrasts sharply with the obsession with purity characteristic of monologism. (p. 71.)

Mr. Howes quotes the following texts from F.P. Walton (a McGill University professor) and P.B. Mignault to show how the philosophy of the civil law changed from one era to the other.

> (F.P. Walton – 1899) In Scotland as in Quebec and in Louisiana the law occupies a position midway between the common law and the civil law. It has drawn largely from both sources.
>
> (P.B. Mignault – 1932) Une cloison étanche et infranchissable sépare les deux grands systèmes juridiques (in Canada) [...] Il n'y a pas immixtion ou absorption de l'un au profit ou au détriment de l'autre. (p. 72.)

How did this change occur ? Mr. Howes attributes this change to the work of the Privy Council and to the Privy Council's Canadian advocate, P.B. Mignault. Mr. Howes submits that the Privy Council looked at the Civil Code of Lower Canada (C.C.L.C.) as just "a statute" and that consequently, it was only in the case of ambiguous language that recourse was to be made to other authorities, such as those on which it was founded. As an example of his theory, Mr. Howes examines the fate of article 1054, para. 1 of the C.C.L.C. He refers to the case of *Shawinigan Carbide Co.* v. *Doucet* (1909) 42 S.C.R. 281 where a workman lost his sight as a result of being injured during an explosion in one of his employer's furnaces. The workman sued his employer and the question which arose for decision was whether the Plaintiff had the onus of explaining the cause of the explosion and thus, linking the cause of the explosion to a fault on the Defendant's part. The majority decision for the Supreme Court of Canada was rendered by Chief Justice Fitzpatrick who wrote :

> Je suggère que mon savant collègue ne donne pas au membre de phrase qui se trouve à la fin de l'article 1054 C.C. al. 1 [...] tout son effet.
> En un mot, en face de l'article 1053 qui d'après certains auteurs et la jurisprudence fait de la faute ou de la négligence la base de la responsabilité je place l'article 1054 al. 1 *in fini* qui est à mon avis le seul applicable et d'après lequel « on est responsable des choses que l'on a sous sa garde ». Le sens que je donne à ce dernier texte c'est que toute propriétaire est responsable en raison même de sa qualité de propriétaire du dommage causé par sa chose lorsqu'elle est sous sa garde. (p. 285.)

Chief Justice Fitzpatrick analyzes article 1054, para. 1 in conjunction with article 1053. It is interesting to compare Chief Justice Fitzpatrick's words with those of Mr. Justice Duff (as he then was) in the same case. (Mr. Howes points out that Duff was a common lawyer who had never learned to reason in a civil fashion) :

> The proper mode of approaching these articles (arts. 1053-1055) is to regard them as an exposition of *one topic* in a co-ordinated system of law already in force — and not at all as a string of detached legal enactments. From this point of view the paragraph in question (1054(1)) presents itself not as embodying a self-sufficient and self-operating legal rule, but as one step simply in the progress of the exposition, [that is], as introductory to the whole subject dealt with in (arts. 1054 and 1055) [...] (p. 319-320.)

Thus, Mr. Justice Duff looks at articles 1053-1055 as "one", whereas Chief Justice Fitzpatrick does not. He looks at article 1054

as introducing a new subject, that is "no fault liability". He puts it as follows:

> La partie prétendue responsable peut n'avoir ni la connaissance du défaut de construction, ni le moyen de s'en rendre compte; mais, si elle en a le soin et la garde, alors, d'après les termes de l'article, elle est responsable des dommages causés par la chose dont elle a la garde. Cette interprétation qui applique la même règle de responsabilité et au propriétaire ou gardien d'une chose inanimée, et au propriétaire d'un animal, en vertu de l'article 1055, est la plus raisonnable du monde. (p. 288-289.)

This line of reasoning was subsequently put to rest by the Privy Council in the case of *Quebec Railway Light, Heat and Power Co.* v. *Vandry* (1920) A.C. 662. The Vandry case went to the Privy Council from the Supreme Court of Canada (a split decision) and Lord Sumner rendered the decision. Lord Sumner noted that in the courts below, the arguments proceeded from the text of the Code Napoleon as interpreted by French courts and the jurisprudence of Quebec. Lord Sumner thought this to be wrong and went on to set aside the aforesaid jurisprudence and concluded his judgment by saying that the plain words of article 1054 must be given effect. It is surprising that these plain words of article 1054 had not been found to be plain by Quebec judges since 1866.

I can testify in support of Mr. Howes' theory. Once arguing a case involving a common carrier (articles 1672-1680 C.C.L.C.) before the Superior Court for the Province of Quebec, I submitted to the Trial Judge a number of English cases including decisions of the Privy Council. No doubt that in that area of the law, English cases should be persuasive and relevant as article 1672 and following of the C.C.L.C. are, in effect, a codification of nineteenth century principles of the common law. However, my opponent argued that the court should not consider these authorities as the wording of the articles was clear. The Judge tacitly agreed with this view.

Mr. Howes presents a convincing case that Quebec civil law lost out because of the Law Lords and their local followers. For the dialogist, the role of the judge is to discover the "best established principles of justice". For the monologist, the judge's role is to "preserve the integrity of the civil law". In other words, the dialogist takes the view that the articles of the Civil Code are to be interpreted by taking into consideration all relevant authorities such as English, American and French cases on the subject. Thus, substance is of greater value in the dialogical camp than it is in the monological camp. The theory of "estoppel" is an appropriate example. Mignault was strongly against the use of "estoppel" for fear that the import of a common law concept into the civil law would have the effect "d'altérer la pureté de notre droit" (*Grace* v. *Perras* (1921) 62. S.C.R. 166 at 173). For the dialogical judge, what matters is the principle and not the form in which it is expressed.

Mr. Howes writes that:

> We are tempted to turn Jean-Louis Baudouin's observation around: a "droit récepteur" risks being colonized by a "droit étranger" only when it borrows from among the latter's techniques and methods of interpretation, not when it selects from among its substantive rules. (p. 85.)

There is nothing wrong in using a common law principle if it happens to be "better". That is to say that it permits justice to be done in a more equitable manner.

This brief summary of Mr. Howes' essay is just the tip of the iceberg. There is a lot more to discover in this book. Chapter XIV on The War Measures Acts, 1914 and 1927 is "must reading" for anyone interested in civil liberties in Canada. Murray Greenwood argues convincingly that The War Measures Act, 1914 was not intended to have any application after the first war. This "intention" came with the 1927 amendments. Writing

about these amendments, Mr. Greenwood says:

> I don't think I am exaggerating when I suggest that the 1927 revision provides further proof of my thesis that in Canadian history vigilance over security legislation has often been sadly lacking. (p. 306.)

I could go on and on with a summary of each chapter, but it would be preferable if those reading this review were to buy a copy of this book. They will not regret it. My only criticism, and it is a minor point, is that the footnotes are at the end of each chapter instead of being at the foot of every page. This is somewhat annoying, considering that most chapters have at least fifty notes and in some cases, over one hundred. In a nutshell, this is a book well worth reading for anyone interested in law, history or sociology or for that matter, in Canada.

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Annuaire canadien du droit international/The Canadian Yearbook of International Law, sous la direction de C.B. BOURNE, Volume XXVII, 1989, Vancouver, University of British Columbia Press, 1990, 533 pages, ISBN 0-7748-035-X, ISSN 0069-0058.

L'article introductif de l'*Annuaire*, sous la plume du professeur R. St-J. MacDonald, se veut un hommage à la remarquable carrière de Maxwell Cohen, avocat international, professeur, juge ad hoc à la Cour internationale de justice et ancien coprésident de la Commission mixte internationale.

Pionnier de l'enseignement du droit international au Québec et au Canada, le professeur Cohen a mené ses recherches dans un nombre étonnant de domaines, tels que les droits de la personne, le droit des espaces internationaux, les privilèges et immunités diplomatiques, le droit de l'environnement, le commerce international, et autres. L'article de R. St-J. MacDonald présente également un homme qui n'a pas eu peur de s'engager, de confronter la théorie à la pratique, que cela soit comme fonctionnaire de l'ONU, ou encore à titre de conseiller de gouvernements ou d'hommes politiques, pour ne pas dire directement engagé en politique. Possédant à la fois la théorie et la pratique, on ne peut dès lors se surprendre que le professeur Cohen ait été et demeure l'un des plus réputés et des plus crédibles internationalistes que le Canada ait produit.

Outre les chroniques habituelles sur le « droit international économique », « la pratique canadienne en matière de droit international public » et « la jurisprudence canadienne en matière de droit international », l'Annuaire 1988-1989 contient, *inter alia*, deux articles remarquables.

D'abord, deux juristes belges, Olivier Corten et Annémie Schaus proposent une réflexion sur « La responsabilité internationale des États-Unis pour les dommages causés par les précipitations acides sur le territoire canadien ». Les auteurs tentent de démontrer que les États-Unis violent le droit international en maintenant une attitude laxiste.

Dans une première partie, il est fait état que les États-Unis n'ont pris que des mesures limitées pour prévenir le dommage causé par les pluies acides. Soulignant que le dommage causé aux lacs, aux forêts, aux sols et aux bâtiments revêt un caractère substantiel, les auteurs précisent que le droit international ne requiert pas une preuve formelle de l'existence d'un lien de causalité entre les émissions et les dégats, mais bien une « certitude raisonnable » ou encore une « approximation sérieuse ». Ce lien de causalité étant établi, les auteurs affirment que les États-Unis n'ont pris que des mesures limitées pour lutter contre les pluies acides, et en fait, bien en deça des engagements de réduction des émissions variant entre 30% et 50% qui ont déjà été pris par plusieurs grands pays industrialisés.

Après avoir évoqué le comportement effectif des États-Unis, les auteurs tentent, dans une seconde partie, de déterminer le comportement requis par le droit internatio-