CRIMINAL JUSTICE: C.I.A.J. PAPERS 1981. By Her Honour Sandra Oxner, ed. Carswell, 1982. Pp. vii, 282. ($42.50)

This is neither a textbook, nor a collection of readings based upon a common theme. Rather it is a record of the 1981 annual conference of the Canadian Institute for the Administration of Justice dealing with criminal justice.[1] The contents thus range across the spectrum from political speech-making to academic research papers. Nor does the volume include the entire spectrum of papers presented at the conference. Rather it is a selection of them.

The first chapter, by S. Cohen,[2] is one of the better segments of the book and is in keeping with the high quality of Professor Cohen's work as reflected by his earlier books.[3] It covers the investigative role of the police; specifically, the ability to question citizens, the power to arrest and detain, and the power to search.

Professor Cohen first analyzes and levels appropriate criticisms at the Supreme Court of Canada decision in *Moore v. The Queen*.[4] The author then examines arrest and detention and, specifically, the case of *R. v. Biron*,[5] which broadened a police officer's power to arrest, a power that had historically been quite restrained; and *R. v. Dedman*,[6] the Ontario "spot check" case. I have discussed this latter case previously[7] and Professor Cohen joins me in questioning how "voluntary" the stop is in that case, the question upon which the entire judgment turned. Professor Cohen makes the important point that: "there seems to be a somewhat alarming tendency in our courts to characterize citizen compliance with police demands as voluntary behaviour".[8]

In dealing with the power to search, Professor Cohen analyzes the Manitoba Court of Appeal decision in *R. v. Dass*,[9] concerning the legality of surreptitious entry made in order to plant electronic surveillance devices. The Court held against such a power, contrary, for example, to the United States Supreme Court decision in *Dalia v. U.S.*[10] *Dass* will

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[1] The Canadian Institute for the Administration of Justice is a non-profit federal corporation founded in 1974 to foster improvements in the administration of justice throughout Canada. Its concerns embrace all aspects of the administration of justice. The Institute sponsors and carries out research and educational programs related to aspects of the administration of justice. Its 1981 conference was held in Halifax on 28, 29 and 30 Oct. At that time over 270 academics, judges, lawyers, police officers, correctional personnel and other citizens met to discuss the issues raised.

[2] Cohen, "Investigation of Offences and Police Powers" at 1.

[3] S. COHEN, DUE PROCESS OF LAW: THE CANADIAN SYSTEM OF CRIMINAL JUSTICE (1977); INVASION OF PRIVACY: POLICE AND ELECTRONIC SURVEILLANCE IN CANADA (1983).

[4] [1979] 1 S.C.R. 195, 5 C.R. (3d) 289 (1978). For an up-date on this case, *see* Gold, *Comment*, 24 CRIM. L.Q. 412 (1982).

[5] [1976] 1 S.C.R. 195, 23 C.C.C. (2d) 513.

[6] 32 O.R. (2d) 641, 59 C.C.C. (2d) 97 (C.A. 1981).

[7] Gold, *Comment*, 24 CRIM. L.Q. 45 (1983).

[8] Cohen, *supra* note 2, at 14.

[9] 47 C.C.C. (2d) 194, [1979] 4 W.W.R. 97.

[10] 441 U.S. 238 (1979).

ultimately be decided by the Supreme Court of Canada. Cohen also considers *Colet v. The Queen*,[11] a case dealing with search and seizure in which the Supreme Court of Canada rejected the doctrine of implied authority. It held that the right to seize firearms under subsection 105(1) of the Criminal Code[12] did not imply a correlative right to enter premises and search for the items to be seized. In summary, Cohen's section is an excellent review and analysis of these recent and important decisions.

The second section, by The Honourable Chief Justice G.T. Evans[13] of the High Court of Ontario, entitled "Pre-Trial Procedures, Conferences and Disclosures", summarizes the present Ontario practice in that regard, thus constituting a useful reference. It includes the relevant forms that are used prior to Supreme Court trials, a description of the pre-trial conferences before a judge, and the appendices include the Attorney-General's disclosure guidelines and relevant forms, and the American Federal Rules of Criminal Procedure dealing with discovery and inspection.

The next three articles deal with the subject of the prosecutorial discretion.[14] Between them, all aspects of the office of prosecutor and its powers are covered. The articles have detailed and lengthy footnotes providing references to all of the relevant caselaw and statutory provisions. Less satisfying is the short two page note of the speech by William J. McCarroll,[15] President of the National Crown Prosecutors Association, on the prosecutor's duty of fairness. The brief excerpts, reprinted from the longer paper delivered in Halifax, indicate that Mr. McCarroll's speech, with references to his personal experience, was probably most interesting. It might be that the editor felt that reprinting the speech in full would detract from the academic nature of *Criminal Justice* as a whole. If so, the compromise is far from satisfying, and fails to do justice to Mr. McCarroll's paper.

In the next section Morris Manning deals with the role of defence counsel.[16] Although Mr. Manning replows familiar ground with his references to the ethics of defence counsel, he does it very well and I found this section to be one of the more enjoyable in the book.

The next two sections[17] again represent abbreviated forms of papers delivered at Halifax and are likewise unsatisfying.

Following these two sections, E.A. Tollefson, Q.C., summarizes the provisions of the new Uniform Evidence Act.[18] Again, this section will be of great use to interested readers. However, it should be noted

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[11] [1981] 1 S.C.R. 2, 57 C.C.C. (2d) 105.

[12] R.S.C. 1979, c. C-34.

[13] P. 23.

[14] His Honour Chief Judge L. Goulet, "Prosecutorial Discretion", at 45; W. MacKay, "The Influence of the Prosecutor: Plea Bargaining, Stay of Proceedings, Controlling the Process", at 69; K. Chasse, "The Role of the Prosecutor", at 79.

[15] W. McCarroll, "The Prosecutor's Duty of Fairness", at 101.

[16] M. Manning, "The Role of Defence Counsel: The Changing Face of Practice at the Criminal Bar", at 103.

[17] B. Bailey, "Use of the Non-Jury Forum", at 141; His Honour Mr. Justice M. Jones, "Use of the Jury Trial", at 147.

[18] E. Tollefson, "The New Uniform Evidence Act", at 151.

that some of the comments are applicable to an earlier draft and not to the legislation in its ultimate bill form, Bill S-33.[19]

The next section,[20] "The Law of Sentencing — Some Unresolved Legal Issues" by D.A. Thomas, covers important issues such as what facts a sentencer may take into consideration, and the procedure to be followed for the determination of facts going to sentence. This section must now be read subject to the Supreme Court of Canada decision in *R. v. Gardiner*.[21]

D.A. Thomas' paper is commented upon in the next section by Crown Counsel Brian D. Williston.[22] Mr. Williston deals at length with the case of *R. v. Roud*[23] showing the type of evidence that may be tendered by the Crown on sentencing. He also examines the question of burden of proof. Again, these comments must be read subject to the *Gardiner* decision. Clayton Ruby[24] of Toronto then provides another commentary on the same section in which he essentially reviews the authorities dealing with the issue of burden of proof on the Crown on sentencing. Mr. Ruby was defence counsel in *Gardiner* and this section appears to be a review of the authorities argued by him in the Supreme Court of Canada in that case.

His Honour Judge Carver's[25] section, "Alternative Sentences", outlines in an interesting fashion community service orders in Judge Carver's jurisdiction, complete with precedents and relevant documents. Lord Hunter,[26] a member of the High Court Judiciary of Scotland, and former chairman of the Scottish Law Reform Commission, then comments[27] on the question of alternative sentences. Again, unfortunately, only very brief excerpts from his paper delivered in Halifax are reproduced and cover merely one page of text.

The next two sections[28] deal with comments on correctional techniques and juvenile process, the latter section in French by Professor Gisele Côté-Harper. This is one of the longest and meatiest parts of the entire book. It is unfortunate that those who do not read French will not have the benefit of this article. It is followed by a much shorter English version which is a mere summary.

Arguably the best is left to the last in this book. The final section by His Honour Judge P.J.T. O'Hearn,[29] entitled "The Development of

[19] Bill S-33, 32nd Parl., 1st sess., 1981-82-83.

[20] D. Thomas, "The Law of Sentencing — Some Unresolved Legal Issues", at 165.

[21] [1982] 2 S.C.R. 368, 140 D.L.R. (3d) 612.

[22] B. Williston, "Commentary: Unresolved Issues in Sentencing", at 175.

[23] 21 C.R. (3d) 97, 58 C.C.C. (2d) 226 (Ont. C.A. 1981).

[24] C. Ruby, "Commentary: Unresolved Issues in Sentencing", at 181.

[25] His Honour Judge H. Carver, "Alternative Sentences", at 185.

[26] Lord Hunter, "Alternative Sentences: Comments by a Scottish Observer", at 211.

[27] I. Macneill, "Some Comments on Correctional Techniques", at 213.

[28] G. Côté-Harper, "Le processus penal juvenile: Son evolution et ses perspectives d'avenir", at 219; "The Legal Process for Young Offenders: Its Evolution and Future Prospects", at 247.

[29] His Honour Judge P. O'Hearn, "The Development of the Concept of *Mens Rea*", at 257. There is a chapter before this by The Honourable R. McMurtry, "Future Directions in the Criminal Justice System", at 251.

the Concept of *Mens Rea*", is one of the most useful sections. His Honour covers the principles of criminal responsibility and the capacity to commit crimes. He also deals with volitional incapacity, including provocation, necessity, duress and irresistible impulse. The decision in *R. v. Rabey*,[30] both in the Ontario Court of Appeal and the Supreme Court of Canada, are covered at length in the context of automatism and non-volitional behaviour.

In general, this volume, like its contributors, covers a wide range. Some sections will obviously be of more interest to certain readers than others, but in a real sense it offers something for everyone concerned with the administration of justice in this country.

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DISCRIMINATION AND THE LAW IN CANADA. By Walter S. Tarnopolsky. DeBoo, 1982. Pp. vii, 595. ($65.00)

In October 1900 Mr. T. Homma, a naturalized Canadian, applied to be placed upon the register of voters for the electoral district of Vancouver City. The Collector of Voters refused to do so, relying on section 8 of the Provincial Elections Act, which provided:

> No Chinaman, Japanese or Indian shall have his name placed on the Register of Voters of any Electoral District, or be entitled to vote at any election.[1]

Mr. Homma was a naturalized Canadian of Japanese origin; and the definition of "Japanese" in the Act included "any person of Japanese race, naturalized or not".[2] In *Cunningham and Attorney-General for British Columbia v. Homma and Attorney-General for Canada*,[3] the Privy Council decided that the legislation was *intra vires* the provincial legislature. Japanese, Chinese and East Indian Canadians did not gain the provincial federal vote in British Columbia until 1947-48.

In May 1912, Mr. Quong-Wing, the owner of the "CER Restaurant" in Moose Jaw, Saskatchewan, was convicted of having employed Mabel Hopham and Nellie Lane as waitresses. Mr. Wing was a Chinese Canadian, and Ms. Hopham and Ms. Lane were white Canadians. Section 1 of An Act to Amend An Act to Prevent the Employment of Female Labour in Certain Capacities provided:

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[30] [1980] 2 S.C.R. 513, 54 C.C.C. (2d) 1, *aff'g* 17 O.R. (2d) 1, 79 D.L.R. (3d) 144 (C.A. 1977).

* Of the Bar of Ontario.

[1] R.S.B.C. 1897, c. 67.
[2] R.S.B.C. 1897, c. 67, s. 3.
[3] [1903] A.C. 151 (P.C. 1902).