

BOOK REVIEWS

LE DROIT PRIVÉ AU CANADA, T. I: INTRODUCTION GÉNÉRALE/PRIVATE LAW IN CANADA, VOL. I: GENERAL INTRODUCTION. Centre canadien de Droit comparé/Canadian & Foreign Law Research Centre. J. A. Clarence Smith & J. Kerby. Editions de l'Université d'Ottawa/University of Ottawa Press. 1975. Pp. xxvii, 459. \$12.00.

The publication of this work is of considerable interest for a number of reasons. It is the first volume in a projected series of eight volumes which, it is announced,¹ will deal with the whole scheme of private law in Canada. This new series is, secondly, conceived as an essentially comparative law study since the intention of the authors is to "bring the two systems [Canadian common law and Canadian civil law] face to face point by point"² within a unified topical arrangement. Thirdly, this volume, and presumably therefore the whole series as well, is bilingual with the French and English texts vis-à-vis.

In the scope, spirit and style of presentation of this new series, the Canadian and Foreign Law Research Centre of the Faculty of Law of the University of Ottawa has thus embarked upon an exciting and ambitious project, which, when complete, will be a major contribution to Canadian legal literature and to the work of furthering the understanding of the two legal systems as they obtain in Canada by jurists of Canada's two language groups.

The manipulation of such a broad range of subjects in a logical presentation intended to demonstrate the similarities and differences of the two systems in their structural arrangement, and in an exposition of "the rules" or answers to the "problems" that any legal system must provide, will carry, as the authors candidly admit, a number of difficulties. There will necessarily be some departure from what might well be the orthodox treatment of material in a uni-systemic and unilingual text.³ The first volume however has successfully surmounted the imaginable difficulties. There is, on the whole, and saving the several observations made below, a happy degree of generalization blended with an exposition of detail. It will be important, in the further volumes of the series, that there be a similar attention paid to the jurisprudential and historical dimensions of each system in the light of which the individual rules or solutions of each find their context and explanation. If this approach is carried through in the whole series, it should prove to be one of the most stimulating and provocative available in English or French Canada today—and at a time when launching this type of series in many volumes, as such, does not appear to be very much in fashion.

¹ J. A. CLARENCE SMITH & J. KERBY, *PRIVATE LAW IN CANADA* ¶ 262 (1975).

² *Id.* ¶ 252.

³ *Cf.* Preface and ¶¶ 252-54.

This first volume prepared by Professor Clarence Smith and Dr. J. Kerby is, therefore, something of an event. Their book, an introduction to the private law in civil and common law Canada, endeavours to unite in its general plan a coverage of much "background" information necessary to an understanding of the configuration of each system in the special subject areas to which the succeeding volumes will be devoted. It is written in an easy, lively and often humorous style (although some of the humour is tucked away in the notes) and it is pleasant to handle (there is an extensive index in each language and tables of cases and legislation). Neither language text is overburdened with the equivalent language terms of the other legal system necessary to understand the comparison made. (This must represent a conscious editorial decision and is to be approved, although one might have wished, for example, that certain key terms such as *obligations*, the designation of a classic grouping of subject matters in the civil law system, had received some word of explanation in the English text⁴).

The authors have succeeded in many instances in summing up, in penetrating and thoughtful passages, the features—sometimes real and, sometimes, as they intimate, perceived—of each system. Their general presentation of the two systems in Canada, and the use of the very terms "civil law" and "common law";⁵ the summary of the historical development of the civil and common law⁶ and of the reception⁷ and continuing influence of French and English law today in Canada;⁸ their summary, on a comparative basis, of the court structures in common law and civil law in Canada;⁹ and their remarks on the "style of expression" in regard to legislative and judicial materials and the academic writing of each,—are all focal points, and memorable parts, of the book.

This first volume, the general introduction, is divided into four principal chapters. It treats of certain preliminary matters, such as the political framework and general features of the two systems; secondly, the "building" or evolution of the law of each system, analyzed from the point of view of the legal dispute and the manner in which, in each system, it is procedurally processed; thirdly, the "building" or evolution of the courts; and, finally, the sources of law (legislation, judicial decisions, *doctrine* or "academic opinion") and their material organization in the collections of serial publications to be found in Canada. In respect of most topics, a survey of the Roman, continental French and English antecedents is made before examining the adaptation that has been carried out in respect of the Canadian civil and common law systems.

Because of this wide range of subject matter, and the historical approach which involves an analysis across centuries of time, this book repre-

⁴ *Cf.* ¶ 93.

⁵ *Id.* ¶¶ 12-20.

⁶ *Id.* ¶ 86.

⁷ *Id.* ¶¶ 99-110.

⁸ *Id.* ¶ 19.

⁹ *Id.* ¶ 212.

sents as considerable a challenge to the organizational skills of its authors as will any volume in the series. And while choice of emphasis in such a work is always, of course, a matter of individual preference and perspective, this reviewer has some reservations about that adopted here. This, the first volume, leaves something of the general impression that it is primarily rather more a history of judicial institutions than a *general* introduction to the private law systems in Canada. While the history of the Canadian courts is, indeed, very well presented and, to my knowledge, nowhere more extensively than here, some imbalance has been created in the work as a whole because of this emphasis placed upon the history of Canada's purely judicial institutions. The subject, traced first through the history of France and England and then in Canada, in each province, from the origins down to the present day, offers a luxury of detail (concentrating to a large extent upon the evolving jurisdiction of the courts at all levels of the court hierarchy) consuming some 140 pages. And yet within this framework, there is, regrettably, no consolidated attention given, for example, to the role of the Judicial Committee of the Privy Council, so important for such a long period of time in the development of Canadian private law; nor is there any special attention paid to the subjects of either the Canadian judiciary or the Canadian legal professions. Some portion of the very extensive material on the development of the jurisdiction of the courts might well have been abbreviated in order to round out, more fully, these other aspects of the overall juridical organization.

The expansive treatment given to "the building of the courts" or judicial system may well have curtailed, moreover, the scope of the fourth chapter devoted to the sources of law (legislation, judicial decisions and doctrinal writing), surely a crucially important portion of a general introduction to our private law systems. And here, in respect of Quebec civil law, a number of points might well have been developed in some greater detail with a view to underscoring the distinctive features of the Quebec system, generally a matter misunderstood by common lawyers. To take a single but important example, the evolution and place of the Civil Code is not given as full a treatment as would appear to be indicated in a comparative text. The treatment of the relationship between civilian codes and "statutory legislation" is in particular rather summary¹⁰ for what is, admittedly, a difficult topic, and the statement that "a simple statute may repeal any provision of a code, even by implication in the fact of being later"¹¹ is surely not accurate in view of the prolonged existence of section 10 of the Quebec *Interpretation Act* of 1868. This provision, unrepealed and unconsolidated, would seem to indicate an intention to prevent "implicit repeal" of a provision of the Civil Code by subsequent, but not express, statutory enactment. The existence of section 10 has, it is true, probably been largely forgotten and appears to have been judicially applied only once. Even though it may

¹⁰ *Id.* ¶¶ 213-14.

¹¹ *Id.* ¶ 213.

constitute something of an anomaly, it is, in the end, the best evidence that the Civil Code itself has over the years enjoyed a special place in the Quebec scheme of legislative materials which sets it apart from ordinarily enacted legislation. A discussion of the distinctive manner in which the Code (not being an ordinary statute) is to be interpreted would, in this respect, have been welcome. It must be added, further, that another statement¹² in the same connection, requires a further precision in respect of Quebec. Every statute in force at the time of the compilation of Revised Statutes is *not* necessarily included therein; the whole of the legislative scheme relating to the abolition of the seigneurial system is all "living law" which has not been brought forward into the Quebec 1964 Revised Statutes.

The initiative in Canadian legal scholarship which the publication of this first volume demonstrates is a significant one. The authors are to be congratulated for breaking new ground in a country where such comparative legal scholarship must, surely, in the years to come, have an increasingly important role to play not only in the general academic training of law students but in the actual practice of Canadian law and the reform of law in Canada. It is important progress to be able to place in the hands of future generations of students a series of texts which will open the perspectives which comparative studies really do offer. We look forward with not a little eagerness to the subsequent volumes promised.

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A COMMENTARY ON THE FOREIGN INVESTMENT REVIEW ACT. By Graeme C. Hughes. Toronto: Carswell Company Limited. 1975. Pp. vii, 214. \$22.50.

Graeme C. Hughes is a Barrister-at-Law of the Supreme Court of New South Wales and the Director, Legislation, Taxation and Technical, of the Canadian Manufacturer's Association. The Commentary on the Foreign Investment Review Act was published soon after the second part of that Act¹ (governing the establishment of new businesses by foreigners in Canada) had been proclaimed. There appears to have been little time available between proclamation (October 15, 1975) and the date of publication, with the result that only half a dozen pages² are devoted to analysing the impact of the Act on new businesses. They include a mere three pages on the ministerial guidelines which define a *related* business. No doubt any future edition will

¹² *Id.* ¶ 226 and somewhat qualified in ¶ 231.

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¹ Foreign Investment Review Act, Can. Stat. 1973 c. 46.

² G. HUGHES, A COMMENTARY ON THE FOREIGN INVESTMENT REVIEW ACT 50-52C (1975).