



Osgoode Hall Law Journal

Volume 23, Number 4 (Winter 1985)

Article 6

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Leon E. Trakman

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Citation Information

Trakman, Leon E.. "Contract and Commercial Law Scholarship in Common Law Canada." *Osgoode Hall Law Journal* 23.4 (1985) :
663-680.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol23/iss4/6>

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Abstract

Professor Trakman characterizes contract and commercial law scholarship in Canada as a young discipline, which has so far focused on descriptive analysis rather than prescriptive synthesis. As the area matures, preoccupations will move naturally to include prescription as well as description, scholars will come to recognize the integration of contract and commercial law with outside values; and the scholarship will accept its potential role in necessary substantive and procedural law reform.

CONTRACT AND COMMERCIAL LAW SCHOLARSHIP IN COMMON LAW CANADA

BY LEON E. TRAKMAN*

Professor Trakman characterizes contract and commercial law scholarship in Canada as a young discipline, which has so far focused on descriptive analysis rather than prescriptive synthesis. As the area matures, preoccupations will move naturally to include prescription as well as description; scholars will come to recognize the integration of contract and commercial law with outside values; and the scholarship will accept its potential role in necessary substantive and procedural law reform.

I. INTRODUCTION

Commercial-contract law scholarship in common law Canada is hybrid in nature. It embodies traditional legal formalism but nevertheless is subject to the growing influence of pragmatism. It is also hybrid in the separation between scholars of the analytical legal positivist school and those who turn to functional and socio-legal studies.

This essay evaluates the philosophical and functional characteristics of contract and commercial law scholarship in Canada. In doing so, the inference is *not* that any one approach towards thinking and writing about contract or commercial law is necessarily counterproductive, harmful to society, or otherwise lacking in intellectual rigour. Duality, indeed plurality, is the lifeblood of scholarship in contract-commercial law. The issue is how have academic roles been played out in Canadian scholarship to date and, prospectively, how might they be played out in the future.

II. MATERIALS

Any first year law student can identify the key text sources in contracts in common law Canada. First, there are those English texts, Cheshire & Fifoot and Treitel, which are regularly referred to in the classroom.¹

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* Professor of Law, Dalhousie Law School. The author thanks Vaughan Black for his comments on drafts of this paper.

¹ A. Guest, ed., *Anson's Law of Contract*, 25th (centenary) ed. (1979); M. Furnston, ed., *Cheshire and Fifoot's Law of Contract*, 10th ed. (1981); A.G. Guest, ed., *Chitty on Contracts*, 25th ed. (1983); G. Treitel, *The Law of Contract*, 6th ed. (1983); P. Atiyah, *An Introduction to the Law of Contract*, 3d ed. (1981); F. Davies, *Contract*, 4th ed. (1981); R. Clark, *Contract* (1982); J.C. Smith & J.A.C. Thomas, *A Casebook on Contract*, 7th ed. (1982).

Then, for those with homegrown commitments, there is Fridman or Waddams;² and for the adventurous, the list of American text and casebook sources are endless.³ Also included are useful essays such as those edited by Reiter & Swan and a variety of law review pieces and law reform studies, spanning decades of thinking.⁴ Contract casebooks also have proliferated in recent years: Milner (edited by Stephen Waddams),⁵ Boyle & Percy,⁶ Swan & Reiter,⁷ and such unpublished works as Read & Foote,⁸ to name a few. Added to this collection are commercial law casebooks, including in particular Zeigel & Geva⁹ and Bridge & Buckley.¹⁰ Each casebook in contracts or commercial law competes for popular approval in the classroom, with publishers like Carswells, Butterworths, and Canada Law Book busily promoting their own productions.¹¹

Regarding periodicals, Canadian contract and commercial law scholars are publishing in far greater number and far more extensively

² G.H.L. Fridman, *Sales of Goods in Canada*, 2d ed. (1979); S.M. Waddams, *The Law of Contracts*, 2d ed. (1984); J. Côté, *An Introduction to the Law of Contract* (1974); D.H. Clark, *Law of Contracts* (1975).

³ See, for example, E.J. Murphy & R.E. Speidel, *Studies in Contract Law* (1970); R. Hamilton et al., *Cases and Materials on Contracts* (1984); A. Mueller et al., *Contract Law and Its Application*, 3d ed. (1983); J.E. Murray, *Cases and Materials on Contracts*, 3d ed. (1983); J. Dawson, *Cases and Comments on Contracts* (1982); D. Kessler, *Contracts, Morality, Economics and the Marketplace: Cases and Materials* (1982); L.L. Fuller & M.A. Eisenberg, *Basic Contract Law* (1981); E.A. Farnsworth & W.F. Young, *Cases and Materials on Contracts*, 3d ed. (1980); J.H. Jackson, *Contract Law in Modern Society: Cases and Materials*, 2d ed. (1980); I.R. MacNeil, *Cases and Materials on Contracts: Exchange Transactions and Relations: Cases & Materials* (1978). See too E.A. Farnsworth, *Contracts* (1982); J.D. Calamari & J.M. Perillo, *The Law of Contracts*, 2d ed. (1977).

⁴ B.J. Reiter and J. Swan. Also included in the literature are Law Reform Commission reports. See, for instance, S.M. Waddams, "Law Reform Commission of British Columbia, Illegal Contracts, Working Paper No. 38, 1982" (1983) 7 Can. Bus. L.J. 361; Law Reform Commission of British Columbia, *Report on the Need for Frustrated Contracts Legislation in British Columbia* (1971); Law Reform Commission of British Columbia, *Report on the Statute of Frauds* (1977); Ontario Law Reform Commission, *Report on the Sale of Goods* (J.S. Ziegel) (1979); Law Society of Upper Canada Special Lectures, *Law in Transition: Contracts* (1984); G.J. Hayek, "Recent Developments in the Law of Contract" (1984) 15 Ottawa L.R. 599; J. Swan & B.J. Reiter, "Developments in Contract Law: the 1981-82 Term" [1983] 5 Supreme Court L. Rev. 139. Especially notable are the published workshops: J.S. Ziegel, ed., *Commercial and Consumer, Including Contract Law* (1978, 1979, 1980, 1981, 1982, 1983).

⁵ S.M. Waddams, *Milner's Cases and Materials on Contracts*, 3d ed. (1977).

⁶ C. Boyle & D. Percy, *Contracts: Cases and Commentaries*, 2d ed. (1981).

⁷ J. Swan & B.J. Reiter, *Contracts: Cases, Notes & Materials*, 2d ed. (1982).

⁸ H.E. Read & A.L. Foote, *Cases and Other Materials on the Common Law of Contracts in Canada* (1970).

⁹ J.S. Ziegel & B. Geva, *Commercial and Consumer Transactions: Cases, Text and Materials* (1981).

¹⁰ M.G. Bridge & F.H. Buckley, *Sales and Sales Financing in Canada: Cases and Materials* (1981).

¹¹ The mails are especially active with advance publication information describing the books concerned, in particular, the eminence of the author, the novelty of the approach, the low student price and, usually, the availability of free or discounted copies to teachers in the subject. See, *supra*, notes 2, 9 and 10 for the names of publishers of contracts and commercial law texts.

than they did ten years ago, as a glance at the most recent issues of the Canadian Bar Review indicates.¹² Canadian scholars are also publishing to a far greater extent in English law journals such as the *Modern Law Review*,¹³ as well as in American periodicals including the *Journal of Legal Studies*, the *Villanova Law Review*, and the *Minnesota Law Review*.¹⁴

If establishing respectability in Canadian academic circles means publishing more in and outside of Canada, progress is undoubtedly being made. If establishing scholarship of a distinctively 'Canadian' legal flavour is in issue, the record is perhaps less rosy. If the more recent reports of the Law Reform Commission of Ontario¹⁵ are given legislative force, however, Canadian lawyers will inherit a hybrid English-Australasian-American blend of thought upon which to build an indigenous Canadian system.

It is unrealistic for the most part to expect scholars to write distinctive Canadian commentaries upon laws which are themselves not distinctively 'Canadian'. A borrowed legal tradition inevitably begets borrowed academic thought. Breaking with past tradition to develop a distinctive Canadian approach to the law is a combined responsibility of *all* sectors of the legal profession; it is not one peculiarly limited to academics. Law reformers and academic commentators need to appreciate the economic, political, and cultural features of Canadian society if they are to develop and comment upon laws in response to the social values and interests reflected in those laws.¹⁶

¹² See, for instance, M.G. Bridge, "Contractual Damages for Intangible Loss: A Comparative Analysis" (1984) 62 Can. B. Rev. 323; P.P.C. Haanappel, "Contract Law Reform in Quebec" (1982) 60 Can. B. Rev. 393; L.E. Trakman, "Interpreting Contracts: A Common Law Dilemma" (1981) 59 Can. B. Rev. 241.

¹³ See, for instance, R. Hasson, "The Special Nature of the Insurance Contract: A Comparison of the American and English Law of Insurance" (1984) 47 Mod. L. Rev. 505; L.E. Trakman, "Frustrated Contracts and Legal Fictions" (1983) 46 Mod. L. Rev. 39.

¹⁴ See, for instance, D.N. Dewees, R.S. Prichard & M.J. Trebilcock, "An Economic Analysis of Cost and Fee Rules for Class Actions" (1981) 10 J. Leg. Stud. 155; B.J. Reiter, "Good Faith in Contracts (Canada)" (1983) 17 Val. U.L. Rev. 705; L.E. Trakman, "Winner Take Some: Loss Sharing and Commercial Impracticability" (1985) 69 Minn. L. Rev. 471.

¹⁵ Ontario Law Reform Commission, *supra*, note 4. The report encompasses, *inter alia*, discussion of the "Evolution of the Modern Sales Contract"; "The Need for and Scope of a Revised Sale of Goods Act"; "The Transfer of Property (Title) in Goods"; and "Seller's and Buyer's Remedies". See too R.L. Simmonds, Book Review (1980) 58 Can. B. Rev. 421. Cf. Ontario Law Reform Commission, *Report on Consumer Warranties and Guarantees in the Sale of Goods* (1972).

¹⁶ American writers on contracts and commercial law have been far more active in evaluating the sociological roots and developments of contract and commercial law in relation to business. See, for example, H.C. Havighurst, *The Nature of Private Contract* (1961) at 67. L.M. Friedman, *Contract Law in America: A Social and Economic Case Study* (1965); S. Macaulay, "Non-contractual Relations in Business: A Preliminary Study" (1963) 28 Am. Soc. Rev. 55; S. Macaulay, "The Use and Non-use of Contracts in the Manufacturing Industry" (1963) 9:5 Prac. Law 13. See too H. Beale & T. Dugdale, "Contracts Between Businessmen: Planning and the Use of Contractual Remedies" (1975) 2 Brit. J. Law & Soc. 45.

Nevertheless, Canadian scholarship in contracts and commercial law cannot be based on unrealistic expectations. To compare Canadian scholarship directly with American scholarly activities, for instance, is inappropriate. Principles of American contract and commercial law have had a far longer period of time in which to acquire independence from their English law roots, a situation not experienced to the same extent in Canada. This independence of American law is further reinforced by a political-commercial system of considerable more complexity and a cadre of law schools ten times as numerous as prevails in Canada. Realism in recognizing what can be accomplished in the future should not descend into hopeless despondency here, nor into a pervasive fear that achievements in academia will be dwarfed by more extensive and sophisticated writings elsewhere.¹⁷

III. TRADITIONS IN CONFLICT

Developments in Canadian contract law have closely followed English legal precedents in several regards. As textbooks and articles indicate, much more discussion is devoted to case law than to legislation; and appellate decisions are highlighted rather than trial determinations. The topics dealt with by scholars often reflect developments in English more than Canadian law. In particular, Canadian common law scholars expend considerable energy dealing with the most recent English cases on fundamental breach, economic duress, *non est factum*, and damages, among other topics.¹⁸ Canadian scholars also criticize judicial decision in England and Canada primarily along analytically positivist lines on the grounds, *inter alia*, that the court's reasoning is suspect, inconclusive, troubling, or not in compliance with prior law. For example, in relation to fundamental breach, discussion may be devoted to evaluating whether fundamental breach is now a matter of construction, whether *Photo Productions*¹⁹ represents a resurgence of *Suisse Atlantique*,²⁰ and what significance should be attributed to these developments as a matter of law in the United Kingdom and common law Canada.²¹ Far less discussion

¹⁷ Conceivably, the very strength of the community of Canadian legal scholars lies in its youthfulness, in the absence of narrowly confined expectations based upon past assessments and indictments.

¹⁸ See, for example, Schwartz, Comment (1985) 34 U.N.B.L.J. 92; M. Hathlerly, Case Comment (1984) 33 U.N.B.L.J. 363; R.S. Nozick, Comment (1982) 60 Can. B. Rev. 345; G. England and N. Rafferty, "Contractual Variations: Consideration and Duress" (1980) 18 Osgoode Hall L.J. 627.

¹⁹ *Photo Production Ltd. v. Securicor Transport Ltd.*, [1980] A.C. 827 (H.L.).

²⁰ *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale*, [1967] 1 A.C. 361 (H.L.).

²¹ See, for example, S.M. Waddams, *supra*, note 2 at 349-61.

is devoted to such interdisciplinary questions as the type of social and economic conditions in which fundamental breach should be determinative and the nature of transactions and parties to which it should apply.

The fact that Canadian scholars have given less attention in contracts to case law in Canada than to English law decisions reflects a continuing reluctance of the Canadian legal community to attribute as much credibility to Canadian judges as to their English brethren. Conversely, American judicial decisions have achieved a high level of credibility within the American legal community, despite similarly early tendencies to highlight English case law in their legal writings. Perhaps the explanation for the difference lies not only in variations of size and stages of legal development between Canada and its southern neighbour, but in the continued lack of revolutionary fervour and ethnocentric values in Canadian common law and society.²²

Nevertheless, Canadian legal academics increasingly have recognized a growing economic interdependence with the United States and an increasing virtue of evaluating commercial law developments along American lines. This interest of Canadian scholars in American commercial law, far less evident within the Canadian judiciary, is most noticeable in the academic involvement in such seminal documents as the *Report on the Sale of Goods*,²³ in writings on the reliance and expectancy interest,²⁴ and 'unconscionability',²⁵ and in the influence of 'law and

²² American legal scholars often view their 'independence' in law as 'A Revolt Against Formalism'. (See M.G. White, *Social Thought in America: The Revolt Against Formalism* (1959).) This revolt had much to do with the pragmatist-functionalist movements that arose in the first half of this century. Spurred on by anti-formalist figures like William James and John Dewey, pragmatism captured the minds of key jurists. Oliver Wendell Holmes stressed that the life of law lay not only in logic but also in experience. O.W. Holmes, "The Path of the Law" (1897) 10 Harv. L. Rev. 457. Karl Llewellyn emphasized the need for law to constantly adapt in response to social forces. Functionalism lay at the centre of this realist movement. See K.N. Llewellyn, "Some Realism About Realism: Responding to Dean Pound" (1931) 44 Harv. L. Rev. 1222; K.N. Llewellyn, "On Reading and Using the Newer Jurisprudence" (1940) 40 Colum. L. Rev. 581; W.L. Twining, *Karl Llewellyn and the Realist Movement* (1973).

²³ *Supra*, note 4.

²⁴ See for instance, B.J. Reiter & J. Swan, "Contracts and the Protection of Reasonable Expectations" in B.J. Reiter & J. Swan, eds., *Studies in Contract Law* (1980) 1. (The writings of Karl Llewellyn as 'realist' are mentioned on p. 2; Grant Gilmore's *Death of Contract* (1974) is identified on p. 5, while Fuller is recognized on pp. 5 and 7.) Lest I be viewed as commenting from 'on high', my book, *The Law Merchant: the Evolution of Commercial Law* (1983), reviewed in C. Williams, Book Review (1984) 97 Harv. L. Rev. 1495 was similarly criticized as a spiritual embodiment of post-realism à la Karl Llewellyn.

²⁵ See especially, M.J. Trebilcock, "An Economic Approach to the Doctrine of Unconscionability" in Reiter and Swan, eds., *ibid.* S.M. Waddams, "Unconscionability in Contracts" (1976) 39 Mod. L. Rev. 369; R.J. Sutton, "Duress by Threatened Breach of Contract" (1974) 20 McGill L.J. 554. See too A.A. Leff, "Unconscionability and the Code — The Emperor's New Clause" (1967) 115 U. Pa. L. Rev. (N.S.) 485; W.H.D. Winder, "The Equitable Doctrine of Pressure" (1966) 82 L.Q. Rev. 165; W.R. Cornish, "Economic Duress" (1966) 29 Mod. L. Rev. 428; J.P. Dawson, "Economic Duress — An Essay in Perspective" (1947) 45 Mich. L. Rev. 253; J. Dalzell, "Duress by Economic Pressure" (1942) 20 North Car. L. Rev. 237; R.L. Hale, "Bargaining, Duress, and Economic Liberty" (1943) 43 Colum. L. Rev. 603.

economics' thinking on Canadian scholarship particularly at the University of Toronto.²⁶

Even though Canadian *law* is so clearly borrowed, analytical positivism embodied in most Canadian writings on contracts and commercial law *does* offer its own particular strengths.²⁷ Clearly evident in the books by Fridman, Waddams, Zeigel and Geva, and Bridge and Buckley, and indeed within most Canadian texts and casebooks is a vital cohesion and structure in the formulation of law and an analytic evaluation of the manner in which legal rules resolve identifiable contract or business law problems.²⁸ Discussions on contracts and commercial law are usually devoted to the classification of law into doctrinal categories: for instance, what are the constituent elements of promise; when is an offer distinguishable from an invitation to treat; and what are the salient characteristics of consideration as a doctrine of law.²⁹ Writings on commercial law are similarly directed to establishing the nature of a warranty in a contract of sale, and the distinction between an express and an implied warranty of fitness or merchantability, among other concerns.³⁰

These are valuable discussions. Commentators who describe positive rules of contract law in textbooks present a statement of the law both as it is perceived and as a critical evaluation of its intrinsic character; their striving for certainty and predictability is a very necessary function in the understanding of law. Predictability is fundamental to commercial law progress: the public should be entitled to conduct their activities on the basis of pre-existing laws rather than upon an unclear legal mandate.

Structural cohesion is also important to establish the boundaries between contract and tort, and the limits, for example, of privity of contract, valuable consideration, *non est factum*, fundamental breach and mistake.³¹ Similarly, by reflecting upon the legal characteristics of a letter of credit, a bill of lading, or a document of affreightment, the academic can provide

²⁶ See for instance, V.A. Aivazian, M.J. Trebilcock & M. Penny, "The Law of Contract Modifications: The Uncertain Quest for a Bench Mark of Enforceability" (1984) 22 Osgoode Hall L.J. 173; M.J. Trebilcock *supra*, note 25, 379.

²⁷ On the jurisprudential evolution of analytical positivism, particularly in English common law, see especially: J. Bentham, *Of Laws in General* ed. by H.L.A. Hart (1970); J. Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* ed. by H.L.A. Hart (1954); H.L.A. Hart, "Definitional and Theory in Jurisprudence" (1954) 70 Law Q. Rev. 37; R. Summers, *The New Analytical Jurists* (1966). See too, H. Kelsen, *The Pure Theory of Law* (1935); H. Kelsen, *General Theory of Law and State* (1946).

²⁸ See *supra*, notes 2-10.

²⁹ See *supra*, note 2.

³⁰ See *supra*, notes 9-10.

³¹ See *ibid.*

an analytical structure needed for a meaningful evaluation of commercial law.³²

This prevailing preoccupation of scholars with analytical cohesion and structural symmetry does not mean that Canadian academics are 'narrow' or ill-attuned to social-business controversies that surround contract law doctrine, or that their legal analyses are inadequate, unduly simplified, or second-best. Discussions in Canadian law journals on the overlap between contract and tort, for instance, are extensive and argumentative; and they raise such pertinent issues as liability for economic loss. Some, like Michael Bridge's "Overlap of Tort and Contract" are useful in their comparative flavour;³³ others reflect in thoughtful detail the fate of 'contorts' in the wake of *Junior Books Ltd. v. Veitchi & Co. Ltd.*³⁴ Canadian scholars are also willing to embark upon highly contentious issues in contract law such as the role of punitive as distinct from compensatory damages and the virtue of a 'good faith' doctrine, despite the difficulty of defining 'good faith' itself.³⁵ Canadian writers certainly have *not* been deterred from such studies by the unwillingness and inability of their American counterparts to give meaningful content to similar notions of 'good faith' or to concepts like 'punitive damages' in American commercial affairs.³⁶ Canadian commercial law scholarship to date is limited in volume and, on occasions, in depth of analysis,

³² Typical of this preoccupation with classification is the 'contract-tort' debate in Canada. See, for example, J. Blom, "The Evolving Relationship Between Contract and Tort" (1985) 10 Can. Bus. L.J. 257; B. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss* (1984); J.M. Gautreau, "The Interrelationship of Contract and Tort" (1984) 5 Advocates Q. 51; R.W. Bradford, "Protection Against Intentional Breach of Contract Remedies in Tort" (1984) 45 Ala. Law. 320; D.K. Allen, Note (1983) 61 Can. Bus. Rev. 876; M.G. Bridge, "Overlap of Tort and Contract" (1981-82) 27 McGill L.J. 872; N. Rafferty, "Concurrent Liability in Contract and Tort: Recovery of Pure Economic Loss and the Effect of Contributory Negligence" (1982) 20 Alta. L. Rev. 357; C. Larroumet, "L'intervention de la responsabilité délictuelle dans le domaine de la responsabilité contractuelle en droit française à la lumière des expériences étrangères" (1981-82) 27 McGill L.J. à la p. 839; P.B. Annis, "Tort or Contract: The Question of Recovery for Economic Loss" (1981) 13 Ottawa L. Rev. 469. See too, A.S. Burrows, "Contract, Tort and Restitution - A Satisfactory Division or Not?" (1983) 99 Law Q. Rev. 217; W. Bishop, "The Contract — Tort Boundary and the Economics of Insurance" (1983) 12 J. Leg. Stud. 241; Note, "Tortious Interference with Contractual Relations in the Nineteenth Century: The Transformation of Property, Contract, and Tort" (1980) 93 Harv. L. Rev. 1510.

³³ Bridge, *ibid.*

³⁴ [1983] 1 A.C. 520. See *supra*, note 32. See too, J. Holyoak, "Tort and Contract After *Junior Books*" (1983) 99 Law Q. Rev. 591; B.L. Fine, "An Analysis of the Formation of Property Rights Underlying Tortious Interference with Contracts and Other Economic Relations" (1983) 50 U. Chi. L. Rev. 1116; C. French, "The Contract/Tort Dilemma" (1983) 5 Otago L. Rev. 236.

³⁵ See esp., M.G. Bridge, "Does Anglo-Canadian Contract Law Need a Doctrine of Good Faith?" (1984) 9 Can. Bus. L.J. 385. (See also comments by E.A. Farnsworth at 426 and M. Tancelin at 430, *ibid.*)

³⁶ See S.J. Burton, "Breach of Contract and the Common Law Duty to Perform in Good Faith" (1980) 94 Harv. L. Rev. 369; R.S. Summers, "'Good faith' in General Contract Law and the Sales Provisions of the Uniform Commercial Code" (1968) 54 Va. L. Rev. 195.

but the strides forward have nevertheless been significant in view of the youthfulness of the Canadian academic profession and the obstacles that are faced by an Anglo-Canadian legal system which is integrally coupled with an American style of legal education.³⁷

Despite their strengths, a distinct 'sociological gap' still remains in contract and commercial law writings in Canada. For instance, a discussion of the *doctrine* of consideration without reflecting upon what merchants or consumers regard as a 'valuable exchange' is purely theoretical, separate and apart from the reasonable expectations of those who must ultimately interact in terms of law. To evaluate fundamental breach as a 'doctrine' or in the alternative as a question of 'construction' is sometimes to by-pass evaluation of the relationship between law and morals, and the manner in which moral standards *should* be embodied in legal doctrine. While analytical positivists include a sociological perspective of business practice, that awareness is usually treated as peripheral.³⁸

Less evident in Canadian scholarship is discussion on how contract and commercial law impacts upon society, and how the operation of the legal order might be improved to advance the quality of Canadian life. For example, what role should legal rules play in relation to consumers and producers, when should they embody business practice, and how should legal institutions be constructed so as best to reflect these competing social interests? These questions are seldom addressed directly here. The Canadian scholar needs to synthesize, *inter alia*, what type of warranties of fitness and merchantability are *actually* employed in business, how consumers view such warranties in fact, and to what extent their views are shared by industry. Writers should evaluate the extent to which the law *ought to* regulate these conceivably different business institutions differently. Commercial law is not simply a *general* body of principles

³⁷ See L.E. Trakman, "Canadian Law Schools: In Search of Excellence" (1980-81) 6 Dal. L.J. 303.

³⁸ A notable exception to this criticism is the intensity with which Canadian legal scholars have evaluated consumer transactions. On social-moral controversies, it seems, Canadian scholars have displayed a deep-seated interest in balancing consumer and producer interests, and in advancing a morally tenable and effective mechanism for regulating the abuses suffered by consumers. See, for instance, E.P. Belobaba, "Unfair Trade Practices Legislation: Symbolism and Substance in Consumer Protection" (1977) 15 Osgoode Hall L.J. 327. S.M. Waddams, "Legislation and Contract Law" (1978-79) 17 U.W. Ont. L. Rev. 185. For a similar intense scrutiny of exclusion of liability clauses in the context of unconscionable transactions, see A.A. Leff, "Thomist Unconscionability" (1979-80) 4 Can. Bus. L.J. 424; R. Hasson, "Unconscionability in Contract Law and in the New Sales Act — Confessions of a Doubting Thomas" *ibid.* at 383. B.J. Reiter, "Unconscionability: Is there a Choice? A Reply to Professor Hasson" *ibid.* at 403.

based upon consistently applied notions of pure reason: it is a responsive system, a monitor of the interdisciplinary environment.³⁹

Similarly, legal scholars need to transcend their frequent preoccupation with restrictive categorization in law. Radically different consequences do *not* arise simply because 'mistakes' are classified as unilateral, mutual, or common. More salient is an appreciation of the social conditions in which mistakes arise, including the knowledge and ability of contracting parties to anticipate and avert mistakes.⁴⁰ The availability of an excuse from performance hinges upon more than a notion that the law of impossibility is doctrinally consistent with the principle of freedom of contract, or that a contract freely and voluntarily concluded should be binding in law. They also hinge upon whether the parties concerned could reasonably have anticipated the disruptive contingency in issue and the manner in and extent to which they could have avoided its harmful consequences. Logical consistency in the law of mistake or impossibility is therefore not a value in itself; it is a means towards a socio-legal end. Avoiding 'economic hardship' by excusing an obligation to perform stems from more than formal logic or judicial supposition as to the facts: the content of 'fairness' in avoiding economic hardship requires a foray into the commercial environment itself.⁴¹ A scholarly evaluation of business practice is necessary to identify dissimilarities between assumed and actual business practices, between short-term 'transactions' and long-term 'relations',⁴² and between contractors who rely upon good will and trust to resolve differences and those who place their faith in the formal authority of law. The fact that *different* practices exist in business affairs is the product of what contractors do, not what judges intuit that they ought to do.⁴³ Given advancing technology in matters of banking and insurance, negotiability and credit, the need for an ongoing study into the business-

³⁹ This proposition in favour of social science study in law is central to the Arthurs Report, somewhat more so than the controversial issue of 'hierarchy' set out in the distinction between 'academic' or 'intellectual' and 'professional' education in law. See, Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council, *Law and Learning* (Chair: H.W. Arthurs) (1983). L.E. Trakman, "Law and Learning. Report of the Consultative Group on Research and Education in Law, Social Sciences and Humanities Research Council of Canada" (1983) 21 Osgoode Hall L.J. 554.

⁴⁰ But see *Report on Sale of Goods*, *supra*, note 4. See also *supra*, note 18.

⁴¹ See further, L.E. Trakman, *supra*, note 14; R.E. Speidel, "Court-Imposed Price Adjustments Under Long-Term Supply Contracts" (1981) 76 Nw. U.L. Rev. 369; I.R. MacNeil, "Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law" (1978) 72 Nw. U.L. Rev. 854.

⁴² See esp. I.R. MacNeil, "Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a 'Rich Classificatory Apparatus'" (1981) 75 Nw. U.L. Rev. 1018; I.R. MacNeil, "Power, Contract, and the Economic Model" (1980) 14 J. Econ. Iss. 909.

⁴³ For an historical yet still profoundly valid commentary to this effect, see P. Devlin, *Samples of Lawmaking* (1962) ch. 2; C.H.S. Fifoot, *Lord Mansfield* (1936) ch. IV.

law interface grows ever more pressing. Given the stratification in knowledge, wealth, and power within Canadian society, *general* principles of contract law based upon a *unitary* theory of contracting must inevitably subserve to a *specific* law of contracts based upon a *plurality* of contract practices.⁴⁴

Scholarly observations about the functions of business laws can be broadened in many ways: through historical study by evaluating common law Canada's long-standing attachments to an arguably outmoded English *Sale of Goods Act*;⁴⁵ through comparative analysis of the functional problems encountered in construing the pragmatic American Uniform Commercial Code;⁴⁶ and by reflecting upon the conceptual role which the Quebec law of obligations may properly play in relation to contracts in common law Canada.⁴⁷

Equally important are ethnographic and demographic studies. Given the diversity of cultural and social conditions, scholars need to evaluate the extent to which Canadian business law should be uniform, and the manner in which rules of business law are biased in favour of particular interest groups. For instance, to what extent and in what settings do business laws favour monopolistic or oligopolistic interests at the expense of consumer concerns? Arguably, such studies are most germane in relation to insurance companies, banks, and other groups who, through influence and power, have traditionally had a considerable impact upon the process of law reform. The law of insurance as it affects warranty clauses, agency, and materiality is a clear illustration of this pro-industry bias at work.⁴⁸

⁴⁴ For classical commentary hereon, see esp. Havighurst, *supra*, note 16; K.N. Llewellyn, "What Price Contract? An Essay in Perspective" (1931) 40 Yale L.J. 704 at 722. See also Reiter & Swan, *supra*, note 24.

⁴⁵ 1979, c. 54 (U.K.). On the history of contract and commercial law in the common law, see esp. C.A. Bane, "From Holt and Mansfield to Story to Llewellyn and Mentschikoff: The Progressive Development of Commercial Law" (1983) 37 U. Miami L. Rev. 351; R.L. Palmer, "Lord Mansfield's Commercial Law and Adam Smith's *Wealth of Nations*: Common Underlying Themes" (1983) 88 Com. L.J. 99; J.R. Goodwin, *High Points of Legal History: The Development of Business Law* (1982); J.W. Hurst, *Law and Markets in United States History — Different Modes of Bargaining Among Interests* (1982); G. Jones, "The Infiltration of Equity into English Commercial Law" (Cambridge-Tilburg Law Lectures, 3d series 1980); P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979).

⁴⁶ I.I. Kavass, "Uniform Commercial Code Research: A Brief Guide to the Sources" (1983) 88 Com. L.J. 547; A.M. Squillante, "Uniform Commercial Code Bibliography" (1984) 89 Com. L.J. 280; J.J. White & R.S. Summers, *Handbook of the Law Under the Uniform Commercial Code*, 2d ed. (1980).

⁴⁷ See for example, J.-L. Baudouin, *Les Obligations* (1983); M.A. Tancelin, *Jurisprudence sur les obligations* 2e éd. (1981); P. Cimoné, *Le droit de l'entreprise* (1980); A. Bohémier, *Droit Commercial Général* 2e éd. (1979).

⁴⁸ This is a preoccupation of the author. See for example, L.E. Trakman, "Mysteries Surrounding Material Disclosure in Insurance Law" (1984) 34 U. Toronto L.J. 421; "Adhesion Contracts and the Law of Insurance" (1983) 13 Man. L.J. 23; "The Unharnessed Insurer: A Foreboding Presence" (1981) 31 U. Toronto L.J. 318.

There is also the need for academics to explore institutional trade developments in Canada. For instance, the activities of trade associations have expanded in recent years as businesses have uncovered a new 'law merchant', one in which business 'law' is less evident in the decisions of courts than it is in detailed trade contracts and regulations developed by businesses themselves.⁴⁹ Implicit within this body of 'law' has been the willingness of contract parties to incorporate the rules and regulations embodied in trade manuals within their commercial agreements. Guides to writing contracts, to negotiating and drafting, to construing and interpreting contract terms are increasingly in evidence, especially in trade with the United States. Trade manuals contain 'model' contracts and rules of arbitration which highlight low cost and expeditious approaches towards commercial conflicts; while 'internal' methods of dispute resolution are emphasized as alternatives to tedious formal adjudication.⁵⁰ Academic lawyers are well advised to study such developments, not merely because they are 'interesting', but because a 'new' body of law is likely to evolve out of such instruments of business. To know the likely direction of business law and to influence the course of that direction in a thoughtful and constructive manner is surely both an opportunity and a responsibility of the academic profession.⁵¹

Interdisciplinary study does have its flaws. In particular, such studies are by no means 'pure' in character or 'value free'. As recent critical legal studies have displayed,⁵² the premises underlying value selection are inherently self-determined; conventional commercial laws generally are based upon purposefully 'liberal' notions of freedom of contract which are aimed at preserving the *status quo*. These are valid critical objections.

⁴⁹ On this history of the law merchant, see *inter alia*, L.E. Trakman, *supra*, note 24; P.W. Thayer, *Cases and Materials in the Law Merchant* (1939); F.R. Sanborn, *Origins of the Early English Maritime and Commercial Law* (1930); W.A. Bewes, *The Romance of the Law Merchant* (1923); G. de Malynes, *The Ancient Law Merchant* (1685).

⁵⁰ See for instance, R.I. Akroyd, *A Guide to Contracting for the Sale of Goods* (1984); J.D. Joseph & J. Hiller, *Legal Agreements in Plain English* (1982); E.L. Piesse, *The Elements of Drafting*, 6th ed. (1981); C. Felsenfeld & A. Siegel, *Writing Contracts in Plain English* (1981); Practising Law Institute, *Construction Contracts in the Eighties* (1980); L. Mandel, *The Preparation of Commercial Agreements* (1973); V.S. Cameron, ed., *Symposium on Negotiating and Drafting International Commercial Contracts* (1966).

⁵¹ The relationship between business and law is a source of extensive debate within other legal communities, most notably in the United States. See, for instance, B. Kolasa, *The Legal Environment of Business* (1984); L.Y. Smith, *Business Law and the Regulation of Business* (1984); R.N. Corley, *Fundamentals of Business Law*, 3d ed. (1982); F.M. Rowe et al., eds., *Enterprise Law of the 80s: European and American Perspectives on Competition and Industrial Organization* (1979); G.J. Siedel, *Lawyer and Business: An Anthology* (1976).

⁵² See for instance, J.M. Feinman, "Critical Approaches to Contract Law" (1983) 30 U.C.L.A.L. Rev. 829; D. Kennedy, "Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power" (1982) 41 Md. L. Rev. 563. See too *infra*, note 69.

Notions like freedom of contract *are* contrasted with behaviour which is inherently not 'free' because the choices available are purposefully restricted in nature. Coupling juridical reasoning with social science investigations into business practice, however, may be preferable to the blanket rejection of these 'liberal' values. 'Stable', even incremental developments in contract and commercial law may well be more advantageous than introducing an uncertain and amorphous social state.

IV. THE ACADEMIC ENVIRONMENT

As a learning process, the business-law interface can assume various forms. Academics can study business conventions in books or in classes taught by fellow academics or by business 'experts'. They can also learn informally, through contact with members of trade associations, corporations, small business enterprises and government. This process already takes place: law teachers take leaves of absence to join law firms; they participate in government projects, in valuable commercial and contract law reform work, and as outside counsel to corporations. Statistical data might usefully demonstrate how frequently this process occurs, the reasons for such vocational exchanges, and the type of academic work which stems from these encounters.⁵³ However, this experience, albeit valuable, does introduce risks, in particular the problem of co-option. The academic may be co-opted into the law firm, business or government; he or she may decide *not* to return to full-time law life, and not to continue scholarly pursuits. Alternatively, the academic may avoid co-option but nevertheless be exposed only to the pretence of business practice, as when he or she is misled, purposefully or otherwise, as to the content and operation of business practice.⁵⁴ These risks are inherent in any academic process. The fact that they exist is *not* a reason to reject any business-law interface, only to be alert to the fact that impediments to information gathering and scholarly commitment, on occasion, may arise.

Topics in need of academic debate are various. What, for example, is the likely benefit of codifying commercial practice; how will common lawyers acquire the necessary skills of deduction in code construction, and what effect will codification likely have upon the business community

⁵³ Data hereon, at least in part, is contained in *Law and Learning, supra*, note 39 and in J.S. McKennirey, *Canadian Law Professors* (1982).

⁵⁴ Interviews conducted with the business community are also subject to a 'self-interested syndrome': the business concerned often wishes to be portrayed in a positive light and the academic usually favours information that demonstrates the utility of the study. On this difficulty see L.E. Trakman, "Nonperformance in Oil Contracts" (1981) 29 *Oil and Gas Tax Q.* 716.

itself?⁵⁵ If codification is favoured, what form should a code assume, who should be responsible for developing its provisions, and what should be its operative design? The scope for academic innovation in response to these questions is equally extensive. For some, a commercial code may conceivably render the law static and rigid. For others, it may be formulated in open-ended language so as to be variously construed from context to context. Also in contention, lawyers and judges may be viewed as inadequately trained for deductive legal reasoning and for deducing particular facts from general code provisions. Still others may stress the retraining of lawyers in deductive reasoning skills, particularly by reference to civil law and more recent constitutional law experiences, and by offering continuing legal education courses in code interpretation itself. In short, the potential for academic debate over codification is particularly germane to the academic community because the issue of codification is immediate, because academics have a responsibility to contribute thought on the issue, and because the future of Canadian business law and practice ultimately shapes and is shaped by code unification.⁵⁶

Similarly aspirational in nature is the necessary involvement of academics in alternative dispute resolution in business. Academic writings seldom recognize the *fact* that alternative methods of dispute resolution are intrinsic to Canadian business, as contract and commercial law documentation often reveals.⁵⁷ Businesses frequently do *not* have the time, opportunity, or willingness to resort to courts of law when solutions to problems can be reached through negotiated settlement and mediation and by recourse to commercial arbitration. Despite these realities, Canadian law schools often teach commercial law through appellate advocacy and scholars continue to concentrate primarily upon compiling books of appellate contract and commercial cases.⁵⁸ Alternative methods of dispute resolution remain the exception rather than the norm. Young lawyers face the ongoing accusation of 'racing' into court rather than conciliating on behalf of their business clients in the face of conflict.

⁵⁵ For insightful comments on the prospects of codification in the common law system, see L.G. Scarman, "A Code of English Law?" (Lecture, University of Hull, 25 February 1966); R.F. Clarke, *The Science of Law and Lawmaking* (1898). See too F. Geny, *Méthode d'interprétation et sources en droit privé positif*, 2e éd. (1963).

⁵⁶ See *ibid.*; Ontario Law Reform Commission, "Should Ontario Adopt a Commercial Code Along the American Model?" in *supra*, note 4 at 31-2.

⁵⁷ In developing alternative methods of dispute resolution, much can be learned from industrial relations. See J.T. Dunlop, *Dispute Resolution: Negotiation and Consensus Building* (1984); M. Kolb, *The Mediators* (1983); P. Craven, 'An Impartial Umpire': *Industrial Relations and the Canadian State 1900-1911* (1980); P.A. Joseph, *The Judicial Perspective of Industrial Conciliation and Arbitration in New Zealand* (1980). See too C. Simmons, *The Role of Mediation and Conciliation in The Collective Bargaining Process* (1976).

⁵⁸ See *supra*, notes 1 and 2.

The 'hired gun' perception of lawyers is perhaps as much a problem for academic education in commercial law, as it is a reflection of underlying human greed and 'unprofessional' conduct. A commercial lawyer is far more than an adversarial advocate: he or she is a means towards conflict avoidance, a mediator of differences, a healer of wounds. These are *facts* that warrant our attention as a community of writers and teachers if we are to succeed in our most basic task — education as a pathway towards understanding, knowledge and responsibility.⁵⁹

Equally suspect has been the academic lawyer's preoccupation with 'general' education in law school. Certainly, contract-commercial lawyers need to appreciate the law in its 'widest' operation. A basic foundation in the general principles of contract law is necessary in providing a sophisticated and rounded legal education:⁶⁰ what about the necessary relationship between theory and practice, or between consumer and business interests? What about law courses, books, and articles on drafting and negotiating various types of contracts; what about studies into the interpretation of such agreements and the rules that should govern this process? Certainly Canadian law schools do *some* of the above; but how effectively, with what scholarly commitment, and to what end?⁶¹

To argue that such educational matters are 'clinical' or lacking in academic worth is to ignore a salient reality: the art of commercial negotiation, mediation, drafting, and arbitration is a highly intricate one. Negotiating, drafting, and interpreting a contract should be taught simply because such processes are technically complex in nature. The academic writer is *not* above such tasks. On the contrary, such functions are intrinsic to the growth of both teaching and scholarship in law and business.

V. CONTEMPLATIVE STUDY

Not discussed yet is the role of contemplative study in writing on commercial and contract law topics. What of the 'writer' who draws less from field study and collaborative debate than from his or her own

⁵⁹ It is interesting to note that the vast majority of instances of lawyer 'incompetence' relate *not* to the incapacity of the lawyer, but to the lack of performance demonstrated. Arguably, lawyers who are more willing to conciliate differences between and among clients *without* court appearance would minimize the complexity of lengthy and premature judicial appearances, all of which needlessly diminish their performance as overtaxed litigators. See further, L.E. Trakman & D. Watters, eds., *Professional Competence and the Law* (1981).

⁶⁰ See *supra*, text accompanying notes 39-42.

⁶¹ Cf. Law Society of Upper Canada Special Lectures, *supra*, note 4; W.Z. Estey, "The Fluctuating Role of Contract Law in the Community" (1983) 8 Can. Bus. L.J. 272; S.M. Waddams, "The Modern Role of Contract Law" (1983) 8 Can. Bus. L.J. 2. For specific recognition of the disparity between business needs and legal education in relation to business, see E. Klayman & K. Nesser, "Eliminating the Disparity Between the Business Person's Needs and What is Taught in the Basic Business Law Course" (1984) 22 Am. Bus. L.J. 41.

thoughts about the role of law as a body of rules, a philosophical system, or an arm of the social order? Arguably, there is no substitute for such a contemplative mode. Legal academia in Canada warrants, perhaps beyond all other involvements, an extension of inventiveness in writing, not for its own sake, but as a means towards developing further insights into the nature, role, and function of law.⁶² Certainly environmental pressures do impede these contemplative ventures: peer group pressure, economic austerity programmes in universities, and even requirements of tenure and promotion are potential obstacles faced by the thoughtful commentator who wishes to ruminate over knowledge acquired in the present in order to write about it in the future. Undoubtedly, few scholars will attain the highest reaches of learning by devising whole new approaches towards problem-solving; but there are abundant problems in contract and commercial law which are less lofty but every bit as important in the pursuit of learning. For example, contract lawyers need to reconsider the division between contracts and torts: why should one distinguish consensual from tortious arrangements when meaningful 'consent' is often absent in contract and fault is often lacking in tort?⁶³ The lessons learned from the unified civil law of 'obligation'⁶⁴ and the insightful comments enunciated by scholars like Grant Gilmore in his *Death of Contract*⁶⁵ indicate that the division between contracts and tort may well have become overworked and may be in need of radical reformulation. Should one accept a unified conception of 'obligation' in Canadian common law in compliance with the civilian tradition? Should one treat 'consent' as only one means whereby obligations arise? If so, how should one formulate a new contract jurisprudence?

Similarly, the growth of 'status' relationships in conventional society offers new questions for scholarly contemplation.⁶⁶ Under what circumstances should a business be bound to fulfill a special obligation of 'good

⁶² Creating the opportunity for scholars to engage in a contemplative role, without writing and sharing their tentative thoughts, does pose problems: from the perspective of 'shared knowledge', will such contemplation create a void or deficiency in the existing literature on contracts and commercial law; and how long should the legal community 'wait' for the contemplator's final written thoughts? In addition, in the shorter pre-tenure period, how are the 'works' of the contemplative thinkers to be evaluated or are such works to be 'anticipated' in the future on a trust basis? These very questions are themselves important sources of scholarly and administrative analysis.

⁶³ See *supra*, text accompanying note 31. But cf. R.A. Epstein, "In Defence of the Contract at Will" (1984) 51 U. Chi. L. Rev. 947.

⁶⁴ See *supra*, note 47. See too *Définition et Domaine de la Responsabilité Contractuelle* (1981). Cf. B. Nicholas, *French Law of Contract* (1982).

⁶⁵ (1974).

⁶⁶ See for instance, O. Kahn-Freund, "A Note on Status and Contract in British Labour Law" (1967) 30 Mod. L. Rev. 635; R.H. Graveson, *Status in the Common Law* (1953); H.S. Maine, *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Times* (1905).

faith' in addition to the usual requirements of performance in contract; and if bound, how should 'good faith' be elevated to a conceptual *and* pragmatic level of operation? In reality such duties of 'good faith' co-operation have already evolved in Canadian commercial law, in the growth of fiduciary relations, and in the rules of construction that require co-operation among unequal bargaining parties. What stamp of legal approval should be given to these expanding conventions, and how should their legitimation be expressed in fact and in law?⁶⁷

Also in need of consideration is the principle of 'freedom of contract' in relation to 'specific' contracts. What special inferences, if any, should arise in relation to employment 'agreements' when employers or even unions abuse their positions of market and personal dominance?⁶⁸ Should the law governing contract formation, performance, and breach be reconstituted where significant differences exist in the economic wealth, education, and contractual abilities of the parties? If so, how much weight should be given to *public* hardship arising out of the abuse of *private* rights. In ideal terms, legal academics are well suited to such tasks because the law school as an institution can insulate them, at least in part, from dominant economic groups who wish to repress public awareness of such abuses. This is not to suggest that such critical commentaries do not already exist in Canadian scholarship, only that they are fewer in number and less pervasive in effect than they might otherwise be in light of a pressing public interest.⁶⁹

Equally pressing is whether the law of privity should be reformulated so as to attain a state of *de facto* privity among parties who are related to one another indirectly through production and use, rather than directly through personal association.⁷⁰ Under what circumstances, if any, should

⁶⁷ See generally K. Renner, *Institutions of Private Law and Their Social Functions* (1949); M. Rehbinder, "Status, Contract, and the Welfare State" (1971) 23 *Stan. L. Rev.* 941.

⁶⁸ Again, such fiduciary 'cooperation' is especially germane in labour affairs where the employee is often subject to two 'status' relationships, one with the employer and the other with the union. See, A. Szakats, "Collective 'Contracts' or Individual Status? Employment Under Management-Union Agreements" (1977) 15 *Alta. L. Rev.* 243; B. Langille, "Labour Law as a Subset of Employment Law" (1981) 31 *U. Toronto L.J.* 200; D.M. Beatty, "Labour is Not a Commodity" in Reiter & Swan, *supra*, note 24, 313; B. Laskin, "Collective Bargaining and Individual Rights" (1963) 6 *Can. B.J.* 278.

⁶⁹ See *supra*, notes 65-67. For critical commentary, see P. Gabel & A. Feinman, "Contract Law as Ideology" in D. Kairys, ed., *Politics of Law: A Progressive Critique* (1982); K. Klare, "Critical Theory and Labour Relations Law" in *ibid.*

⁷⁰ Canadian scholars may learn a great deal from attempts to regulate privity by statute in other commonwealth environments. See for instance, R.H. Newman, "The Doctrine of Privity of Contract: The Common Law and the Contracts (Privity) Act 1982" (1983) 4 *Auckland U.L. Rev.* 339; G.D. Pearson, "Privity of Contract: Proposed Reform in New Zealand" (1983) 5 *Otago L. Rev.* 316.

contractors be required to pay non-compensatory and punitive damages, for what reasons, and subject to what limits?⁷¹

The answers to these and other questions do not lie neatly mapped out within legal guide books; they are unlikely to evolve without the significant contribution of academic thought. The fact that some of us may propose deficient answers is itself less of a reason to reject such speculative ventures than to continue with them. Contemplative reflections operate at various levels of abstraction between a state of germination and ultimate fruition. Indeed, fruition is often less the result of a naturally inventive mind than it is the product of perseverance and determination. Canadian legal scholars, arguably, have the potential to attain these highest reaches.

VI. CONCLUSION

Contract and commercial law scholarship in Canada can and does assume various forms: a description of the nature and content of rules of contract and commercial law; a critical analysis of these rules in moral, social, political and economical terms; a synthesis of the values underlying them and their reconstruction in terms of a reconstituted value system. Understandably, as a youthful discipline, Canadian academics have developed their strengths in the descriptive analysis of contracts and commercial law before they have honed their skills in prescriptive synthesis. Scholars have investigated the common law as it is, in their view, before they have evaluated how the law ought to be; and they have considered law as a discipline, separate and apart from other disciplines before they have viewed it as a system integrally dependent upon values existing outside of its formal confines. This approach towards contract and commercial law scholarship adopted to date is not a state to be cry. Contract texts and articles often display a high level of descriptive analysis. The critical evaluation of legal doctrine, of principles and rules of law is frequently insightful. The picture only becomes bleak when the status quo gives rise to smug satisfaction or disinterest in striving further afield or for greater heights. The potential for scholarly work includes institutional investigation into the value of arbitration in dispute settlement, study on the utility of mediation and negotiation, and analysis of the sufficiencies of adjudication. Scholarship should itself be a means towards substantive and procedural law reform.

⁷¹ On the recent upsurge of interest in damages for mental suffering and punitive damages in contract see M.G. Bridge, "Contractual Damages for Intangible Loss: A Comparative Analysis" (1984) 62 *Can. B. Rev.* 323; M.G. Cochrane, "Imaginary Damages for Breach of Contract: Part II — Punitive Damages and Damages for Mental Distress" (1984) 5 *Advocates Q.* 110.

Law teachers have a distinct role to play in the evolution of contract and commercial law; they have ready access to one another, to scholars elsewhere, to libraries, and to lawyers, economists and sociologists who function outside of the confines of the law school. Establishing links with business executives, corporate counsel and consumer advocates is especially necessary if law teachers are to have the opportunity to interact with and learn from others within an interdependent academic and professional community. None of this is to suggest that the legal scholar should cease to conduct 'traditional' research, nor that global collaboration should displace intensive study in isolation. Scholars who spend copious energy on co-operative interactions and little on insightful thought are unlikely to make lasting contributions to contract and commercial law. Nor are those who 'think' about law in a contextual vacuum likely to contribute much insight where their 'thoughts' are devoid of analytical and synthetic content.

The road ahead is filled with new challenges. There is a need to rethink well accepted institutions and rules of law, just as much as there is a benefit in reconstituting the common law itself. Undoubtedly, the commercial and contract law scholar cannot be all things to all persons — adroit in analytical research, well-trained in economics and sociology, appreciative of the inner workings of government and business and, in addition, a contemplative thinker all rolled into one. Nevertheless, scholars can be some of these things; they can draw upon non-lawyers, and they can build upon the quality of their writings in the past so as to become more skillful, thoughtful, and productive in the future. Given the nature of human progress, development in the quality of legal scholarship is more likely to be incremental than geometric. To reach the sky, the scholar must learn to fly; no one should reasonably expect less, nor more.