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The Canadian Patient's Book of Rights: A Consumer's Guide to Canadian Health Law

A. Bissett-Johnson

Reviews

The Canadian Patient's Book of Rights: A Consumer's Guide to Canadian Health Law. By Lorne E. Rozovsky. Toronto: Doubleday Canada Ltd., 1980.

Well qualified lawyers rarely take time to communicate important, often vital, information to the general public about matters of law which affect their lives and their health. This attractive handbook is a welcome exception to that rule. One of Canada's best known and most experienced lawyers in the medicolegal field, Lorne Rozovsky, has written a "consumer's guide" of some 140 pages on the subject of medical and hospital patient's rights under the laws. The area of law covered is what the author calls "health law," one of the most exciting and fastest growing of legal specialization fields in both Canada and the United States.

This volume is Mr. Rozovsky's first attempt at reaching the public directly to inform them about a great variety of legal issues in general medical care, mental illness, and public health-communicable disease control. At the outset, the author cautions his readership that his book is not intended to replace the advice of a lawyer on a specific question of health law where the particular circumstances and the effects of local law must be considered. The book is intended rather to alert interested people to their rights under the law, so that they are not misled about what they can and cannot do when they are ill. Also, to help them to ask the correct questions of both their medical care-givers and their attorneys.

Rozovsky has succeeded in a task wherein many lawyers fail: He has written briefly, in plain English, with a clear, uncomplicated prose style. In so doing, I find few quarrels with him about his explanations of the law he covers. Most of the book deals with common law matters concerning medical treatment, medical malpractice, patient consent and refusal of treatment, and access to hospital patient records. There are also useful explanations of areas of statutory law such as abortion, mental illness hospitalization, hospital insurance and medicare, and the definition of death.

Lay readers can begin at the beginning and read on through the text, gaining greater sophistication with each section. The chapters are organized in such a way that this approach is feasible and interesting. Furthermore, the book can serve as a desk reference where the reader can select particular topics for special instruction.

The chapter headings are clear and unambiguous and there is a two-page subject index at the rear of the volume.

The opening chapter considers the concept of a "patient's bill of rights," a codification of legal entitlements in the health law field. The author points out that there is no national or provincial law in Canada known as a patient's bill or code of rights. Most of the chapter is taken up in an analysis of the American Hospital Association's Patient's Bill of Rights adopted by the Association in 1973. The principles of the AHA document provide a convenient and brief summary of the common law rights of hospitalized patients. The author's analysis does not indicate any specific disagreement in the Canadian provinces with these principles. In the main, the author's discussion deals with the practicality of carrying out these principles in actual practice in acute-care hospitals.

The last section of the chapter contains a series of arguments *against* a patient's bill of rights. A surprising amount of space is given over to this exercise. It is not entirely clear to me whether the author agrees with these arguments or not. However, no counter-balance of reasons is given favoring such statements of hospital policy.

In his critique, Rozovsky opens with the rather severe statement that, by developing a patient's bill of rights, "an entirely new atmosphere may be created in a hospital, an atmosphere that may *harm* the relationship between the patient and the hospital" (emphasis supplied, p. 7). He goes on in the first of six "basic arguments" against the bill of rights to assert: "The real problem is a lack of humanity, not a lack of rights. That cannot be cured by rules" (p. 7).

I would agree with the author in his observation that the essential key to patients' rights is humanity, the respect of all medical personnel for the individual human nature of each patient. It does seem, however, that a hospital-adopted policy of respect for the rights and the humanity of patients is a forward step. That is also the purpose of law. Rules can encourage hospital personnel to afford patients the respect and individual attention they deserve. Rules can also be the basis for discipline of hospital personnel who violate the rights and humanity of patients.

The author also asserts that a hospital-adopted bill of rights is "useless" because the patient cannot enforce his rights while in the hospital, where he or she is "at the mercy of the hospital staff." But the purpose of the bill of rights is to provide hospital policy against just such a circumstance. Doctors and nurses should be educated to accept these rights of patients. In fact, the bill is perhaps most effective as a part of a hospital's educational efforts. I am glad to say

that the author accepts this idea in his own critique where he asserts, "It would seem preferable to have a list of staff duties to patients. If the hospital-patient or doctor-patient relationship is poor, it is the hospital staff and doctors who need educating, not the patient." I would agree that the patient's bill of rights can be viewed as an expression of duties by the hospital care-givers. At the beginning of this chapter, Mr. Rozovsky also acknowledges this point by observing, "Without the existence of a legal duty, there can be no right." (page 1)

The second chapter contains important information for all Canadian citizens concerning entitlements to medical care and hospital services under government health insurance plans. Eligibility is explained in clear language. The description of benefits and restrictions on benefits is especially well prepared; in fact, it is the best explanation I have seen on issues of coverage under the various provincial plans. Mr. Rozovsky has combined in a few pages a ready reference to the common features in all the provinces, especially the exemptions from coverage, and the problems of cross-province coverage for Canadians moving from one part of the country to another.

The third chapter is also of particular importance for the exercise of patient's rights in Canada. It deals with the issue of choice of physician by patients. Canadian law in this chapter is evidently affected by the health insurance systems in the various provinces. The author states that Canadian patients do not have the right to be treated by any particular doctor. The law concerning hospitals, however, is changing. Many provinces have legislation giving the right to patients to be admitted to particular hospitals if there is accomodation for them on the recommendation of a member of the medical staff. In Ontario, however, this right is restricted to Ontario residents or dependents of residents, unless the person is suffering from a life-threatening condition. The chapter also analyzes Canadian law on the privileges of physicians to practice in Canadian hospitals.

The book contains a useful and practical analysis of the matter of informed consent, or refusal, of medical treatment. In both Canada and the United States this is an area of serious concern for both patients and doctors. For patients, it is the fundamental principle upon which is based their right to participation in medical decisions. For doctors, it is the confusing stumbling block of malpractice liability. As the author aptly observes, "no other topic in the field of health law brings medicine and law into such clearly defined conflict" (p. 28). The definition of "informed consent" is put forth quite well

where the author asserts, "The patient must be told the nature and risks of the treatment, of not having treatment, and of any alternative treatment" (p. 34). He goes on to observe, however, that the doctor need not provide the patient with a long and detailed medical lecture, nor describe every conceivable risk. There is an interesting discussion of unsolved problems in consent to treatment, such as with those patients who are all too willing to consent and who do not want even to hear about the details of treatment, along with those patients who consent and seem to understand, but who later reveal their lack of understanding to nursing staff on the hospital ward. Practical advice is provided for hospitals in handling these issues. The chapter ends with a suggested model form for obtaining consent for hospital treatment and operations. The author observes that hospital admitting clerks may regard patient consent forms as mere formalities, but that patients should never adopt this attitude. This is sound advice. He instructs patients well in reading the forms and in their rights to alter the documents or to add further restrictions to their consent. Mr. Rozovsky makes an interesting statement also about the hospital's rights: He asserts that if the patient agrees to the procedure, but refuses to sign the form, the hospital can refuse to allow the procedure to be performed in the hospital. This may be a correct statement of the law, but I can't recall any American support for it. It does seem basically reasonable that the hospital ought to be able to insist on a signed consent form when the patient has indicated orally that he or she wishes the procedure and has no objections or restrictions to express. However, if the procedure is necessary and especially if there would be danger to the patient in a delay or in a discharge, it might be advisable to allow it to be performed without a signed form if the attending surgeon or physican wants to go ahead and there are witnesses to the oral consent. As the author points out, the consent form is not the patient's consent but only evidence of that consent (p. 47).

I found the chapter on abortion law in Canada especially enlightening. Most American lawyers are entirely unfamiliar with the fact that Canadian law on illegal abortions is contained in the national Criminal Code. An induced abortion is prohibited unless a certificate is obtained from a hospital therapeutic abortion committee finding that the continuation of the pregnancy would be likely to endanger the life or health of the woman. The abortion must take place in the hospital, it cannot be performed in a clinic or doctor's office. The physician who performs the abortion cannot serve on the hospital committee which approved the abortion. As a further safeguard, the

law provides that no member of any hospital therapeutic abortion committee is allowed to perform any abortions while a member of the committee. Any abortion or attempted abortion performed without a hospital certification is illegal in Canada and carries severe punishment up to life imprisonment. The pregnant woman involved can also be charged with a crime if the certificate is not obtained.

The Criminal Code does not set forth procedural due process requirements for hospital abortion committees. Mr. Rozovsky raises some interesting questions about whether the patient, her attorney, or her own physician have the right to appear before the committee to present evidence, the right to written reasons for a refusal of approval for an abortion, or even the right to know who is sitting on the committee. The author asserts that there are no definite answers to these questions since no patients have sought to enforce such rights in the courts. He observes that in most cases the answer "will probably be that the patient has no such rights" (p. 87). However, he also indicates that some Canadian hospitals have adopted internal regulations on procedures to be followed by such committees, but he does not indicate whether hospitals have afforded any of these procedural rights to patients.

The chapter also deals with insurance payment for abortions. Since therapeutic abortions can only be performed if the life or health of the mother is endangered, it seems clear that the provincial hospital and medicare insurance programs would cover medical charges for the abortion as "medically necessary." The author asserts, however, that the insurance authorities are not bound by the certification. They can make their own determination as to whether the abortion was medically necessary. He offers the example that the committee may allow the abortion because another child may reduce the stamina of the mother in caring for her other ten children, thus endangering her health. The insurance authorities might disagree and refuse to approve insurance coverage for the abortion services.

On a comparative basis, the current law on abortion in Canada is very similar to the law in many American states prior to the early 1970s. In Massachusetts, my own jurisdiction, the law was almost identical, even to the use of hospital abortion committees to provide independent medical support for the attending physician's decision to perform an abortion where there was a serious threat to the life or health of the pregnant woman. This was due to an earlier Massachusetts criminal case where a physician had performed an abortion on his own wife without a consultation from colleagues. There was no national law on the subject in the United States. In the early 1970s a

few American states, notably Colorado and New York, passed highly liberalized abortion laws, putting political pressure on other states to follow suit. Also, there were serious problems created by "quickie abortion clinics" set up in the liberal states luring desperate women and young girls to package tours to these clinics without adequate medical follow up for later complications. The situation was becoming progressively worse when, in early 1973, the U.S. Supreme Court moved in two cases to strike down most of the nation's state-level abortion statutes by declaring the abortion decision of the pregnant women (and her physician) to be a matter of personal privacy protected by the national constitution, at least during the first two trimesters of the pregnancy. The present conservative political shift in the United States at the national level may bring with it some change in the present legal situation.

As an American lawyer, I was also interested in the discussion of matters of defining death and the treatment of persons who may refuse life-supporting measures. Only Manitoba has passed legislation approving medical determinations of death due to irreversible cessation of brain function. Mr. Rozovsky seems to speak disapprovingly of such legislation as unnecessarily tying physicians' hands. He concludes, "One wonders why we should train physicians to exercise judgment in these matters if a legislature is to do it for them" (p. 15). In the United States, a number of states have passed brain death statutes and we also have a Uniform Act prepared by the National Conference of Commissioners on Uniform State Laws. The effort in all of these laws, including the Uniform Act, has been to leave the actual criteria for determining brain death, or any other form of death, to accepted medical standards. The law provides only that this type of death can be applied on the doctor's medical judgment.

There have apparently been no decisions in Canada similar to the recent rash of cases in the American states on patient refusal of treatment or on court-ordered treatment of incompetent persons who may die if not treated. Mr. Rozovsky's discussion of these issues is thoughtful and complete in only a few pages. He observes that where a dying patient is not mentally competent, physicians are in no position to make judgments about whether someone else would accept life as it is, or the quality of that life, rather than death. Physicians should therefore concentrate upon preserving life. He concludes that the decision to discontinue treatment is not a legalistic one but is "more a matter of consensus between the physicians and the family" (p. 107). This is a sensible and practical statement, and it

was largely the accepted view of the law in the United States until recent years.

So-called "living wills" are examined in the text. No Canadian provinces have passed laws making such documents legally effective as have several American states, with more jurisdictions being added each year. Mr. Rozovsky observes that it may be doubtful that Canadian provinces can deal with this area since the Criminal Code is a matter of federal law. In the United States, one of the objectives of these laws has been to remove any threat of civil as well as criminal liability from any physician who stopped treatment of a patient under the instruction of a living-will document. The living-will laws in the United States do not, however, allow physicians to take active steps to end a patient's life. There is a considerable controversy about what is meant in these laws about ending treatment. Most of the provisions speak of ending "extraordinary care," or "heroic measures," or "being kept alive by artifical means." Just what these terms mean in any given clinical situation is not very clear in the statutes. The few field studies done in the United States as yet do not indicate any widespread use of the documents by patients in states that have already adopted the laws. It would seem, however, that such legislation can be helpful to patients' efforts to have their own wishes followed rather than leaving the matter in the hands of available family and treating physicians. It is probable that no living will document should be considered in evaluating the patient's wishes if it is over five years old. Such legislation has generally been opposed by "right to life" groups (or anti-abortion groups) and sponsored by Euthanasia Societies and other "pro choice" patient advocacy organizations.

The concluding pages of this text contain lists of addresses of major public authorities and private medical groups to whom complaints about medical and hospital clinical services and financial problems can be addressed throughout Canada. The lists are preceded by a brief chapter describing where complaints of different types can be handled under Canadian law.

There is no doubt but that this handbook can be invaluable and worth its small initial cost for concerned consumers of health care. More than that, however, it has other uses. The text can serve as an excellent introductory monograph on health law for health care providers, particularly those functioning in hospitals. I would also suggest it as an inexpensive background textbook and reference work for law students taking courses in health law in Candian law schools. I can make these recommendations confidently because of

the admirably even-handed manner of Mr. Rozovsky's approach to his subject. He is not at all as strident in his advocacy of a single-minded consumer viewpoint as many other legal commentators in similar texts in this field, especially in the United States. When in doubt, when the law is not clear, Mr. Rozovsky admits it clearly. When he believes, from his experience, that no legally enforceable right exists for the patient, even if it should, he does not hesitate to state that the right does not exist. Some examples of this style of writing have been cited in this review. Also, some of the subject matter in the book is actually at least as directly relevant for provider's rights and attorney guidance as it is for the average consumer patient. This would include, for example, the discussion of physicians' rights to staff privilages in hospitals, the coverage of hospital responsibility for physician and nurse errors, the "borrowed servant rule," and other technical areas of malpractice defense. It would also include much of the analysis in the chapter on informed consent where, as noted earlier, the author's advice is particularly helpful to hospitals and doctors in dealing with unsolved problems in this area, developing model patient consent forms, and advising on the content of effective informed consent statements which will protect hospitals and physicians from unwarranted law suits. The text also supplies references to "additional readings" after each chapter which should be particularly useful to health care providers, law students, and lawyers. Mr. Rozovsky cites authorities separately for Canadian, English, and American law. In the Canadian field, he cites authoritative government reports and Royal Commission documents that might not otherwise come to the attention of such readers, even those familiar with the use of a law library. Mr. Rozovsky also cites similar government reports from the United States such as the Report of the Secretary's Commission on Medical Malpractice, and Westin's government report on privacy and citizen's rights of access to health records and computerized medical and hospital data. These reports have been without doubt the most important documents on their subjects over the past ten years.

In summary, it would seem clear that Lorne Rozovsky has produced even more than he has promised. He has provided a highly useful introductory text on health law in Canada, not only for

patients, but for health care providers and attorneys interested in this important field of the law.

William J. Curran
Professor of Legal Medicine
Harvard University
Cambridge, Mass., U.S.A.

The Practice of Freedom: Canadian Essays on Human Rights and Fundamental Freedoms. Edited by R. St.J. Macdonald and John P. Humphrey. Toronto: Butterworths 1979. Pp. xx, 460. Price: $21.95 (paper)

This Macdonald/Humphrey collaboration is the result of an innovative experiment; they have sought out and brought together, in a single volume, articles written by individuals whose particular areas of interest and expertise might never otherwise have been affiliated. The law teaching profession constitutes the body from which the largest number of contributors (17 of 26) are drawn. However, unlike most collections of essays, the area of academic concentration of the contributors is not a limited one; it extends from the study of domestic criminal law and procedure to the study of public international law. Further, even among the group of legal scholars who have contributed to the book, a number of individuals bring to bear upon their writings the experience of other occupational qualification (*e.g.* Doyen Gerald A. Beaudoin was Assistant Parliamentary Counsel of the House of Commons, Professeur Henri Brun is the Director Général des Affaires, Civiles et Pénales, Ministère de la Justice du Quebec, and Professor Alan Grant, was a Constable who rose to the rank of Chief Inspector of the Metropolitan Police of London, England). In addition, the remaining contributors possess occupational credentials which often have little, if any affiliation with law teaching; some are legal practitioners, others are political scientists, and yet others are civil servants or journalists. Together, their collective observations provide for the reader an introduction to the study of Canadian human rights and freedoms which attempts to transcend the more narrow approach taken by texts of edited articles, whose authors are usually drawn from a single area of study and expertise.

At the end of the five page Introduction to the text, the editors have stated that the purposes of it are fourfold: (1) to "contribute to the organization of the study of and practice of human rights law"; (2) to encourage "the necessary idea that we should study society by seeing what men make of it rather than what it makes of them"; (3) to

"stimulate discussion of our fundamental values in the late twentieth century"; and (4) to "provide a convenient source book for lawyers and laymen". The act of gathering together the material from the various contributors fulfills the first of the editors' purposes, for (in Canada, at least) as both the study and the practice of human rights law is in its infancy, so too is a collection of published material which attempts to define and elucidate that area of legal study. *The Practice of Freedom* is a text which begins to fill the need for a body of Canadian literature on the subject.

The nature of the second and third goals set by Professors Macdonald and Humphrey is such that it is difficult to determine whether they have been met by the contents of the book. However, although opinions may differ, the least one can say is that an attempt has been made to collect writings which promulgate a diverse number of viewpoints. For example, Professor Smiley's contribution ("Rights, Power and Values in Canadian Society") the political scientists' observation, that human rights are, in essence, the "demands of human dignity". As such, they "are conditioned by time, place and circumstances" and differ according to the needs of the particular individual. With this in mind, his concept of institutional mechanisms is noteworthy - particularly in light of the recent federal/provincial accord on the constitution:

> As we should be less dogmatic in our formulation of what rights are to be protected, and in the ranking of such rights, so we should be experimental and tentative in our approach to the most useful institutional mechanisms for the protection of human rights. The superficial argument put forward by the federal government a few years ago for a Canadian Charter of Human Rights seem to imply that rights were self-enforcing if they were "guaranteed" by way of entrenchment in the Constitution...
>
> I have elsewhere argued against the further entrenchment of human rights in the Canadian Constitution. Much of this debate revolves around the relative institutional capacities of courts and legislatures in the definition and protection of rights. But in another dimension the argument for entrenchment is founded on arrogance: we are willing to impose our present-day formulation of human rights on future generations....There is profound wisdom in the single restriction on parliamentary sovereignty that no legislature can bind its successors. The proponents of entrenchment disregard this wisdom. (pp. 3-4)

Mr. James Leavy's article, "The Structure of the Law of Human Rights", reaches a different conclusion. With the eye of the seasoned

legal practitioner he examines Canadian constitutional rights, traditional legal rights and remedies, human rights legislation and international human rights obligations of the state, and weighs them against the increasing legislative and regulatory involvement in peoples' lives, "the changed situation of Parliament, the more pervasive complex nature of the state, the difficulty of organizing public opinion in the defence of fundamental rights, and the possibility that parliament will reflect an intolerant or oppressive public opinion" (p. 72). His final analysis is in accord with a movement in the United Kingdom supported by jurists such as Lord Hailsham and Lord Justice Scarman - that a charter of human rights be written into the constitution:

> An entrenched bill of rights would give the courts much more power than they now possess, since they would not be merely interpreting legislation or deciding on the constitutionality in the technical jurisdictional sense, but also assessing the conformity of the laws and their application to a fixed standard. In one sense the judges would be "making law" since by repealing laws contrary to an entrenched bill of rights they would uphold the law as it stood before the impuned statute was adopted. However, it is probably more accurate to say that in reviewing legislation they would be exercising the purely judicial function of interpreting the provisions of the fundamental law to which the state itself is subject and which could only be changed with the consent of the people. Such an entrenched bill contained in a supreme, written constitution would mark a distinct break with the notion of parliamentary supremacy, which has formed the basis of the "British Constitution since 1688 and of the Canadian Confederation since its beginnings. (p. 73)

Professor Grant's contribution, "The Police: Organization, Personnel and Problems", adds a different nuance to the notion of studying society "by seeing what men make of it rather than what it makes of them". He provides a basic outline of the internal administrative and operational workings and problems of police forces. In so doing, the reader is provided with a rare glimpse of the administrator's view of a law enforcement agency. Professor Grant's article concerns itself primarily with the development of the quality of a police force and with the work it can do, and he leaves references to human rights and fundamental freedoms to the mind of the reader. After examining this chapter of the text, one questions whether the job conditions of law enforcement officials permit them to address themselves to human rights concerns. Further, upon becoming aware of the legal and organizational burdens under which police officers must operate, and considering what the public expects them

to do, one's mind is directed to the third goal of the editors of the book: we begin to question "our fundamental values in the twentieth century".

Although every article in the text contributes, in varying degrees, to the first three goals set by the editors, the primary purpose of most are directed toward the fourth: the compilation of a source book. To that extent, virutally no subsection is left untouched and one encounters comments on every human rights and fundamental freedoms issue from the standard topics (e.g., administrative fairness, rights of women, the rights of the institutionalized, the rights of native people) to those not normally associated with them (e.g., the Law Reform Commission, the TV Ombudsman). However, a problem which frequently arises with such collection is manifested in this one; the number of contributors is so great that the standards of the articles vary considerably. For example, like the chapter written by Professor Grant, the ones by Professors Barnes ("the Law Reform Commission") and Friedmann ("the Ombudsman") deal with the functions and activities of their subject matter in a manner that relates only tangentially to human rights and fundamental freedoms, while the contribution by Mr. Sloan on "Freedom of Information", though stimulating, has not enough references to give an interested reader a beginning point from which to continue the study of the subject matter. By contrast, Professor Gibson's article on the "Legal Protections of Privacy" provides a good general overview of the topic, as does Professor Hunter's ("The Origin, Development and Interpretation of Human Rights Legislation") with its criticism of good intentions and its detailed examination of some of the work of human rights commissions and some of the case law on the subject. The contributions by Doyen Beaudoin ("Linguistic Rights in Canada") and Mr. Yalden ("The Office of the Commissioner of Official Languages") appear to be quite good, but their topics deal with such a vital area of concern to Canadians that a reader is left with the feeling that far more could be said. Similarly, the article by Professor Marx on "Human Rights and Emergency Powers" proves to be so interesting that it was a disappointment to discover that it continued for but a brief thirteen pages.

Donald J. Fleming
Assistant Professor of Law
University of New Brunswick

Towards a Constitutional Charter for Canada. By Albert S. Abel. Toronto: University of Toronto Press, 1980. Pp. 105. Price: $7.50.

"Reform the Constitution" has been the cry of many Canadian scholars and politicians for years. None however had ever individually attempted to formulate recommendations for such major constitutional changes as Professor Albert Abel was considering before his death. He was not content merely to add his voice to the clamour, but was prepared to articulate proposals for change, even though he was fully aware that they would be met with a great deal of opposition. Unfortunately, he died before his proposals were completed so what is offered is merely the foundations of his proposed reform constitution for Canada.

Economic matters are the central focus of his published proposals, and Abel's starting premise is that the federal legislature should have the power to deal with matters that affect the economy of Canada as a whole. His proposals would strengthen the economic powers of the federal legislature, but at the same time would allocate important responsibilities to the provinces in other areas. Professor Abel believes that the present B.N.A. Act permitted the erosion of the powers of the provinces while federal power was enhanced. In order to ensure that Canada remains a true federation this growing imbalance has to be remedied.

Before making his recommendations Professor Abel examines similar provisions in the American and Australian constitutions to ascertain if either of them would provide a satisfactory model for a reformed Canadian constitution. His conclusions are primarily that no other constitution is a satisfactory model because of the deficiencies found to exist in their provisions, plus the significant factor that Canada is uniquely different and must evolve its own model. His examination, which he shares with the reader, is very useful, however, since he shows why these similar provisions have not been successful or why they would not be appropriate in a Canadian setting.

An essential part of his reform package is a reversal of the current premise in the B.N.A. Act that the residual power should be vested in the federal legislature. This he views as the vehicle which has often been used to subordinate the position of the provinces. In his reform constitution the provinces would be given the residual power in a clause that would give them the power to make laws operative within the province with respect to anything not assigned to Parliament. In this area he examines in detail the American and Australian constitutions and concludes that although the states in both countries are by

the wording of their constitution assigned the residual powers, in practise the federal state has consistently encroached upon these powers. Part of the problem has been the use of terminology giving the federal legislatures annexed incidental powers because the courts have tended in the past to interpret these very liberally in favour of the federal legislatures. As a result Professor Abel exhorts draftsmen to make it very clear that the residual power lies with the provinces and to make no mention of federal powers other than those specifically enumerated. This list should also be sparse and specific.

One possible ramification of this proposed reversal of residual power is not dealt with. Would the federal legislature be able to deal effectively with a crisis outside the economic sphere? How would Abel ensure that the federal government had adequate powers and at the same time ensure that they are only used in times of genuine crisis? Is the court an effective body to police this? It seems that Albert Abel had doubts that it was, since he stressed that there should be no mention of federal incidental powers to remove the temptation from the courts to interpret such provisions in favour of the federal legislatures.

After considering the residuary power Abel then turns to the taxing and spending powers. His initial taxation proposals are neither controversial nor new. He recommends that the provinces should have the power to raise money by any mode of taxation except duties or imports, subject to the limitation that these laws are operative within the province. This chapter is unnecessarily long since his proposals are not complex.

The following two chapters raise a question of constant concern under the present constitutional position, and offer an unusual solution. For a number of years the provinces have been concerned about the unbridled use of the federal spending power. In many cases it has forced them to establish priorities that they may not have chosen on their own but the offer of money from the federal government was very difficult to refuse. Major problems have arisen when the federal government encouraged the provinces to establish programmes such as medicare, and then proposed to withdraw its monetary support at a later date. A province is then left scrambling to find the money to continue the programmes since in most instances a demand for and reliance upon the existence of such programmes has been created. The new proposals would ensure that federal monies were only used for carrying out laws "in effectuation of the powers granted to or recognized in the federal government by this constitution" unless the

provinces unanimously agree to the spending or Abel's proposed Canadian equalization council recommended it.

This council will undoubtedly not receive a warm welcome from government officials since it is to be an independent body created to allocate some of the federal monies to the provinces using a form of equalization which Abel believes to be more equitable that that used in the past. What is most unusual about his proposal is that this equalization council would be independent from both levels of government, its members designated by each province and the federal government, but not subject to their direction. A fund would be established from net proceeds of duties on import and federal revenues in excess of expenditures in execution of federal purposes.

The money collected would then be allocated among the provinces to the "end that the resources of each may be such that it can provide government services at a level worthy of Canadian life." These would be unconditional grants to be used as the province so desires. Traditionally these grants have been worked out by a process of political bargaining which Abel feels has not been a satisfactory method since only the strongest voices tended to have their demands and expectations met. He does not see this as problematic for the principles or notions of parliamentary responsibility since it would be elected legislatures who appointed the members of the council. However, this council would not be accountable to the legislatures - in fact if they have a protected term of office they would be allocating money without being accountable to anyone. While politicians would undoubtedly oppose this move, it is also questionable whether this would be satisfactory for a democratic system. Is there not some merit in allowing politicians to make these decisions as to allocation of public resources since they are the ones who should be responsible if this money is not allocated in a satisfactory manner?

On the whole Professor Abel's proposals are a very admirable attempt to resolve some of Canada's constitutional problems. It is truly unfortunate that he did not complete his book before he died, since some of the future chapters left undone were designed to fill in loopholes in earlier chapters. However, even in these few well written and researched chapters he has provided valuable insights for constitutional reform, and provided encouragement by his bold example for those who would venture into this crucially important area.

Clare Beckton
Faculty of Law
Dalhousie University

Report on Civil Litigation in the Public Interest. By the Law Reform Commission of British Columbia. Vancouver: Ministry of Attorney General, 1980, Pp. 80 (No price given)

In the context of contemporary society, our traditional rules of standing seem peculiar. They tell us that the more people affected by a wrongful act, the less likely it is that any citizen will be able to maintain a law suit seeking redress. That narrow circle of persons with a pecuniary or proprietary interest will be able to pursue their private interests, but what of the broader public interest when others are as well affected? In the infamous *Hickey et. al.* v. *Electric Reduction Co. of Canada, Ltd.*[1] case, even fishermen whose livelihood had been affected when fish became contaminated by the discharge of poisonous materials were told that they did not have the requisite *locus standi* to sue. This was so because the offending action also affected the rest of the public and hence constituted a public rather than a private nuisance. Only if they had suffered "peculiar damage" could they sue. If this is the reaction commerical fishermen receive, imagine the reaction awaiting a public-spirited citizen; imagine the reaction an environmental defence group would receive!

The Courts have traditionally told us that these are not cases of wrongs without remedies. There is a remedy for public nuisance, just as there is where a public body exceeds its powers and where statutory provisions enacted for the benefit or protection of the public are breached. In each of these instances the Attorney General has standing to seek an injunction or declaration. He is regarded as responsible for the protection of the public interest and the Courts have been content to assume that if the public interest is really affected, he will act. The problem is that often he does not act, in which case the exercise of his discretion is unreviewable and the Courts will not, with limited exceptions, allow a substitute advocate of the public interest. In that sense a wrong can go without a remedy. In these days of expanding statutory norms of conduct and public duties, it is not surprising that an Attorney General cannot give full attention to all such violations. Often, however, there are persons and groups willing and able to place these matters before the Courts for adjudication. Why not by-pass procedural concerns and allow the Courts to decide issues which affect the public interest on their merits?

It is in this kind of context that the Law Reform Commission of British Columbia has recommended the enactment of legislation

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1. (1970), 21 D.L.R. (3d) 368 (Nfld. S.C.).

expanding the role of citizens in maintaining public interest proceedings.[2] Such proceedings are defined as those which could be brought by the Attorney General, and include specifically proceedings in respect of a public nuisance, a violation of an enactment, and an action by a public body in excess of its powers. The Commission would require a person wishing to maintain a public interest proceeding to apply as usual to the Attorney General, requesting him to commence the proceeding himself or to consent to a relator action. If the Attorney General does not respond favourably within ten days, the applicant can apply to the Supreme Court for consent to undertake the proceeding in his own name. The Court "on conditions it considers appropriate, shall give its consent unless it considers there is not a justiciable issue to be tried".[3] An amendment to the Constitutional Questions Act[4] is also suggested to permit any person to seek a declaration that an enactment of the Province or of Canada is "invalid". This would seem to eliminate consideration of prelitigation conditions precedent,[5] and to remove from the Court the discretion residing in it as to whether standing ought to be accorded in such cases.

These recommendations are significant. Their incorporation into Canadian legal systems would represent, in my view, one of the most important innovations in a good many years. Such legislative changes would go quite some distance in enhancing public participation in our legal system and would put real teeth into many of the laudatory but largely platitudinous statements found in modern legislative schemes. However, this Report has more to recommend itself to the reader's attention than just its introduction into the fascinating possibilities unfolding in British Columbia.

It will be a number of years, if at all, one suspects, before these recommendations are widely acted upon. In the meantime, lawyers acting for public interest oriented clients will continue to be confronted with questions of standing and will be in need of information and arguments concerning them. The Report serves admirably as a

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2. This they suggest should be done by adding new sections to the *Law and Equity Act*, R.S.B.C. 1979, c. 224.
3. At 75.
4. R.S.B.C. 1979, c. 63.
5. *Eg.* in *Nova Scotia Board of Censors* v. *McNeil* (1975), 55 D.L.R. (3d) 632 (S.C.C.) Laskin, C.J. noted at 635 that the plaintiff had taken "all the steps that he could reasonably be required to take in order to make the question of his standing ripe for consideration."

statement of law as well as a source of critical comment concerning the need to push the *Thorson* and *McNeil* frontiers[6] further forward.

The Report essentially consists of four segments. The first segment discusses the position of the Attorney General, relator actions, the Attorney General's fiat and the standing of the Attorney General in three types of action: public nuisance, the excessive use of power by a public body and the breach of statutory provisions. The three chapters devoted to the role of this public official are followed by a chapter dealing with the standing of an individual.

This chapter begins with the proposition that an individual will have standing in a matter of public interest only if a private right of his has been interfered with or he has suffered special damage peculiar to himself from the interference with a public right. Statutory appeals are next examined, under headings coinciding with the terms of art usually used, i.e., "person aggrieved", "person interested", "person dissatisfied", and "person affected". The next section of the chapter deals with the exceptions to the above-mentioned proposition, namely ratepayers cases, constitutional cases and express statutory exceptions. The type of remedy sought by an individual is sometimes a pertinent factor in decisions on standing, and this is examined in the penultimate section. Finally, the chapter on individual standing is rounded out by consideration of private prosecutions and intervention as *amicus curiae*. It is this chapter on individual standing that the busy practitioner will find most useful as an up-to-date statement of the law. This is particularly so since English and Canadian, as opposed to purely British Columbian, authorities are canvassed.

The third segment of the Report discusses the Commission's perceived "Need for Reform" of the present law. It argues persuasively in favour of relaxing standing requirements, discussing the arguments usually advanced in favour of the traditional rules. It reviews the literature on the subject, including the work of such other law reform commissions as the English and the Australian. The final segment to the Report puts forward the Commission's recommendations for reform, which take the form already outlined above.

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6. *Thorson* v. *Attorney-General of Canada et. al.* (1974), 43 D.L.R. (3d) 1 (S.C.C.) and *McNeil, supra* note 5 both involved challenges to the constitutionality of legislation. It is still an open question as to whether the liberalized views represented by these two cases will be expanded to non-constitutional areas. See the discussion in the Report, at 42-50 and the comment of the Honourable Wishart Spence in *Water and Environmental Law* (Halifax: Dalhousie Law School, 1979).

From a reviewer's standpoint,[7] there is little in this Report to draw negative comment.[8] The prose is lucid; the complexions of the present state of the law are set out in understandable form; the layout is professional; the quality of print and binding suitable for permanent collections.[9] The research has been thorough and citations indicate sources of other useful material. In short this is one report which is a "must" for anyone interested in the subject.

Bruce H. Wildsmith
Faculty of Law
Dalhousie University

Child Support in America: The Legal Perspective. By Harry D. Krause. Virginia: The Michie Company, 1981. Pp. 700. Price: $30.00 (U.S.)

Canadians will view as little short of miraculous, the ability of the publishers to market this hard cover book at a price of $30.00 U.S. The ten chapters cover:

(i) Child Support Obligations Under State Law
(ii) Enforcement Remedies under State Law
(iii) Legitimacy and Illegitimacy
(iv) The New Law of Illegitimacy
(v) Ascertaining the father of the non-marital child
(vi) Blood tests and science
(vii) & (viii) Federal intervention in child support
(ix) The mother's cooperation in ascertaining and locating the absent father
(x) Discuss the direction in which Child Support might develop in the next five years.

In addition to the above there are 8 appendices covering, *inter alia* reciprocal enforcement of support legislation, the Uniform Parentage Act and a number of papers on blood tests and the use of blood tests in other countries, and the capacity of U.S. laboratories for blood typing.

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7. The purpose of this review is not to examine critically the substance of the recommendations. Suffice it to say in that respect that I endorse the direction recommended by the Commission.
8. A few defects in the footnotes did come to my attention, *e.g.*, note 36 at 35 should be "Nfld. S.C." instad of "N.S.S.C." and should be dated 1970 instead of 1972; note 30 at 34 should be "McLaren" instead of "McClaren".
9. It would have been useful to have put the title along the back of the binding to ease retrieval after shelving.

For those familiar with the problems of child support in Canada there may be some reassurance in the fact that the United States has faced similar problems, though until recently[1] we lacked some of the empirical research which has been done there. In the United States constitutional requirements of due process and equal protection add an extra dimension and have led to support obligations being equally imposed on both parents of illegitimate children (p. 5). In Canada much the same result has been reached, for example, by recent legislative amendments[2] to the Nova Scotia Family Maintenance Act.

In addition to the flexible tests commonly found in Canada for arriving at the quantum of child support, Canadians may find interesting some of the Tables of Support in use in some of the American courts. (See p. 13 for the Beoward County Court Schedule). Canadians will also find the Parent Location Service discussed at pages 330-338 and 424-427 of great interest. This federally funded programme set up under the Aid to Families with Dependent Children is not restricted to cases where public aid is being provided to children, and enables statutorily authorized state and federal Parent Location Services to trace the defaulting parent. The initial search is at the local and state level.

> At the state level, these sources include employment, unemployment, public assistance, income tax and motor vehicle offices, as well as criminal-record repositories. At the local level, sources include personnel of state or local assistance, food stamp and social services programs, relatives, friends and past employers of the absent parent, financial references, the telephone company and post office, as well as police, union and fraternal organization records.

Subsequently a federal search may be made covering the following sources by means of a computer search:

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1. *See Matrimonial Support Failures: Reasons, Profiles and Perceptions of Individuals Involved* (Alberta: Institute of Law Research and Reform, 1981). This study was based on research in Alberta. For a recent study of Maintenance Orders in the Vancouver area see "A. Wachtel and B. Burtch, "Excuses"—An Analysis of Court Interaction in Show Cause Enforcement of Maintenance Orders (Vancouver: United Way of the Lower Mainland, 1981).
2. See the Nova Scotia Family Maintenance Act, S.N.S. 1980, c. 6 where s. 8 involving maintenance of children seems to overlap with s. 11 which covers maintenance of illegitimate children. The net result of these opaque provisions may be to achieve in Nova Scotia much of the same result as the more direct approach in Ontario of abolishing the legal distinction between legitimacy and illegitimacy in the Children's Law Reform Act, S.O. 1977, c. 41, s. 1.

> Under this system, the federal parent locator service compiles all search requests and, once weekly, disseminates all requests to the Social Security Administration, the Internal Revenue Service, the Veterans Administration, the Department of Defense, the Department of Transportation (Coast Guard), the National Personnel Records Center, the General Services Administration, and the Immigration and Naturalization Service. These agencies report the results of their internal searches to the federal parent locator service, which updates its answers to state requests as information from the federal agencies' searches come in.

This contrasts strongly with the Canadian position. Although some provinces such as Nova Scotia have made provincial data bases available to those wishing to trace a defaulting payer parent or spouse,[3] these do not bind the Crown in right of Canada, which, through its Income Tax, U.I.C. and other data bases has a much more extensive means of tracing defaulters. Quebec, however, unlike the other provinces, is in the position of being able to have recourse to its own income tax returns and moreover has amended its laws to require persons in Quebec, such as provincial tax authorities, or even the relatives of an absconding parent or spouse, to reveal their whereabouts in order to facilitate enforcement of existing courts orders.[4] Where out of Province orders are concerned there is no doubt that the Reciprocal Enforcement of Maintenance legislation leaves a great deal to be desired. Only Manitoba[5] makes a real effort

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3. Nova Scotia Family Maintenance Act, S.N.S. 1980, c. 6, s. 51.
4. See Bill 183, 1980. An Act to promote the payment of support which adds a new article 546.1 to the Quebec Code of Civil Procedure.
5. See the position paper by R. M. Diamond of the Manitoba Attorney General's Department presented at the 2nd C.B.A. in Montreal August 28, 1980. The following extract indicates the basic Manitoba position.

> The Department of the Attorney-General for the Province of Manitoba provides Crown Counsel in cases of child abduction to represent custodial parents in the civil enforcement of foreign custody orders pursuant to either the *Extra Provincial Custody Orders Enforcement Act* or Section 15 of *The Divorce Act.*
>
> It is the opinion of the Manitoba Department of the Attorney-General, that for the *Extra Provincial Custody Orders Enforcement Act* and for Section 15 of *The Divorce Act* as it effects foreign Custody Orders to have any real effect, it is necessary for the Attorney-General's Department to provide legal counsel in such situations.
>
> As a result, on March 14th, 1979 the Department wrote to the Deputy Attorneys-General of the other Provinces in Canada setting out our rule and requested that they provide a similar service. Three provinces replied with negative responses and six ignored the requests to date.
>
> Despite the lack of reponse by the other Provinces, our Department does provide legal counsel to custodial parents where the non-custodial parent abducts the child into Manitoba for purposes of enforcing Foreign Custody Orders. Our Department has taken the position that this is a logical extension of the legal services provided by our

to provide personnel to assist the recipient of an out of Province maintenance or custody order to enforce it in the Province where the payer is. Clearly the advent of a parent location service on the American model would be of great benefit. It would equally facilitate the enforcement of support orders under the Divorce Act. Although these are enforceable throughout Canada once they have been registered, they presuppose the recipient of the award knows where the payer spouse or parent is located. Recent research from Alberta[6] has shown that finding defaulting payers (usually husbands and fathers) does not require extensive detective skills and the creation of such a system has a great deal to commend it. Fears of encroachment of the civil liberties of the defaulter have to be set against the rights of children (and spouses) to support and not to be left in destitution. One salutary lesson, however, despite the virtues of the American system, is anecdotal evidence of the several reliable sources at the recent National Workshop on Child Support[7] that it is still possible for defaulting fathers to disappear in Cook County notwithstanding the virtues of the U.S. Parent Location Services.

Once a parent has been located in the U.S.A. Krause shows how various novel methods of enforcement of arrears have been employed, including deducting arrears from tax refunds due to the defaulting parent. These contrasts nicely with the more robust methods of enforcement so graphically described by David Chambers in "Making Fathers Pay".

Department and other Attorney-General's Departments under *the Reciprocal Enforcement of Maintenance Orders Legislation.*

By the Departments' direct involvement in the Civil Enforcement of Custody Orders a system of co-operation has developed between our Department, the Police Department, the Children's Aid Societies and the Courts with regard to these type of cases. It has been the experience that providing assistance to foreign custodial parents enables quick enforcement of Orders as well as the foreign custodial parent not having to incur any expenses with regard to engaging the services of a private detective or a lawyer in Manitoba to enforce the legal right of custody. Involving the Crown expedites these matters by the easy assessability to the Courts and Police Departments, and has resulted in quick returns of abducted children.

The Attorney General's Department, rather than Legal Aid should be responsible for enforcement of foreign custody orders. Financial circumstances should not dictate whether the government of each state becomes involved for purposes of enforcing foreign custody orders. The urgency of having the matters dealt with as quickly and expediently as possible dictate that the Crown be involved. Using Legal Aid could involve months of processing the application. Economics should not be a consideration when the interest of an abducted child is at stake."

6. See *supra* note 1.
7. Held in Madison, Wisconsin; April 22-24, 1981.

In virtually every country the question has to be faced "how far is the mother's cooperation in locating the father a precondition to public support being made available to the mother and child." Federal legislation in the U.S.A., although requiring the mother's support, provides relatively modest sanctions where the mother will not cooperate. The mother can keep her children's AFDC benefits which are then paid to a third person known as the protective payee, but may lose her own. This contrasts markedly with the Provincial position in Canada where the mother is required to take proceedings against her husband or the father of her child as a precondition to obtaining Family Benefits.[8] In *Jollimore* v. *For, City of Halifax, et al,* a man who had successfully resisted such an application sued the City of Halifax for the cost of blood tests involved in resisting his claim alleging that the City of Halifax was the real plaintiff in the action. Although the action was unsuccessful on technical grounds the Court of Appeal was far from being unmoved by the man's plight.

Even these few examples (and there are many more) show the relevance in Canada of American approaches to what are common social problems in the field of child support transcending national boundaries. There is scarcely a family lawyer, social worker or administrator of social security programmes who could not read this book with advangage.[10] The book may even provide a fillip to the proposals of Myrna Bowman to improve the interprovincial enforcement of Maintenance Orders after Divorce by either utilising the Federal Courts in this area, adding garnishment powers to the Divorce Act, or by making the Minister of National Revenue subject to garnishment to collect arrears of maintenance with respect to any refund payable to the taxpayer/maintenance debtor or the "Tentative Proposals for an Enforcement of Maintenance Orders Act" published in March 1982 by the Saskatchewan Law Reform Commission.

A. Bissett-Johnson
Faculty of Law
Dalhousie University

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8. See Reg. 15(3), Family Benefits Rep. N.S., No. 178.
9. 7 N.S.L.N. 90.
10. "Practical tools to improve inteprovincial enforcement of maintenance orders after divorce." Law Reform Commission of Canada, Working Paper (1980).

Surviving the Breakup - How Children and Parents Cope with Divorce. By Judith S. Wallerstein & Joan Berlin Kelly. New York: Basic Books, 1980. Pp. 341. Price: $8.95.

Until recently the position of a mother involved in a battle with the father for custody of her children was bolstered and fortified by at least two doctrines: The common law "tender years doctrine", masquerading as a rule of common sense but applied in some jursidictions like a rule of law,[1] and Dr. John Bowley's work on Maternal Deprivation.[2] Both these tended to support the mother's claim to custody. If she obtained custody then her decision to deny her husband or ex-husband access to his children might have been justified by Goldstein, Solnit and Freud's assertion that whether access was to take place or not should depend on the decision of the custodial parent.[3] Access could even be terminated if it made the custodial parent anxious and this was transmitted to the child to his or her actual or perceived future detriment.[4] Of late, however, con-

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1. See the Saskatchewan Law Reform Commission "Proposals on Custody, Parental Guardianship, and the Civil Rights of Minors." Commenting on the change made to the Infants Act of Saskatchewan made in 1978 by s. 4 of the Infants Amendment Act R.S.S. 1978, c. 32 (supp.) that in considering applications for custody "no presumption shall exist as between parents that one parent shall be preferred over the other on account of his or her status as father or mother." The Commission recognised that this amendment was not intended to prevent a court finding, as a matter of fact, that a particular mother was better suited to have custody of her child than the child's father. The amendment was, however, intended to prevent the use of the tender years doctrine as a rule of common sense in the absence of actual evidence showing a relationship between parent and chiold. Unfortunately, by characterising the relationship as one of common sense rather than a presumption, the courts in some cases were apparently still applying the "tender years" doctrine despite the statutory amendments and the Commission recommended (p. 6) that more explicit amendments, be made to abolish the tender years doctrine or rule of common sense.

2. Maternal Care and Mental Health (W.H.O. Monograph Number 2, 1951).

3. Joseph Goldstein, Anna Freud and Albert Solnit *Beyond the Best Interests of the Child*" New York: Free Press Paperbacks, 1973) at 38. It is true that the authors do not overtly deny the value of a continuing contact between the child and the non custodial parent, but, by denying any legally enforceable right of access by the non-custodial parent they seem to suggest that the more unreasonable for non-custodial parent is over access the stronger is their hand at law. This appears to confuse the best interests of the parents with those of the child. However, having raised the issue one must recognise the extremely limited powers of a court to enforce access orders, and the reluctance of the court to use the contempt power, or to change custody. Perhaps in fairly evenly balanced but competing claims for custody an important criteria is "which parent, if granted custody, is more likely to allow unimpeded access by the other?"

4. *Lavery* v. *Lavery* (1977), 22. N.S.R. (2d) 432 at 441 (para 30). "If, as I find, the continuing relationship between the child and the respondent causes emotional upset on the part of the mother of the child, this, undoubtedly, has an effect on the child itself, and is a factor which I keep in mind, not, as I have said, because the welfare of the mother is of primary concern, but because anything which disturbs the emotional balance of the

trary views emphasizing the importance of both parents to children have emerged. Dr. Judith Grief has challenged the inherently unequal division of power in the traditional sole custody and reasonable access award.[5] To this must be added Wallerstein and Kelly's recent empirical work on how children and parents cope with divorce. This book, which should be required reading for all those involved in the marriage breakdown process, whether as judges, lawyers, doctors or social scientists, consists of 17 chapters broken down into four parts: (i) separation; (ii) parents and children after separation; (iii) in transition; and (iv) five year follow-up.

The study was based on a small sample, 60 families comprising 121 children[6] and, though the sample might be regarded as unrepresentative by having a "middle class or California bias," its findings are nevertheless valid even though they challenge many of our comfortable beliefs about divorce. Even if the decision to divorce can be viewed as rational from an adult perspective, the overwhelming majority of children preferred the unhappy marriage to divorce (p. 10) and decried the concept of the painless divorce. The study reveals willingness of parents to see their children's response to the divorce very much from their own point of view. The parent who opted for divorce tended to see the children as adjusting well to the crisis, whilst the parent who disapproved of the divorce tended to see the children as suffering or in crisis (p. 17). This perhaps compliments the survey in the English periodical "The Woman" in February 1982 which revealed that adults are now placing their own happiness first in marriage or the decision to divorce, and hoping their children will cope with the new situation.

The lack of safety mechanisms, such as the extended family or counselling, (p. 43) compounded the child's difficulties in dealing with divorce. Divorce aroused feelings of rejection, of divided loyalties (their relationship with their mother might be endangered if the

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mother is bound to have an effect on the child." This principle must be treated with great caution lest it be taken to mean the more neurotic a custodial parent is the less likely is he or she to have to allow access or her former partner. For an example of the "domino effect" in the related area of step parent adoptions see *Re Carter* (1976) 15 N.S.R. (2d) 181 in which the need for the stepmother to feel less like a surrogate parent was a factor in the decision to dispense with the natural mother's consent. This decision may have be been overtaken by the subsequent decisions in *Wolfe Cherrault* (1978), N.S.R. (2d) 17 (N.S C.A.) and *Stoodley v. Blunden* (1980) 17 R.F.L. (2d) 280.

5. J. Grief, "Access: Legal Right or Privilege at the Custodial Parent's Discretion," 3 *Can. J. Fam. L.* 43.

6. Interviews were conducted at divorce, 18 months later and concluded with a 5 year follow up interview.

children visited or retained loyalty to their father (p. 30). The younger children (under five) often experienced guilt that they might have contributed to the breakdown, though other, usually older children, often had both sophisticated and realistic assessment of the causes of marital breakdown.

The response of the chidren depended, confirming Goldstein, Solnit and Freud, on the age of the child. Young children regressed or had macabre fantasies to explain the departure of the absent parent. Those of young school age yearned for the departed parent, expressed anger at the custodial mother (as it usually was) and engaged in fantasies of reconciliation. For children on the threshhold of adolescence, the nine to twelves, this was an especially vulnerable time (p. 80). However, even for thirteen to eighteen year olds divorce created worries about their own future marriages or even triggered their indulgence in promiscuous behaviour.

The survey deals with the problems of how children come to terms with the whole process of divorce. This is much more than the single event of breakdown. It involves chidren being marked off as "his" and "hers" by their parents and then, having become close to one parent or the other, finding themselves displaced by a lover or new found interest, of having to cope with worsening economic conditions, and changed neighbourhoods.

In working through this process the role of the custodial and non-custodial parent is crucial. Mothers often felt vulnerable and in need of "mothering" themselves. "I feel like a twelve year old raising an eight year old" (p. 109). For the custodial parent the quality of parenting that they offered was affected both by their feelings of having to be both parents to their child and the need to find a job. Often what brought them through this difficult period was almost a transference of roles and recognition in later years that "I would not have made it but for the children". At the same time the problem of visits has to be dealt with. The role of the visiting parent is unclear. Does he (or she) retain the right to enforce discipline? Where are the visits to take place - an especially important problem with younger children? What is clear is that things were not so easy for the men as their former wives may have believed. Over half feared rejection and to head this off, the fathers were especially generous. Thus, fear rather than bribery is the explanation for the special treats lavished on the children which are often criticized by mothers (p. 124). Perhaps only half of the mothers saw any value in the visits and one-fifth actually tried to sabotage the visits. Given how depressed

the fathers often were, their possible guilt feelings, it is perhaps not surprising to see why these visits often tail off over time.

The factors favouring access were the motivation of all the parties, the ability of the fathers to deal with the complex logistics of visiting, their ability to deal with the hostility or capriciousness of their former spouse and children, and the psychological profile of the men - those men who were lonely but not guilt ridden and who were psychologically intact. (p. 131). This still does not address the question of the frequency of access. In the States the norm appears to be twice monthly visits, but these are influenced more by lawyers' advice to winning parties than the best interests of the child. At the time of the initial interviews at least 40% of children were seeing their absent parent once a week. Where the children were young school aged boys whose fathers lived close by visits were often taking place two or three times a week. Just over a quarter of fathers were seeing their children twice a week and another quarter "infrequently" i.e. less than once a month. There seemed to be some evidence that fathers visited their sons more than their daughters. This might have been influenced by either a feeling that boys needed their fathers more, or the fact that the fathers feelings towards their daughters were influenced by their feelings for their ex-wives. These antagonisms between the parents could reach a point where 15% of children felt their visits were being ruined by the parents' crossfire. Eighteen months later things had changed. The girls seem to adjust substantially more quickly than the boys. The boys were significantly more opposed to the divorce than the girls and more longed intensely for their fathers. In a quarter of the children psychopathological feelings, usually depression, were present. By five years the cases where the outcome was most successful (at all ages of children) were those where there was a close relationship between the custodial and non-custodial parents. Usually there was a regular pattern of visiting encouraged by the custodial parent. In practice there seems to be a relationship between access and support even if the courts see these as independent matters (p. 186). Sixty-eight percent of the fathers were paying child support regularly, but in about one-fifth of the cases, litigation, often on the issues of support and access, ensued. Perhaps surprisingly the emotional importance of the non-custodial father to the child did not diminish over the five years, or with the custodial parent assuming a greater role in the child's life (p. 307). This must diminish the significance of Goldstein, Solnit and Freud's argument about the need to reinforce the position of the custodial parent, or any thoughts that a child has only one psychological parent. Indeed there is evidence in

the chapter on 'remarriage' that many children are able to have satisfying relationships with both their fathers and stepfathers and that each fitted a slightly different slot in the child's feelings, nor was there confirmation of the expectation of conflict as they dealt with their father and stepfather in their formative years. The adult parties were often less able to cope with this duality, and on occasions found it difficult when a child retained a desire to see his father despite a deliberate move to another part of the country aimed at cutting the father out of the child's life (p. 295).

The study reveals divorce as a several stage process in which the most stressful period is the initial one. After this period the girls seem to rebound faster than the boys. This is followed by a transitional period of two to three years, and by the five year mark most of the marriages had stabilized or entered into a new marriage. The perceptions of children and adults however, differed markedly even after five years. Thus whilst the adults generally approved of the divorce over a half of the children did not regard the divorced family as an improvement on the predivorce family. A third of the children were still unhappy or angry with their parents. The absent parent was still an emotionally important figure in the child's life.

The study becomes important in supporting new investigations of joint custody despite their lack of attraction to the courts.[7] The report is also important in its suggestion that children below adolescents are not reliable judges of their own best interests. Unfortunately, with overstretched social work departments, this does not help courts desiring good quality reasonably objective home enquiry or home study reports by the same social workers who had been able to evaluate both competing homes. It does, however, support the view that the court should take as active steps as possible to ensure that access orders are respected. Finally the survey emphasizes the need for good quality counselling to enable a period to adjust to divorce. Alas it is not available generally in Canada nor does there seem to be much hope of creating such schemes in the present economic climate.

The significance of the book is not just in its providing balance to the more controversial works of Goldstein, Solnit and Freud,[8] but in

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7. See for example *Baker* v. *Baker* (1979), 8 R.F.L. (2d) 236 (Ont. C.A.), the majority view of the Ontario Court of Appeal in *Kruger* v. *Kruger* (1980), 11 R.F.L. (2d) 52 and *Zwicker* v. *Morine* (1980), 38 N.S.R. (2d) 236. In contrast see Wilson J.A.'s decision in *Kruger;* J. D. Payne, "Co-parenting Revisited" in Payne & Begin, *Canada: Cases and Materials on Divorce,* Vol. 2 at 40-673, and a number of Prince Edward Island authorities mentioned by A. Bissett-Johnson in Recent Developments in Family Law F.L.R.

8. Joseph Goldsetin, Anna Freud, and Albert Solnit, *Before the Best Interests of the Child* (New York: Free Press Paperback, 1979).

its long term follow up. Keeping in touch with even 60 families over five years in a mobile society like the United States raises tremendous problems of logistics.

A. Bissett-Johnson
Faculty of Law
Dalhousie University