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Aviation Insurance

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Book Reviews

Desmond H. Brown, *The Genesis of the Canadian Criminal Code of 1892* Toronto: Published for the Osgoode Society by University of Toronto Press, 1989, 253 pp. $35.00 (cloth).

Brown gives an interesting and readable account of the background of the 1892 Code and its genesis in the politics of the day. His preface and six short chapters are followed by an epilogue, a short biographical note and footnotes. Chapter One deals with the ambiguity of the term "code". Clearly, the 1892 Code was not a codification in the civilian tradition as exemplified, for example, in the Napoleonic Code, nor was it even a code such as Bentham might have drafted. It was a "code" only in the loose sense in which the word was used by English and Canadian legislators in the nineteenth century to describe a consolidation and systematization of statutory law combined with some reform legislation by way of filling gaps, incorporating some of the common law or expressly altering case law relating to a particular issue. Indeed, in English Canada in 1892, little distinction was made between a systematized consolidation and a codification of the law.

Chapter Two summarizes sixty years of penal reform in England, culminating with The English Draft Code of 1879. Under the heading of "Origin and Development of Legal Systems in British North America" Chapter Three summarizes legislative reforms of criminal law in the pre-confederation Canadian colonies. Chapter Four entitled "Consolidation and Codification Before Confederation" gives a detailed account of various statutory consolidations in the Canadian colonies; it suggests an implicit dependence of "codification" upon development of certain drafting skills. Chapter Five deals with the Revised Statutes of Canada, 1886 which Brown sees as an important prelude the 1892 Code. The implication is that the 1886 consolidation gave the Code drafters a necessary foundation on which to proceed with the Code, namely, a clear and up to date statement of Canadian criminal law and procedure. The 1886 revision also provided an opportunity for one of the commissioners, G.W. Burbidge, to draft a proposed Code of Criminal Law to take the place of the "revised" criminal law statutes. He was unsuccessful in persuading the Commission Chairman to make the substitution. Chapter Six moves beyond the 1886 consolidation and lays bare the genesis of the Code of 1892.

This genesis, it appears, lies not in a nobly conceived plan of law reform by a high minded public servant bent on serving the public good, but in narrow partisan politics; in short, a desire by Sir John Thompson,

Minister of Justice, to stay one step ahead of the Liberals on the codification issue and to prevent them from embarrassing the government on the matter. Brown outlines the following incident. In the fall of 1889 Thompson received an offer from Sir Henri-Elizar Taschereau to draft a Canadian criminal code. Taschereau was highly regarded not only as a judge, but for his sophisticated and professional publication of the annotated federal criminal statutes which rivalled Burbidge's *Digest* and surpassed it with their clear, logical style. Although Thompson had a long history of initiating legislative action to "systematize" the law, by the time Taschereau made his offer in 1889 one would have thought that Thompson's passion for order and system would have been cooled by the recent and exhaustive work on the Revised Statutes of 1886. According to Brown, Thompson felt he could not reject Taschereau's offer with a flat "No". Taschereau was a Liberal appointee to the bench and Thompson apparently felt that if Taschereau were given a simple rejection he would proceed to draft a code on his own, in which event, the Liberal opposition would pick it up and introduce it as a private member's bill, to the embarrassment of the government. Brown suggests that Thompson engaged in a bit of a fiction: he told Taschereau not to waste his time drafting a code since the Department of Justice was already at work on such a project. Thompson then immediately turned around and contacted Burbidge with an offer to start work on a code. The laws of patronage, apparently, forbid the making of such an offer to Taschereau. Brown's guess as to Thompson's motive in failing to accept Taschereau's offer has an air of reality about it. It would not be the first time, nor the last, that important legislative or constitutional changes hinged on considerations of partisan political advantage. The genesis of the Code was, perhaps, a case of partisan advantage running parallel to noble purpose.

There is no suggestion that the Prime Minister, Sir John A. MacDonald, played a role in the 1892 Code, although the inference is that he was sympathetic to the idea. The fact was that MacDonald was exhausted and ill; on first reading of the Bill to introduce the Code in Parliament, Thompson was summoned from the House by MacDonald who promptly collapsed. The Prime Minister was seriously ill and in three weeks lay dead. Thompson steered the Code through Parliament with Abbott as Prime Minister.

The reader may ask as to the genesis of the Code, is that all there is, a deceptive partisan ploy made with a view to keeping ahead of the Liberals? Is there nothing else, for example, what sources did Thompson rely on in scraping together a Code within a bare eighteen months of Taschereau's offer? Simply put, the materials were already on hand.

Brown's account makes clear that for over sixty years in both Canada and England, law reform, including criminal law reform, occupied a prominent place on the public agenda: Select Committee Reports, Royal Commission Reports, the Draft Codes of 1843 and 1849 in England and the consolidation of penal statutes, Stephen's *Digest* of the criminal law, Stephen's Draft Code of 1878, Wright's Code, the English Draft Code of 1879, and in the Canadian colonies, the progressive Nova Scotian Code of 1841 followed by the elegant consolidations of 1851 and 1873 with parallel work in New Brunswick. In addition the Canadians had experienced the perils of an over-hasty adoption of purely English reforms: the federal Criminal Law Statutes of 1869, being paraphrases of Greaves' 1861 Consolidation of English criminal law, at least in respect to substantive law, served as an unfortunate precedent. Besides all this, Thompson had on hand Taschereau's extensive and learned publication of the annotated criminal law statutes, Burbidge's *Digest* of Canadian criminal law, modelled on Stephen's *Digest* and the extensive and careful federal consolidation of 1886. In addition to this English and Canadian material, the Canadians had access to the codification work that had been on-going in Massachusetts, New York and elsewhere in the United States.

The English reforms and the progress of the English Draft Bill of 1879 and the detailed Royal Commission analysis of that proposal were well known to Burbidge, Sedgewick and Masters, three of the five people Thompson selected to draft the Canadian Code. Besides being abreast of codification movements in England, Burbidge had practical experience in drafting and in thinking about appropriate forms and ordering of consolidations of penal law in New Brunswick; Masters also had practical experience.

The result was that Thompson's Code reflected Burbidge's admiration for the work of Stephen and the English Draft Code. This reflection is found in the organization, structure and style of drafting of the 1892 Code. As for content, the Canadian Code differed from the English Draft Code in that it included both indictable and summary conviction procedure, and in these matters relied heavily on Canadian statutory law. There were some procedural reforms traceable directly to the E.D.C., particularly the abolition of the common law classification of crimes as felonies or misdemeanors and replacing it with the now familiar indictable/summary conviction categories. Although classification would affect right to trial by jury, the name change *per se* did not greatly affect criminal procedure as Canadian lawyers knew it. The powers of the grand jury were restricted, but that move had considerable support throughout the profession. Punishments were largely reflective of those in the existing federal statutes.

With respect to substantive law, the Code reflected much of the existing Canadian law respecting offences, law that in turn reflected the English consolidation of 1861. However, important substantive changes were made, following the EDC in that, for the first time, definitions of offences were included for some crimes: rape, murder, robbery and theft. Indeed, theft was a wholly new offence, replacing common law larceny, following Stephen's Draft Code and the E.D.C.

How was it, then, that a Canadian parliament enacted a Code of criminal law when similar efforts in England had failed in the face of a hostile opposition both within and outside Parliament? Brown suggests that both sides of the Atlantic offered a climate supportive of criminal codes; in England the E.D.C. failed principally because the government attempted to ram the legislation down the throat of the Opposition whereas in Canada, Thompson proceeded with consummate skill to get the cooperation of the Opposition through a joint committee of the Senate and House of Commons, that being only the second time of using such a joint committee. More importantly, Brown suggests Thompson allayed fears in advance; he extolled the Bill as one based principally on the imperial model in Westminster, that is on the English Draft Code, and taking what was best from Stephen's *Digest;* Burbidge's *Digest* and Canadian statute law. Thompson downplayed or omitted to mention the changes the Bill would bring about and downplayed the codification aspect of the Bill; instead he emphasized the need to reduce "needless technicalities, obscurities and other defects which the experience of administration was disclosed."

Despite Brown's admiration for Thompson's parliamentary skills it is astonishing to this reader that he could get away with first and second reading without distributing copies of the Bill. Even more of an affront to Parliament, it would seem, was Thompson's distribution of 2000 copies of the bill to the bench, bar and "leading members" of the public six months in advance of members of Parliament being allowed to see a copy. Printer delays were blamed but Brown suggests that Thompson was keen to restrict knowledge as to how far the Bill went beyond a simple consolidation. Yet Thompson did tell the House that the Bill, following the E.D.C., would abolish the felony/misdemeanor distinction and follow the E.D.C. with respect to some substantive changes in the law; however, throughout, Thompson downplayed the extent of the changes. Brown refers to Thompson's "ploy" of playing up the popular notion that grand jury powers would be restricted, but avoiding discussion of more significant changes.

A reading of Brown's book underscores the hopeless tangled obscurity of the criminal law in the eighteenth century and the enthusiasm with

which legislatures and others on both sides of the Atlantic for over 60 years attacked the mass with a view to systemization, order, clarity and accessibility. The wonder is not that the criminal law was reduced to some type of code form but that it did not occur sooner.

Brown's book suggests that the central Canada view of the world was imposed on federal policy in criminal reform at an early stage. As early as 1841 Nova Scotia adopted an elegant and progressive codification of its criminal law and the levels of punishment were the most humane of any of the Canadian colonies and more humane than those in England. New Brunswick, too, had taken the "codification" approach, but when Sir John A. MacDonald felt constrained to legislate federal criminal law in 1869 he decided not to follow the Nova Scotian or "Maritime" models for fear of stirring provincial jealousies — he opted instead for an unsuitable paraphrase of the Greaves consolidation of English criminal law of 1861 and the relatively harsh levels of punishment reflective of pre-confederation Quebec and Ontario rather than Nova Scotia. It is an unwritten history, perhaps, but in this area, at least, Canadians to their detriment, neglected to take advantage of the Nova Scotian wisdom and experience.

Brown suggests that Canada got a Code where England failed because Canada was not faced with a hostile and historically powerful bench and bar committed to defending the common law against all legislative reform. This may well overstate the extent of the hostility in England, for, as he points out, the E.D.C. failed not so much because the judges publicly expressed their hostility to legislative reform, but because of inept handling of legislation on the floor of the House. Certainly, Brown may well be right in saying that Canadian lawyers and, indeed, the public generally, in 1892 had an openness to legislation and codification; an openness born of the many pre and post-Confederation attempts to untangle the obscure mass of inherited English law and the volumes of amending Canadian legislation. Brown writes:

> The conditions in Ottawa were completely different from those that obtained in London. In contrast to England, Canada was a country of vast distances and separate jurisdictions. Its inhabitants were subject to rational, written constitutions which specified the structure of the court systems and the composition of their benches. Unlike the central courts at Westminster and the Judicial Committee of the Privy Council, the Supreme Court of Canada was not supreme, and the senior provincial courts with criminal jurisdiction were unsupervised tribunals of equal and concurrent jurisdiction. Canadian legal systems were staffed with judges and lawyers who had been educated in a variety of autonomous systems different from the Inns of Court and from each other.

In general Brown is an enthusiastic supporter of the Code but the reader may wish to suspend judgment until the Code is compared with other models that were then available, including Wright's Code and Taschereau's proposal of 1889. Brown tells us nothing about Taschereau's proposed Code, perhaps the state of the archives is such as to make it virtually impossible even to find out, nor is there any comparison made with Codes enacted about the same time in some American jurisdictions and later in New Zealand and Queensland.

All in all Brown's book is a readable account of the background of criminal law reform on both sides of the Atlantic in the sixty years preceding the Code, with principal emphasis on English developments. Certain themes appear to run through the text without overt explication, including the importance of the intellectual climate of the times, the interesting relationship between developing skills of drafting and the concept of codification; the misunderstood use of the term "codification" itself; the Canadian, pre-confederation law reform movement and the American influence, the connection between parliamentary skills and law reform, the importance of personalities in promoting law reform and the role of chance and political partisanship. Instead of developing themes Brown tends to give a detailed factual account of how certain selected events developed and matured; thus for example, chapter five gives a great deal of detail respecting the revised Statutes of Canada 1886. The reader may find herself carried along by Brown's enthusiasm despite the lack of an obvious need for example, to spend a whole chapter establishing the connection between the 1886 revision and the 1892 Code.

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Pierre Patenaude, *La preuve, les techniques modernes et le respect des valeurs fondamentales.* (Sherbrooke: Les Editions Revue de Droit, Université de Sherbrooke, 1990, 235 + xv pp. $40.00 (paper).

In *La preuve, les techniques modernes et le respect des valeurs fondamentales,* Professor Pierre Patenaude has produced a scholarly *and* practical inquiry into the question of how law responds to science. This book raises questions of the gathering, the admissibility and the reliability of evidence through modern techniques such as electronic surveillance, breathalyzer tests, lie detectors, radar, the administration of truth-inducing drugs, and hypnosis. It combines a thoughtful examination of values underlying the law of evidence with an introduction to the complexities and the frailities of scientific investigative techniques.

Professor Patenaude originally conceived these materials as a set of lecture notes for use by students in a course that he pioneered to study the conjunction of evidentiary law and emerging technologies. It was at the urging of practitioners who were invited to participate on an occasional basis in the course that Professor Patenaude has now published his book.

It is not difficult to understand how both students and practitioners would find this book useful and stimulating. Its utility lies its development of a framework to address issues posed by the "vertiginous pace" at which scientific investigative techniques have developed during the latter half of this century.[1]

Its stimulation emerges from two dominant characteristics of Professor Patenaude's style: electricism of sources, and concern for underlying values.

Professor Patenaude draws upon the Canadian law of criminal evidence, upon Quebec and continental civil law, and upon United States constitutional law. He introduces readers to scientific debates from both scholarly and popular sources. Throughout, the discussion he is attentive to questions of underlying values.

The advantage of this electic and value-conscious approach is that it obliges the reader and the student to go beyond positivistic problem-solving to reflect on fundamental questions that include: what ought to be the respective roles of legislator and judge in developing new rules of evidence; how does the *Charter of Rights* affect the balance of interests and values in this area; and, how confident can we be that science

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1. *Wong* v. *The Queen,* (Unreported decision of the Supreme Court of Canada, November 22, 1990), *per* La Forest J. The reference by La Forest J. is in particular to eavesdropping technology. In the fall term of 1990, the Supreme Court decided several major cases involving the use of electronic technologies.

provides an answer to the considerable challenges of reliable fact-finding, even if truth were the singular objective?

Professor Patenaude's discussion of values is notable for being more broadly humanistic than is the traditional discourse about evidentiary rules. He emphasizes two basic interests: the individual interest in privacy, and the inviolability of the human person. He is also concerned about individuality and, ultimately, about democracy itself.[2] He articulates the relevant interests in terms of four ideals: the social, the political, the affective and the physical. While courts typically advert to the privacy interest, the ultimate choice tends to come down to a balancing of concerns for a fair trial against concerns for effective law enforcement.[3] This is not Professor Patenaude's central preoccupation. So, in this sense it might be said that the discussion of values is out of step with judicial discourse about evidence. But there is much to be said for a clearer articulation of the humane emphases that are underlined by Professor Patenaude; these values are, or ought to be, comprehended by the balancing analysis. That said, Professor Patenaude's discussion would benefit from a more explicit assessment of concerns focussed on the administration of justice and on the trial itself.

An element of this book that typically does not enter into consideration of the rules of evidence is its discussion of reliability. Professor Patenaude takes the reader through a series of modern techniques, including the breathalyzer, the lie detector, photography, recorded conservations and radar, and develops a discussion around the probative force of each. For example there is a discussion of the reliability of voice identification, a critical issue in wire-taps. The reader is treated to an electic range of sources, from the United States National Research Council[4] to the Journal of the Acoustical Society of America to more

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2. "La surveillance amène l'unification: elle assimile chacun à une moyenne collective, le prive de la liberté de choix, aliène son indépendence. C'est la déchéance de la démocratie." (at 6).
3. This debate about values underlying evidentiary rules in the context of new technologies is reflected in recent judgments of the Supreme Court in *Dersch* v. *Attorney General of Canada* (November 22, 1990); *LaChance* v. *R.*; and *Garofoli* v. *R.* (unreported decisions dated November 22, 1990). The central issues in these cases were access by the accused to the sealed packet containing affidavits upon which authorizations of wiretaps were based, and whether the accused is entitled to cross-examine on the affidavits. There was also an issue regarding the scope of the original authorization. The majority judgment of Sopinka J. favours access and, in the circumstances, cross-examination, emphasizing the interest in the making of a full answer and defence. The dissenting judgment of McLachlin J. (concurring in *Dersch*) emphasizes the interests of the accused in the protection of privacy and a fair trial, including the right to make full and answer and defence, but adds that these are to balance against the public interest in the administration of justice, including concerns for protecting the identity of informers.
4. *On the Theory and Practice of Voice Identification* (1979).

popular scientific journals.[5] This material is presented in an entirely accessible fashion, reflecting its origins as a set of readings for students in an advanced course. Again, Professor Patenaude shows no signs of dogmatism. Various points of view are marshalled and critical debates are identified, but the reader is given credit for being able to reach his or her own assessment, and for being able to make further inquiries. The central message is that, in science as in law, there are debates about values and about effectiveness. It is to Professor Patenaude's credit that these debates are exposed for, but left with, the reader. From the perspective of the prospective purchaser, this material may be the most unique aspect of the book. There is an effective discussion, accompanied by a rich and eclectic bibliography. People trained primarily in law do not have regular access to, and do not have research skills to locate, this kind of information.

So, this is not an ordinary book about the law of evidence. It pushes the normal bounds of the discourse, but in a pragmatic and a principled way. Its greatest value is as an occasion for reflection on how the law of evidence deals with new technologies. It is the kind of book that makes an invigorating first-read, and that will be a useful addition to ones law library. One caution, this book really does require a serious first-read; otherwise, it is unlikely to be used as an occasional reference.

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5. E.g., Bert Black, "Evolving Legal Standards for the Admissibility of Scientific Evidence" (1988), 239 Science 1508. This is cited, as is the Research Council publication, *ibid.,* at 183.

Rod D. Margo, *Aviation Insurance* (2nd ed.). London: Butterworths, 1989. liii + 573. $212.00 (cloth).

The first edition of *Aviation Insurance* was an outgrowth of the author's graduate work at McGill University's Institute of Air and Space Law. Detailed and comprehensive, it filled a noticeable void in Butterworth's Insurance Series.[1] Dr. Margo has now drawn upon a decade of practice in the field[2] to make a fine book even better.

The new edition is more than a simple update. The layout has been partially rearranged to present a more logical and readable outline. What was once 31 chapters has been shrunk to 27. This was done by including "Slips and Proposal Forms" as a subheading under Chapter 6, "Underwriting Practice and Formation of the Contract". "Proximate Cause" is now a division of Chapter 23, "Extent of Insurer's Liability". Four other chapters have been merged into two.[3] The result is a cleaner and more polished structure that better ties together relevent principles.

Another important change — one of particular significance to North American readers — is the addition of materials on the peculiarities of U.S. practice, included as subsections in "The Aviation Insurance Market", "The Relationship Between the Parties", and "Underwriting Practice". Other new inclusions are discussions of the roles of agents, surveyors and adjusters, and punitive and exemplary damages. Chapter 21, formerly "Satellite Insurance", has been broadened to "Spacecraft Insurance", a change that is also reflected in the book's subtitle.

There have been many important developments since publication of the first edition in 1980, and all are canvassed in the new book. Some specific examples are in Chapter 4, "The Aviation Insurance Market", which has been updated to reflect the Lloyd's Act 1982, the Insurance Companies Act 1982 and other new legislation. Recent cases on the slip form are fully discussed in Chapter 6. Chapter 7, which deals with the insurable interest, now includes the landmark *Kosmopolous* decision.[4] Chapter 21 refers the reader to several helpful papers on spacecraft

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1. Other titles in the series are *Fire and Motor Insurance* (4th ed., 1984), *General Principles of Insurance Law* (5th ed., 1986), *Marine Insurance* (4th ed., 1985), *Personal Accident, Life and Other Insurances* (2nd ed., 1980), all by E.R.H. Ivamy; *Insurance of Commercial Risks* (1986), *Insurance of Professional Negligence Risks* (2nd ed., 1989), both by D.C. Jess; and *The Law of Liability Insurance* (1990), by Derrington and Ashton.
2. With Condon & Forsyth, Los Angeles.
3. "Claims and Adjustment" and "The Making of a Claim" are now "The Presentation and Adjustment of Claims", and "Forms" and "Contents" are combined as "The Forms and Contents of the Policy".
4. *Constitution Ins. Co. of Canada* v. *Kosmopolous,* [1987] 1 S.C.R. 2, 34 D.L.R. (4th) 208, 74 N.R. 360, 21 O.A.C. 4, 36 B.L.R. 245, 22 C.C.L.I. 296, [1987] I.L.R. 1-2147.

insurance and liability which have appeared since the first edition. In short, the book has been thoroughly updated to present a current picture of the law.

The most outstanding characteristic of *Aviation Insurance* is its accessibility. The excellent tables of cases and statutes and the very complete index have been supplemented by a new table of abbreviations and a list of reports and journals cited. When these features are combined with the straightforward and well-documented writing style, the whole is an eminently practical and authoritative reference that makes research quick and easy. Rather suprisingly, the page headings, which in the first edition alternately reflected the chapter and subheadings, now only present the chapter title; in my opinion, this is a step backward, as it no longer allows the reader to flip through the pages for relevant issues. The table of contents may of course be consulted, with some loss of convenience.

The main text is followed by an appendix of policy forms, clauses and endorsements. These have been made substantially more complete by the inclusion of third party forms and American accident clauses. Canadian needs are specifically addressed by the addition of AVN 57 (aircraft accident liability insurance), AVS 102 (C.T.C. air carrier regulations), and NMA 303 (TP [CG] public liability). In fact, the appendix has now swollen to over 200 pages. Perhaps it is now time for the publication of a separate and more easily updated compendium of aviation insurance clauses?[5] Finally, the appendix too has been made considerably more accessible by the addition of helpful keys to the AVN, AVS and NMA reference numbers.

The book is not without flaws. Although its didactic style will be welcomed by researchers, one occasionally wishes the author would provide more interpretative and speculative analysis; this would better allow him to display his undoubted scholarship, and might well permit the reader to obtain a more thorough grasp of the issues. The absence of a bibliography was previously noted in a review of the first edition;[6] this ommission has not been rectified. Another problem is the citation of Canadian cases. No alternative citations are provided (unlike British cases, which are fully referenced). At the very least, citations should be to official report series wherever possible.[7] Finally, at over two hundred dollars the book seems unusually expensive, even given its specialized

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5. Similar to the convenient *Reference Book of Marine Insurance Clauses.* London: Witherby & Co. Ltd., new edition published annually.
6. J.-L. Magdelenat, "Book Review" (1980), 5 Ann. Air & Space L. 701, at 702.
7. Most Canadian citations are to the Dominion Law Reports or the Insurance Law Reporter.

topic and U.K. printing. However, these complaints are obviously minor in nature, and are not intended to detract from the author's efforts in any way.

In conclusion, Dr. Margo is to be congratulated on the detailed coverage he has given his subject. The second edition is a substantial improvement on an already well-written treatise. It makes a noteworthy addition to the existing works on air law, and should enhance the author's growing reputation as the leading authority on aviation insurance.

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