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Introduction to Volume I [of the Canadian Law of Obligations III Conference]: The Power and Limits of Private Law

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THE SUPREME COURT LAW REVIEW

SECOND SERIES

Canadian Law of Obligations III:
The Power and Limits of Private Law

Volume I

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Foreword to Volume I

Private law issues touch the everyday experiences of individuals and businesses. Contracts, torts, trusts and other areas of private law and the law of obligations evolve with jurisprudential and statutory changes. *The Power and Limits of Private Law* is a timely compilation of papers developed from a conference on the subject at the University of British Columbia's Green College in June of 2022. The contributors are eminent scholars in their respective fields and their commentaries and observations on developments in private law provide a useful reference for lawyers, judges, academics and students who confront private law issues in their work.

The material in this collection covers a wide spectrum of issues, including Indigenous perspectives in contract law, the deterrent function of medical negligence law, exclusion of liability clauses, the doctrine of frustration, joint and several liability, good faith in the performance of contracts, justifications for judicial innovations in private law, and adaptations of the law of fiduciary obligations to problems from the age of technology. These topics which appear in this volume are just a sampling of the important issues of private law addressed by the conference and by its theme of *The Power and Limits of Private Law*.

I enthusiastically recommend this volume to anyone interested in private law or the law of obligations. I commend Professors Marcus Moore and Samuel Beswick for organizing the conference that led to the publication of this volume. Their work in putting together this compilation will enable *The Power and Limits of Private Law* to make an enduring contribution to our understanding of these areas of law.

The Honourable Marshall Rothstein

January 2023

Introduction to Volume I

This first volume of papers addressing *The Power and Limits of Private Law* draws upon the third Canadian Law of Obligations conference ("CLO III") held on June 23-24, 2022, in Vancouver, British Columbia.

I. The Conference

1. Synopsis

CLO III was organized by Samuel Beswick and Marcus Moore of the University of British Columbia's Peter A. Allard School of Law. The proceedings were hosted at Green College on UBC's Point Grey campus. The Point Grey campus sits on the traditional, ancestral, unceded territory of the xʷməθkʷəy̓əm (Musqueam) First Nation.

The motto of Green College — "Ideas and Friendship" — aptly encapsulates the uplifting vibe of CLO III that inspired fervent discussion among participants. Indeed, it was a delight finally to be able to come together after the COVID-19 pandemic had scuppered organizing plans at the University of Ottawa a year earlier, along with so much else.

In the tradition of previous Canadian Law of Obligations conferences, CLO III brought together distinguished and emerging private law scholars from across Canada and around the world for the opportunity of sharing ideas and building connections.

A brief review of the history of the conference will help put the most recent edition in context: The first Canadian Law of Obligations conference was held in May 2017 at UBC's Allard School of Law, with the theme of *Innovations, Innovators, and the Next 20 Years*.[1] Organized by Margaret Hall and Lachlan Deyong, the event marked the retirement of Joost Blom Q.C. from his long career as a professor and Dean at the law school. It featured keynote addresses from Bruce Feldthusen, Lewis Klar and Supreme Court of Canada Justice Russell Brown. The second Canadian Law of Obligations conference was hosted in May 2019 at the University of New Brunswick Faculty of Law. Organized by Hilary Young, it carried the theme of *Access to Justice in the Law of Obligations*.[2] Angela Swan O.C. and Shannon Salter delivered keynote addresses.

CLO III brought together an expanded slate of private law scholars, reuniting many who had contributed to the previous conferences, and integrating many additional scholars from Canada and abroad who did not attend prior editions. The

[1] Margaret Isabel Hall, ed., *The Canadian Law of Obligations: Private Law for the 21st Century and Beyond* (LexisNexis Canada, 2018).

[2] Hilary A.N. Young, ed., *The Canadian Law of Obligations: Access to Justice* (LexisNexis Canada, 2020).

conference occupied two very full days. The conference featured 30 panel presenters and four plenary speakers, exploring the conference theme of The Power and Limits of Private Law. Panel presenters were grouped into eight panels held over the two days. Panels were held in the areas of Contract Law (two panels), Torts/Delicts (two panels), Private Law Theory (two panels), Private Law and Regulation (one panel), and Private Law and Innovation (one panel). Additional details are contained in the conference program, reproduced below. The diversity of topics presented on, and the passionate discussions that followed each paper, showed how study of the law of obligations is thriving in Canada.

For many who attended, this was the first academic gathering since before the pandemic began. There was a sense of relief and excitement at finally convening in person to share our ideas — bolstered by the idyllic venue grounds and inviting summer climate. While this was an in-person conference, CLO III integrated elements of the new livestream era. Scholars who were unable to travel to Vancouver watched the presentations live over the internet, and a small number of geographically distant presenters Zoomed onto the conference presentation screens.

The conference began with a keynote address by the Attorney-General of Canada, David Lametti, formerly a professor at McGill Law School, whose research interests lie in private law and theory. The Attorney-General spoke of the challenges facing government in a turbulent era and of reform efforts his office is engaged in. He sought to underline in particular the important role that scholars play in informing and improving law reform. Following lunch on Day 1, the conference's honoured guest Lionel Smith drew on the wisdom gained from a long and esteemed career in the legal academy to deliver his keynote address. Smith spoke on how and why the core nature of the common law trust necessarily limits the powers of settlors to retain control over trust property. A third plenary speech was delivered by retired Supreme Court of Canada justice Marshall Rothstein C.C. Q.C. Speaking at the conference's evening reception, Justice Rothstein shared insights from his time on the bench and anecdotes from his long career of service in the law. On Day 2, distinguished UBC alumna, former University of Toronto law professor, and internationally-renowned Contracts author Angela Swan O.C., used her address to encourage scholars to look at the law though the eyes of legal clients, and in particular their desire to avoid conflict and litigation through wise legal planning. Perhaps confirming Lametti's comments, Swan explained the power of scholarly ideas that work in practice: legal approaches that advance clients' interests are useful; formalist theories that are elegant but that fail to reflect how the law actually works reveal their true limits when students exit the classroom and enter the door of the profession.

CLO III honoured a distinguished Canadian scholar of the Law of Obligations, Lionel Smith, marking the occasion of his move across the Atlantic to take up the University of Cambridge's Downing Professorship of the Laws of England. Professor Smith is one of Canada's preeminent obligations scholars and is world-renowned. His scholarship is regularly relied upon by courts and has contributed

immeasurably to private law doctrine and theory in Canada and around the world. This includes both common law and civil law jurisdictions — particularly in the areas of trusts, fiduciary obligations, tracing, and unjust enrichment. His scholarly interest in the private/public law distinction is an important dimension of the conference theme of *The Power and Limits of Private Law,* alongside other facets such as those explored in some of the conference panels and collected essays associated with it (including those in this volume previewed below). Until accepting his new post in the United Kingdom, Smith was a law professor at McGill University for 22 years, most recently as the Sir William C. Macdonald Chair. He was long-time Director of McGill's Paul-André Crépeau Centre for Private and Comparative Law. As the organizers of CLO III, we were delighted to have this chance to honour Smith, and together with all participants, to celebrate both his career in Canada and his appointment to the prestigious chair at Cambridge once held by the legendary Frederic William Maitland. A common thread in CLO III's plenary speeches — the value of legal scholars in shaping the law in practice — resonates in Smith's career. Smith's scholarly impact is matched by the personal impact he has had on generations of law students and teachers who he has generously and graciously taught or mentored. For us and for so many others in attendance, the conference was thus an opportunity to thank and congratulate a friend and mentor, with some participants travelling far or interrupting sabbaticals to do just that. The Canadian law of obligations and the Canadian obligations academy owe much to Lionel Smith.

There are many people to thank for assisting us in organizing this conference, rich in scholarly reflections and which proceeded smoothly despite ongoing pandemic restrictions. We are immensely grateful to everyone who, in different capacities, supported CLO III and contributed to making it a success. That begins, of course, with the 34 conference presenters. In supporting roles, from our Faculty we thank Dean Ngai Pindell who introduced Justice Rothstein's plenary address and Equity Committee Chair Gordon Christie who introduced Angela Swan's plenary address; we likewise express our appreciation to our many faculty colleagues who kept a packed conference right on time and offered thoughtful comments in generously chairing the conference's various panel sessions — Joost Blom (emeritus), Cristie Ford, Benjamin Goold, Hoi Kong, Debra Parkes, Graham Reynolds, and Régine Tremblay. We are grateful also to Allard Law Events Manager Michelle Burchill and to the JD students who assisted us with the conference and helped make CLO III run so smoothly: Gabriel Rincon, Yara Nijm, Caitlin Cunningham (conference aides), and Melodie Eure (photographer).

We also wish to convey our thanks to Green College, including Principal Mark Vessey, and staff Heather Muckart, Alan Gumboc, and Damien Terezakis. Situated at the northern tip of campus, overlooking Vancouver's mountain and ocean vista, Green College supplied a marvellous venue for the Conference. Finally, we are grateful to the Social Sciences and Humanities Research Council of Canada, which

graciously supported CLO III by helping to fund the conference via a Connection Grant.

2. CLO III Conference Program

Thursday, June 23

8:00 - 8:30am	**Registration & continental breakfast — Graham House (Lobby & Billiards Room)**
8:30 - 9:15am	**Welcome & Keynote — Coach House** **The Honourable David Lametti** (Minister of Justice and Attorney General of Canada) Introduction by Assistant Professor Marcus Moore & Assistant Professor Samuel Beswick (Allard Law)
9:15 - 10:40am	**Panel 1: Private Law & Innovation — Coach House** Chair: Professor Debra Parkes (Allard Law) • Associate Professor Jane Thomson (The University of New Brunswick Faculty of Law) — *"'Til Death Do Us Part. . . And Then Also for the Rest of Your Life: Marriage Clauses in Canadian Wills"* • Professor Jennifer L. Schulz (The University of Manitoba Faculty of Law) — *"Mediator Liability in Canada, the USA, England, Australia, New Zealand and South Africa"* • Assistant Professor Alan Hanna & Emmaline English (The University of Victoria Faculty of Law) — *"Can a Moose be a Party to a Contract? Nuanced Spaces for Indigenous Perspectives in Canadian Contract Law"*
15 min break	**Tea & coffee — Billiards Room**
10:55 - 12:20pm	**Panel 2: Contract I — Coach House** Chair: Professor Benjamin Goold (Allard Law) • Associate Professor Daniele Bertolini (Toronto Metropolitan University Ted Rogers School of Business Management) — *"Unpacking Entire Agreement Clauses: On the (Elusive) Search for Contractually Induced Formalism in Contractual Adjudication"* • Professor Nathalie Vézina (Université de Sherbrooke Faculté de droit) — *"Of Power and Limits: Bargaining Power and the Limits of Private Law Regarding Exclusion of Liability Clauses"* • Assistant Professor Greg Bowley (The University of New Brunswick Faculty of Law) & John Enman-Beech (The University of Toronto Faculty of Law) — *"The Power and Limits of Unconscionability: Debating the Impact of Uber v Heller on Canadian Contract Law"*

12:20 - 1:35pm	**Lunch & Keynote — Billiards Room & Upper Patio** **Professor Lionel Smith** (McGill University Faculty of Law) — *"Confusion, Illusion, or Delusion: The Irreducible Core of the Common Law Trust"* Introduction by Assistant Professor Marcus Moore & Assistant Professor Samuel Beswick (Allard Law)
1:35 - 3:30pm	**Panel 3: Private Law Theory I — Coach House-** Chair: Assistant Professor Régine Tremblay (Allard Law) • Associate Professor Alexandra Popovici (Université de Sherbrooke Faculté de droit) — *"Rights and Powers in Québec's Private Law"* • Luigi Buonanno (Bocconi University School of Law) — *"A Subsidiary Model of Joint and Several Liability: Responsibility for Another's Debt Between Common Law and Civil Law Traditions"* • David Campbell (The University of Oxford Faculty of Law) — *"The Limits of Tortious Defences"* • Assistant Professor Stéphane Sérafin (The University of Ottawa Faculty of Law) & Kerry Sun (Sullivan & Cromwell LLP) — *"Beyond Corrective Justice? Inducing Breach of Contract Reconsidered"*
15 min break	**Tea & coffee — Billiards Room**
3:45 - 5:45pm	**Panel 4: Private Law Theory II — Coach House** Chair: Professor Hoi Kong (Allard Law) • Professor Helge Dedek (McGill University Faculty of Law) — *"When Rights Became 'Subjective'"* • Assistant Professor Manish Oza (The University of Western Ontario Faculty of Law) — *"Voluntary Associations and the Rule of Law"* • Assistant Professor Marcus Moore (The University of British Columbia Peter A. Allard School of Law) — *"What is Private Law? Exploring Possibilities of Enhanced Social Justice in Private Ordering Against the Spectre of Authoritarianism"* • Professor Stephen Waddams (The University of Toronto Faculty of Law) — *"Legal Change and the Temptation of Elegance"*
5:45 - 7pm	**Reception — Piano Lounge** **Marshall Rothstein C.C. Q.C.** (former Puisne Justice of the Supreme Court of Canada) Introduction by Professor Ngai Pindell (Dean of Allard Law)
7pm onwards	**Dinner — The Great Hall**

Friday, June 24

8:00 - 8:30am	**Continental breakfast — Billiards Room**
8:30 - 10:30am	**Panel 5: Private Law & Regulation — Coach House** Chair: Professor Cristie Ford (Allard Law) • Professor Ádám Fuglinszky (Eötvös Loránd University School of Law) — *"Private Law Liability Powered and Limited by European Regulatory Law: The Effects of the Liberalization of the Railway Sector in Europe on the Contractual and Extracontractual Liability of Railway Companies"* • Dr. Bogna Kaczorowska (The University of Wrocław Faculty of Law, Administration and Economics) — *"Regulatory Relevance and Legitimacy of Contract Law in Juxtaposition to Private Ordering"* • Professor Hilary Young (The University of New Brunswick Faculty of Law) — *"Anti-SLAPP Laws' Unintended Consequences"* • Sofia Santinello (Università degli Studi di Padova) — *"Fiduciary Obligations in the Expanding World of Data Trusts"*
15 min break	**Tea & coffee — Billiards Room**
10:45 - 12:15pm	**Panel 6: Contract II — Coach House** Chair: Emeritus Professor Joost Blom Q.C. (Allard Law) • Professor Mitchell McInnes (The University of Alberta Faculty of Law) — *"COVID-19 and the Limits of Contractual Frustration"* • Jakub Adamski (McGill University Faculty of Law / Université de Montréal Faculté de droit) — *"Merger of Contract Law"* • Assistant Professor Krish Maharaj (The University of Manitoba Faculty of Law / Thompson Rivers University Faculty of Law) — *"The Supreme Court's Take on Pre-Existing Legal Relations: An Undue Limit on The Power of Promissory Estoppel"*
12:15 - 1:25pm	**Lunch — Billiards Room & Upper Patio** **Angela Swan O.C.** (Aird & Berlis LLP) — *"A Solicitor Looks at the Law of Contracts"* Introduction by Professor Gordon Christie (Allard Law)

1:25 - 3:20pm	**Panel 7: Torts/Delicts I — Coach House** Chair: Professor Graham Reynolds (Allard Law) • Assistant Professor Martine Dennie (The University of Manitoba Faculty of Law) — *"Tying Tort to Professional Sport: Culture, Common Law, and the Reasonable Hockey Player"* • Assistant Professor Maytal Gilboa (Bar-Ilan University Faculty of Law) — *"Biased but Reasonable: Bias Under the Cover of Standard of Care"* • Aaron Yoong (Singapore Management University Yong Pung How School of Law) — *"The Limits of Vicarious Liability"* • Associate Professor Desmond Ryan (Trinity College Dublin School of Law) — *"The Power and limits of Close Connection: Assessing the Legacy of Bazley v Currey through Three Recent Case Studies"*
15 min break	**Tea & coffee — Billiards Room**
3:35 - 5:30pm	**Panel 8: Torts/Delicts II — Coach House** Chair: Emeritus Professor Joost Blom Q.C. (Allard Law) • Dr. Lachlan Deyong (Université de Montréal Faculté de droit) — *"Structural Barriers to Deterring Medical Harm in Canadian Medical Malpractice"* • Professor Margaret Hall (Simon Fraser University School of Criminology) — *"Beyond the "King's Peace": Rethinking Direct Interferences with the Person"* • Dr. Majid Pourostad — *"Jones's Limited Protection of Intrusion on Seclusion"* • Assistant Professor Samuel Beswick (The University of British Columbia Peter A. Allard School of Law) — *"The Open Casebook Revolution: Tort Law"*
5:30pm	**Closing remarks — Coach House**

II. THE COLLECTION: THE POWER AND LIMITS OF PRIVATE LAW

1. Overview of Volume I

The chapters to follow, authored by a diverse set of distinguished and emerging private law scholars, together comprise a first volume of papers associated with the conference, addressing its theme of *The Power and Limits of Private Law.*

The broad scope of the volume as a collection can be appreciated from a number of relevant angles. From the standpoint of the Law of Obligations, four of the articles in this volume focus on Contract Law (Chapters 1, 2, 3 and 6), two contributions concern Torts/Delicts (Chapters 4 and 7), one paper situates itself in the area of Restitution (Chapter 5), and one piece explores broader theoretical

considerations relating to Private Law (Chapter 8).

As well, taken together, the contributions in this volume examine the Law of Obligations and the theme of *Power and Limits in Private Law* from the perspective of multiple legal traditions. In this regard, four of the articles (Chapters 1, 3, 7 and 8) reflect on the Common Law of Obligations. Meanwhile, two papers (Chapters 2 and 4) address primarily the Civil Law of Obligations. Another contribution (Chapter 5) highlights a legal construct (the trust model developed by Quebec) that is a product of the mixing of the Common Law and Civil Law traditions. Additionally, one chapter (Chapter 6) incorporates both a comparative perspective (the Common Law on one hand and the Tsilhqot'in and Māori Legal Traditions on the other) and an inter-systemic study that explores the interaction between Colonial and Indigenous Law in the context of legal relationships and agreements between humans and non-humans.

Also notable among the contributions to this volume is a diversity in the types of legal sources emphasized. Two of the articles in this volume (Chapters 3 and 8) concern case law. Another article (Chapter 2) examines the interpretation of legislation (focusing on the Civil Code of Quebec). Chapter 5 contemplates transnational regulation (especially within the EU). Doctrinal exegesis (in the Civilian Tradition) is the source of law that lies at the centre of the analysis in Chapter 4. The inaugural chapter of this volume draws our attention to the practical solutions devised by solicitors in response to clients' needs. Another paper (Chapter 7) interprets statistical data on litigation outcomes. And one piece (Chapter 6) investigates an inter-systemic legal negotiation, embedded in a broader Indigenous-Colonial inter-cultural dialogue.

2. Syllabus

This first volume of papers addressing *The Power and Limits of Private Law* begins with an original and insightful look at the Law of Contract. Noting the limitations of the litigation lens on the subject that typically dominates textbooks and law teaching, Angela Swan argues that powerful insights may be gained by adopting instead the perspective of a solicitor. The seminal insight of the solicitor, she submits, is that the rules of Contract Law are "for something" — they enable, condition or prevent contracting parties (aided by their solicitors) from doing X, Y or Z in crafting private arrangements to advance their interests. Understanding the rules on offer and acceptance and good faith, for instance, help the solicitor to advise the client on how best to establish and maintain their relationship with their contracting partner. Private Law, Swan insists, is purposive — and to ignore this reality would preclude a solicitor from being able to provide useful advice to clients. While a functionalist perspective is thus required, it cannot be reduced merely to maximizing economic efficiency, as the wishes of clients and the motivations of judges in fact disclose a far more complex picture. In Swan's estimation, the experienced solicitor's understanding of Contract Law therefore represents a realist

perspective, sharply contrasting with the formalist picture of the law presented in many textbooks and law courses.

The limits of formal law is a theme which carries through into the second chapter of this volume, authored by Nathalie Vézina. In this contribution, what stands in opposition to formal law is the *de facto* power of private actors who abuse freedom of contract to defy the law with impunity. Building on the Supreme Court of Canada's *Prelco* decision, Vézina examines the treatment of liability-restricting clauses (including exclusion clauses and limitation of liability clauses) in Quebec Civil Law. Moving away from assessing whether a breach covered by such a clause pertained to an obligation which was fundamental or ancillary, other principles emerge. Liability-restricting clauses are prohibited in certain situations (bodily or moral injury, gross or intentional fault) reflecting public policy concerns. In contexts where inequality of bargaining power is presumed (contracts of adhesion, consumer contracts), the clauses may be nullified if they go too far. But otherwise, "sophisticated parties" are free to make use of them. What worries Vézina is frequent use of such clauses in the ways that are not permitted. Sanctioning lawyers involved for acting unethically, she suggests, may be a more potent means than contractual remedies of deterring this abuse of freedom of contract.

Still within the realm of Contracts, Chapter 3 provides an exploration of Private Law's power and limits in dealing with extraordinary circumstances. Mitchell McInnes investigates the capacity of the doctrine of frustration to deal adequately with cases in which parties were impeded from performing contractual duties as a result of government restrictions taken in response to the COVID-19 pandemic. One might expect that in such extraordinary circumstances, judges would interpret the doctrine liberally to allow, for instance, consumers to recover money they paid for services they could not receive as contemplated due to government COVID restrictions. Instead, the pattern revealed by the COVID-19 cases is the same tendency to apply frustration sparingly as has prevailed in ordinary times, ostensibly to protect stability of contract. McInnes notes, however, that many of the cases concern services owed to consumers by small-business, which was hit hard by pandemic restrictions, and whose contracts with consumers often do not include the *force majeure* clauses that big businesses typically use to protect themselves in extraordinary events. It cannot be ruled out, then, that the COVID-19 cases might incorporate judicial adjustments to the doctrine, but that the adjustments "cut both ways". Alternatively, given the systemic disruptions to consumer transactions occasioned by the extraordinary circumstances of COVID-19, perhaps these were a category of cases ripe for the intervention of public law solutions to reset the status quo at large.

With a more abstract and conceptual focus, Chapter 4 reveals limits to the logic of private law, but also private law's power to develop itself to resolve internal contradictions, thus fostering the coherence that is essential to private law as a system. Luigi Buonanno conducts a thorough and detailed analysis of the principle of *libera electio* (or "free choice") of the creditor in the context of joint and solidary

obligations. The analysis shows how this is problematic in situations where one of the obligations is intended to be subsidiary to the other, emblemized by the example of the surety. However, private law has a capacity to develop itself to resolve internal conflicts such as these. In the context discussed, Buonanno proposes how this conflict can be resolved: the creditor should have to first seek payment from the principal debtor, and only if the principal is unable to pay the debt may the creditor approach the subsidiary debtor to satisfy the debt. The chapter considers how such an approach can advance the goals that underlie solidary obligations both in common law and civil law systems.

The discussion in Chapter 5 adverts us to the straining of traditional private law institutions under pressure from phenomena of the Information Age. Sofia Santinello looks at legal difficulties around the use of data, including questions of ownership, conditions for processing, and frameworks of regulation. The power and limits of private law are evident in the use of trusts to manage controversies around data. On its own, the most suitable trust model for data, Santinello submits, is the Quebec trust: building on Quebec's concept of a patrimony by appropriation, the Quebec trust is able to sidestep the ownership controversy, defining itself instead by a purpose. However, international recourse to it is limited by Quebec not being a signatory to the *Hague Trust Convention*. On the issue of processing, Santinello endorses a meta-consent model by which an initial consent can be used to construct parameters governing when and how to obtain further consent for future uses of data other than that initially contemplated. The role of the data trustee in protecting the interests of data subjects is particularly critical in this scheme of regulating use of data, and Santinello identifies the duty of loyalty which is part and parcel of the trustee's fiduciary duty as the most potent means of preventing abuse.

In Chapter 6, Alan Hanna and Emmaline English provide a thought-provoking reflection on the encounter between Colonial and Indigenous Law on issues of stewardship over the natural world, approached from a trans-systemic Contract Law perspective. They argue that private law is limited by Western conceptual and attitudinal biases regarding, in this case, who can be a party to a contract. The effect of this is severe, in denying Indigenous peoples' relationships with and reciprocal obligations to non-human natural entities. English and Hanna explore how private law can be expanded to recognize these relationships and obligations as valid under Indigenous legal orders, and resonant with common law contracts. Taking such a step would help Indigenous laws find their place in the Canadian legal system. Drawing on Aotearoa New Zealand's recognition of legal personhood in a river holding significance in tikanga Māori, Hanna and English ask whether moose — who are party to a vital contract with the Tsilhqot'in nation under Tsilhqot'in Law — could be recognized as a contracting party under Canadian Law.

Chapter 7 examines the limits of deterrence under Tort Law in medical malpractice suits in Canada. Deterrence is among the functions of the law of negligence commonly invoked by functionalist theories of tort law. One might think that the formal power of patients to sue negligent medical practitioners would play

a salient role in the practice of medicine in Canada. Lachlan Deyong investigates this question through interviews with malpractice litigators and members of the medical profession and discovers the limits of tort law's deterrent function. Playing a central role in this area is the Canadian Medical Protective Association ("CMPA"), which defends physicians in malpractice litigation. Deyong argues that the coverage provided by the CMPA insulates doctors directly and indirectly from any monetary costs associated with malpractice claims, effectively neutralizing the deterrent effect of the tort of negligence. The absence of liability-based accountability for physicians in Canada raises larger questions about the power of private associations like the CMPA, in particular, whether it has exploited a regulatory blindspot to defeat public policy, and if so, what should be done about that.

In the concluding chapter of this volume, Stephen Waddams reflects on the power of judges in (re)making private law, and considers the proper limits of this tremendous power. An essential power of common law courts is to develop private law to meet the needs of justice or equity, as the circumstances informing legal issues evolve and/or as community values change over time. But legal change comes at a price of disrupting existing law. And sometimes it comes at the further price of the unforeseen generation of new inequities. A seemingly attractive guiding principle for the judicial lawmaking power is for judges to develop the law whenever it would be elegant to do so. But elegance, Waddams warns us, is an injudicious standard: it inadequately constrains the judicial lawmaking power. Elegance tends toward overreach, for instance, when courts prefer to abandon a rule that has been girded by inelegant reasons, rather than first searching for a principled alternative basis for the rule that might preserve stability in the law. Waddams puts forward "necessity" as a more appropriate limiting principle of judges' power to remake private law: a rule should be changed when this is the only way to meet the needs of justice and equity.

In closing, some further acknowledgments are in order with respect to the preparation of this Volume. We are grateful to LexisNexis Canada, and in particular Lara Saraireh, for their support as the publishers of this collection, as the latest instalment on the Law of Obligations in Canada. As well, we are very grateful to Allard Law student Dr. Caitlin Cunningham for her project management and editorial work which were an indispensable part of bringing this Volume to completion.

Marcus Moore and Samuel Beswick
Vancouver, British Columbia
October 2022