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Book Review: Canadian Conflict of Laws, vol. 2 (Choice of Law), by J. G. Castel

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CANADIAN CONFLICT OF LAWS, Vol. 2 (Choice of Law), J. G. CASTEL, Toronto: Butterworths, 1977. Pp. 791.

Professor Castel has now completed his study on the Canadian conflict of laws. Canadian lawyers will probably find this second volume the most practical part of his work; its scope is exhaustive. Almost every legal topic that can raise conflicts issues is covered in detail. The views of the author fairly accurately reflect the views of the Canadian courts on most aspects of conflicts. Professor Castel has demonstrated that there are a great many Canadian conflicts cases, and his survey of them is impressive. The significance of all of those cases is more doubtful.

As might have been expected, the Canadian cases have nearly always followed English precedent, and in almost every area of the law discussed by Professor Castel, the leading cases are English. The authorities referred to, however, are not only Canadian and English cases. The author has added many references to American cases and to the Restatement of Conflicts. In general, this is useful and offers some basis for comparing the approach of both countries, though more could have been made of the comparison. References to various Hague Conventions on Conflicts are also useful; it is helpful to have the text of the Conventions set out in full. Canada has begun to participate in the Hague Conferences and, as a result, some of them may be of practical importance to Canadian lawyers. Canadian legislatures have not responded to any of these conventions with any enthusiasm and it remains to be seen what use will be made of the results of the Hague Conferences. Professor Castel also refers to the activities of the Conference of Commissioners on Uniformity of Legislation in Canada. The Commissioners have made valiant efforts to avoid conflicts problems by ensuring the enactment of uniform legislation on a variety of topics. It is useful to have reference to their efforts, though, again, their significance is slight.

In short, this volume is a comprehensive reference book for those interested in Canadian conflicts, and Professor Castel is to be complimented for his industry. To refer to this work as a reference book is in a sense unfair to the author and some explanation has to be given of why the work is regarded as having only this limited utility.

The basic difficulty faced by anyone who writes on conflicts is how to achieve a reconciliation between fidelity to some theoretical structure for choice of law and accuracy in representing what the courts have said and done. If one adopts the theoretical approach of the leading English cases, the *results* of the cases cannot be satisfactorily reconciled. If one rejects this approach and offers some more or less radical alternative, the *statements* of the judges in the cases cannot be accepted. I do not think that Professor Castel ever dealt with this problem successfully. This failure, in my view, is responsible for the major defect of the book. Simply put, the cases are not critically analysed in a very useful manner.

A fair question to ask is what would be a useful way of analysing the cases? In discussing the choice of law in contracts, Professor Castel states:

> In the field of contracts, the best way to develop international trade and be responsive to social commitments is to adopt conflict of laws rules that promote

> the doctrine of freedom of contract or party autonomy and protect the justifiable expectations of the contracting parties. In this way certainty, predictability and uniformity of results can be achieved. (at 514)

This is assumed as the basis for a justification of the traditional Anglo-Canadian rules on choice of law in contracts—at least as that rule was formulated, i.e., "the proper law of a contract is the jurisdiction with which the transaction has its closest and most real connection." The difficulty is that the general purpose for choice of law rules is, first, a distortion of what the purposes of contract law are, and, secondly, regularly frustrated in the courts' application of choice of law rules.

It is not true that the whole purpose of the law of contracts is to encourage freedom of contract or party autonomy. First, there are many cases where the issue before the court is whether there was an agreement or not. Some of these cases can be disposed of by saying that the parties should normally be held to their bargains, but there are a large number of cases where this cannot be done. Secondly, many contracts cases raise problems of deciding what to do when the parties have completely failed to deal in advance with some particular contingency. Third, recent developments in the law of contracts have made it clear that the courts are more and more concerned with the abuse of freedom of contract. Freedom of contract or party autonomy is, in any case, a meaningless maxim when one realizes that freedom for one party may be the negation of effective freedom for the other.

An example of the courts ignoring the contracts issues by focussing on the conflicts aspects is provided by the leading case of *Imperial Life Assurance Co.* v. *Colmenares* in the Supreme Court of Canada.[1] The issue in that case was whether supervening illegality by Cuban law affected the obligation of the company to pay the cash surrender value to the insured in Toronto. The Court held that the proper law was Ontario law and then regarded the case as being disposed of. One might have assumed that the next question would have been whether the Cuban law was relevant under Ontario law. That question would have been the only real *contracts* issue for the Court to consider. It raises the general issue of frustration, or more narrowly, on the facts of this case, whether the insurer or insured ran the risk of Cuban (or even Ontario) legislation affecting the obligation under the contract. Insofar as the application of choice of law rules ignored these issues, there was a serious chance that the arrangement made by the parties was subverted. (Subsequent cases, with differently worded policies, have not lessened this chance.)

A consideration of *contracts* cases in a *conflicts* context leads to the inescapable conclusion that choice of law rules of the traditional English or Canadian type lead to one of two results. Either the contracts issues are ignored and the conflicts case results in a distortion of the contracts issue or the rules are manipulated so that the right contract result is reached but the conflicts rules are subverted. This occurs whenever the "escape devices" of characterization or renvoi are manipulated to reach whatever result the court wants, or by use of the very open-ended test of the "proper law."

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[1] [1967] S.C.R. 443.

Whatever happens under the application of the traditional rules cannot really be conducive to "certainty, predictability and uniformity of result" if the contracts aspects of contracts cases are ignored by the conflicts rules. This criticism can be made in every area of the law discussed by Professor Castel. The fact is that the courts are put in an impossible position. Most judges, most of the time, have a very clear idea of what will be a sensible result in the cases that come before them. However, the problems they face in reaching that result are frequently compounded by the rules they must follow. This phenomenon is not unique to conflicts: it is found throughout the law. The principle culprit is the academic or text-writer who fails to give the judges the help that they need. Certainty, predictability and uniformity are jeopardized by rules that ignore the pressures that judges feel when attempting to reach fair and sensible results. These values are more likely to be achieved by rules that are relevant and that let the judge consider expressly what appears to be important. At the same time, of course, this permits counsel to argue the things that are important, thus contributing to the achievement of whatever values we may want to stress. In this regard, I cannot accept that the process undergone by a lawyer under the traditional rules (as outlined by Professor Castel at p. 30) contributes in any way to the achievement of any values the system may have.

The need to develop a more useful approach to conflicts arises in every area discussed by Castel. Marriage and divorce, torts, etc., all have special problems that arise from the peculiar domestic features of those areas of the law. If the criticisms are valid in contracts, they are equally valid in any other area of the law.

We can, I think, push this argument further, in two respects. First, the notion of certainty in the law is a very complex idea. Certainty in contracts is not the same as certainty in torts or in property. Sometimes we need certainty to plan our affairs, at other times we need certainty in making a settlement only after something has gone wrong. The verbal formulation of propositions that achieve certainty in these two respects can differ as much as the Rule in *Shelley's Case* and the principle in *Donoghue* v. *Stevenson*. It is naive to think that certainty comes from black-letter rules: it may, but equally, it may not.

In a similar manner, it can be shown that the notions of predictability and uniformity are also very complex. Uniformity presumably involves the similar treatment of similar cases. However, to know which cases are similar is only to know the whole of the law. Crude ideas of similarity are as dangerous as crude ideas of certainty. Those who use the verbal formula that the law should seek to achieve certainty, predictability and uniformity often believe that simply making that statement justifies any form of legal reasoning or analysis.

The second aspect to this argument is that discussions of this kind ultimately come down to a difference in legal philosophy. Everyone who thinks about the law and how to resolve a concrete problem that might come before a judge must eventually face the question of what the law's response should be to issues like the scope of judicial discretion and the relevance of social values. Traditional Anglo-Canadian conflicts doctrine has adopted one

set of answers to these issues. There are other approaches that adopt radically different approaches. I am not suggesting that one is wholly right or that one is completely wrong. I do believe, however, that one is better able to achieve certain values than the other. The question of which one should be adopted may be a matter of what one wants to achieve. What I have suggested as defective in Professor Castel's approach to the choice of law problem is that he adopts an approach that seeks and can only seek to achieve the values of historical continuity and simplification of the judicial task. Historical continuity is, at best, a dubious value for the law, and simplification of the judicial task cannot be anything other than a very minor value. There are many judicial statements making these points.

The tragedy of the choice which is made by those who advocate the traditional rules is that it is an unconscious choice. It is necessary to spell out explicitly the reasons for the choice, the alternatives to it, and its consequences. In a way, the tragedy is compounded when an analysis of conflicts is proposed that assumes some very important social values will be achieved and yet completely fails to understand either what those values really are or how they can be achieved in concrete cases. Conflicts analysis is one of the few places in the law where one has to speak explicitly about the ends of the law and the means of achieving these ends; not to take advantage of this is to leave the law without the direction it requires. It is false to suggest that an approach which has the crude values of the traditional approach can do anything to achieve certainty, predictability or uniformity of result, to say nothing of "responsiveness to social commitment." If the only purposes forwarded by the law were historical continuity and simplification of the judicial task, the law would indeed deserve the criticism it now receives and a great deal more.

Professor Castel's work, therefore, is a good summary of how we got the rules that we have, and what the courts have said that they were doing. It does all of this with an impressively exhaustive survey of the cases and other sources of the law. However, it does little to show us how the courts reached the results that they have and where we should go from here if we are to achieve the values he wishes to achieve. Some hope may be put in legislation, but we have to accept that much more depends on the courts. They are, I believe, entitled to more help than they have received up to now.

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